NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM D. ALBRIGHT
petitioner

V.

STATE OF KANSAS
respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

WILLIAM D. ALBRIGHT 67816
PRO SE
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EL DORADO, KS 67042

Questions Presented:

QUESTION 1: DOES THIS COURT'S DECISION IN ALLEYNE V. UNITED STATES, 570 US 99 (2013) ANNOUNCE A NEW RULE OR WAS IT DICTATED BY APPRENDI V. NEW JERSEY, 530 US 466 (2000)?

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Opinions Below

The order of the Kansas Supreme Court denying the Motion to Recall the Mandate in State v.. Albright, docket no. 94,244, is unreported but attached as Appendix A to this petition. The decision of the Kansas Supreme Court in petitioner's direct appeal is reported at State v. Albright, 283 Kan. 418 (2007), and is attached as Appendix B to this petition.

Jurisdiction

The order of the Kansas Supreme Court was entered on September 28, 2018, and a copy of the order is attached as Appendix A to this petition. Jurisdiction is confered by 28 U.S.C. sec. 1257.

Constitutional and Statutory Provisions Involved

USCS Const. Amend. 14, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

USCS Const. Amend. 6, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and tohave Assistance of Counsel for his defence.

21-4635. Sentencing of certain persons to mandatory term of imprisonment of 40 or 50 years or life without the possibility of parole; determination; evidence presented; balance of aggravating and mitigating circumstances.

(a) Except as provided in K.S.A. 21-4622, 21-4623 and 21-4634 and amendments thereto, if a defendant is convicted of the crime of capital murder and a sentence of death is not imposed pursuant to subsection (e) of K.S.A. 21-4624, and amendments thereto, or requested pursuant to subsection (a) or (b) of K.S.A. 21-4624, and amendments thereto, the defendant shall be sentenced to life without the possibility of parole.

(b) If a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years or for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years or sentenced as otherwise provided by law.

(c) In order to make such determination, the court may be presented evidence concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4636 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value

may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing shall be admissible and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the time of sentencing shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.

(d) If the court finds that one or more of the aggravating circumstances enumerated in K.S.A. 21-4636 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced pursuant to K.S.A. 21-4638 and amendments thereto; otherwise, the defendant shall be sentenced as provided by law. The court shall designate, in writing, the statutory aggravating circumstances which it found. The court may make the findings required by this subsection for the purpose of determining whether to sentence a defendant pursuant to K.S.A. 21-4638 and amendments thereto notwithstanding contrary findings made by the jury or court pursuant to subsection (e) of K.S.A. 21-4624 and amendments thereto for the purpose of determining whether to sentence such defendant to death.

Statement of the Case

In 2005, petitioner was convicted of first degree murder, which carries a standard sentence of life with parole eligibility after 25 years [life hard-40] in Kansas. Before sentencing the State filed a notice that they were going to seek an increased penalty of life hard-40, pursuant to K.S.A. 21-4635. In order for the hard-40 sentence to be imposed, the State had to prove to the court that one or more of the aggravating factors under K.S.A. 21-4636 outweighed any mitigating factors presented by the defense. Defense counsel objected to the hard-40 sentencing proceedings as being in violation of Apprendi v. New Jersey, 530 US 466 (2000), which required that (1) the intent to seek the upward departure sentence be included in the charging information, and (2) the facts be presented to a jury to act as factfinder. The sentencing court overruled defense counsel's objection and imposed the hard-40 sentence. That decision was affirmed by the Kansas Supreme Court on direct appeal. State v. Albright, 283 Kan 418 (2007).

In 2013, this court ruled that Apprendi did apply to Kansas hard-40 and hard-50 cases. Astorga v. Kansas, 570 US 913 (2013) applying Alleyne v. United States, 570 US 99 (2013). Petitioner filed a motion to recall the mandate back in the Kansas Supreme Court, requesting that they correct their erroneous ruling on his Apprendi argument in his direct appeal pursuant to Alleyne and Astorga. On September 28, 2018, the Kansas Supreme Court denied that motion stating that Alleyne/Astorga announced a new rule that would not be given retroactive application to cases final on appeal in 2013. This petition follows.

Basis for Federal Jurisdiction

This case raises a question about the interpretation and application of the Sixth and Fourteenth Amendments of the United States Constitution in State Court sentencing proceedings. This court obtains federal question jurisdiction under 28 U.S.C. sec. 1257.

