No. 18-7860

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY L. BARNES -- PETITIONER

VS.

STATE OF MICHIGAN -- RESPONDENT

ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI TO

THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Timothy L. Barnes #440738
Petitioner In Propria Persona
Chippewa Correctional Facility
4269 West M-80
Kincheloe, Michigan 49784

QUESTIONS PRESENTED

1. Does the new rule of constitutional law announced in Alleyne v. United States, 570 U.S. 99 (2013), that any fact that increases the mandatory minimum sentence is an "element" of the offense and thus must be found by a jury, rather than a judge, and must be found beyond a reasonable doubt, apply retroactively on collateral review, either because it is a substantive rule or a watershed rule of criminal procedure?

2. If Alleyne is not a substantive rule but is a watershed rule of criminal procedure, are the states constitutionally required to give it retroactive effect, a question this Court explicitly left open in Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to reivew the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and has been designated for publication but is not yet reported.

The opinion of the state trial court appears at Appendix B to the petition and is unpublished.

The order of the Michigan Court of Appeals denying discretionary review appears at Appendix C to the petition and is unpublished.

JURISDICTION

Petitioner seeks certiorari from the opinion of the Michigan Supreme Court decided on July 9, 2018, a copy of which appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 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 to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> 1. 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.

STATEMENT OF THE CASE

In 2002, Petitioner Timothy L. Barnes was convicted of second-degree murder, Mich. Comp. Laws 750.317, and other offenses and sentenced to 40 to 75 years in prison. The Michigan Court of Appeals affirmed his convictions, and the Michigan Supreme Court denied leave to appeal. People v. Barnes, 472 Mich. 866; 692 N.W.2d 840 (2005). In 2008, Petitioner sought state-court collateral review, which was denied. People v. Barnes, 488 Mich. 869; 788 N.W.2d 418 (2010). See Appendix A, People v. Barnes, p.1.

In 2013, this Court issued its decision in Alleyne v. United States, 570 U.S. 99 (2013), overruling Harris v. United States, 536 U.S. 545, (2002), and holding that the Sixth and Fourteenth Amendments require that any fact that increases a mandatory minimum sentence be found by a jury, rather than a judge, beyond a reasonable doubt, rather than by a preponderance of evidence.

In 2015, the Michigan Supreme Court held that Alleyne "applies to Michigan's sentencing guidelines and renders them constitutionally deficient" because they "require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that manditorily increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under Alleyne." People v. Lockridge, 498 Mich. 358, 364; 870 N.W.2d 502 (2015)(emphasis in original). See also People v. Hardy, 494 Mich. 430, 438 (2013)(holding that a trial court's factual findings used to

score OVs must be supported only by a preponderance of evidence).

Petitioner subsequently filed another motion for state postconviction relief based on Alleyne and Lockridge, arguing that the sentencing judge found facts by a preponderance of evidence that increased his mandatory minimum sentencing range. See Appendix A, pp.1-2.

The state trial court held that the successive motion for state postconviction relief was barred by Michigan Court Rule 6.502(G)(1), which permits such successive motions only if they are based on newly-discovered evidence or a retroactive change in law, and Lockridge is not retroactive. Appendix B, p.2 (citing federal Court of Appeals decisions holding that Alleyne is not retroactive).

Petitioner appealed, and, on July 9, 2018, the Michigan Supreme Court affirmed in a 9-page opinion. Appendix A. It held that Alleyne is not retroactively applicable to cases on collateral review under the standard announced in Justice O'Connor's plurality opinion in Teague v. Lane, 489 U.S. 288 (1989), later affirmed by this Court in several cases and recently made at least partly applicable to the states by this Court in Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016). See Appendix A, pp.2-6.

Petitioner now seeks the writ of certiorari and argues that Alleyne is either substantive or a watershed rule of criminal procedure and thus retroactively applicable on state collateral review.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The Court should grant certiorari because "a state court [of last resort] . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

It is true that all federal Courts of Appeal (and the one other state Supreme Court) to have considered the question whether Alleyne v. United States, 570 U.S. 99 (2013), applies retroactively on collateral review have agreed that it does not apply retroactively. See Appendix A, p.6, n.4 (citing cases); Commonwealth v. Washington, 142 A.3d 810 (Penn. 2016).

