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Alleyne v. United States133 S. Ct. 2151 (2013)

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Ohio Northern University
Law Review

Student Case Notes

Alleyne v. United States
133 S. Ct. 2151 (2013)

I. INTRODUCTION

The Sixth Amendment guarantees that persons charged with a crime have the right to a trial by an impartial jury in criminal proceedings.[1] In accordance with this right, prosecutors must present and prove each element of a crime to a jury beyond a reasonable doubt.[2] In order to protect this right, there must be a consistent presentation to a jury of elements that define each crime.[3] However, in *McMillan v. Pennsylvania*,[4] the Supreme Court of the United States held that judges may find facts, known as "sentencing factors," by a preponderance standard, because they become relevant "only after the defendant has been found guilty . . . beyond a reasonable doubt."[5]

In conjunction with the rule from *McMillan*, the Supreme Court has long held that sentencing discretion, if within the proper framework of judicial fact-finding, is constitutional.[6] However, the Court placed a distinct limit on this framework in *Apprendi v. New Jersey*,[7] holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[8] *Apprendi* demonstrated the Court's commitment to ensuring that defendants are not exposed to penalties exceeding the

1. U.S. CONST. amend. VI.
2. United States v. Gaudin, 515 U.S. 506, 510 (1995) (citing Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993)).
3. *See* Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013).
4. 477 U.S. 79 (1986).
5. *Id.* at 86, 91.
6. *See Alleyne*, 133 S. Ct. at 2163 (citing Dillon v. United States, 130 S. Ct. 2683, 2692 (2010)).
7. 530 U.S. 466 (2000).
8. *Id.* at 476 (quoting Jones v. United States, 562 U.S. 227, 243 n.6 (1999) (internal quotation marks omitted)).

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maximum sentence possible based on the elements of the crime charged.[9] Despite this commitment, the *Apprendi* Court only expressly addressed facts that increased the statutory maximum, raising the question of whether mandatory minimums would also constitute elements of a crime.[10] Just two years later in *Harris v. United States*,[11] the Court answered this question in the negative by limiting *Apprendi* to cases that implicate statutory maximums.[12] *Harris* drew a definitive distinction between facts that increase statutory maximums and facts that increase statutory minimums by holding that the factual basis for increasing a minimum sentence was not essential to the defendant's punishment.[13]

However, in June of 2013, in *Alleyne v. United States*,[14] the Supreme Court was again presented with the issue of the constitutionality of judge-found facts that increase statutory minimum sentences.[15] In this landmark sentencing case, the Court overturned both *McMillan* and *Harris*, holding that they could not be reconciled with the reasoning in *Apprendi*.[16] Relying heavily on *Apprendi*, the Court stated in certain terms, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."[17] The Court clearly reiterated the historical importance of a "'defendant's ability to predict with certainty the judgment from the face of the felony indictment . . . .'"[18]

Alleyne is a meaningful case in criminal sentencing, as it falls directly in line with *Apprendi*, eliminates the distinction created by *Harris*, and is consistent with the Court's Sixth Amendment jurisprudence and sentencing reform.[19] Undoubtedly, the potential impact of *Alleyne* is vast, as it makes current federal sentencing procedure unconstitutional, and nullifies the sentencing structures in many states.[20]

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

A jury convicted Petitioner, Allen Ryan Alleyne, of one count of "robbery affecting interstate commerce," and one count of using a gun

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9. *See id.* at 475-76.
10. *See id.* at 490.
11. 536 U.S. 545 (2002).
12. *See id.* at 565.
13. *See id.* at 560-61.
14. 133 S. Ct. 2151.
15. *See id.* at 2155.
16. *See id.* at 2155, 2157.
17. *Id.* at 2155 (citing *Apprendi*, 530 U.S. at 483 n.10, 490).
18. *Id.* at 2160 (quoting *Apprendi*, 530 U.S. at 478).
19. *See* Alleyne, 133 S. Ct. at 2160. *See* Blakely v. Washington, 542 U.S. 296, 303-06 (2004); *see also* United States v. Booker, 543 U.S. 220, 232-34 (2005).
20. Brief of Respondent at 8, 51-54, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335), 2012 WL 6624225 at **8, 51-54.

