No. 11-1536

In the Supreme Court of the United States

TREVOR LUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code provides that a person who brandishes a firearm during and in relation to a crime of violence shall "be sentenced to a term of imprisonment of not less than 7 years." The question presented is whether a term of imprisonment of 210 months is within the range of punishment authorized by Section 924(c)(1)(A)(ii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, guideline and rule: Page

Statutes, guideline and rule—Continued: Page

In the Supreme Court of the United States

No. 11-1536

TREVOR LUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 670 F.3d 784.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2012. On May 22, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 28, 2012, and the petition was filed on June 25, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Wisconsin, petitioner was convicted of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). He was sentenced to 210 months of impris-

onment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner communicated with a minor boy, CG, while playing an online video game. Pet. App. 1a-2a; Presentence Investigation Report (PSR) ¶¶ 6, 10. Petitioner asked CG to send naked pictures of himself. Pet. App. 2a; PSR ¶ 10. CG refused and put petitioner on an online "ignore list." *Ibid.* Petitioner offered CG videogame currency to remove him from the list. *Ibid.* CG agreed, but petitioner soon began sending him sexual messages again. *Ibid.* When CG put petitioner back on the ignore list, petitioner accused him of stealing the currency and sent him a series of threats in text messages and a voicemail. Pet. App. 2a-3a; PSR ¶¶ 11-12.

After assembling an arsenal of firearms, stun guns, pepper spray, handcuffs, and duct tape (PSR ¶ 22), outfitting his car to look like a police vehicle (PSR ¶ 27), removing the emergency release latch from the car's trunk (*ibid.*), and lining the inside of the trunk with plastic (*ibid.*), petitioner drove from his home in Gloucester, Massachusetts, to Madison, Wisconsin, where CG lived (PSR ¶ 25). See Pet. App. 3a-4a. When petitioner reached Madison, he paid another online acquaintance $500 to show him where CG resided. *Id.* at 3a; PSR ¶ 25. When petitioner arrived at CG's house, CG's mother answered the door. Pet. App. 4a; PSR ¶ 6. Petitioner told her he was in law enforcement and needed to speak with CG. *Ibid.* She asked for identification, grew doubtful that petitioner was in law enforcement, and ultimately refused to let him in. *Ibid.* Petitioner pulled out a handgun, pointed it directly at her face, and tried to push the door open. *Ibid.* She screamed and slammed the door shut before he was able to react.

Ibid. Petitioner fled and was arrested two days later in Massachusetts. Pet. App. 4a; PSR ¶ 7.

2. a. A grand jury in the Western District of Wisconsin returned a three-count superseding indictment charging petitioner with transporting firearms in interstate commerce with the intent to commit a felony, in violation of 18 U.S.C. 924(b); attempted kidnapping, in violation of 18 U.S.C. 1201(a)(1) and (d); and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Superseding Indictment 1-2. The Section 924(c) count alleged that petitioner had brandished a handgun during the attempted kidnapping. *Id.* at 2; see 18 U.S.C. 924(c)(1)(A)(ii).

Petitioner entered a plea agreement under which he agreed to plead guilty to the Section 924(c) count in exchange for the government dismissing the other two counts. Plea Agreement 1-2. The plea agreement stated that the Section 924(c) count "carrie[d] penalties of a mandatory minimum of seven years in prison and a maximum of life in prison." *Id.* at 1. Petitioner signed the agreement, "acknowledg[ing] his understanding * * * that the Court can impose any sentence up to and including the maximum penalties set out above." *Id.* at 3; see Pet. App. 5a. Similarly, at the guilty plea hearing, the district court asked petitioner: "[D]o you understand that if I accept your plea and adjudge you guilty, that you could be subject to the penalties up to and including the maximum * * * [of] life in prison * * * [and] a minimum sentence of seven years?" Plea Tr. 5-6. Petitioner responded: "Yes, Your Honor." *Id.* at 6.

b. The probation office prepared a PSR stating that petitioner faced a "term of imprisonment [of] at least 7 years to life" under 18 U.S.C. 924(c)(1)(A)(ii). PSR ¶ 88.