But consensus does not equal correctness, and all of these courts have labored under a fundamental misunderstanding of the nature of Alleyne by failing to recognize that, although Alleyne has a procedural component (requiring a jury, instead of a judge, to decide facts that increase punishment), it also has a substantive component (barring punishment unless the defendant is guilty beyond a reasonable doubt of every element necessary to impose that punishment).

Thus, Alleyne is similar to the rule that this Court found substantive and thus retroactive in Montgomery v. Louisiana, 136 S.Ct. 718, 734-735 (2016), even though it, too, "has a procedural component[,]" ibid., at 734, on which many federal and state

courts had focused myopically to hold that that rule was not substantive and thus not retroactive, just as all of them have done with Alleyne, including the Michigan Supreme Court, which has now made the same mistake a second time. Compare People v. Carp, 496 Mich. 440 (2014)(holding that the rule in Montgomery was not retroactive) rev'd sub nom Davis v. Michigan, 136 S.Ct. 1356 (2016).

Further, the courts that have held that Alleyne did not announce a watershed rule of criminal procedure -- the second exception to non-retroactivity -- have done so by simply failing to comprehend the fundamental paradigm shift wrought by Alleyne, which further indicates what a watershed rule Alleyne truly is. Those courts have continued to view the world through the pre-Alleyne lens, in which a fact used to increase the mandatory minimum sentence range is merely a "sentencing factor," and thus "has nothing to do with the accuracy of a conviction." Appendix A, p.6 (emphasis in original). In reality, after Alleyne, such a fact "constitutes an 'element' or 'ingredient' of the charged offense" and thus is necessarily concerned with the determination of guilt or innocence. Alleyne, 133 S.Ct. at 2158, 2161 (emphasis added). In other words, the rule announced in Alleyne has everything to do with the accuracy of a conviction because it concerns the elements of the offense itself, since every fact used to increase the mandatory minimum punishment is an element of the offense and thus requires a jury to find that element beyond a reasonable doubt.

Moreover, granting certiorari to resolve this issue in this

case -- on direct review from a state's highest court -- would allow this Court to resolve this important federal question unencumbered by AEDPA's standard of review. See Harrington v. Richter, 562 U.S. 86, 102 (2011).

II. THE LAW OF RETROACTIVITY

This Court, through a series of decisions, most recently Montgomery v. Louisiana, 136 S.Ct. 718, 728 (2016), and Welch v. United States, 136 S.Ct. 1257, 1264 (2016), has held that Justice O'Connor's plurality opinion in Teague v. Lane, 489 U.S. 288 (1989), governs the determination whether a new rule of law applies retroactively on federal-court collateral review of state-court convictions. See Danforth v. Minnisota, 552 U.S. 264, n.1 (2008)("Although Teague was a plurality opinion that drew support from only four Members of the Court, the Teague rule was affirmed and applied by a majority of the Court shortly thereafter.").

"Under Teague, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced." Montgomery, 136 S.Ct. at 728. Teague provides two exceptions to this rule; both substantive rules and "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" apply retroactively on collateral review. Montgomery, 136 S.Ct. at 728 (quotation marks omitted).

This Court held in Montgomery that, "when a new substantive rule of constitutional law controls the outcome of a case, the

Constitution requires state collateral review courts to give retroactive effect to that rule." Montgomery, 136 S.Ct. at 729. But the Court expressly left open the question whether the Constitution also requires state courts to give retroactive effect to new rules falling within the second exception, that is, watershed rules of criminal procedure. Montgomery, 136 S.Ct. at 729.

In this case, Petitioner contends that the new rule announced in Alleyne v. United States, 570 U.S. 99 (2013), applies retroactively on state-court collateral review because it is either a substantive rule or a watershed rule of criminal procedure.

III. ALLEYNE AND THE SIXTH AND FOURTEENTH AMENDMENTS

The rights at issue in this case are the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to be free "from conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime . . . charged.'" Jackson v. Virginia, 443 U.S. 307, 315 (1979)(quoting In re Winship, 397 U.S. 358, 364 (1970)). The jury-trial right is ancient in origin. Duncan v. Louisiana, 391 U.S. 145, 148-154 (1968). Likewise, the reasonable-doubt standard has deep roots in our jurisprudence. See Winship, supra.

