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IN THE SUPREME COURT OF THE UNITED STATES

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ALLEN RYAN ALLEYNE, :

Petitioner : No. 11-9335

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Monday, January 14, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MARY E. MAGUIRE, ESQ., Assistant Federal Public Defender, Richmond, Virginia; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-9335, Alleyne v. United States.

Ms. Maguire.

ORAL ARGUMENT OF MARY E. MAGUIRE

ON BEHALF OF THE PETITIONER

MS. MAGUIRE: Mr. Chief Justice, and may it please the Court:

This case is about who gets to decide the facts that trigger a mandatory minimum sentence. Any fact that entitles a prosecution by law to a sentence more severe than a judge could otherwise impose must be found by the jury beyond a reasonable doubt.

Under Harris, the government is entitled --

JUSTICE SOTOMAYOR: Counsel, could you address an issue that's very important to me, the one of stare decisis. And so, that -- hone in on that.

MS. MAGUIRE: Yes, Justice Sotomayor. I do not believe that stare decisis poses a problem for the Court in this case, because Harris was a plurality opinion. And while four of the justices found that -- I'm sorry, five of the justices voted to uphold McMillan, only four of the justices found that McMillan

1 was consistent with Apprendi. And so we have a
2 plurality opinion, and for our constitutional issue, we
3 do not believe that Harris --

4 JUSTICE SOTOMAYOR: Well, the problem is,
5 whether you're right or wrong -- and you're absolutely
6 right, it was a plurality opinion -- your adversary says
7 States have passed laws relying on it, the Federal
8 system is now structured around it, why isn't the damage
9 as great as they claim? Potential damage, I should say.

10 MS. MAGUIRE: Well, first of all, I would
11 just note that even though McMillan was decided in 1986,
12 there is nothing in the legislative history that
13 indicates that Congress referred on McMillan when it
14 passed 924(c). In addition, 924(c) is silent as to who
15 should be the fact-finder that triggers the mandatory
16 minimum. And finally, in the McMillan case, that was
17 not really a Sixth Amendment case --

18 JUSTICE SOTOMAYOR: Address, please, the
19 practical consequences.

20 MS. MAGUIRE: Certainly.

21 JUSTICE SOTOMAYOR: How many -- how many
22 Federal courts are you aware are already charging the
23 924(c) facts to a jury, notwithstanding the -- the fact
24 that it's not required?

25 MS. MAGUIRE: Yes, I would say that there is

1 little to no practical effect if the Court is to adopt a
2 rule, because the majority of the Federal courts are
3 already -- and Federal prosecutors are already --
4 alleging these facts in the indictment and proving them
5 to a jury beyond a reasonable doubt. And I think that
6 this case is the exact example of that. It was alleged
7 in the indictment. It went to the jury, the jury got a
8 special verdict form, so there is no difficulty in
9 implementing this rule --

10 JUSTICE ALITO: Isn't your position that a
11 decision of this Court is not entitled to stare decisis
12 protection if there isn't a majority opinion in that
13 case?

14 MS. MAGUIRE: Yes, Your Honor. I do not
15 believe that Harris has precedential value, because it
16 is a plurality opinion. In our --

17 JUSTICE ALITO: I can think of some pretty
18 important decisions of this Court that were not the
19 result of a majority opinion. Do you want us to adopt
20 that as a blanket rule?

21 MS. MAGUIRE: No, Your Honor, but I would
22 note that in constitutional questions like this one,
23 stare decisis is at its weakness -- weakest. I would
24 also --

25 JUSTICE ALITO: All right. Constitutional

1 decisions of this Court not decided with the majority
2 opinion, no stare decisis effect. That's your argument?

3 MS. MAGUIRE: Well, and also, Your Honor,
4 what I think is significant in this case in terms of the
5 issue of stare decisis is that McMillan was not a Sixth
6 Amendment case. McMillan was decided more on due
7 process grounds. And the only discussion of the Sixth
8 Amendment in McMillan comes in the last paragraph, when
9 it talks of the fact that the defendant has no right to
10 jury sentencing.

11 And so for those reasons, we do not believe
12 that stare decisis poses a problem.

13 JUSTICE SCALIA: You haven't distinguished
14 McMillan. You've distinguished Harris. How do you
15 distinguish McMillan? Your only grounds for
16 distinguishing that is it was not a
17 Sixth Amendment case, even though the opinion refers to
18 the Sixth Amendment?

19 MS. MAGUIRE: Well, Your Honor, it does in
20 fact refer to the Sixth Amendment in the very last
21 paragraph.

22 But what McMillan was mostly concerned about
23 was a due process claim --

24 JUSTICE SCALIA: I don't care about
25 "mostly." The issue is whether McMillan was a

1 Sixth Amendment case, in part or in whole. And I don't
2 know how you can say it wasn't. We -- we don't decide
3 cases on what a case mostly says. We decide on what it
4 says.

5 MS. MAGUIRE: That's absolutely --

6 JUSTICE GINSBURG: Ms. Maguire, you don't --
7 you don't have to take the position that there's no
8 stare decisis effect. In a unanimous -- and a recent
9 unanimous decision of this Court, obviously, would carry
10 more weight than one that has a plurality opinion, so
11 you don't have to say -- it isn't a question of yes or
12 no, it's a question of the degrees of respect that we
13 would give to our former decision.

14 MS. MAGUIRE: I think that that is exactly
15 right, Justice Ginsburg. And in fact the other factors
16 that the Court considers when looking at stare decisis
17 is: What were the margins of vote on the previous
18 cases, and McMillan was decided on a 5-4 decision,
19 whereas Harris, as we've noted, was a plurality
20 decision.

21 Both opinions were found over spirited
22 dissents. They have been criticized by this Court and
23 the lower courts, and in all of those instances we
24 believe that stare decisis is at its weakest.

25 JUSTICE ALITO: Well, I think it's important

1 for this Court to have a consistent doctrine of stare
2 decisis. The doctrine can't be We will overrule
3 decisions that we don't like, but we will stick with
4 decisions that the majority does like. So I'm still
5 looking for your understanding of what stare decisis
6 means in constitutional cases.

7 Now, with the suggestion of
8 Justice Ginsburg, I gather that your position is if it's
9 a narrow decision then it's -- stare decisis has less
10 weight; is that it? Now, what other factors? So it has
11 less weight. Why isn't it controlling, though? Why
12 does it have insufficient weight here?

13 MS. MAGUIRE: Because, Justice Alito,
14 another thing that you look to when you are considering
15 stare decisis is whether or not the rule is workable,
16 whether or not the prior decision was badly reasoned,
17 and those are other factors that the Court can consider.
18 And if you look at this Court's Sixth Amendment
19 jurisprudence as it has developed since Apprendi, then
20 in Booker, then in Blakely, then in Cunningham, what we
21 are asking for today is a logical --

22 JUSTICE KAGAN: But why is this not
23 workable? I mean, you can -- you can argue about
24 whether it was right or wrong. You can argue about
25 whether it has created some incongruity in the system.

1 But haven't the last number of years suggested that it's
2 perfectly workable? Everybody knows what they are
3 supposed to do, everybody does it. Why -- why is this
4 not workable?

