AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice

Alleyne v. United States, ___ U.S. ___ (2013)

Allen Alleyne robbed a store manager at gunpoint and was subsequently convicted of "using or carrying a firearm in relation to a crime of violence." Federal law required persons convicted of that crime to be sentenced to at least five years in prison if they merely used or carried a firearm, but to at least seven years in prison if they brandished the firearm. The jury that convicted Alleyne indicated on the verdict form that Alleyne merely used or carried the firearm. The presentence report nevertheless recommended a seven-year sentence on the grounds that Alleyne brandished the firearm during the robbery. The federal district judge imposed that seven-year sentence on the grounds that "brandishing" was a sentencing factor that could be found by the sentencing judge, not an element of a crime that must be found by the jury using the beyond-a-reasonable-doubt standard. The Court of Appeals for the Fourth Circuit affirmed. Alleyne appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote reversed Alleyne's conviction. Justice Thomas's majority opinion declared that juries must find beyond a reasonable doubt any fact that increases the statutory minimum for a criminal offense. The majority, concurring, and dissenting opinions all distinguished between facts that concern elements of the crime, which must be found by a jury beyond a reasonable doubt, and sentencing facts, which can be found by a judge using a preponderance of the evidence standard. How did the various opinions distinguish the elements of the crime from sentencing facts? What was their constitutional evidence? Who had the better argument? Alleyne *overruled* Harris v. United States *(2002). Why did the justices in the majority reject* stare decisis *in this case? Are they correct to do so?*

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion in which JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and Justice KAGAN join in part.

The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *In re Winship* (1970). . . .

The question of how to define a "crime"—and, thus, how to determine what facts must be submitted to the jury—has generated a number of divided opinions from this Court. The principal source of disagreement is the constitutional status of a special sort of fact known as a "sentencing factor." This term . . . refer[s] to facts that are not found by a jury but that can still increase the defendant's punishment.

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In *Apprendi v. New Jersey* (2000), . . . [w]e explained that there was no "principled basis for treating" a fact increasing the maximum term of imprisonment differently than the facts constituting the base offense. The historic link between crime and punishment, instead, led us to conclude that any fact that increased the prescribed statutory maximum sentence must be an "element" of the offense to be found by the jury. . . .

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[I]n *Harris v. United States* (2002), (t)he Court declined to apply *Apprendi* to facts that increased the mandatory minimum sentence but not the maximum sentence. In the Court's view, judicial factfinding that increased the mandatory minimum did not implicate the Sixth Amendment. Because the jury's verdict "authorized the judge to impose the minimum with or without the finding," the Court was of the

view that the factual basis for increasing the minimum sentence was not "'essential'" to the defendant's punishment. Instead, it merely limited the judge's "choices within the authorized range." From this, the Court drew a distinction between "facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory maximum." The Court limited *Apprendi* 's holding to instances where the factual finding increases the statutory maximum sentence.

Alleyne contends that *Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi*. We agree.

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. In *Apprendi,*we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.

At common law, the relationship between crime and punishment was clear. As discussed in *Apprendi,* "[t]he substantive criminal law tended to be sanction-specific," meaning "it prescribed a particular sentence for each offense." . . . Consistent with this connection between crime and punishment, various treatises defined "crime" as consisting of every fact which "is in law essential to the punishment sought to be inflicted," . . . If a fact was by law essential to the penalty, it was an element of the offense.

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It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. But for a finding of brandishing, the penalty is five years to life in prison; with a finding of brandishing, the penalty becomes seven years to life. Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.

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[I]t is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's "expected punishment has increased as a result of the narrowed range" and "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." . . . This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.

. . . . As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction. . . . The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt.

Because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, *Harris* was inconsistent with *Apprendi*. It is, accordingly, overruled.

In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that

influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. . . .

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JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, concurring.

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[U]nder our doctrine of *stare decisis,* establishing that a decision was wrong does not, without more, justify overruling it. . . . We generally adhere to our prior decisions, even if we question their soundness, because doing so "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." To protect these important values, we require a "'"special justification"'" when departing from precedent.

A special justification is present here. As an initial matter, when procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced. And any reliance interest that the Federal Government and state governments might have is particularly minimal here because prosecutors are perfectly able to "charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury." . . .

. . . . In *Harris,* . . . (f)ive Members of the Court recognized that [*Harris* and *Apprendi*] were in fact incompatible. In the controlling opinion, Justice BREYER nevertheless declined to apply *Apprendi* to mandatory minimums because, though he found no way to distinguish sentencing floors from sentencing ceilings, he could not "yet accept" *Apprendi* itself. We have said that a decision may be "of questionable precedential value" when "a majority of the Court expressly disagreed with the rationale of [a] plurality." And *Harris* has stood on especially weak ground because its vitality depended upon the possibility that the Court might retreat from *Apprendi*. That has not happened. . . .

Harris has become even more of an outlier. For that reason, I agree that it is appropriate for the Court to "overrule *Harris* and to apply *Apprendi*'s basic jury-determination rule to mandatory minimum sentences" in order to "erase th[is] anomaly" in our case law. . . .

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JUSTICE BREYER, concurring in part and concurring in the judgment.

Eleven years ago, in *Harris v. United States,* I wrote that "I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic." I nonetheless accepted *Harris'* holding because I could "[n]ot yet accept [*Apprendi*'s] rule." I continue to disagree with *Apprendi*. But *Apprendi* has now defined the relevant legal regime for an additional decade. And, in my view, the law should no longer tolerate the anomaly that the *Apprendi*/*Harris* distinction creates.