during a crime of violence.[21] Alleyne received a forty-six-month sentence on the robbery charge; the district court found that he "had '[u]sed or carried a firearm during and in relation to a crime of violence . . . .'"[22] While the prosecutors charged Alleyne with brandishing a firearm during the robbery, the jury did not make such a finding.[23] However, the district court ruled in accordance with the presentence report, which recommended the mandatory minimum seven-year sentence based on the finding that the defendant had brandished the firearm.[24] The court issued this ruling under the authority of nearly identical facts as those in *Harris*, which permitted judges to determine facts that increase the statutory minimum sentence by a preponderance of the evidence.[25]

Petitioner appealed, arguing that raising his mandatory minimum sentence based upon a fact that the jury did not find beyond a reasonable doubt violated his Sixth Amendment right to trial by an impartial jury.[26] The United States Court of Appeals for the Fourth Circuit affirmed the sentence based upon the Supreme Court's ruling in *Harris*, and the Supreme Court granted certiorari.[27]

In a concise five-to-four decision written by Justice Thomas, the Court overruled its prior holding in *Harris*, and ruled that Petitioner's seven-year mandatory minimum sentence violated the Sixth Amendment because the jury did not find beyond a reasonable doubt that the defendant brandished the firearm.[28]

III. THE COURT'S DECISION AND RATIONALE

A. The Majority Opinion

Justice Thomas delivered the opinion of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan; Justice Breyer, who concurred in part and in the judgment, wrote separately to explain his disagreement with the anomaly created by the "*Harris*/*Apprendi* distinction."[29] First, Justice Thomas addressed the deep-rooted tradition of "including in the indictment, and submitting to the jury, every fact that was a basis for imposing or

21. *Alleyne*, 133 S. Ct. at 2155-56.
22. *See id.*; *see also* Lyle Denniston, *Argument Preview: Back to the Sentencing Puzzle*, SCOTUSBLOG (Jan. 12, 2013, 12:02 AM), http://www.scotusblog.com/2013/01/argument-preview-back-to-the-sentencing-puzzle/.
23. *Alleyne*, 133 S. Ct. at 2155-56.
24. *Id.*
25. *See id.*
26. *Id.* at 2156.
27. *Id.* at 2155-56.
28. *Alleyne*, 133 S. Ct. at 2155.
29. *Id.* at 2155, 2166-67.

Ohio Northern University Law Review, Vol. 40 [], Iss. 2, Art. 11

increasing punishment."[30] Turning to the accepted principle that "'[f]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense,'"[31] the Court reasoned, "a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense."[32]

Next, the Court addressed the significance and necessity of overruling *Harris* to implement reasoning consistent with *Apprendi*.[33] By defining the facts that increased a mandatory statutory minimum as part of the principal offense, a defendant could predict the legally appropriate penalty from the face of the indictment.[34] Importantly, this also upheld the original "role of the jury as an intermediary between the State and [the accused]."[35]

The Court then turned to the issue at hand: whether Petitioner "brandishing" the gun was an element of the crime.[36] Because a finding that Petitioner "brandished," as opposed to "used or carried," the gun increased the mandatory minimum sentence from five years to seven years, the Court found this fact to be an element of the crime.[37] As such, this fact should have been presented to the jury and found according to the usual criminal standard—beyond a reasonable doubt.[38]

In concluding, the Court took care to reaffirm its long-standing belief that "broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment."[39] Insisting that this opinion reflected consistency with the tradition of judicial discretion, the Court reiterated that, "'[e]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.'"[40]

B. Concurring Opinion by Justice Sotomayor

In a brief concurring opinion that Justices Ginsburg and Kagan joined, Justice Sotomayor expressed caution in the decision to overrule *Harris*, but confidence that the issue presented in *Alleyne* provided a "special justification" for doing so.[41] She specified that "particularly in a case where

30. *Id.* at 2159.
31. *Id.* at 2160 (quoting *Apprendi*, 530 U.S. at 483 n.10).
32. *Id.* (citing *Apprendi*, 530 U.S. at 501).
33. *See Alleyne*, 133 S. Ct. at 2160-63.
34. *Id.* at 2161 (citing *Apprendi*, 530 U.S. at 478-79).
35. *Id.*
36. *See id.* at 2162.
37. *See id.* at 2155, 2162-63.
38. *See Alleyne*, 133 S. Ct. at 2162-63.
39. *Id.* at 2163 (citing *Dillon*, 130 S. Ct. at 2692).
40. *Id.* (quoting *Apprendi*, 530 U.S. at 519).
41. *See id.* at 2164 (Sotomayor, J., concurring).