5 MS. MAGUIRE: Well, the Harris rule is not
6 workable on a practical level because what happens under
7 the Harris rule is the government is entitled to a fact
8 that drives a more severe punishment, that never goes to
9 the jury. And what we are asking here is that the court
10 find that where there is a fact that triggers a
11 mandatory minimum, that that fact be found by the jury.

12 JUSTICE SOTOMAYOR: Can I say --

13 CHIEF JUSTICE ROBERTS: That sounds like --
14 that sounds like an argument that it's wrong and that
15 is, of course, the first step in the stare decisis
16 analysis. It doesn't sound to me responsive to Justice
17 Kagan's question as in what sense is it unworkable.

18 MS. MAGUIRE: Well, I think it becomes
19 unworkable in the drug cases, Your Honor, and in the
20 9841 statute, because what you have there is you have in
21 some circuits people alleging drug weight, but in other
22 circuits you have what is called mixing and matching.
23 And as long as the statutory maximum does not exceed
24 20 years, the prosecutors are not alleging the drug
25 weights in the indictment.

1 And that becomes unworkable and quite
2 confusing to the courts. And the lower courts have
3 criticized the Harris rule primarily in cases like
4 Krieger and others that we -- are cited in our amicus
5 brief, that the rule is somewhat unworkable.

6 JUSTICE SCALIA: Why wouldn't that be a
7 problem if the question had to be decided by the jury?
8 Why does -- why does requiring it to be decided by the
9 jury eliminate that problem of the mixing or not mixing?

10 MS. MAGUIRE: Well, asking it to be found by
11 a jury solves the problem because it allows the fact to
12 go to the jury, the jury finds it, and we have a long
13 history in this country that jury verdicts drive
14 punishment. And so the idea is that the punishment that
15 somebody is open to should be driven by the jury
16 verdict.

17 JUSTICE GINSBURG: You mentioned drug
18 weight. Let's -- so you're making -- your argument
19 would mean that drug weight also has to be found by the
20 jury, because that can -- the length of the sentence can
21 depend on the -- the drug weight.

22 MS. MAGUIRE: If the drug weight is going to
23 trigger a mandatory minimum, Your Honor, yes, we would
24 say that under our rule that that would have to be
25 alleged in the indictment and proved to the jury beyond

1 a reasonable doubt, which, as our amicus briefs point
2 out, is being done already in the majority of circuits
3 throughout the country.

4 And so this is not going to put any
5 additional burden on the prosecutors to be doing this,
6 and fundamentally what it does is that it levels the
7 playing field, because what it does in trial situations
8 is it allows a defendant to know exactly what it is that
9 the government is going to prove. The government then
10 has to bring in those witnesses at the time of trial so
11 that they can be cross-examined on this fact that is
12 going to trigger the mandatory minimum in their case,
13 and so it helps level the playing field in that regard.

14 JUSTICE ALITO: Now, if you were defending a
15 case involving drug weight and your client maintained
16 that he or she had nothing to do with these drugs, how
17 would you proceed? Your argument would be: They're not
18 my drugs, but if they were my drugs, they weren't --
19 they didn't weigh more than one kilo.

20 MS. MAGUIRE: Well, Justice Alito, those are
21 strategical questions that come up in every trial case
22 that we have. And you have to decide as a trial lawyer
23 what your theory of the defense is going to be. It's
24 simply going to be, I wasn't there, or you may decide to
25 challenge the drug weight. But those -- those strategic

1 decisions exist whether or not the Court adopts this
2 rule or doesn't adopt the rule.

3 JUSTICE KENNEDY: But the question was,
4 what -- what strategic decision do you think the lawyer
5 should make?

6 MS. MAGUIRE: Well, any strategic decision a
7 lawyer makes is going to depend on the individual facts
8 of the case. For example --

9 JUSTICE KENNEDY: So you -- but
10 Justice Alito has a real problem. What -- don't you put
11 the defense in a very difficult position?

12 MS. MAGUIRE: You don't put the defense in a
13 very difficult position, because in fact if you adopt
14 our rule we believe that you are protecting the
15 defendant's Sixth Amendment right to a jury because this
16 is a fact that is going to be triggering a mandatory
17 minimum. And if the government has to prove it, they
18 then have to bring in the witness to the trial, who is
19 then subject to cross-examination, which is a far
20 more --

21 JUSTICE KENNEDY: But isn't it difficult for
22 you to say he had nothing to do with the drugs plus the
23 drugs didn't weigh more than a certain amount?

24 MS. MAGUIRE: I don't believe that that is
25 difficult, and I believe that those are decisions that

1 you make in every case. For example, in the case -- in
2 this case, in Mr. Alleyne's case --

3 JUSTICE KENNEDY: I think that I am hearing
4 that in every case you are going to want witnesses, you
5 are going to insist on a jury determination of the
6 amount. That's kind of what I'm hearing.

7 MS. MAGUIRE: That is the rule,
8 Justice Kennedy, that we are asking the Court to adopt,
9 that if there's a fact --

10 JUSTICE KENNEDY: Justice Alito says why
11 doesn't that put defense counsel in a very difficult
12 position?

13 MS. MAGUIRE: Well, it doesn't put defense
14 counsel in a difficult position at all, because those
15 are the same decisions that you make whether or not you
16 adopt this rule or you don't adopt this rule.

17 JUSTICE KENNEDY: Well, we're not getting
18 far with this. But one answer you could say is that in
19 order to preserve the constitutional right you want us
20 to have a bifurcated trial. I thought you might say
21 that.

22 MS. MAGUIRE: No, we are not -- we are not
23 asking for a bifurcated trial. We are just asking that
24 if there's --

25 JUSTICE KENNEDY: That's good, because

1 that's an extra problem.

2 (Laughter.)

3 JUSTICE KAGAN: Ms. Maguire, could I take
4 you to a different kind of question?

5 MS. MAGUIRE: Certainly.

6 JUSTICE KAGAN: Let's assume that there were
7 a statute and it said carrying a gun is an offense and
8 that the range is 5 to 10 years. I realize it goes up
9 further in the real world, but let's just say 5 to 10
10 years. And Congress said in setting the penalty within
11 that range the judge shall consider whether the
12 defendant brandished the gun and whether the defendant
13 discharged the gun. Now -- and that's all the statute
14 said.

15 That would be constitutional, is that not
16 right?

17 MS. MAGUIRE: Yes, Justice Kagan, that would
18 be constitutional, because it doesn't have the mandatory
19 effect.

20 JUSTICE KAGAN: Okay. So it's
21 constitutional for the judge to say, 7 years because you
22 brandished, 9 years because you discharged.

23 So what makes it unconstitutional, what
24 makes it a violation of the Sixth Amendment, when now
25 Congress just provides something extra in the statute?

1 It says, not just you shall consider brandishing and
2 discharging, but if you find brandishing you get 7, if
3 you find discharging, you get 9.

4 MS. MAGUIRE: Okay. What makes that
5 unconstitutional is because you are stripping the judge
6 of all authority, and by operation of law you are
7 telling that judge that, you must impose this sentence.