Nevertheless, in McMillan v. Pennsylvania, 477 U.S. 79 (1986), this Court accepted the state's characterization of a fact found by a judge that increased the defendant's mandatory minimum sentence as a mere "sentencing factor," rather than an

element of the offense, and thus held that such a fact did not have to be submitted to a jury or found beyond a reasonable doubt.

But when subsequently faced with a similar factor that increased the maximum allowable sentence, this Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

This Court rejected a subsequent challenge to McMillan based on Apprendi. Harris v. United States, 536 U.S. 545, 550 (2002). But Justice Breyer's concurrence did not embrace the logic of the Court, which left "only a minority of the Court embracing the distinction between McMillan and Apprendi that forms the basis of today's holding[.]" Harris, 536 U.S. at 583 (Thomas, J., dissenting).

In the wake of these decisions and others applying them, the Michigan Supreme Court upheld Michigan's sentencing guidelines scheme because that scheme only allowed judicial preponderance-of-evidence factfinding to determine the mandatory minimum, as opposed to maximum, sentence. People v. Claypool, 470 Mich. 715, 730, n.4; 684 N.W.2d 278 (2004); People v. Drohan, 475 Mich. 140, 146; 715 N.W.2d 778 (2006).

Then this Court decided Alleyne v. United States, 570 U.S. 99 (2013), overruling Harris, and holding that "a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." Alleyne, 133 S.Ct. at 2160.

The Michigan Supreme Court followed suit, holding that "the rule from Apprendi . . . as extended by Alleyne . . . applies to Michigan's sentencing guidelines and renders them constitutionally deficient" because Michigan's sentencing guidelines "require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that manditorily increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under Alleyne." People v. Lockridge, 498 Mich. 358, 364; 870 N.W.2d 502 (2015)(emphasis in original). Although not discussed in Lockridge, another reason Michigan's sentencing guidelines scheme runs afoul of Alleyne is that it allows those factfindings to be made by a preponderance of evidence rather than beyond a reasonable doubt. See also People v. Hardy, 494 Mich. 430, 438; 835 N.W.2d 340 (2013)(holding that a trial court's factual findings used to score OVs must be supported only by a preponderance of evidence).

Petitioner was sentenced in 2002, and his first state postconviction petition was denied in 2010, before Michigan's sentencing guidelines scheme was called into question by Alleyne or Lockridge. See Appendix A, p.1. In 2016, after both Alleyne and Lockridge were decided, Petitioner filed a second state postconviction motion arguing that his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to proof beyond a reasonable doubt of every fact necessary to constitue a crime were violated by the sentencing court's factfindings that increased his mandatory minimum sentence range. Appendix A,

pp.1-2. The Michigan Supreme Court held that Petitioner's challenge was barred by Michigan Court Rule 6.502(G), which prohibits successive motions for postconviction relief unless they are based on a retroactive change in law or newly discovered evidence. Appendix A, pp.2-3. The Michigan Supreme Court held that, although Alleyne is a "new" rule under Teague, it is not substantive or a watershed rule of criminal procedure. Appendix A, pp.3-6.

IV. ALLEYNE APPLIES RETROACTIVELY

A. ALLEYNE IS A NEW RULE

The first question under Teague is whether the rule is "new." Welch, 136 S.Ct. at 1264. "'[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" Id. (quoting Teague, 489 U.S. at 301 (emphasis in original)).

Petitioner's conviction became final in 2005. At that time, Harris and Claypool controlled, and under those decisions, the rule was the opposite of the one announced in Alleyne. See People v. Claypool, 470 Mich. 715, 730, n.4; 684 N.W.2d 278 (2004). Therefore, the rule announced in Alleyne was not "dictated by precedent existing at the time the defendant's conviction became final." Welch, 136 S.Ct. at 1264.

It appears that every court to have decided this question has agreed that Alleyne announced a new rule. See Appendix A, p.5, n.2 (citing cases).