Beaty: Alleyne v. United States133 S. Ct. 2151 (2013)

the reliance interests are so minimal, and the reliance interests of private parties are nonexistent, *stare decisis* cannot excuse a refusal to bring 'coherence and consistency.'"[42] Justice Sotomayor concluded by declaring that the reasoning of *Harris* was "thoroughly undermined by intervening decisions and . . . no significant reliance interests are at stake that might justify adhering to their result."[43]

C. Concurring Opinion by Justice Breyer

Justice Breyer departed from his well-known renunciation of the majority opinion in *Apprendi*, instead providing the decisive, fifth vote in *Alleyne*.[44] While Justice Breyer reaffirmed his opposition to the rule in *Apprendi*, he also acknowledged its two decades of importance in the legal regime of criminal sentencing.[45] As the *Apprendi* standard had endured for eleven years at the time of the decision in *Alleyne*, Justice Breyer stressed that "the law should no longer tolerate the anomaly that the *Apprendi*/*Harris* distinction creates."[46] Nonetheless, he made clear his continued belief that *Apprendi* failed "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)."[47] Justice Breyer declared that the Sixth Amendment does much more than merely "prevent 'judicial overreaching;'" it acts at the very least to protect defendants from the desires of the government.[48] As such, he argued that it would be, "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."[49]

D. Dissenting Opinion by Chief Justice Roberts

Chief Justice Roberts, joined by Justices Scalia and Kennedy, departed from the Court's opinion in several regards.[50] In its quest to identify the historical understanding of the Sixth Amendment, the dissent accused the majority of transforming the Sixth Amendment "into a protection for judges

42. *Id.* at 2165 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989)).
43. *Alleyne*, 133 S. Ct. at 2166 (Sotomayor, J., concurring).
44. *See id.* at 2166-67 (Breyer, J., concurring in judgment).
45. *See id.* at 2166.
46. *Id.*
47. *Id.*
48. *Alleyne*, 133 S. Ct. at 2167 (Breyer, J., concurring in judgment).
49. *Id.* (emphasis in original).
50. *See generally id.* at 2167-72 (Roberts, C.J., dissenting).

Ohio Northern University Law Review, Vol. 40 [], Iss. 2, Art. 11

from the power of the legislature."[51] Chief Justice Roberts explained the original role of the jury, as envisioned in the Sixth Amendment, was "a 'double security, against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude . . . .'"[52] However, he insisted that "no such risk of judicial overreaching" was present in this case, since "the jury's verdict fully authorized the judge to impose a sentence of anywhere from five years to life in prison."[53]

Next, Chief Justice Roberts addressed each of the Court's arguments in turn.[54] First, he argued that the sources of authority in *Apprendi* provided no support to the Court's reasoning, as no historical evidence was available concerning "the treatment of facts that altered *only* the floor of a sentencing range."[55] Second, he stated that criminal statutes have long had both floors and ceilings, so there was no merit in the argument that "'the floor of a mandatory range is as relevant to wrongdoers as the ceiling'. . . [as the] Sixth Amendment does not turn on what wrongdoers care about most."[56] Similarly, simply because a minimum sentence was "'relevant'" to the penalty, "d[id] not mean it must be treated the same as the maximum sentence the law allows."[57] Third, he argued that the Court unpersuasively explained, "what it is about the jury right that bars a determination by Congress that brandishing (or any other fact) makes an offense worth two extra years, but not an identical determination by a judge."[58] Finally, Chief Justice Roberts asserted that the Court failed to address "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."[59]