The PSR also calculated an advisory Sentencing Guidelines imprisonment range of 84 months, pursuant to Sentencing Guidelines § 2K2.4(b). PSR ¶ 89. Petitioner filed "objections, corrections or comments" to the PSR. Pet. Objections to PSR 1, 4. He acknowledged, however, that none of the objections "affect[ed] the seven year mandatory minimum." *Id.* at 4. Nor did he take issue with the PSR's statement that he faced a statutory maximum of life imprisonment under Section 924(c)(1)(A)(ii). *Id.* at 1-4.

About two weeks after filing his objections to the PSR, petitioner submitted a sentencing memorandum to "support * * * a defense sentence recommendation for seven years in prison, the mandatory minimum sentence for the offense of conviction." Pet. Sent. Memo. 1. Discussing the sentencing factors of 18 U.S.C. 3553(a)(1), the memorandum cited various medical- and character-related reasons for imposing a seven-year term of imprisonment instead of some lengthier sentence, but it did not dispute that petitioner faced a statutory maximum of life imprisonment. See Pet. Sent. Memo. 1-12.

At sentencing, the district court noted that petitioner faced a "mandatory minimum of seven years" and agreed with the PSR's calculation that petitioner's advisory Sentencing Guidelines range of imprisonment was likewise seven years. Sent. Tr. 3. Again without disputing that petitioner faced a maximum of life imprisonment under Section 924(c)(1)(A)(ii), petitioner's counsel characterized the issue before the court as "where does [petitioner's conduct] cause you to fall with respect to the sentencing range." *Id.* at 12. Weighing petitioner's potentially mitigating psychiatric history (*id.* at 22, 29-32) against the "chilling details" of the case (*id.* at 25; see *id.* at 22-32)—including that petitioner's "egregious"

behavior was not "spontaneous" but rather the product of a year and a half of planning CG's kidnapping in "frightening detail" (*id.* at 28-29)—the district court sentenced petitioner to 210 months of imprisonment (*id.* at 32). The court noted that it had taken into consideration petitioner's "relevant conduct in the underlying offense of" attempted kidnapping, even though the government had dismissed the kidnapping count. *Id.* at 3. After the court imposed the sentence, petitioner's counsel did not object that it exceeded the statutory maximum under Section 924(c)(1)(A)(ii). See *id.* at 37-38.

3. The court of appeals affirmed. Pet. App. 1a-27a. As relevant here, the court rejected petitioner's claim, raised for the first time on appeal, that the statutory maximum sentence under 18 U.S.C. 924(c)(1)(A)(ii) is seven years of imprisonment, and that petitioner's 210-month sentence was therefore "illegal as a matter of law." Pet. App. 22a; see *id.* at 22a-24a.

The court noted that it had in a prior case interpreted Section 924(c)(1)'s references to sentences of "not less than" the stated terms to prescribe a unitary "maximum sentence of life imprisonment, regardless of what subsection [of Section 924(c)(1)] the defendant is sentenced under." Pet. App. 23a (quoting *United States* v. *Sandoval*, 241 F.3d 549, 551 (7th Cir.), cert. denied, 534 U.S. 1057 (2001)). The court found further support for this interpretation in *Harris* v. *United States*, 536 U.S. 545 (2002), which observed that "[s]ince [§ 924(c)(1)(A)'s] subsections alter only the minimum, the judge may impose a sentence *well in excess of seven years*, whether or not the defendant brandished the firearm." Pet. App. 23a (quoting *Harris*, 536 U.S. at 554) (emphasis and brackets supplied by court of appeals). Finally, the court observed that every court of appeals to have con-

sidered the issue agreed that Section 924(c)(1)(A)'s references to sentences of "not less than" the specified terms of years "implicitly authorize[] district courts to impose a sentence up to a maximum of life imprisonment." *Id.* at 23a-24a (citations omitted).