8 JUSTICE KAGAN: Well, that seems right as a
9 definitional matter, as a descriptive matter. But I
10 guess the question I'm having difficulty with is why
11 does that matter for purposes of the Sixth Amendment?
12 The jury is doing the exact same thing, which is the
13 jury isn't doing anything in either of my examples.

14 So the only difference between example
15 number one, which you said was constitutional, and
16 example number two is that now Congress is giving
17 further instruction to the judge, but nothing more is
18 being taken away from the jury, is it?

19 MS. MAGUIRE: Well, yes, it is, because in
20 your second hypothetical where it is the mandatory
21 minimum, which is exactly what we have in this case,
22 this notion that somehow Congress is channelling
23 discretion is a fiction, because what it does is it
24 tells the judge, you must impose 7 years and you cannot
25 even consider what is authorized by the jury verdict in

1 this case.

2 And the jury verdict in this case authorized
3 a range of 5 years as the bottom. And so what happens
4 is when you have Congress coming in and saying that if
5 you find this fact on a mere preponderance standard you
6 must impose 7 years, then you are stripping the
7 defendant of the benefit of the full jury verdict in
8 this case, which authorized a range that had a lower
9 floor than that called for by the Federal statute.

10 JUSTICE SCALIA: Ms. Maguire, could you
11 repeat the first sentence you uttered in this argument?
12 I hesitated to jump in so early, but could you repeat it
13 verbatim? Maybe you had committed it to memory.
14 Good -- good counsel often does that.

15 MS. MAGUIRE: Thank you, Justice Scalia. My
16 very first sentence was: This case is about who gets to
17 decide the facts that trigger a mandatory minimum
18 sentence.

19 JUSTICE SCALIA: No, that wasn't it.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: It started
22 "Mr. Chief Justice."

23 (Laughter.)

24 JUSTICE SCALIA: I think what you said was:
25 Who has to decide a fact which causes a defendant to be

1 subject to a penalty that he would not otherwise be
2 subject to? And the fact is that in the case of a
3 mandatory minimum the defendant could have been given
4 that mandatory minimum. It was up to the judge.

5 So this mandatory minimum does not increase
6 the penalty to which the defendant is subject. He's
7 subject in Justice Kagan's example to any penalty
8 between 1 years -- 1 year and 10. The judge, even
9 without the statute that she mentioned, could have given
10 him 7 years because he brandished a gun. There is
11 really no -- no increase in the penalty to which he is
12 exposed.

13 And I thought that is what Apprendi
14 addressed, any increase in the penalty to which you are
15 exposed, so that when you decide, I'm going to rob a
16 bank, you know, when you go in, you are going to get
17 between 1 and 10 years, and with a mandatory minimum you
18 get between 1 and 10 years. So what's the complaint as
19 far as Apprendi is concerned?

20 MS. MAGUIRE: The complaint is that -- and
21 why we believe that the rule we are asking the Court to
22 adopt, Justice Scalia, is a natural -- it follows the
23 logic of Apprendi, is because in both cases you have
24 judicial factfinding that's leading to a more harsh
25 sentence. In your --

1 JUSTICE SCALIA: It isn't leading to a more
2 harsh -- more harsh sentence. That's the whole point of
3 Apprendi: Does it lead to a sentence which is greater
4 than the judge would otherwise be authorized to impose?
5 And in the case of a mandatory minimum, it never is.
6 The judge could impose that if he was a hanging judge.
7 You know, you have some hanging judges; you have some
8 bleeding heart judges.

9 And -- and what a mandatory minimum simply
10 says is, you know, we don't care what kind of a judge
11 you are, at least this much. But it doesn't expose the
12 defendant to any greater penalty. He's -- he's at risk
13 between 1 and 10 years.

14 MS. MAGUIRE: Well, and I think,
15 Justice Scalia, that's -- that's a false presumption.
16 And I think that's the position of the government, that
17 somehow mandatory minimums channel discretion within a
18 range. That is a fiction because the judge is being
19 told, You must impose this. You have no choice. You
20 cannot go below this. That is the whole nature of a
21 mandatory minimum, and so this --

22 JUSTICE SOTOMAYOR: Do you have any
23 statistics on at least 924(c) of how often the greater
24 is the sentence than the absolute minimum required by
25 law?

1 MS. MAGUIRE: Well, Justice Sotomayor, this
2 Court found in O'Brien, and I think that it's also cited
3 in the Lucas briefs and Dorsey briefs that this Court is
4 holding, that the majority of all defendants convicted
5 under 924(c) are, in fact, sentenced at the mandatory
6 minimum.

7 JUSTICE SOTOMAYOR: So, in effect, your
8 argument is that fixing a sentence is different than
9 giving a judge discretion because it ignores the fact
10 that a judge might have given you less?

11 MS. MAGUIRE: That is exactly right.

12 JUSTICE SCALIA: That seems to me --

13 JUSTICE SOTOMAYOR: So it's depriving you of
14 the constitutional right to have a jury decide what your
15 sentence could be?

16 MS. MAGUIRE: That is exactly right.

17 JUSTICE SOTOMAYOR: Of having a judge decide
18 what your sentence could be?

19 MS. MAGUIRE: That is exactly right, and
20 it's further depriving you -- it is depriving the
21 defendant of liberty interests. It is imposing a
22 stigma, and it is entitling the prosecutor to a greater
23 and more severe punishment.

24 CHIEF JUSTICE ROBERTS: I'm not sure
25 that that's -- you've emphasized several times that it

1 takes away the discretion of the judge. That seems to
2 me to be a matter between Congress and the Judiciary and
3 not a Sixth Amendment question.

4 MS. MAGUIRE: Well, Mr. Chief Justice,
5 actually the language of this Court in Apprendi said
6 that "It is unconstitutional for the legislature to
7 remove from the jury the assessment of facts that
8 increase the prescribed range of penalties to which a
9 criminal defendant is exposed." And that is exactly
10 what's happening in this context because --

11 JUSTICE KAGAN: Well, Apprendi goes both
12 ways. I mean, that's the best sentence for you in
13 Apprendi, but there are other sentences in Apprendi
14 which more go towards what Justice Scalia suggested,
15 that the question was increasing it above the maximum
16 that the jury authorized. So I'm not sure that we can
17 get from the language of Apprendi -- and I guess the
18 question is as a matter of principle.

19 I completely understand why a defendant
20 would care about this. The question is, does it -- does
21 it create a Sixth Amendment violation, which is, you
22 know, the jury has to do this, when -- when Congress is
23 decreasing the judge's discretion, but it's -- either
24 way the jury isn't deciding this.

25 MS. MAGUIRE: Well, Justice Kagan, we do

1 believe the Sixth Amendment is implicated because we
2 think the history of the Sixth Amendment in this country
3 shows that the role of the jury is the buffer between
4 the citizen meant to protect and the government.

5 And mandatory minimums give the prosecution
6 far much power and, in fact, if you do not adopt our
7 rule and -- and make the government have to prove it
8 beyond a reasonable doubt, what happens is then the
9 average citizen does not get the benefit of a jury
10 verdict and his sentence is not driven wholly by the
11 jury verdict, because in this case we had a jury
12 verdict, the government alleged the fact, we had a
13 special verdict form, and the jury failed to find that
14 fact.