E. Dissenting Opinion by Justice Alito

Justice Alito chided the Court for overruling a "well-entrenched precedent with barely a mention of *stare decisis*."[60] Although concerned that the majority's willingness to reconsider precedent set a dangerous precedent itself, he further questioned why the majority did not reconsider

51. *Id.* at 2168.
52. *Id.* at 2169 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 657 (1833)).
53. *Alleyne*, 133 S. Ct. at 2169 (Roberts, C.J., dissenting).
54. *See id.* at 2171-72.
55. *Id.* at 2171 (emphasis in original).
56. *Id.* at 2171-72 (quoting *Alleyne*, 133 S. Ct. at 2161 (majority opinion)).
57. *Id.* at 2172.
58. *Alleyne*, 133 S. Ct. at 2172 (Roberts, C.J., dissenting).
59. *Id.*
60. *Id.* (Alito, J., dissenting).

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Beaty: Alleyne v. United States133 S. Ct. 2151 (2013)

its decision in *Apprendi*.[61] Justice Alito reiterated his opposition to *Apprendi*, insisting that the majority based its reasoning upon a flawed historical understanding of the Sixth Amendment.[62] Ultimately, Justice Alito asserted that, "[t]he Court's decision creates a precedent about precedent that may have greater precedential effect than the dubious decisions on which it relies."[63]

IV. ANALYSIS

A. Introduction

In *Harris*, the Supreme Court of the United States allowed judges to retain discretion over facts that increased mandatory minimums.[64] However, *Alleyne* narrowed the range of this judicial discretion, holding that judges cannot use judge-found facts to increase minimum sentences.[65] Thus, the *Harris* distinction between mandatory maximums and mandatory minimums has finally fallen by the wayside, leaving hope for increased consistency and decreased uncertainty in criminal sentencing procedures.[66] Despite jubilation among defense attorneys across the nation, *Alleyne* still leaves some questions unanswered; questions that could seriously affect the future of criminal sentencing.[67]

This analysis focuses on: (1) the increased consistency and decreased uncertainty in criminal sentencing created by *Alleyne*; (2) the questions left unanswered by the Court in *Alleyne*; and (3) how *Alleyne* will affect the future of criminal sentencing.[68]

B. Discussion

1. Increased Consistency and Decreased Uncertainty

By overturning *Harris* in conjunction with *McMillan*, the Court finally resolved the elusive problem of the "sentencing factor," turning it into an "element" of a crime for constitutional purposes.[69] Although not part of a substantive criminal offense, these aggravating facts will now be lumped

61. *See id.*
62. *See id.* at 2172-73.
63. *Alleyne*, 133 S. Ct. at 2173 (Alito, J., dissenting).
64. *See* Harris v. United States, 536 U.S. at 565.
65. *See Alleyne*, 133 S. Ct. at 2155.
66. *See* Brief of the Sentencing Project and the American Civil Liberties Union as Amicus Curiae in Support of Petitioner at 30-32, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335), 2012 WL 6018740 at **30-32 [hereinafter Brief of the ACLU].
67. *See infra* Part IV.B.
68. *See infra* Part IV.B.
69. *See Alleyne*, 133 S. Ct. at 2156-58.

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into the category of issues that must be submitted to, and found by, a jury beyond a reasonable doubt.[70] With *Alleyne*, the Court continues to pave the road of modern sentencing reform, proffering hope of increased consistency and decreased uncertainty for the criminally accused.[71] Although a landmark decision in its own right, *Alleyne* stands as yet another example of the increased emphasis by the judiciary on procedural fairness within criminal sentencing structures.[72]

Alleyne serves to decrease markedly legislative control over criminal sentencing through statutory mandatory minimums, while simultaneously decreasing the government's prosecutorial power to push for increased sentences through judge-found facts.[73] The effects of this decreased prosecutorial control will directly affect areas, such as plea bargaining, that operate principally within the framework of structural constraints, and which prosecutors previously used to induce guilty pleas on lesser charges.[74] Further, it curtails some of the government's flexibility in imposing criminal penalties, eliminating the one size fits all sentencing that resulted from generalized mandatory minimums.[75] Because "[l]egislators often draft mandatory minimums with the most culpable offenders in mind," *Alleyne* empowers juries to tailor their verdicts more accurately to the particulars of each case, and reduces the length of burdensome sentences that many jurists consider unduly harsh.[76] Similarly, according to the Center on the Administration of Criminal Law, offenders benefit substantially by receiving lower sentences when *Apprendi* is applied in jury trials.[77]