ARGUMENT

Petitioner contends (Pet. 5-27) that the statutory maximum for brandishing a firearm under 18 U.S.C. 924(c)(1)(A)(ii) is seven years of imprisonment, and that his 210-month sentence was thus unlawful. The court of appeals' decision is correct and petitioner does not contend it conflicts with a decision of this Court or of any other court of appeals. In any event, this would be a poor vehicle for reaching the question presented because petitioner failed to raise his claim in the district court, and he cannot establish reversible plain error. Further review is not warranted.

1. The court of appeals' decision is correct. Section 924(c)(1) of Title 18 provides in relevant part:

> (A) * * * [A]ny person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

Petitioner contends that "Subsection 924(c)(1)(A) prescribes fixed sentencing terms" rather than sentencing ranges starting at five, seven, and ten years and "extending [upward] to life imprisonment." Pet. 12 (capitals altered). That is incorrect.

a. This Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2002), squarely forecloses petitioner's contention. In *Harris*, the Court addressed the very provision at issue here, 18 U.S.C. 924(c)(1)(A)(ii). The district court in *Harris* imposed a mandatory-minimum seven-year term of imprisonment under Section 924(c)(1)(A)(ii) based on a judicial determination that the defendant brandished a firearm during a drug-trafficking offense. 536 U.S. at 551. The Court first concluded, as a statutory matter, that Section 924(c)(1)(A) "regards brandishing * * * as [a] sentencing factor[ ]" and not as an element of a separate, graduated offense. *Id.* at 556. A majority of the Court also concluded, as a constitutional matter, that "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments" as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Harris*, 536 U.S. at

568 (plurality opinion); see *id.* at 569-570 (Breyer, J., concurring in part and concurring in the judgment) ("join[ing]" the plurality opinion "to the extent that it holds that *Apprendi* does not apply to mandatory minimums").

In the portion of *Harris* interpreting the statute, this Court observed that "[s]ince the subsections [of Section 924(c)(1)(A)] alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm." 536 U.S. at 554. Likewise, the Court repeatedly referred to Section 924(c)(1)(A)'s prescriptions of "not less than" five, seven, and ten years as "minimum[s]" rather than fixed terms. *Id.* at 551-553; see *id.* at 569-572 (Breyer, J., concurring in part and concurring in the judgment).[1]

Petitioner dismisses the foregoing as "dicta" and faults the court below for relying on them. Pet. 24-25. But they were not dicta. This Court's recognition that the clauses of Section 924(c)(1)(A) "alter only the minimum[s]" and subject all defendants convicted under Section 924(c)(1) to the same statutory maximum—life imprisonment, whether or not they brandish or discharge a firearm—was essential to the Court's constitutional holding that *Apprendi* permits the treatment of brandishing as a sentencing factor. *Harris* upheld the statute as consistent with *Apprendi* on the understanding that a defendant's brandishing or discharging of a firearm does not expose him to a greater maximum sen-

---

[1] This Court has consistently adhered to its description of the sentences in Section 924(c)(1) as "minimum" sentences. See *Abbott* v. *United States*, 131 S. Ct. 18, 22-23 (2010); *United States* v. *O'Brien*, 130 S. Ct. 2169, 2177 (2010); *Dean* v. *United States,* 556 U.S. 568, 570 (2009).

tence than he would otherwise face if he did not brandish or discharge it:

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (*but not extending the sentence beyond the statutory maximum*), for the jury's verdict has authorized the judge to impose the minimum with or without the finding.

Harris, 536 U.S. at 557 (plurality opinion) (emphasis added); see *id.* at 566 (what matters under *Apprendi* is "[i]f the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum"); see also *id.* at 574 (Thomas, J., dissenting) ("In the plurality's view, any punishment less than the statutory maximum of life imprisonment for any violation of [Section] 924(c)(1)(A) avoids the single principle the Court now gleans from *Apprendi*.").