B. ALLEYNE IS A SUBSTANTIVE RULE

"'A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.'" Welch, 136 S.Ct. at 1264-65 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)). "'This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.'" Welch, at 1265 (quoting Schriro, at 351). "Procedural rules, by contrast, 'regulate only the manner of determining the defendant's culpability.'" Welch, 136 S.Ct. at 1265 (quoting Schriro, 542 U.S. at 353)(emphasis added and omitted)).

New rules can be substantive even if they have a procedural component. For example, the rule of Miller v. Alabama, 567 U.S. 460 (2012), that the Eighth Amendment prohibits mandatory life without parole sentences for juvenile homicide offenders, is a substantive new rule that applies retroactively on state collateral review, even though "Miller's holding has a procedural component." Montgomery, 136 S.Ct. at 734. Indeed, this Court said in Miller itself that its rule "'does not categorically bar a penalty for a class of offenders or type of crime . . . [but] mandates only that a sentencer follow a certain process -- considering an offender's youth and attendant characteristics -- before imposing a particular penalty.'" Montgomery, 136 S.Ct. at 734 (quoting Miller, 567 U.S. at 483). Despite this seemingly clear language and an abundance of lower-court authority that

relied on it to conclude that Miller announced a procedural rule and was thus not retroactive on collateral review, this Court held that Miller was, indeed, substantive and thus retroactive on collateral review. Montgomery, supra.

This Court explained in Montgomery that the lower courts holding otherwise had "conflate[d] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the manner of determining the defendant's culpability.'" Montgomery, at 734-735 (quoting Schriro, at 353)(emphasis in original). The Montgomery Court continued:

> There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish. . . . For example, when an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime. In a similar vein, when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to that protected class. See, e.g., Atkins v. Virginia, 536 U.S. 304, 317 (2002)(requiring a procedure to determine whether a particular individual with an intellectual disability 'fall[s] within the range of [intellectual disabled] offenders about whom there is a national consensus' that execution is impermissible). Those procedural requirements do not, of course, transform substantive rules into procedural ones.
>
> The procedure Miller prescribes is no different. A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. 567 U.S. at 465. The hearing does not replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Montgomery, 136 S.Ct. at 735.

Similarly, here, Alleyne's new rule is substantive even though it has a procedural component. Alleyne's holding is based on two separate constitutional guarantees, the Sixth Amendment right to a jury trial (procedural) and the Fourteenth Amendment right to be free from punishment except when guilty beyond a reasonable doubt of every element of the charged offense (substantive). The jury-trial component of Allenye is the procedure that implements the substantive guarantee that a defendant cannot be punished unless he is guilty beyond a reasonable doubt of every element necessary to impose the particular punishment.

Alleyne is substantive because it prohibits the imposition of a particular punishment (a mandatory minimum sentence) on a particular class of offenders (those who are not guilty beyond a reasonable doubt of every element of the offense necessary to impose that punishment). This "place[s] particular . . . persons . . . beyond the State's power to punish[,]" Schriro, 542 U.S. at 353, with a particular punishment, just as Miller placed juvenile offenders who are not "irreparably corrupt" beyond the state's power to punish with the particular punishment of life in prison without parole. Montgomery, 136 S.Ct. at 735.

As in Miller, to implement this substantive guarantee, a procedure is required. For Miller, the procedure is necessary to

determine whether the juvenile offender is incapable of reform. For Alleyne, the procedure is necessary to determine whether the defendant is guilty beyond a reasonable doubt. For Miller, the particular procedure was not proscribed by the constitution. Montgomery, 136 S.Ct. at 735. For Alleyne, by contrast, the particular procedure is prescribed by the constitution, the jury trial. But this difference -- the source of the procedural component of the rule -- does not make the substantive component any less of a substantive guarantee that a defendant cannot receive a particular punishment unless he is guilty beyond a reasonable doubt of every element necessary to impose that punishment.

The courts that have held that Alleyne is only procedural have totally ignored this substantive aspect of the rule, focusing instead solely on its procedural component, just as many of the courts that had found Miller not retroactive had done. See, e.g., Appendix A, p.5; In re Mazzio, 756 F.3d 487, 491 (6th Cir. 2014); People v. Carp, 496 Mich. 440 (2014). Compounding this error, many of those same courts have also relied on this Court's decision in Schriro to ratify their holdings, thus betraying a fundamental misunderstanding of both Alleyne and Schriro. See, e.g., Mazzio, 756 F.3d at 491; Walker v. United States, 810 F.3d 568 n.5 (8th Cir. 2016).