Next, *Alleyne* eliminates the division in federal court interpretation of *Harris*.[78] This discord was possibly most evident in drug cases where federal courts were decisively split on whether a judge or jury must make

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70. *See id.* at 2162.

71. *See* Brief of the ACLU, *supra* note 66, at 30-32, 2012 WL 6018740 at **30-32.

72. *See Apprendi*, 530 U.S. at 554. *See also Blakely*, 542 U.S. at 305-06 (stating the right to a jury trial is a "fundamental reservation" to the people of control over the judiciary insuring that a judge's authority to sentence is derived wholly from a jury's verdict); *Booker*, 543 U.S. at 246 (holding that the United States Sentencing Guidelines were advisory and not mandatory, so they did not bind district courts).

73. *See* Brief of Amicus Curiae Center on the Administration of Criminal Law in Support of Petitioner at 28-30, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335), 2012 WL 5953278 at **28-30 [hereinafter Brief of Center on Administration of Criminal Law].

74. *See* Reply Brief of Petitioner at 19-20, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335), 2012 WL 122631 at **19-20; *See also* Brief of Center on Administration of Criminal Law, *supra* note 73, at 31-34, 2012 WL 5953278 at **28-30.

75. *See* Brief of Center on Administration of Criminal Law, *supra* note 73, at 33-34, 2012 WL 5953278 at **33-34.

76. *See id.* at 32-33, 2012 WL 5953278 at **32-33.

77. *See id.* at 31, 2012 WL 5953278 at *31.

78. Brief of the ACLU, *supra* note 66, at 13, 2012 WL 6018740 at *13.

factual findings in regard to drug quantity, creating differences in how prosecutors charged defendants.[79] The imposition of a jury requirement for aggravating facts that impose higher minimum sentencing eliminates this confusion.[80] Further, the narrowed scope of judicial fact-finding serves the important policy concern of decreased uncertainty in criminal sentencing by "enabl[ing] the defendant to predict the legally applicable penalty from the face of the indictment."[81]

Ultimately, *Alleyne* provides an important check on the prosecutorial power of the government and brings much needed consistency and stability to criminal sentencing.[82]

2. The Questions Left Unanswered by Alleyne

Despite the promising congruity of criminal sentencing in the wake of *Alleyne*, several important questions remain unanswered.[83] *Alleyne* failed to answer fully the fundamental question of what qualifies as "[a]ny fact that, by law, increases the penalty for a crime . . . ."[84] For example, must any offense conduct that raises offense levels be put before the jury? While offense conduct may not prompt a mandatory minimum, it often increases the offense level, resulting in an increase in the guideline range prescribed by probation officers.[85] In *Peugh v. United States*,[86] the Court recently stated that a rise in offense levels does not impose a mandatory sentence, but that it could indeed create a "sufficient risk of a higher sentence . . . ."[87] Do these guideline increases reflect a risk significant enough to put the issue of offense conduct before the jury?

Further, does this concept encompass sentence enhancements such as a mandatory minimum period of incarceration before parole? State statutes often provide for a minimum period of incarceration before an offender is offered the opportunity of parole.[88] Referring to mandatory minimum sentences, Justice Thomas quoted his concurring opinion in *Apprendi*,

79. *See id.* at 11-13, 2012 WL 6018740 at **11-13.

80. *See* Brief of Center on Administration of Criminal Law, *supra* note 73, at 28-30, 2012 WL 5953278 at **28-30.

81. *See Alleyne*, 133 S. Ct. at 2161.

82. *See id.*

83. *See infra* Part IV.B.2.

84. *Alleyne*, 133 S. Ct. at 2155.