The Court's basic error in *Apprendi,* I believe, was its failure to recognize the law's traditional distinction between elements of a crime (facts constituting the crime, typically for the jury to determine) and sentencing facts (facts affecting the sentence, often concerning, *e.g.,* the manner in which the offender committed the crime, and typically for the judge to determine). The early historical references that this Court's opinions have set forth in favor of *Apprendi* refer to *offense elements,* not to *sentencing facts*. Thus, when Justice Story wrote that the Sixth Amendment's guarantee of trial by jury offered "'securit[y] against the prejudices of judges,'" he was likely referring to elements of a crime; and the best answer to Justice SCALIA's implicit question in *Apprendi*—what, exactly, does the "right to trial by jury" guarantee?—is that it guarantees a jury's determination of facts that constitute the elements of a crime.

. . . . I repeat this point now to make clear why I cannot accept the dissent's characterization of the Sixth Amendment as simply seeking to prevent "judicial overreaching" when sentencing facts are at issue. At the very least, the Amendment seeks to protect defendants against "the wishes and opinions of the government" as well. And, that being so, it seems to me highly anomalous to read *Apprendi* as

insisting that juries find sentencing facts that *permit* a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence.

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CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

Suppose a jury convicts a defendant of a crime carrying a sentence of five to ten years. And suppose the judge says he would sentence the defendant to five years, but because he finds that the defendant used a gun during the crime, he is going to add two years and sentence him to seven. No one thinks that this violates the defendant's right to a jury trial in any way.

Now suppose the legislature says that two years should be added to the five year minimum, if the judge finds that the defendant used a gun during the crime. Such a provision affects the role of the judge—limiting his discretion—but has no effect on the role of the jury. And because it does not affect the jury's role, it does not violate the jury trial guarantee of the Sixth Amendment.

The Framers envisioned the Sixth Amendment as a protection for defendants from the power of the Government. The Court transforms it into a protection for judges from the power of the legislature. For that reason, I respectfully dissent.

In a steady stream of cases decided over the last 15 years, this Court has sought to identify the historical understanding of the Sixth Amendment jury trial right and determine how that understanding applies to modern sentencing practice. Our key sources in this task have been 19th-century treatises and common law cases identifying which facts qualified as "elements" of a crime, and therefore had to be alleged in the indictment and proved to a jury beyond a reasonable doubt. With remarkable uniformity, those authorities provided that an element was "whatever is in law essential to the punishment sought to be inflicted."

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Because the sentence [in *Apprendi*] was two years longer than would have been possible without the finding of bias, that finding was "essential to the punishment" imposed. Thus, in line with the common law rule, we held the New Jersey procedure unconstitutional. . . . Our holdings that a judge may not sentence a defendant to more than the jury has authorized properly preserve the jury right as a guard against judicial overreaching.

There is no such risk of judicial overreaching here. Under [federal law] the jury's verdict fully authorized the judge to impose a sentence of anywhere from five years to life in prison. No additional finding of fact was "essential" to any punishment within the range. After rendering the verdict, the jury's role was completed, it was discharged, and the judge began the process of determining where within that range to set Alleyne's sentence. . . . As *Apprendi* itself recognized, "nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." . . . Thus, under the majority's rule, in the absence of a statutory mandatory minimum, there would have been no constitutional problem had the judge, exercising the discretion given him by the jury's verdict, decided that seven years in prison was the appropriate penalty for the crime *because of* his finding that the firearm had been brandished during the offense.

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[T]here is no body of historical evidence supporting today's new rule. The majority does not identify a single case holding that a fact affecting only the sentencing floor qualified as an element or had to be found by a jury, nor does it point to any treatise language to that effect. To be sure, the relatively recent vintage of mandatory minimum sentencing enhancements means that few, if any, 19th-century courts would have encountered such a fact pattern. . . . But given that *Apprendi*'s rule rests heavily on affirmative historical evidence about the practices to which we have previously applied it, the lack of such evidence on statutory minimums is a good reason not to extend it here.

Nor does the majority's extension of *Apprendi* do anything to preserve the role of the jury as a safeguard between the defendant and the State. That is because even if a jury does not find that the

firearm was brandished, a judge can do so and impose a harsher sentence because of his finding, so long as that sentence remains under the statutory maximum. . . .

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[T]he majority asserts that "because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." The syllogism trips out of the gate, for its first premise—that the constitutionally relevant "penalty" includes the bottom end of the statutory range—simply assumes the answer to the question presented. Neither of the historical sources to which the majority points gives an answer: The Bishop treatise speaks only to situations in which "a statute prescribes a particular punishment," not a range of possible punishments. . . .

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[L]egal rules frequently focus on the maximum sentence while ignoring the minimum, even though both are "relevant" to punishment. Closest to this case, the question whether the jury right applies at all turns on whether the *maximum* sentence exceeds six months—not, say, whether the minimum punishment involves time in prison. Likewise, the rights to vote and to bear arms are typically denied to felons—that is, those convicted of a crime with a maximum sentence of more than one year in prison. Examples of other distinctions turning only on maximum penalties abound, as in cases of recidivism enhancements that apply only to prior convictions with a maximum sentence of more than a specified number of years. That a minimum sentence is "relevant" to punishment, and that a statute defines it, does not mean it must be treated the same as the maximum sentence the law allows.

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[T]he majority argues that "[i]t is no answer to say that the defendant could have received the same sentence with or without" a particular factual finding, pointing out "that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical." In that hypothetical case, the legislature has chosen to define two crimes with two different sets of elements. Courts must, of course, respect that legislative judgment. But that tells us nothing about when courts can override the legislature's decision *not* to create separate crimes, and instead to treat a particular fact as a trigger for a minimum sentence within the already-authorized range.

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JUSTICE ALITO, dissenting.

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