15 As a result of that, then, the range that
16 Mr. Alleyne should have been exposed was a 5-year
17 mandatory minimum and for the constitutional argument
18 assuming a maximum of life. Here what happened, then,
19 at the sentencing hearing was on a mere preponderance
20 the judge had to impose seven. And so we believe that
21 is where you have the Sixth Amendment problem, because
22 the defendant --

23 JUSTICE SCALIA: You quoted Apprendi
24 correctly as saying that the jury has to decide any fact
25 which increases the sentence to which the defendant is

1 exposed. That's the language you quoted, and it's
2 accurate.

3 Why does a mandatory minimum increase the
4 sentence to which the defendant is exposed? He could
5 get the mandatory minimum sentence, even if there were
6 no mandatory minimum prescribed. He is exposed to a
7 sentence of 1 to 10 years. A mandatory minimum says,
8 You must impose 7 years if he brandishes. But the
9 sentence to which he is exposed is 1 to 10 years. And
10 the mandatory minimum does not change that at all. He
11 is at risk for 1 to 10 years.

12 MS. MAGUIRE: Well, I understand that that
13 may not change the exposure. What it does on a
14 practical level is it prevents the judge from even
15 considering anything less than the 7 years.

16 JUSTICE SCALIA: That's true.

17 MS. MAGUIRE: And that becomes the problem.

18 JUSTICE SCALIA: That's true, but you must
19 acknowledge that that's not the theory of Apprendi.

20 MS. MAGUIRE: Well, I think the theory of
21 Apprendi if you -- if you take it out to its logical
22 step is that if you have judicial fact finding that is
23 resulting in a more harsh sentence being imposed, then,
24 in fact, you have a Sixth Amendment problem.

25 And so what happens on a mandatory minimum

1 is that if a judge finds the mandatory minimum a more
2 harsh sentence is being imposed, because as an example
3 in this case, the judge could not even consider giving
4 the 5-year year floor as a mandatory minimum, which
5 we've already noted is, in fact, how most criminal
6 defendants are sentenced under the 924(c) statute at the
7 mandatory minimum level.

8 JUSTICE SCALIA: I think the logic of
9 Apprendi is that the jury has to decide it if it
10 increases the sentence to which the defendant is
11 exposed, not if it eliminates some discretion of the
12 Court. He's exposed.

13 JUSTICE SOTOMAYOR: How about Booker? What
14 did Booker do --

15 MS. MAGUIRE: Well, I think --

16 JUSTICE SOTOMAYOR: -- to the logic of
17 Apprendi?

18 MS. MAGUIRE: Justice Sotomayor, what I
19 believe that Booker did is that Booker indicated that
20 when you have a fact that drives -- a finding of fact
21 that drives a mandatory sentence to be imposed, that
22 obviously that was the Sixth Amendment problem. Now, I
23 understand and appreciate --

24 JUSTICE SOTOMAYOR: Even when the statutes
25 had a higher maximum.

1 MS. MAGUIRE: That is correct, Your Honor.

2 JUSTICE SOTOMAYOR: Because the jury was --
3 because the judge was constrained within a different
4 maximum.

5 MS. MAGUIRE: That is correct, Your Honor.

6 JUSTICE SOTOMAYOR: Is that your argument
7 here?

8 MS. MAGUIRE: Yes. And so what I believe is
9 that what Booker indicates is that it is this mandatory
10 effect which may -- and that is why this Court found,
11 extending Apprendi in the Booker case, that in fact the
12 guidelines then had to become advisory. It is the
13 mandatory effect of the fact finding that is essential
14 in these cases.

15 JUSTICE SCALIA: It wasn't a mandatory
16 minimum case, Booker was a case in which the maximum was
17 increased on the basis of judge finding of fact. The
18 maximum was increased. So under the situation in
19 Booker, the -- the exposure of the defendant was indeed
20 increased on the basis of judge fact finding. Instead
21 of 1 to 10, the statute in Booker said, If you brandish
22 a gun, you can get 15.

23 That's a -- that's a quite different
24 situation from saying, Yeah, you are still on the hook
25 for 1 to 10, but if you brandish, you got to get 7.

1 MS. MAGUIRE: Well, Justice Scalia, I think
2 the concern in Booker was the mandatory nature of the
3 guidelines, and while I would agree with you that this
4 Court in its constitutional part of the Booker decision
5 did, in fact, look to the increase in the maximums, it
6 is the same problem. You have judge -- judicial fact
7 finding that is mandating a particular sentence.

8 JUSTICE ALITO: Why is Booker -- why is
9 Booker entitled to greater stare decisis weight than
10 Harris and McMillan?

11 MS. MAGUIRE: Well, I believe that Booker
12 is -- is entitled to greater weight because it was more
13 recently decided by this Court, and I also believe that
14 it is a more recent interpretation of this Court of the
15 principles held in Apprendi.

16 I would like to reserve the remainder of my
17 time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Dreeben?

20 ORAL ARGUMENT OF MICHAEL R. DREEBEN

21 ON BEHALF OF THE RESPONDENT

22 MR. DREEBEN: Mr. Chief Justice, and may it
23 please the Court:

24 This Court should adhere to its decision in
25 Harris v. United States, which reaffirmed

1 McMillan v. Pennsylvania, because those decisions
2 properly respected the fact that a mandatory minimum
3 divests the defendant of the right to judicial leniency.

4 JUSTICE SOTOMAYOR: Could I go back to a
5 simple question on the stare decisis, the practicality
6 question. What is so impractical about letting a jury
7 decide an issue that sets a mandatory sentence of any
8 kind? Why -- why are juries incapable of figuring out
9 whether a gun was carried or brandished? Why are they
10 incapable of figuring out how many -- how much drugs
11 were sold or whether someone was driven by any of the
12 factors that States want to commit to judges, but the
13 Sixth Amendment might require them to submit to juries?

14 MR. DREEBEN: Justice Sotomayor, the
15 government's argument here is not that juries are
16 incapable of finding facts under the Federal statutes
17 that involve mandatory minimums. It's that Congress has
18 sound reasons for wishing to allocate that factfinding
19 to the sentencing process and that it is not
20 unconstitutional for Congress to do so.

21 JUSTICE SOTOMAYOR: But what does that have
22 to do with the needs, the constitutional need to make
23 sure that juries are driving a fixed sentence of any
24 kind?

25 MR. DREEBEN: The -- the constitutional

1 question, in my view, Justice Sotomayor, turns on
2 whether there is a right to the mercy of a tenderhearted
3 judge. That is what a defendant loses when a judge
4 finds a mandatory minimum fact.

5 JUSTICE BREYER: No, no, it isn't quite. I
6 mean, the -- the linguistic difference, I agree with
7 Justice Scalia and I agree with you, it turns on the
8 word "exposed." I mean, if you state Apprendi's holding
9 as it was just stated, this is a different case because
10 you could in fact, if you were the defendant, have been
11 sentenced to that anyway. That's your argument.