Harris simply could not have reached its result if petitioner were correct (Pet. 12) that Sections 924(c)(1)(A)(i), (ii), and (iii) prescribe "[f]ixed"—and therefore maximum—sentences of five, seven, and ten years, respectively. On petitioner's view, brandishing a firearm would have to be treated as an element of a distinct Section 924(c)(1)(A)(ii) offense—irrespective of the constitutional status of facts altering *minimum* prescribed punishments—because the fact of brandishing would increase the defendant's *maximum* exposure from five to seven years. In short, *Harris*'s recognition (536 U.S. at 554) that Sections 924(c)(1)(A)(i), (ii), and (iii) all prescribe the same maximum—namely, "life im-

prisonment" (*id.* at 574 (Thomas, J., dissenting))—was "integral to the outcome of the case" and thus "binding in future cases" (Pet. 25).[2]

b. Petitioner relies on *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010), for a contrary conclusion, arguing that the Court there "expressly * * * reserve[d] the question of whether subsection (A) allows sentences beyond its specified terms." Pet. 25. *O'Brien* did not reserve the question; to the contrary, that case squarely rejects petitioner's position.

In *O'Brien*, this Court addressed whether, under 18 U.S.C. 924(c)(1)(B)(ii), "the fact that the firearm was a machinegun is an element to be proved to the jury beyond a reasonable doubt or a sentencing factor to be proved to the judge at sentencing." 130 S. Ct. at 2172. The Court noted at the outset that in *Castillo* v. *United States*, 530 U.S. 120 (2000), it had "determined that an

---

[2] This Court has granted certiorari in *Alleyne* v. *United States*, No. 11-9335, to address the question whether this Court's decision in *Harris* should be overruled. In *Alleyne*, as in *Harris*, the district court imposed a mandatory-minimum seven-year term of imprisonment under Section 924(c)(1)(A)(ii) based on a judicial determination that a firearm had been brandished during the commission of the defendant's offense. See U.S. Br. in Opp., *Alleyne*, *supra*, at 7. *Alleyne* presents no occasion to reconsider *Harris*'s conclusion that "the judge may impose a sentence well in excess of seven years," 536 U.S. at 554, under Section 924(c)(1)(A)(ii). Indeed, as explained in the text, if petitioner's submission in this case were correct, then the "fixed sentences" (Pet. 6) in Sections 924(c)(1)(A)(i), (ii), and (iii) would reflect varying statutory maximum sentences and would plainly be subject to *Apprendi*—resolving the *Alleyne* petitioner's claim that his brandishing should have been proven to a jury beyond a reasonable doubt and making *Alleyne* an entirely inappropriate vehicle for considering whether to overrule *Harris*. Conversely, because petitioner does not contend *Harris* should be overruled, the petition should not be held for *Alleyne*.

analogous machinegun provision in a previous version of [Section] 924 constituted an element." 130 S. Ct. at 2173. The Court in *O'Brien* held that, notwithstanding Congress's 1998 revisions to the statute, its conclusion in *Castillo* remained correct. *Id.* at 2175-2180.

This Court reached that conclusion, however, only after acknowledging and addressing the fact that "[t]he 1998 amendment did make substantive changes to the statute." *O'Brien*, 130 S. Ct. at 2176. As relevant here, the Court observed that "[t]he previous version of [Section] 924 provided mandatory sentences: 5 years for using or carrying a firearm and 30 years if the firearm is a machinegun, for example." *Id.* at 2177. By contrast, the Court noted, "[t]he current statute provides only mandatory *minimums*: not less than 5 years for using or possessing a firearm; not less than 7 for brandishing it; and not less than 30 if the firearm is a machinegun." *Ibid.* (emphasis added); see *id.* at 2179 ("[T]he amendment changed what were once mandatory sentences into mandatory minimum sentences."). Those statements cannot possibly be read to be consistent with petitioner's position that the post-amendment version of Section 924(c) continues to prescribe mandatory fixed sentences, just as did its predecessor.[3]