In Schriro, this Court held that the rule of Ring v. Arizona, 536 U.S. 584 (2002), is not retroactive on collateral review. In Ring, the Court extended Apprendi to hold that a jury, not a judge, must find facts that authorize the death

penalty. In Schriro, this Court held that Ring was only procedural and therefore not retroactive on collateral review. But -- and this is key -- this Court specifically noted that it was only addressing the jury-versus-judge aspect of Apprendi and not its beyond-reasonable-doubt aspect because the particular state law at issue in that case already set the burden of proof at beyond a reasonable doubt. Schriro, 542 U.S. at 351 n.1. Thus Schriro did not involve the same rule at issue here. It only involved the purely procedural aspect of the Apprendi/Alleyne rule and not its substantive component.

In this case, under Michigan law, the sentencing judge found the facts necessary to permit it to impose the particular punishment by a preponderance of evidence, not beyond a reasonable doubt. People v. Hardy, 494 Mich. 430, 438; 835 N.W.2d 340 (2013). Therefore, in this case, unlike in Schriro, the substantive component of Apprendi and Alleyne is relevant and compels a different result than in that case.

In sum, Alleyne announced a substantive rule (albeit with a procedural component) that is therefore fully retroactive on state collateral review.

C. ALLEYNE IS A WATERSHED RULE OF CRIMINAL PROCEDURE

"In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton v.

Bockting, 549 U.S. 406, 418 (2007)(quoting Schriro, 542 U.S. at 356)(quotation marks and citations omitted). Alleyne satisfies both of these requirements.

Before applying this second Teague exception, the Court must determine whether it is binding on the states. In Montgomery, this Court held that the first Teague exception, for substantive rules, is constitutionally binding on the states, but it explicitly reserved the question whether the second exception, for watershed rules, is too. Montgomery, 136 S.Ct. at 729.

The Court should hold that the exception for watershed rules is also binding on the states, as it would be highly anomolous to find that a rule of federal constitutional law is a watershed rule of criminal procedure "necessary to prevent an impermissibly large risk of an inaccurate conviction[,] [and] . . . essential to the fairness of a proceeding[,]" Whorton, 549 U.S. at 418, yet still not require the states to give it the same retroactive effect that federal courts are required to give it on habeas review. Indeed, what this Court said about substantive rules in Montgomery is equally applicable here: "Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constition" or, for procedural rules, to continue to suffer punishment imposed under procedures that create an impermissibly large risk of an inaccurate conviction. Montgomery, 136 S.Ct. at 731. Therefore, Teague's second exception is also binding on state courts.

As explained above, Alleyne ushered in a paradigm shift from a system in which judges found facts by a preponderance of evidence that increased the mandatory minimum sentence range ("sentencing factors") to one in which such facts are considered elements of the offense itself and thus must be found by a jury beyond a reasonable doubt. In other words, each fact that increases the mandatory minimum sentence range "constitutes an 'element' or 'ingredient' of the charged offense." Alleyne, 133 S.Ct. at 2158.

"[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime." Id., at 2162. Thus, under Alleyne, the "crime" has been transformed from what was formerly thought to be the crime to that plus what were formerly thought to be mere "sentencing factors" that increase the mandatory minimum sentence range.

For example, in this case, what was formerly thought to be Petitioner's crime, second-degree murder, consisted solely of four elements, (1) a death, (2) caused by the defendant, (3) with malice, and (4) without justification or excuse. See People v. Mendoza, 468 Mich. 527, 534 (2003). But, after Alleyne, "the crime" for Sixth and Fourteenth Amendment purposes is those four elements plus the former "sentencing factors" that increased the mandatory minimum sentence range beyond that authorized by those four elements alone. Thus, after Alleyne, the "conviction" is not merely the second-degree murder conviction but the second-degree murder conviction plus the findings made to increase the mandatory minimum sentencing range. In this case, those latter

findings were made by a judge under the preponderance-of-evidence standard and thus violated the Sixth Amendment right to a jury trial on every element of the offense and the Fourteenth Amendment right to proof beyond a reasonable doubt on every element of the offense.