Reason for Granting Petition

QUESTION ONE: DOES THIS COURT'S DECISION IN ALLEYNE V. UNITED STATES,

570 US 99 (2013) ANNOUNCE A NEW RULE OR WAS IT DICTATED BY APPRENDI V. NEW JERSEY, 530 US 466 (2000)?

Importance of Question Presented

Courts in every jurisdiction across this country have construed Alleyne as announcing a new rule and have refused to apply it to cases that were final on direct appeal prior to its pronouncement. Kirtdoll v. State, 306 Kan 335 (2017); State v. Large, 234 Ariz. 274 (2014); People v. Barnes, 502 Mich. 265 (2018); State v. Salim, 2014-Ohio-357; Commonwealth v. Dimatteo, 177 A.3d 182 (2018); Butterworth v. United States, 775 F.3d 459 (1st Cir. 2015); United States v. Redd, 735 F.3d 88 (2nd Cir. 2013); United States v. Reyes, 755 F.3d 210 (3rd Cir. 2014); United States v. Adepoju, 756 F.3d 250 (4th Cir. 2014); United States v. Olvera, 775 F.3d 726 (5th Cir. 2015); In re Mazzio, 756 F.3d 487 (6th Cir. 2014); Crayton v. United States, 799 F.3d 623 (7th Cir. 2015); Walker v. United States, 810 F.3d 568 (8th Cir. 2016); Hughes v. United States, 770 F.3d 814 (9th Cir. 2014); In re Payne, 733 F.3d 1027 (10th Cir. 2013); In re Sams, 830 F.3d 1234 (11th Cir. 2016); United States v. Robinson, 66 F. Supp. 3d 86 (Dist. D.C. 2014).

As petitioner explained to the Kansas Supreme Court, Alleyne did not announce a new rule, but merely informed the courts that Apprendi v. New Jersey applied to every case where the government was seeking an increased sentence based upon a finding of aggravating factors. The courts in every jurisdiction are erroneously refusing to apply Apprendi to cases that were improperly decided between June 2000 (Apprendi decided) and June 2013 (Alleyne clarification). It is of great importance to the legal community that this court clarify that Alleyne does

not announce a new rule but was mandated by Appendi.

Why Alleyne Does Not Announce a New Rule

In 2000, this court rendered its decision in Apprendi v. New Jersy, 530 US 466 (2000) holding that anytime the government seeks to increase a standard sentence based upon a finding of aggravating factors, those factors become elements of the offense that must (1) be included in the charging document and (2) submitted to a jury for determination beyond a reasonable doubt. The constitutional foundation for this ruling is fundamentally simple: (1) the citizen has an absolute right to be put on notice that the government intends to seek an increased punishment based on specific facts during the charging stage and (2) the Sixth Amendment guarantees the citizen the absolute right to have a jury of his peers act as factfinder. Of course, prosecutors and judges in every jurisdiction immediately started trying to carve out exceptions to the Apprendi rule. State v. Moseley, 335 N.J. Super. 144 (2000)(parole eligibility is for judge, not jury); United States v. Maldenaldo sanchez, 269 F3d 1250 (11th Cir. 2001)(drug quantity does not have to be found by jury); United States v. Alleyne, 457 Fed.Appx. 348 (4th Cir. 2011); State v. Conley, 270 Kan 18 (2000)(imposition of hard-40 parole eligibility instead of the standard hard-25, for life sentences, does not implicate Apprendi).

Of course, petitioner's case falls under the purview of State v. Conley, which held that the increased mandatory time to be served before becoming parole eligible on a life sentence didn't increase the maximum sentence of life and, therefore, did not run afoul of Apprendi. However, the attorneys in the Kansas Appellate Defend-

ers office knew that the Conley ruling was erroneous because the hard-40 sentencing required a finding of aggravating facts and the weighing of those facts against any mitigating facts. For this reason, they raised the Apprendi issue in every hard-40 and hard-50 case that came through their office between 2000 and 2013. There are at least 78 cases that they raised this argument in, from Conley in 2002 and State v. Haberlein, 296 Kan 195 (2012).