12 MR. DREEBEN: Correct.

13 JUSTICE BREYER: Now, let's put it
14 differently. There is a fact in the world. There's a
15 gun or there wasn't a gun. In the Apprendi case, if the
16 fact turns out to be gun, you could get 2 more years.
17 All right? We have to go to the jury. Now, here
18 there's a fact in the world, gun or not gun. If it
19 turns out not gun, you get a lower sentence, you could;
20 and if it turns out to be the fact, gun, you can't --
21 the judge cannot put you in that box, he has to put you
22 in a worse box. He has to put you in a worse box. He
23 has to give you more than -- more than the 3 years, 2
24 years or 1 year. He has to. Okay?

25 Now, from the point of view of the

1 defendant, worse or at least as bad. From the point of
2 view of Congress, same. They drew some lines, want a
3 judge to administer them, and they turn on facts, and
4 the sentence very often will turn on those facts.

5 From the point of view of the judge, same.
6 It's the jury decides or he decides. In the one case,
7 his discretion is cut off to give a lower sentence; in
8 the other case, his discretion is granted to give a
9 higher sentence. Now, I see tremendous similarities,
10 though I grant you the words are different, but can
11 you -- can you just explain --

12 MR. DREEBEN: Justice Breyer, yes.

13 JUSTICE BREYER: -- why the difference in
14 the words should overcome the fact that I can't think of
15 a -- of a difference other than those words that
16 happened to be used in Apprendi?

17 MR. DREEBEN: Well, Justice Breyer, we have
18 a chart in our brief that I think is addressed
19 explicitly to the question that you are asking, and it's
20 on page 36 of our brief. And it illustrates the
21 difference between an Apprendi situation and a
22 Harris-McMillan situation. So the government's gray
23 brief. And the point of the chart is this --

24 JUSTICE SCALIA: What page? What page?

25 MR. DREEBEN: This is page 36 of the

1 government's brief.

2 JUSTICE BREYER: I'm afraid the other side
3 was upside down and I saw what you meant.

4 MR. DREEBEN: Okay. The point of Apprendi
5 is a jury cannot be reduced to low-level gatekeeping.
6 Congress cannot pass a statute that says it is a crime
7 to assault someone and that's punishable by 1 year in
8 prison, but if the crime involves rape then it's
9 punishable by 10 years in prison, or if the crime
10 involves attempted murder then it's punishable by up to
11 life. Congress can't do that, because it would diminish
12 the role of the jury in finding the critical facts that
13 constitute the crime that sets the defendant's maximum
14 exposure. Apprendi protects against that.

15 In a Harris situation, the defendant is
16 already exposed to the maximum penalty that the
17 defendant incurs under the statute, and that's what the
18 second column illustrates. The defendant who commits a
19 section 924(c) crime knows that the defendant faces up
20 to life in prison. When the mandatory minimum comes
21 along, it doesn't increase the defendant's exposure to
22 the most severe punishment he can get; it divests the
23 defendant of a degree of judicial discretion. But the
24 Sixth Amendment does not protect a right to judicial
25 discretion.

1 JUSTICE SOTOMAYOR: You know, but that --

2 JUSTICE BREYER: But --

3 JUSTICE SOTOMAYOR: I'm sorry.

4 JUSTICE BREYER: That's the -- that's the --
5 you've used all the words, which do make the difference
6 in your mind. But my question --

7 MR. DREEBEN: It's not just in my mind,
8 Justice --

9 JUSTICE BREYER: -- is why should those
10 words make a difference? Look, in the one case, I'll be
11 repeating myself, but I want you to see it, in the one
12 case, presence of a fact or not means the defendant goes
13 into a higher sentencing box. And the other case,
14 presence of a fact or not means that he cannot go into
15 the low sentencing box.

16 MR. DREEBEN: And when he cannot --

17 JUSTICE BREYER: In the one case, he cannot
18 go into the low sentencing box; in the other case, he
19 can't go into the high sentencing box. I got that
20 difference. My only problem is, why does it make a
21 difference?

22 MR. DREEBEN: It matters because the Sixth
23 Amendment protects a right to a jury trial, it does not
24 protect a right to judicial leniency.

25 JUSTICE BREYER: No, it's not -- well, you

1 can call it judicial leniency, but you could call the
2 other judicial harshness. I mean, what is in fact
3 turning out --

4 MR. DREEBEN: No, because in -- in the other
5 situation, it protects the right of the jury to
6 determine the ingredients of the crime that Congress has
7 determined exposed the defendant --

8 JUSTICE BREYER: And here we have the
9 ingredients of a crime that Congress has determined that
10 you have to get the 5 years.

11 MR. DREEBEN: Well, we know --

12 JUSTICE BREYER: I mean, in the one case you
13 can say all that Apprendi did -- it never should have
14 been decided; I mean, some of us thought that -- because
15 in fact --

16 JUSTICE SCALIA: I wonder who that could
17 have been.

18 (Laughter.)

19 JUSTICE BREYER: -- all you're talking about
20 there is that you are stopping the judge from exhibiting
21 his otherwise discretion towards harshness, and that's a
22 matter for judges. I've heard all these arguments
23 before, you see.

24 MR. DREEBEN: Well --

25 JUSTICE BREYER: And I've just heard them in

1 the context of harshness, and now I don't know why
2 changing it to leniency makes them somehow more
3 relevant. They weren't apparently relevant in the first
4 situation, so why are they relevant in this one?

5 MR. DREEBEN: They weren't relevant in the
6 first situation, because if there is no cap from the
7 maximum that a judge could impose based on judicial
8 factfinding, the role of a jury can be shrunk to what
9 the Court has called low-level gatekeeping. That can
10 never happen under a statute that increases only the
11 mandatory minimum.

12 JUSTICE KAGAN: Well, you said, Mr. Dreeben,
13 and -- and I think it's -- it's a great question: Is
14 the jury functioning as a low level gatekeeper under the
15 Harris rule? Because I could make the argument that in
16 fact it is. You know, you take a statute and it says, 5
17 and up for carrying, and 7 and up for brandishing,
18 right? And this isn't even a hypothetical. This is
19 pretty close to this case.

20 It goes to the jury, the jury says we think
21 he was carrying, we do not think that he was
22 brandishing, all right? And then it goes to the judge.
23 And now the judge says, you know what, if I had my
24 druthers, I would only give 5 years. If I had my
25 druthers, I absolutely would defer to the jury verdict,

1 but I can't defer to the jury verdict because Congress
2 has said I have to make this special factfinding, and
3 the truth of the matter is I think he did brandish, and
4 so I have to give 7 years.

5 So the judge is not deferring to the jury,
6 and he's not deferring to the jury when he would prefer
7 to do so. I guess the question is: Isn't that in every
8 practical sense -- doesn't the mandatory minimum
9 effectively increase the maximum punishment that the --
10 that the defendant otherwise would get?

11 MR. DREEBEN: Well, it certainly doesn't
12 increase the maximum punishment that's authorized under
13 the statute, and it doesn't prevent the judge from
14 making the exact same finding by a preponderance of the
15 evidence that the jury did not make beyond a reasonable
16 doubt, and giving 7 years even if there were no
17 mandatory minimums.