---

[3] This Court also pointed out in *O'Brien* that, since the 1998 amendment, some defendants had indeed received sentences longer than the minimum sentences prescribed in Section 924(c)(1)(A). 130 S. Ct. at 2177-2178. That the Court did so without commenting on the fact that it would be unlawful to impose such terms if Sections 924(c)(1)(A)(i), (ii), and (iii) prescribed fixed sentences is further confirmation that the Court viewed the provisions to prescribe five, seven, and ten years as minimums, not both minimums *and* maximums. Accord *id.* at 2182 (Stevens, J., concurring) (observing that Section 924(c)(1)(A) prescribes no express "ceiling" but instead "contains an implied statutory maximum of life") (emphasis omitted); *id.* at 2184

c. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [this Court has] done." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). That principle carries even more force when Congress has, as in Section 924(c), actually relied on this Court's characterization of "not less than" a term of years as establishing a statutory maximum sentence of life imprisonment. In 2005, three years after *Harris* was decided, Congress enacted 18 U.S.C. 924(c)(5). Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 6(b), 119 Stat. 2102. That provision makes it a crime to use or carry armor-piercing ammunition in connection with a crime of violence or drug trafficking crime. Section 924(c)(5) parallels Section 924(c)(1) in nearly every respect, including its provision that a convicted defendant "be sentenced to a term of imprisonment of not less than 15 years," 18 U.S.C. 924(c)(5)(A). The use of that language can only be understood to reflect Congress's approval of, and reliance on, this Court's decision in *Harris*. Against the force of those considerations of *stare decisis*, petitioner does not even attempt to offer a "compelling justification," *Hilton*, 502 U.S. at 202, for departing from this Court's repeated descriptions of Section 924(c)(1) as supplying a series of sentencing ranges, each with a statutory maximum of life imprisonment.

(Thomas, J., concurring in the judgment) (noting that the "penalty range for a conviction under [Section] 924(c)(1)(A)(i) is five years to life imprisonment").

d. Even construing Section 924(c)(1)(A) *res nova*, petitioner's analysis of the statute's text, structure, and history (Pet. 12-24) supplies no basis for a contrary conclusion. Section 924(c)(1)(A) provides that a defendant shall be sentenced to "not less than" the prescribed terms. Petitioner's sentence is within the range prescribed by Section 924(c)(1)(A)(ii) because petitioner's 210-month term of imprisonment is "a term of imprisonment of not less than 7 years."

As one court of appeals recently commented, "not less than" should not lightly be interpreted to mean, simultaneously, "not less than" and "not more than." *United States* v. *Dorsey*, 677 F.3d 944, 957 (9th Cir. 2012), petition for cert. pending, No. 12-6571 (filed Sept. 28, 2012).[4] That would be an odd construction under any circumstance, but especially in this context because when Congress prescribes a statutory maximum, it ordinarily uses the phrase "not more than" expressly—including in Section 924's other provisions prescribing penalties for firearm violations. See, *e.g.*, 18 U.S.C. 924(a)(1)-(7), (b), (f), (g), (h), (i), (k), (*l*), (m), (n), (*o*) and (p)(1)(A); accord 18 U.S.C. 930(a), (b) and (e).

Construing "not less than" in Section 924(c)(1) to prescribe a maximum term of imprisonment is especially untenable in view of Section 924(c)(1)(A)'s drafting history. As petitioner notes (Pet. 19), the issue presented here is not discussed in the "House Report, testimony, and floor statements." But "legislative history need not confirm the details of changes in the law effected by

---

[4] The pending petition in *Dorsey* presents a question nearly identical to the question presented here, *viz.*, whether an 18-year sentence for discharging a firearm during and in relation to a crime of violence exceeds the maximum sentence authorized by 18 U.S.C. 924(c)(1)(A)(iii).