85. *See* Peugh v. United States, 133 S. Ct. 2072, 2084 (2013).

86. 133 S. Ct. 2072.

87. *See id*. at 2084.

88. *See, e.g.*, CAL. PENAL CODE § 186.22(b)(5) (West 2013) (stating that a person receiving this enhancement onto his or her sentence must serve no less than fifteen years of incarceration before becoming eligible for parole); *see also* N.J. STAT. ANN. § 2C:43-7.2 (West 2013) (stating that a person convicted of an offense falling within the statute must serve a minimum term of eighty-five percent of the sentence imposed before becoming eligible for parole).

Ohio Northern University Law Review, Vol. 40 [], Iss. 2, Art. 11

stating, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime . . . . Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior?"[89] Similarly, statutory sentence enhancements serve to decrease offender liberty by mandating a minimum incarceration period before parole.[90] Courts must consider the question of whether a fundamental or functional difference exists between these two forms of sentencing mandates.

Next, offenders often face increased sentences because they are classified as career offenders.[91] Under U.S.S.G. section 4B1.1, an offender is considered a career criminal if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[92]

Pursuant to U.S.S.G. section 4B1.1, each defendant who qualifies as a career offender automatically receives a criminal history category of VI, the highest available under the U.S.S.G. Manual.[93] Under the Armed Career Criminal Acts, any offender who violates 18 U.S.C. § 922(g), and who has three previous convictions for a violent felony receives a sentence with a minimum of fifteen years.[94] While *Apprendi* specifically excluded prior convictions from facts that must be presented to the jury, prior convictions undoubtedly have a detrimental impact on proposed sentencing guidelines.[95] Many state legislatures have enacted similar statutes, requiring increased sentencing upon the determination of prior convictions.[96] However, because many of these statutes contain general language and encompass

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89. *Alleyne*, 133 S. Ct. at 2161 (Thomas, J., concurring) (citing *Apprendi*, 530 U.S. at 522 (Thomas, J, concurring)).

90. *See* CAL. PENAL CODE § 186.22(b)(5); *see also* N.J. STAT. ANN. § 2C:43-7.2.

91. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2013).

92. *Id.*

93. *Id.* §§ 4A1.1, 4B1.1(b). Though Category VI is the highest classification available, the Sentencing Guidelines Manual does provide for upward departures for defendants who have extreme, egregious criminal history records. *Id.* at § 4A1.3(a)(4)(B).

94. 18 U.S.C. § 924(e)(1) (Supp. 2006).

95. *See Apprendi*, 530 U.S. at 490; *see generally* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 91.

96. *See, e.g.*, MINN. STAT. § 609.1095 (2013) (mandating increased sentences for certain dangerous and repeat felony offenders); TEX. PENAL CODE ANN. § 12.42 (West 2013); N.D. CENT. CODE § 12.1-32-09 (2013); MICH. COMP. LAWS. SERV. § 769.11 (LexisNexis 2013); FLA. STAT. § 775.084 (2013).

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Beaty: Alleyne v. United States133 S. Ct. 2151 (2013)

various forms of offense behavior, judges frequently face difficult determinations of what behavior actually qualifies criminals as career offenders.[97] As these judge-found facts often lead to increased sentences in exceedingly inconsistent ways, should this *Apprendi* exception also be put to the jury?

Finally, there remains the question of whether courts will apply *Alleyne* retroactively. Retroactive application of the *Alleyne* ruling could lead to a major court backlog and present a host of procedural issues, as each individual case would require unique assessment.[98] In order to determine such a possibility, a court would need to apply the test for retroactivity as handed down by the Supreme Court in *Teague v. Lane*,[99] and as recently reasserted in *Chaidez v. United States*.[100] In *Chaidez*, the Court stated:

> *Teague* makes the retroactivity of our criminal procedure decisions turn on whether they are novel. When we announce a "new rule," a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. Only when we apply a settled rule may a person avail herself of the decision on collateral review.[101]

The Court continued on to define a new rule as one that "'was not *dictated* by precedent existing at the time the defendant's conviction became final.'"[102] However, the Court also noted that "when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes."[103]

Based on these principles, it is likely that courts will retroactively apply *Alleyne*.[104] While precedent for *Alleyne* existed where courts logically applied *Apprendi* to both mandatory maximum and minimum sentences, *Harris* stood as the controlling contrary precedent until *Alleyne* overruled

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97. *See* Johnson v. United States, 559 U.S. 133, 144 (2010); *see also* Chambers v. United States, 555 U.S. 122, 126 (2009) (finding that the Illinois statute before the Court included "several different kinds of behavior . . .in a single . . . statutory section").