Most of the courts holding that Alleyne did not announce a watershed rule of criminal procedure have floundered on this fundamental aspect of Alleyne. For example, the Michigan Supreme Court rejected the contention that Alleyne announced a watershed rule in a single, conclusory sentence: "The rule here does not satisfy this exception either, because it has nothing to do with the accuracy of a conviction." Appendix A, p.6 (emphasis in original). As is clear from the above discussion, though, this betrays a fundamental misundertanding of Alleyne.

Alleyne altered our understanding of what constitutes a "crime" so dramatically that some judges seem simply unable to comprehend that what used to be "sentencing factors" that only had to be found by a preponderance of evidence are now elements of the crime that must be found beyond a reasonable doubt, and therefore, that Alleyne does, indeed, have something to do with the accuracy of a conviction.

Alleyne's rule is "necessary to prevent an impermissibly large risk of an inaccurate conviction," Whorton, 549 U.S. at 418, not because jurors make more accurate decisions than judges (although it may be that a decision reached unanimously by twelve people after sharing their views is more accurate than a decision reached by a single person in isolation) but because the beyond-reasonable-doubt standard is such a higher

standard of proof. It is the same reason that the beyond-reasonable-doubt standard applies to criminal trials and not to civil trials. The stakes are so much higher and thus the accuracy concerns so much greater that we do not allow conviction unless the jury is convinced beyond a reasonable doubt, even though we allow civil liability to attach upon a mere preponderance of evidence. In other words, the greater accuracy obtained by the beyond-reasonable-doubt standard is precisely why it is used in criminal trials. As this Court has observed, "by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard emphasizes the significance that our society attaches to the criminal sanction and thus to liberty itself." Jackson v. Virginia, 443 U.S. 307, 315 (1979).

Granted, the beyond-reasonable-doubt standard does not guarantee flawless accuracy, as the rolls of DNA-exonerations in recent decades can attest. But no one would doubt that those rolls would be infinitely longer had the factfinders in every trial in this country been permitted to find guilt by a mere preponderance of evidence rather being restricted to finding guilt only upon coming to a "subjective state of near certitude of the guilt of the accused," i.e., being convinced beyond a reasonable doubt.

Therefore, the Alleyne rule, which requires the use of the beyond-reasonable-doubt standard, as opposed to the preponderance-of-evidence standard, is "necessary to prevent an impermissibly large risk of an inaccurate conviction." Whorton,

549 U.S. at 418. It therefore satisfies the first requirement for watershed rules of criminal procedure.

Second, the Alleyne rule "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Id. This is demonstrated by the preceding discussion. Alleyne is so revolutionary that most judges and justices still do not even understand what it held and are still mired in their pre-Alleyne mindset that simply has no application under the new rule of Alleyne.

Thus, Alleyne announced a watershed rule of criminal procedure under Teague and is therefore retroactively applicable on state collateral review.

To be sure, as the Michigan Supreme Court noted, this Court has only ever found one rule to satisfy the exception to non-retroactivity for watershed rules of criminal procedure, the holding in Gideon v. Wainwright, 372 U.S. 335 (1963), that the Sixth Amendment requires the appointment of counsel for indigent defendants. See Appendix A, p.6 n.3. But this solitary fact should not detract from a straightforward application of the two-part test for determining whether a new rule is a watershed rule. The fact that Gideon has thus far occupied a class of one does not logically mean that Alleyne does not satisfy the two-part standard for determining whether a rule is a watershed rule of criminal procedure.

In sum, Alleyne is a watershed rule of criminal procedure under Teague. It therefore applies retroactively on collateral review.

In sum, "a state court [of last resort] ... . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Therefore, certiorari should be granted.

CONCLUSION

Petitioner Timothy L. Barnes asks this Honorable Court to grant certiorari.

Respectfully submitted,

Date: 10-1-18

Timothy L. Barnes #440738
Petitioner In Pro Per
Chippewa Correctional Facility
4269 W. M-80
Kincheloe, MI 49784