statutory language before [this Court] will interpret that language according to its natural meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992). And consider what Congress actually did in 1998: The old statute stated that a defendant who uses or carries a firearm during and in relation to a crime of violence or drug-trafficking crime "shall * * * be sentenced to imprisonment for five years." 18 U.S.C. 924(c)(1) (Supp. V 1993). In other words, the statute previously *did* provide a fixed term for the *simpliciter* use-or-carry offense. In 1998, however, Congress made a "substantive change[]," *O'Brien*, 130 S. Ct. at 2176; see *id.* at 2177-2179, striking that directive of a fixed term and replacing it with language that now prescribes sentences of "not less than" five, seven, and ten years, respectively, for a *simpliciter* offense, an offense involving brandishing, or an offense involving the discharge of a firearm.

If the 1998 Congress had wanted to prescribe fixed sentences of five, seven, and ten years, there was no reason to adopt a new phrase in the tenor of a mandatory minimum ("not less than") when the existing language ("shall * * * be sentenced to imprisonment for five [or seven or ten] years") already directed fixed terms. The change in terminology cannot be dismissed as accidental or merely stylistic, particularly given that Congress is "presum[ed]" to "understand[] the state of existing law when it legislates." *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988). Significantly, the 1998 Congress was presumably aware that this Court had read a neighboring provision of Section 924—18 U.S.C. 924(e), the Armed Career Criminal Act—to prescribe a maximum term of life imprisonment through the phrase "not less than fifteen years." 18 U.S.C. 924(e)(1); see *Custis* v. *United States*, 511 U.S. 485, 487 (1994) (Section

924(e) prescribes "a mandatory minimum sentence of 15 years and a maximum of life in prison").[5] Congress presumably expected the same "not less than" language in Section 924(c)(1)(A) to be interpreted the same way. See *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, * * * it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Petitioner also relies on the rule of lenity. Pet. 21-24. "The rule of lenity, however, is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute], such that even after a court has seized every thing from which aid can be de-

---

[5] The courts of appeals were likewise unanimous in interpreting Section 924(e)(1) to prescribe a maximum term of life imprisonment. See *United States* v. *Williams*, 892 F.2d 296, 304 (3d Cir. 1989), cert. denied, 496 U.S. 939 (1990); *United States* v. *Blannon*, 836 F.2d 843, 845 (4th Cir.), cert. denied, 486 U.S. 1010 (1988); *United States* v. *Fields*, 923 F.2d 358, 362 (5th Cir.), cert. denied, 500 U.S. 937 (1991), overruled on other grounds, *United States* v. *Lambert*, 984 F.2d 658, 662 & n.10 (5th Cir. 1993); *United States* v. *Alvarez*, 914 F.2d 915, 919 (7th Cir. 1990), cert. denied, 500 U.S. 934 (1991); *United States* v. *Carey*, 898 F.2d 642, 646-647 (8th Cir. 1990); *United States* v. *Tisdale*, 921 F.2d 1095, 1100 (10th Cir. 1990), cert. denied, 502 U.S. 986 (1991); *United States* v. *Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993).

Similarly, this Court has consistently adhered to *Custis*'s interpretation of Section 924(e)(1). See, *e.g.*, *Johnson* v. *United States*, 130 S. Ct. 1265, 1268 (2010) ("[Section] 924(e) * * * provides that a [convicted defendant] shall be imprisoned for a minimum of 15 years and a maximum of life."); *Logan* v. *United States*, 552 U.S. 23, 27 (2007) ("Ordinarily, the maximum felon-in-possession sentence is 10 years. If the offender's prior criminal record includes at least three convictions for 'violent felon[ies]' or 'serious drug offense[s],' however, the maximum sentence increases to life.") (citation omitted, brackets in original).

rived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (internal quotation marks and citations omitted). That rule has no application here. For the reasons discussed, including the plain meaning of "not less than" and in view of the "substantive change[]" in 1998 from a fixed sentence to "mandatory minimum" sentences of five, seven, and ten years, *O'Brien*, 130 S. Ct. at 2176-2179 (emphasis added), it cannot be thought that there is any "grievous ambiguity" in the statute.