98. *See* Douglas Berman, *Argument Recap: Justices Struggle with Rules for Resentencing after* Booker, SCOTUSBLOG (Dec. 7, 2010, 4:54 PM), http://www.scotusblog.com/2010/12/argument-recap-justices-struggle-with-rules-for-resentencing-after-booker/ (discussing the challenges and consequences for resentencing following the Supreme Court's decision in *Booker*, which made the Federal Sentencing Guidelines effectively advisory).

99. 489 U.S. 288 (1989).

100. 113 S. Ct. 1103 (2013).

101. *Id.* at 1107.

102. *Id.* (quoting Teague v. Lane, 489 U.S. at 301) (emphasis in original).

103. *Id.*

104. *See* Luke Rioux, Alleyne v. United States*: An Element by Any Other Name* . . ., HARMLESS ERROR BLOG (June 24, 2013, 12:28 AM), http://harmlesserrorblog.blogspot.com/2013/06/united-states-v-alleyne-element-by-any-other-name.html.

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Ohio Northern University Law Review, Vol. 40 [], Iss. 2, Art. 11

it.[105] Further, the rule articulated in *Alleyne* is conceivably the same general rule as that handed down in *Apprendi*, perhaps expanded in function to include statutory minimum sentences as well.[106] Thus, it appears quite possible that a court could find that retroactive application is proper by deciding that *Alleyne* and *Apprendi* provide a settled rule entitling a defendant convicted under *Harris* to collateral review.[107] Should this be the case, the courts may be facing a monumental resentencing challenge, similar to the one that followed the Supreme Court's 2005 decision in *United States v. Booker*.[108] Inevitably the courts will confront these questions and many others in the future, as these uncharted waters provide likely material for circuit court splits.

3. How Alleyne Will Affect the Future of Criminal Sentencing

Many changes lay on the horizon for both state and federal criminal sentencing procedure.[109] As current sentencing systems relied upon both *McMillan* and the *Apprendi*/*Harris* distinction, a fundamental overhaul must take place in order for both state and federal policies to pass constitutional muster.[110] This certainly holds meaningful consequences for sentencing by placing more discretion in the hands of the jury and decreasing legislative influence on punishments rendered, likely resulting in an overall reduction in sentence length.[111] *Alleyne* also invites the possibility of a backlash from legislatures that must enact new statutes to conform to the *Apprendi* decision in the very near future.[112]

New procedures must be established to handle everything from the way prosecutors approach plea bargains, to sentencing hearing procedures, and individual jury instructions.[113] In light of the reduction in prosecutorial power, the government's approach to the imposition of punishment may appear different from before.[114] At the very least, *Alleyne* will require

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105. *See Alleyne*, 133 S. Ct. at 2155.
106. *See id*. at 2157-58.
107. *See* Chaidez v. United States, 113 S. Ct. at 1107.
108. *See* Luke Rioux, *A Criminal Sentencing Revolution?* Alleyne v. United States, Harmless Error Blog (Mar. 22, 2013, 3:09 PM), http://harmlesserrorblog.blogspot.com/2013/03/criminal-sentencing-revolution-alleyne.html; *see also* Berman, *supra* note 98.
109. *See* Brief of Respondent, *supra* note 20, at 51-54, 2012 WL 6624225 at **8, 51-54.
110. *See id.* at 51-54, 2012 WL 6624225 at **51-54.
111. *See* Brief of Center on Administration of Criminal Law, *supra* note 73, at 31-35, 2012 WL 5953278 at **31-35.
112. Brief of Respondent, *supra* note 20, at 51-54, 2012 WL 6624225 at **51-54.
113. *See* Brief of Center on Administration of Criminal Law, *supra* note 73, at 33, 2012 WL 5953278 at *33.
114. *See id.* at 33-34, 2012 WL 5953278 at **33-34.