Finally, in 2012, one of the cases made it to this court in Astorga v. Kansas, No. 12-7568. This ocurt granted the petition and remanded the case to be reviewed in light of Alleyne v. United States, 570 US 99 (2013), on June 24, 2013. (Astorga v. Kansas, 570 US 913 (2013). In Alleyne, this court ruled unequivocally that Appendi controlled every case that increased the punishment by way of factfinding of any facts. The court specifically ruled that it did not matter whether the sentence being increased was a minimum or maximum. Facts being applied to a sentence in any fashion become elements of that offense and must be included in the charging document and found by a jury beyond a reasonable doubt. Thus, in every case that the Kansas Appellate Defenders office raised the issue in, including petitioner's, they were correct in their legal analysis. A fortiori, in every case that the Kansas Supreme Court denied the Appendi argument in, their decision was erroneous.

In 2017, the Kansas Supreme Court ruled that Alleyne announced a new rule that would not be applied to any cases that were final on direct appeal prior to June 24, 2013. Kirtdoll v. State, 306 Kan 335 (2017). That determination runs afoul of long-standing Supreme Court precedent that holds that a holding only constitutes a

"new rule" if it "was not dictated by precedent existing at the time the defendant's conviction became final." Graham v. Collins, 506 US 461, 467 (1993) citing Teague v. Lane, 489 US 288, 301 (1989). This holding has been reaffirmed over thirteen-hundred times in every jurisdiction in this country. Chaidez v. United States, 568 US 342; United States v. Chang Hong, 671 F3d 1147 (10th Cir.2001); United States v. Morgan, 845 F3d 664 (5th Cir. 2017); Casiano v. Comm'r of Corrections, 317 Conn 52 (2015). Even Kansas has recognized this holding. [see: State v. Rhoten, 2016 Kan.App. Unpub. LEXIS 603 and Johnson v. State, 1993 Kan.App. Unpub. LEXIS 710].

This court recently elaborated in Chaidez that:

> "Teague also made clear that a case does not "announce a new rule, [when] it '[is] merely an application of the principle that governed'" a prior decision to a different set of facts. 489 U.S., at 307, 109 S. Ct. 1060, 103 L.Ed.2d 334 (quoting Yates v. Aiken, 484 U.S. 211, 217, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988)). As Justice Kennedy has explained, "[w]here the beginning point" of our analysis is a rule of "general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." Wright v. West, 505 U.S. 277, 309, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)(concurring in judgment); see also Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). Otherwise said, 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." Chaidez @ 347-348.

The governing principle being applied in Alleyne and Astorga was clearly Apprendi. Nothing in Alleyne altered the rule announced in Appreni in any way. Rather, Alleyne merely clarified that Apprendi stands for the principle that "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." Id., at 490, 120 S.Ct.

2348, 147 L.Ed.2d 435 (internal quotation marks omitted); id., at 483, n. 10, 120 S.Ct. 2348, 147 L.Ed.2d 435 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense"). We held that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. Id., at 484". Alleyne @ 111.

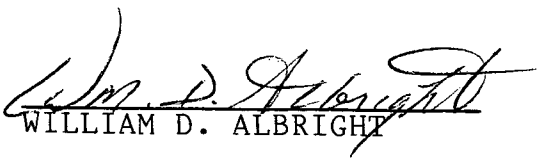
This is precisely the principle the Kansas Appellate Defenders office has been arguing to the Kansas Supreme Court since the pronouncement of Apprendi in 2000, including in Petitioner's direct appeal in 2007. Because the hard-40 and hard-50 sentences are an upward departure from the statutorily prescribed hard-25 sentence, the facts being used to impose these harsher sentences must be charged in the charging information and found by a jury beyond a reasonable doubt, pursuant to Apprendi.

It is Petitioner's position that Alleyne did not announce a new rule, but simply clarified that Apprendi applied to every case wherein the government seeks to increase the sentence required by statute by finding aggravating factors. This means that all of the courts, in every jurisdiction, that are construing Alleyne as establishing a new rule are denying constitutional relief to tens of thousands of citizens who are entitled to it.

Conclusion

Because the courts are improperly construing Alleyne as announcing a new rule, justice is being improperly denied to citizens in every jurisdiction. For this reason, Petitioner prays this honorable court will grant this petition and issue a writ of certiorari to the Kansas Supreme Court to resolve this issue.

Respectfully Submitted,



WILLIAM D. ALBRIGHT

Verification

I, William D. Albright, sworn upon my oath hereby swear under the threat of penalty for perjury pursuant to 28 U.S.C. §1746, that I have read the foregoing petition, that I know the contents thereof, and that the matters therein stated are true.

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