2. The courts of appeals uniformly agree on the question presented. As petitioner concedes (Pet. 7-8 & n.1), every court of appeals to have considered the issue, both before and after *Harris*, has held or otherwise indicated that the sentencing provisions in Section 924(c)(1)(A) prescribe a maximum sentence of life imprisonment. See, *e.g.*, *United States* v. *Johnson*, 507 F.3d 793, 798 (2d Cir. 2007), cert. denied, 552 U.S. 1301 (2008); *United States* v. *Shabazz*, 564 F.3d 280, 288-289 (3d Cir. 2009); *United States* v. *Sias*, 227 F.3d 244, 246-247 (5th Cir. 2000); *Dorsey*, 677 F.3d at 955-958 (9th Cir.); *United States* v. *Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000) (per curiam), cert. denied, 532 U.S. 984 (2001).

3. In any event, this would be a poor vehicle for addressing the question petitioner presents because he failed to preserve his claim in the district court.

a. Petitioner failed to argue at any point in the district court that the statutory maximum punishment for brandishing a firearm under 18 U.S.C. 924(c)(1)(A)(ii) is seven years rather than life imprisonment. Indeed, quite the opposite: Petitioner acknowledged in the Plea Agreement (at 1, 3) and at the plea hearing (Tr. 5-6) that he could be sentenced to a maximum prison term of life. Similarly, in his sentencing pleadings and at the sen-

tencing hearing, his sole focus was on persuading the district court not to exercise its undisputed discretion under 18 U.S.C. 3553(a) to impose a term longer than seven years. See p. 4, *supra*.

Petitioner accepts that because he failed to object in the district court, his current claim would be reviewed only for plain error under Federal Rule of Criminal Procedure 52(b). Pet. 26 n.8; see Pet. C.A. Br. 54-56 (similar concession in court of appeals). To establish reversible plain error, petitioner would have to show (1) that there was an error, (2) that was obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); see *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993).

b. With respect to the second prong of the plain error analysis, petitioner contends that the putative sentencing error in his case would be "obvious" because it is settled that it is error to impose a sentence above the applicable statutory maximum. See Pet. 26 n.8. That argument misconceives the level of generality at which claims of error must be raised. Petitioner's theory would nullify the "obvious" prong of plain error review: Any forfeited violation of the Due Process Clause, for example, would be "obvious" on appeal because it is settled that it is error to convict a defendant following a trial that did not accord the defendant due process. Likewise, in *Johnson* itself—which considered whether the failure to instruct the jury on a particular element of the charged offense was reversible plain error—this Court should have, on petitioner's theory, found the error obvious by simply noting that the Sixth Amendment requires for conviction that the jury find every element

of the offense charged (see, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 277-278 (1993)), rather than focusing on the Court's particular decision (*United States* v. *Gaudin*, 515 U.S. 506 (1995)) that had found error in the failure to give a particular instruction for the particular offense that Johnson was charged with. See *Johnson*, 520 U.S. at 467-468.

Thus, petitioner must establish that it is "obvious" that Section 924(c)(1)(A)(ii) provides a fixed seven-year sentence. "[I]n a case * * * where the law at the time of trial was settled and clearly contrary to the law *at the time of appeal*[,] it is enough that an error be 'plain' at the time of appellate consideration." *Johnson*, 520 U.S. at 468 (emphasis added). That was satisfied in *Johnson* because this Court had decided *Gaudin* at the time it reviewed Johnson's case. Petitioner's case does not fit the *Johnson* mold because he seeks to use *his own case* to establish the error he says is "obvious." The Court has never found reversible plain error in such a posture, it is by no means clear that it should, and at a minimum the Court would face that procedural question before deciding the substantive question petitioner would present. If the Court is inclined to address the question presented, it should follow its customary practice of awaiting a vehicle in which the question was preserved below.

c. Petitioner also implicitly contends that the third and fourth prongs of plain error review would necessarily be satisfied in a case involving a sentence that exceeds the authorized statutory maximum sentence. The government agrees that, with respect to the third prong of the plain error analysis, such a sentence affects a defendant's substantial rights. But that error would not be a proper subject for correction on appeal in the con-

text of this case because the fourth prong of the plain error analysis would not be satisfied.