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Beaty: Alleyne v. United States133 S. Ct. 2151 (2013)

prosecutors to submit additional facts to the jury, in lieu of presenting "sentencing factors" to the judge.[115]

However, while some states face a monumental renovation of their criminal sentencing systems, others may not feel the effect so acutely.[116] New York state courts, for example, already apply *Apprendi* to mandatory minimums in many situations.[117] In arson cases, a jury determines whether the government proved "the offense-specific element of serious physical injury to another person," beyond a reasonable doubt, thereby deciding whether an offender will receive a mandatory minimum sentence.[118] Similarly, a jury must find that an offender acted with the intent to cause death, in order to establish "the distinction between the Class A-I felony . . . murder in the second degree and Class B felony . . . manslaughter in the first degree."[119] With this finding, a jury determines whether an offender "is subject to a mandatory minimum sentence of life without parole."[120]

Additionally, *Alleyne* requires minimal changes from federal courts that already applied *Apprendi* to mandatory minimums.[121] The Second Circuit, for instance, observed that requiring prosecutors to prove drug quantities at trial has benefited prosecutors, defendants, defendants' counsel, and trial judges, by clearly conveying "which facts must be proved to a jury and which ones can be reserved for resolution by the sentencing judge."[122] Further, this use is not an anomaly, as the American Civil Liberties Union reported, "at least 54% of all drug trafficking sentencings [in 2011] occurred in districts where prosecutors charge drug quantity in an indictment and submit it to a jury."[123] Therefore, while many state and federal criminal sentencing procedures must fundamentally change to conform to new constitutional standards, the jurisdictions that already applied *Apprendi* to mandatory minimum sentences will experience few, if any, disruptions from *Alleyne*.[124]

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115. *Id.* at 36, 2012 WL 5953278 at *36.
116. *See* Brief of New York Counsel of Defense Lawyers as Amicus Curiae Supporting Petitioner at 5-13, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335), 2012 WL 6042510 at **5-13[hereinafter Brief of New York Counsel of Defense Lawyers].
117. *Id.* at 11, 2012 WL 6042510 at *11.
118. *Id.* at 12, 2012 WL 6042510 at *12.
119. *Id.*, 2012 WL 6042510 at *12.
120. *Id.*, 2012 WL 6042510 at *12.
121. *See* Brief of New York Counsel of Defense Lawyers, *supra* note 116, at 7, 2012 WL 6042510 at *7 (the Second Circuit has applied *Apprendi* to mandatory minimum sentences since 2005).
122. United States v. Gonzalez, 420 F.3d 111, 131 (2d Cir. 2005).
123. Brief of the ACLU, *supra* note 66, at 17, 2012 WL 6018740 at *17.
124. *See supra* Part IV.B.3.

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V. CONCLUSION

The Supreme Court's holding in *Alleyne v. United States* stands as a landmark decision in the modern movement for criminal sentencing reform.[125] *Alleyne* eliminates the *Harris* distinction between mandatory maximums and mandatory minimums, holding that judge-found facts are impermissible triggers of mandatory minimum sentences.[126] The imposition of a jury requirement for aggravating facts that lead to higher minimum sentencing removes the confusion that resulted from various interpretations of *Harris*.[127] *Alleyne* provides an important check on the prosecutorial power of the government by promoting increased consistency and decreased uncertainty in criminal sentencing.[128] Ultimately, this important decision preserves a defendant's Sixth Amendment right to a jury trial, in which each element of the crime charged must be presented to an impartial jury and found beyond a reasonable doubt.[129]

TAYLOR A. BEATY

125. *See Alleyne*, 133 S. Ct. at 2157-59.
126. *See id.*
127. *See id.* at 2161.
128. *See* Brief of Center on Administration of Criminal Law, *supra* note73, at 29-31, 2012 WL 5953278 at **29-31.
129. *See Alleyne*, 133 S. Ct. at 2156-58.