18 JUSTICE KAGAN: Yes, but what I'm suggesting
19 is that in the world of judges, you know, this -- the
20 graph you wrote has very little difference in the Harris
21 situation between five and seven, but in fact most
22 judges want to give five. I mean, that's the truth of
23 the matter, that, you know, nobody's given a 97-year
24 sentence. So -- so the action in the criminal justice
25 system is at this lower range. And at this lower range,

1 what the mandatory minimums do is effectively tell a
2 judge that they cannot defer to a jury verdict.

3 MR. DREEBEN: Well, it's first of all, not
4 entirely accurate that judges do not give higher
5 sentences than the minimum. There are plenty of cases
6 in which they do so. If the 920 --

7 JUSTICE GINSBURG: But --

8 JUSTICE KAGAN: I know there are plenty of
9 cases. All I'm saying is it's not the unusual case to
10 find ourselves in exactly this position, where the judge
11 wants to give five, the jury wants to give five, the
12 judge can't defer to the jury's verdict that it should
13 be five.

14 MR. DREEBEN: But taking away judicial
15 discretion to treat a fact within the range differently
16 than what Congress wants doesn't infringe the jury trial
17 right. The jury can find facts by a -- beyond a
18 reasonable doubt, but when the judge is at sentencing,
19 he is not operating under that burden, so the fact
20 finding role of the jury --

21 JUSTICE KENNEDY: But you could say that
22 with reference to the -- to the maximum. Everything you
23 said could be applied to the maximum, and Apprendi says
24 you can't say that.

25 MR. DREEBEN: I don't think that it's quite

1 true that everything that I said applies to the maximum,
2 Justice Kennedy, because as the plurality opinion in
3 Harris explained, once the court has been confronted
4 with a defendant who's convicted, the judge's discretion
5 extends up to the statutory maximum. He can't use his
6 fact finding ability to increase the defendant's
7 exposure to criminal punishment. Mandatory minimums can
8 never do that.

9 The defendant is already exposed to the
10 sentence that the judge could give. And I grant you,
11 Justice Kagan, that some judges might choose to give a
12 lower sentence, but the fact that they might choose to
13 reflects judicial leniency, tenderheartedness, something
14 that the Sixth Amendment does not speak to.

15 JUSTICE GINSBURG: How about in deference to
16 the jury's finding? I mean, in this -- this -- this
17 very case, wasn't it so that the judge said, I could
18 just say 7 years because it's within the range, but it
19 would be dishonest of me to do that, wouldn't it? I
20 have to say seven because it's the mandatory minimum.

21 I think this is a case where the effect is
22 shown graphically, that the judge says, I'm stuck with
23 the stuck. I would prefer five. That's what the jury
24 would lead me to do, but I'm -- my hands are tied, I
25 cannot respect the jury's finding.

1 MR. DREEBEN: I think, Justice Ginsburg,
2 that the judge said he would be intellectually honest
3 and not ignore the fact that the -- the finding of
4 brandishing did trigger the mandatory minimum. He did
5 not say, I otherwise would have given five. And I think
6 that this case --

7 JUSTICE SCALIA: But is it the usual case
8 that a judge when faced with his decision has before him
9 a jury finding? I -- that --

10 MR. DREEBEN: It's not the usual case,
11 Justice Scalia.

12 JUSTICE SCALIA: The petitioner is asking
13 these cases to be thrown out even if there has been no
14 jury finding.

15 MR. DREEBEN: Correct.

16 JUSTICE SCALIA: And the judge says, you
17 know, I have to decide whether he brandished or not; I
18 think he brandished. But I -- you know, the petitioner
19 here wants to say, The judge cannot consider himself
20 bound by a mandatory minimum. It seems to me the
21 unusual case in which you have a jury finding that the
22 judge must ignore in -- in -- actually he doesn't ignore
23 it, he goes along with it. The jury may well be right
24 that it's impossible to prove beyond a reasonable doubt
25 that -- that the felon brandished a gun, but it's -- it

1 -- it's quite easy to say that it's very likely he
2 branded a gun -- brandished a gun, which is what the
3 judge has to find. So he's not even ignoring the jury
4 finding.

5 MR. DREEBEN: No, there is no inconsistency
6 between it, and I think if you look at the way this case
7 evolves, it's not even clear that the jury rejected
8 brandishing. What's very interesting about this case is
9 it's possibly the best illustration of the unfairness
10 problem that Justice Alito alluded to and that
11 Justice Breyer has written about in his opinions. The
12 issue at trial in this case was identity.

13 Was the defendant actually the person
14 sitting in the car while his accomplice walked up to the
15 victim and -- and put a revolver into his neck and asked
16 for money? That was the issue at trial. There was no
17 discussion of brandishing whatsoever. Nobody focused on
18 it, and it allowed the defendant, after the jury
19 rejected his identity argument, to go to the judge and
20 say, Even though the jury has now found that my guy did
21 it, he could not have foreseen that a gun would have
22 been used.

23 JUSTICE SOTOMAYOR: Mr. Dreeben, can I go
24 back to a point you made earlier? You talked about a
25 legislature not attempting to supplant the jury's role

1 on the maximum. You don't see the same danger -- we
2 started out in a country where almost all sentencing was
3 in the discretion of the judge; whatever crime you
4 committed, the judge could decide where to sentence you.
5 As Apprendi and its subsequent progeny laid out, these
6 sentencing changes that have come into existence have
7 really come into existence the latter half of the last
8 century.

9 What -- don't you fear that at some point
10 the legislature will go back to the old system of
11 supplanting the jury by just saying what it said in
12 924(c)? Every single crime has a maximum of life. And
13 all the -- and every single fact that's going to set a
14 real sentence for the defendant, a minimum, we're going
15 to let the judge decide by a preponderance of the
16 evidence. The bottom line of my question is, when
17 Apprendi was decided, what should be the driving force
18 of protecting the jury system? The deprivation of
19 discretion, whether that's permissible or not, or
20 whether a sentence is fixed in a range, whatever it
21 might be, by a jury?

22 MR. DREEBEN: Justice --

23 JUSTICE SOTOMAYOR: What's the better rule
24 to keep both extremes from happening?

25 MR. DREEBEN: I think, Justice Sotomayor,

1 that the Court recognized in Apprendi that its role was
2 limited and to certain extent could be evaded by
3 legislatures if they were inclined to do so.

4 JUSTICE SCALIA: Mr. Dreeben, I think that
5 history is wrong. In fact, the way the country started,
6 there was no judicial discretion. There were simply
7 fixed penalties for crimes. If you stole a horse, you
8 were guilty of a felony and you would be hanged. That's
9 where we started.

10 MR. DREEBEN: Well --

11 JUSTICE SCALIA: And I would think that the
12 risk involved is whether if we come out the way that the
13 petitioner here urges us to do, legislatures will
14 consider going back to -- to where we started from, and
15 simply saying, If you brandish, you get 7 years, period,
16 with no discretion in the judge. That, it seems to me,
17 is the greater risk.