In entering a plea bargain with petitioner, the government agreed to dismiss one count carrying a potential twenty-year sentence (attempted kidnapping, in violation of 18 U.S.C. 1201(a)(1) and (d)) and another count carrying a potential ten-year sentence (transporting firearms in interstate commerce with the intent to commit a felony, in violation of 18 U.S.C. 924(b)), in reliance on the parties' mutual understanding that the remaining count under 18 U.S.C. 924(c)(1) carried a potential life sentence. See Plea Agreement 3; Pet. App. 5a. As the district court recognized in imposing the sentence it did, petitioner's shocking and deliberate conduct would not merit a mere fixed seven-year sentence, and petitioner offers no basis to believe the government would have entered into such a plea bargain.

This Court has held that, in deciding whether a habeas corpus petitioner's actual innocence is a sufficient basis to recognize a procedurally defaulted claim of error, "where the Government has forgone more serious charges in the course of plea bargaining, [the habeas] petitioner's showing of actual innocence must also extend to those charges." *Bousley* v. *United States*, 523 U.S. 614, 624 (1998). Those considerations have similar force in considering on direct review whether an error "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Johnson*, 520 U.S. at 467 (internal quotation marks and citation omitted). On plain error review of a sentence claimed to exceed the authorized statutory maximum sentence, it undermines the integrity of criminal proceedings to permit a defendant to claim the benefit of both a lower statutory maximum sentence recognized for the first time on appeal

and the government's concessions in plea bargaining that removed any exposure to a sentence for the dismissed charges.

In petitioner's case, even if Section 924(c)(1)(A)(ii) carried a maximum penalty of seven years of imprisonment, his 210-month sentence would be within the range of punishment authorized for a violation of Section 924(c)(1)(A)(ii) and for attempted kidnapping under 18 U.S.C. 1201(a)(1) and (d)—indeed, petitioner's sentence is less than the 240-month statutory maximum sentence for attempted kidnapping alone. Petitioner cannot possibly claim "factual innocence" of the attempted kidnapping charge because attempted kidnapping was the underlying crime of violence that supported petitioner's conviction under Section 924(c)(1). The government proffered a factual basis for that element of the Section 924(c)(1) offense, petitioner agreed that the government had a factual basis, and the district court so found. See Plea Tr. 14-24. At points in the proceedings, petitioner maintained that he only intended to "scare" his intended victim, not to kidnap him. See Plea Tr. 22; Sent. Tr. 21. But the district court found otherwise, both in accepting petitioner's guilty plea and in fashioning its sentence, and the court of appeals upheld that finding. See Plea Tr. 22-23; Sent Tr. 28 ("The instant offense involved a premeditated, meticulous plan to kidnap and harm a minor."); Pet. App. 16a ("It was not speculation that [petitioner] wanted to kidnap CG; there [was] an abundance of facts supporting this finding.").

Under those circumstances, it would not be appropriate to correct the claimed error in petitioner's sentence. The parties and the district court operated on the understanding that petitioner's plea exposed him to a maximum life term of imprisonment; only on that basis did

the government dismiss the factually intertwined counts covering the same conduct embodied in the Section 924(c)(1) count and carrying potential sentences that exceed the sentence actually imposed on petitioner. No reason exists to suppose that petitioner would not have received the same sentence had he made his position clear, before entering the plea agreement, that his Section 924(c)(1) charge alone carried only a seven-year term—a period that would be plainly insufficient to cover the magnitude of his crime. On these facts, "it would be the reversal of a [sentence] such as [petitioner's] which would * * * seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 470; see also *Puckett* v. *United States*, 556 U.S. 129, 143 (2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

OCTOBER 2012