18 MR. DREEBEN: Well, Justice Scalia, I agree
19 in part with both you and Justice Sotomayor on history.
20 In fact, if you look at the 1790 Crimes Act that the
21 First Congress passed, many of the set sentences are
22 determinant sentences. Others of the sentences were
23 --were prescribed up to a certain amount of years, and
24 within that, it was well understood that judges would
25 find facts to graduate the penalties according to the

1 gravity of the crime.

2 And what the legislatures have done in the
3 20th Century innovation of mandatory minimums within an
4 otherwise authorized range, as you have with 924(c), is
5 say, We would prefer that judges take into account
6 brandishing and discharging as under Justice Kagan's
7 hypothetical statute, but we would like to -- to do that
8 in a uniform manner. We know that they can find by a
9 preponderance of the evidence that brandishing exists.
10 We know that many, if not most, judges would consider
11 that worse than simple possession of a firearm in a
12 crime of violence, and we want judges to behave
13 consistently.

14 By proscribing consistency, they are acting
15 in accord with the historical tradition of having
16 determinate sentences, a tradition that this Court held
17 in Chapman versus --

18 JUSTICE SOTOMAYOR: I'm sorry, the
19 historical -- you said earlier that most of the
20 historical evidence was that determinate sentences would
21 be decided by juries; they found facts and a determinate
22 sentence was given.

23 MR. DREEBEN: And there was no judicial
24 discretion, which I think makes --

25 JUSTICE SOTOMAYOR: So what is the judicial

1 discretion now? You find by a preponderance of the
2 evidence, and a mandatory minimum makes you give seven.
3 So where is the judicial discretion?

4 MR. DREEBEN: The judicial discretion is
5 what the defendant is losing. He is not losing the
6 right to a jury trial because the very same verdict
7 authorizes the judge to find brandishing and impose 7
8 years.

9 JUSTICE SOTOMAYOR: You think for a
10 defendant in a constitutional right, that they are
11 more -- that it's constitutional to have a determinate
12 sentence at seven, and still constitutional and make the
13 jury find it by a -- beyond a reasonable doubt and that
14 it's still constitutional to have a determinative
15 sentence of 7 years but have the jury find it by a
16 preponderance of the evidence?

17 MR. DREEBEN: To have the jury find it by a
18 preponderance of the --

19 JUSTICE SOTOMAYOR: Those are -- those are
20 equal?

21 MR. DREEBEN: It's not just my position that
22 it's constitutional for a -- a judge to find mandatory
23 minimum triggering facts by a preponderance. I'm sure
24 that a legislature could allocate that to a jury.

25 JUSTICE SOTOMAYOR: No, I know we said it in

1 Harris; the question here before us today is --

2 MR. DREEBEN: Yes. And I think that -- that
3 not only does it not contradict any decision of this
4 Court to allow the judge to make those findings, it
5 doesn't contradict the principle behind the jury trial
6 right or the right to proof beyond a reasonable doubt.

7 JUSTICE BREYER: Here's another way of
8 putting the same point: With the mandatory minimum, the
9 judge can't go below the 5 years, okay?

10 But you say, Well, he could have gone below
11 the 5 years anyway, couldn't he have? I mean, you -- he
12 could have given you the 5 years anyway.

13 Sorry, he could have given you the 5 years
14 anyway. That's your point.

15 MR. DREEBEN: Correct.

16 JUSTICE BREYER: All right. He could have
17 given you the 5 years -- he could have given you the
18 5 years if you'd been -- if you had been convicted of a
19 different crime.

20 MR. DREEBEN: And that's the difference
21 between this and Apprendi.

22 JUSTICE BREYER: But why does that make a
23 difference? The best way I thought of putting it is the
24 heading on page 6 of their reply brief is almost right,
25 I think. It says -- it's permitting judges to find

1 facts by a preponderance of the evidence that compels
2 sentences higher than a set of those permitted by the
3 jury's verdict.

4 That's exactly what's going on here.

5 MR. DREEBEN: Well --

6 JUSTICE BREYER: And -- and I want to know,
7 what is it? And the trouble is --

8 MR. DREEBEN: That's --

9 JUSTICE BREYER: -- you're just going to
10 say, Well, he could have given the same sentence anyway.
11 And I'm going to say, Well, so what, why does that
12 matter?

13 MR. DREEBEN: It's descriptively accurate,
14 but it says nothing about the constitutionality of the
15 procedure. And I think that it's very important to
16 focus not only on the fact that stare decisis is in
17 play, but that Apprendi has been a very history-driven
18 area of the law. Last term, when the Court extended
19 Apprendi to fines, it has found an ample historic basis
20 for doing so.

21 In this case, by comparison, there is no
22 historical showing that would justify extending Apprendi
23 to fines. Not only is there no direct analogy to a
24 924(c) type statute, but the three pillars of their
25 historical argument are extremely weak and strained

1 analogies.

2 The first one is simply that to get a
3 statutory crime that was parallel to a common law crime
4 but differed, the prosecutor had to charge all of the
5 elements of the statutory crime in the indictment. That
6 says nothing about mandatory minimum sentencing.

7 The second pillar of their historical
8 argument is the procedure called benefit of clergy,
9 which was a form of what Blackstone called a statute
10 pardon, that allowed a defendant to avoid a capital
11 sentence.

12 In the First Crimes Act in Section 31 in
13 1790, Congress said: "Benefit of clergy shall not exist
14 in the United States for any crime punishable by a
15 capital sentence." Benefit of clergy has never been
16 part of this country's Sixth Amendment heritage. It was
17 abolished before the Sixth Amendment was even ratified.

18 And the third pillar of their historical
19 argument are three late 19th Century cases: Jones,
20 Garcia, and Lacy, each of which involve statutes that
21 both raised the maximum and the minimum, not a single
22 one of them spoke about the Constitution. None of them
23 purported to define what a legislature could do if it
24 wanted to raise only the minimum, and that's it.

25 And I would suggest to the Court that this

1 kind of Gertrude Stein history where there's really no
2 "there" there, is not sufficient to overturn the
3 legislative prerogative to make uniform the findings of
4 fact within a range --

5 JUSTICE KAGAN: Mr. Dreeben, could I take
6 you back to the principles involved? Let's suppose that
7 instead of this statute, which is 579, you had a statute
8 which was five for carrying, five otherwise and then for
9 brandishing, 40. All right? And maybe if we did
10 discharge, then 60. All right. So a very large gap.
11 Is your argument still the same?

12 MR. DREEBEN: The constitutional argument is
13 the same. I think this Court's decision in O'Brien
14 suggests that unless the legislature were absolutely
15 clear about it, the Court would conclude that those
16 would be deemed elements.

17 JUSTICE KAGAN: But suppose the
18 legislature --

19 JUSTICE SCALIA: I'm sorry. I didn't hear
20 your last word. Those would be?

21 MR. DREEBEN: Deemed elements. Under the
22 decision in O'Brien, where the machine gun finding
23 raised the minimum to 30 years, the Court held that it
24 should be deemed to be an element, but --

25 JUSTICE KAGAN: Suppose -- suppose that

1 Congress is absolutely clear about it, and you say --
2 and I think that you're right, you've got to be right
3 about this -- it's a constitutional matter, it's the
4 same, but the hypothetical sort of suggests exactly what
5 you said our inquiry ought to be, is that in a world
6 like that, the jury is in fact functioning only as a low
7 level gatekeeper.

8 Isn't that right?

9 MR. DREEBEN: No.

10 JUSTICE KAGAN: And that the only reason we
11 see it in the hypothetical a little bit more clearly is
12 because the numbers are a bit more dramatic.

13 MR. DREEBEN: I wouldn't suggest that the
14 jury is being a low level gatekeeper in that situation,
15 because the jury's verdict alone -- and this is a
16 serious crime -- exposes the defendant to a life
17 sentence. This is a crime that involves either a
18 predicate Federal crime of violence or a Federal drug
19 trafficking crime, plus the use of the gun in it.

20 And I think Congress could reasonably expect
21 that the worse the use of the gun, the more extreme, the
22 higher the corresponding penalty. And indeed if a
23 924(c) violation is charged by itself, and a defendant
24 is an armed career criminal, then his sentencing range
25 goes up to 360 months to life --

1 JUSTICE KAGAN: If it's something deeply
2 incongruous, isn't there, where you have an Apprendi
3 rule which says if the maximum is, you know, five to
4 seven, and then the judge says 7 years and a day, we're
5 going to take that out. But as a mandatory minimum that
6 will leapfrog you from five to 40 doesn't get the same
7 result?

8 MR. DREEBEN: It's not incongruous if you
9 look at it from the point of view of the fact that the
10 jury verdict itself allows a life sentence, and if the
11 defendant draws the proverbial hanging judge who in his
12 discretion or her discretion wants to give that life
13 sentence, the defendant knew from day one when he
14 committed the crime that if the jury finds him guilty of
15 it, he's exposed to a life sentence.

16 And the Court in Apprendi said structural
17 democratic constraints will preclude legislatures, or at
18 least discourage them, from assigning maximum sentences
19 to crimes that are higher than what the legislature
20 deemed --

21 JUSTICE SOTOMAYOR: So how about in O'Brien,
22 if the legislature had said 40 years for a machine gun.
23 Would we -- how do we justify saying, No, that has to
24 remain an element? Under your theory, the democratic
25 process didn't work.

1 MR. DREEBEN: No, I think that --

2 JUSTICE SOTOMAYOR: So how -- what would we
3 do in that situation?

4 MR. DREEBEN: In that situation, the
5 democratic process would have concluded that firearms
6 brandishing, discharge or use of a machine gun is an
7 extremely serious component of this crime. We know
8 judges will take that into account in sentencing. We
9 simply want them to take that into account in the same
10 particularly harsh way.

11 And in -- in trying to achieve uniformity
12 among judicial actors when finding facts at sentencing,
13 which everybody knows that they will do, does not
14 deprive the defendant of a right to a jury trial on the
15 elements of the crime, it deprives him of the right to a
16 judge who might show mercy under a particular set of
17 facts. And that simply is not the right that's embodied
18 in the Sixth Amendment.

19 JUSTICE BREYER: That's -- I don't know if
20 you can add anything to this, but remember, I agree with
21 you about the history, but I just apply it to Apprendi,
22 too. So the one --

23 JUSTICE SCALIA: It is so bad he wants to
24 extend it.

25 (Laughter.)

1 JUSTICE BREYER: I thought -- are you sure
2 it was Gertrude Stein and not Dorothy Barker? But I
3 think you're probably right about that.

4 But the -- the -- I'm thinking of this as
5 well, Apprendi, I see what they're thinking. They're
6 thinking that once you have to add the extra fact to get
7 above the otherwise ceiling, it's like a new crime. It
8 isn't really a new crime, but it's like a new crime.
9 Okay? But then I can say, Well, once you have to really
10 cut off that 5 years and less and really send him to
11 jail for 5 years, hey, that's just like a new crime. It
12 isn't really a new crime, but it's like a new crime.

13 So why can't I say everything that we said
14 about Apprendi here, except I can't deny what you say,
15 the judge could have given the sentence anyway. That's
16 absolutely right. But all the other things, I can say.
17 Is that true?

18 MR. DREEBEN: Well, I agree that you can say
19 them, Justice Breyer --

20 JUSTICE BREYER: But I mean, are they true?
21 (Laughter.)

22 MR. DREEBEN: Respectfully, no.

23 We -- the critical point about Apprendi is
24 by assigning the role of constitutional element status
25 to a fact that increases the maximum, the Court has

1 preserved the jury trial right against its reduction to
2 essentially a formality on a particular subset of
3 elements. And the relationship of a crime that's
4 covered by Apprendi and the so-called base crime is like
5 a greater included offense and a lesser included
6 offense.

7 Whereas, in the mandatory minimum situation,
8 we know that the judge will be engaged in sentencing.
9 We know that the judge will find facts that extend
10 beyond the elements of the crime to inform himself about
11 how the basic crime is committed. We also know that
12 different judges may treat those facts differently after
13 finding them by the preponderance of the evidence.

14 The mandatory minimum changes only one
15 thing: It says, Judge, if you find this fact,
16 brandishing or discharge, you will impose the same
17 sentence as your neighboring judge down the hall, not a
18 different one based on your different perception of
19 sentencing philosophy. So it allows the legislature to
20 intervene after having defined a sufficiently serious
21 enough crime and determine how the judges will treat
22 those facts.

23 JUSTICE SOTOMAYOR: Why is the legislature
24 being deprived of that right, if they give it to the
25 jury?

1 MR. DREEBEN: The legislature --

2 JUSTICE SOTOMAYOR: I mean, it seems to me
3 that whether you give it to a jury or a judge, the
4 legislature protects itself by declaring a minimum
5 sentence.

6 MR. DREEBEN: There are many ways --

7 JUSTICE SOTOMAYOR: It determines the
8 sentence, really.

9 MR. DREEBEN: There are many ways that a
10 legislature could achieve a goal that allows the judge's
11 fact finding to carry more weight. For one thing, it
12 could extend the maximum punishments and convert
13 everything into an affirmative defense, which this Court
14 said last week is constitutional. The point is whether
15 the defendant has really been divested of a jury trial
16 right when he loses the right to the mercy of a judge.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Dreeben.

19 Ms. Maguire, you have five minutes
20 remaining.

21 REBUTTAL ARGUMENT OF MARY E. MAGUIRE

22 ON BEHALF OF THE PETITIONER

23 MS. MAGUIRE: It is the effect of the fact
24 finding that is important, not what it is called. A
25 mandatory minimum does, in fact, increase the exposure

1 that a defendant is -- is exposed to, because his range
2 then goes from five to life, which was wholly authorized
3 by the jury's verdict in this case, to seven to life,
4 and that is an increase.

5 And we are not talking about a right to
6 leniency, but a right for the judge to consider the full
7 range that the jury authorized. And I would note the
8 language in Apprendi did, in fact, address this issue of
9 range when it said: "One need only look to the kind,
10 degree, or range of punishment to which the prosecution
11 is by law entitled for a given set of facts." Thank
12 you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

15 (Whereupon, at 10:59 a.m., the case in the
16 above-entitled matter was submitted.)

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