No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH R. BEAGLE — PETITIONER
(Your Name)

vs.

ANTHONY STEWART — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kenneth Beagle #146913
(Your Name)

G. Robert Cotton Correctional Facility
3510 N. Elm Street
(Address)

Jackson, Michigan 49201-8877
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

DID THE COURT IN MONTGOMERY V. LOUISIANA IDENTIFY, FOR THE FIRST TIME, A THIRD CRITERIA FOR DETERMINING WHICH OF ITS RULINGS MAY BE APPLIED RETROACTIVELY, AS OUTLINED IN TEAGUE V. LANE, AND IF IT DID, MAY ALLEYNE V. UNITED STATES NOW BE APPLIED RETROACTIVELY?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

CASES **PAGE NUMBER**

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "E" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix "D" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "C" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Michigan court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the State trial court appears at Appendix "A". It is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 10, 2018.

☒ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presenment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, SIXTH AMENDMENT

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 defense.

U.S. CONSTITUTION, FOURTEENTH AMENDMENT

Section 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 protections of the laws.

STATEMENT OF THE CASE

Petitioner was convicted, by way of a guilty plea, to first degree criminal sexual conduct, contrary to M.C.L.A. 750.520b(1)(f), and sentenced to a sentence of 25 years to 50 years.

The mandatory sentencing guidelines set Petitioner's minimum sentencing range of 223 to 375 months, or life. Petitioner has, previously, in the state courts, attacked the scoring of his guidelines strictly on state law, and ineffective assistance of counsel for failing to object to the misscoring of the guidelines.

The Court, on June 17, 2013, issued its ruling in Alleyne v. United States, 570 U.S. 99, 133 S.Ct.2151, 186 L.Ed.2d 314 (2013), and on January 25, 2016, the Court issued its ruling in Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

Petitioner, based on the Court's Montgomery ruling, filed a successive motion for relief from judgment in the state trial court, pursunt to Michigan Court Rule (M.C.R.) 6.502(G), which permits the filing of a subsequent collateral attack on a sentence, based on a retroactive change in the law. It was Petitioner's claim that because of the standards set forth in Montgomery for determining which of the Court's rulings may be applied retroactively, the Court's ruling of Alleyne could now be applied to him.

The state trial court ruled that Alleyne could not be applied retroactively, based on Montgomey, and thus the only basis left for relief was the retroactively application of People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (2015). Thus, since Lockridge was not to be applied retroactive, Petitioner could not receive any relief.

The Michigan Court of Appeals did not address whether Alleyne could be applied retroactively, based on the Court's ruling in Montgomery. It ruled that Petitioner "failed to demonstrate his entitlement to an application of any of

the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G)."

The Michigan Supreme Court denied Petitioner's application, stating that "it is DENIED becasue the defendant's motion for relief from judgment is prohibited by MCR 6.502(G)."

The United States District Court for the Eastern District of Michigan ruled that Alleyne was strictly a procedural rule and was not made retroactive by applying the rationale of Montgomery. That court also noted that Montgomery did not apply because it dealt with sentencing of juveniles while Alleyne did not. It also denied Petitioner a Certificate of Appealability (COA).

When Petitioner filed for a COA, the Sixth Circuit Court of Appeals noted, when denying the COA, that the district court relied on In re Mazzio, 756 F.3d 487, 489-490 (6th Cir. 2014), when it denied Petitioner's request for habeas corpus relief and COA. It also stated that Petitioner's claim was that the State case of Lockridge should be applied to him retroactively, because it created a substantive constitutional right. This was not the claim. The claim was that because of the Court's ruling of Montgomery, Alleyne could now be applied to him retroactively because it contained a substantive component as well as a procedural component.

Neither the district court, nor the Sixth Circuit Court, has addressed Petitioner's claim that Montgomery has added a third standard to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and when the standard is applied to Alleyne, as noted in Montgomery, it permitts Alleyne to be applied retroactively, because it contains a substantive component as well as a procedural component.

The claim Petitioner is presenting to the Court is whether or not the Court's Montgomery ruling added a third ground when applying Teague to retroactive claims, and if it did, can Alleyne be applied retroactively, for the first time.

REASONS FOR GRANTING THE PETITION

It is Petitioner's position, as presented in the following, that the Court's ruling in Montgomery v. Louisiana, 577 U.S. ___ , 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) expanded the standards for determining which of its rulings may be applied retroactively, as noted in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d (1989). Also, as a result of the expansion of the Teague ruling on retroactivity, the Court's ruling of Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), may now be applied retroactively.

THE STANDARDS FOR DETERMINING IF A RULE OR LAW SHOULD BE CONSIDERED SUBSTANTIVE OR PROCEDURAL

The Court has addressed, in Montgomery, at 577 U.S. ___, 136 S.Ct. 730, what constitutes a substantive rule:

> Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal law and punishments altogether beyond the State's power to impose. (Emphasis added).

The Court, at 577 U.S. ____, 136 S.Ct. 730, then went on to note what constitutes procedural rules:

> ...Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the manner of determining the defendant's culpability." (Emphasis added). (Citation omitted).

Later, the Court, at 577 U.S. ___, 136 S.Ct. 732, added to its definition of a substantive rule, as it relates, specifically, to punishment:

> ...A substantive rule "alters the range of conduct or the class of persons that the law punishes. (Emphasis added).

One type of substantive rules are those "'of substantive categorical guarantees accorded by the constitution, regardless of the procedures followed.'" Montgomery, at 577 U.S. ____, 136 S.Ct. 729, citing Penray v. Lynaugh, 492 U.S. 302, 329, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The Court's

definition of what constitutes a substantive rule, or rights, is reflected in Taylor v. Watters, 636 F.Supp. 181, 188 (E.D.Mich. 1986), citing this Court:

> Substantive due process claims fall within two categories: 1) official conduct that shocks the conscience as in Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209-210, 96 L.Ed. 183 (1982), or 2) the conduct infringes a specific constitutional guarantee. (Emphasis added).

From the above description of what constitutes substantive rights, are those that are protected under the substantive due process protection of the Fifth and Fourteenth Amendments, as opposed to procedural due process protection under the Fourteenth Amendment. The Fifth Amendment substantive due process right, like the Fourteenth's Amendment's substantive counterpart, is applied to a "fundamental right", and the government may not infringe upon that right "no matter what process is provided." Reno v. Flores, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993). See also, Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992). Further, the purpose of substantive due process is to prevent the government from abusing its power no matter the process used. Deshaney v. Winnebago Dep't of Social Services, 489 U.S. 189, 194-196, 109 S.Ct. 1002-1003, 103 L.Ed.2d 249 (1989); Obergefell v. Hodges, ____ U.S. ____, 135 S.Ct. 2584, 2616, 192 L.Ed.2d 609 (2015).

The substantive due process amendment, the Fifth, sets the parameters for determining when substantive due process is violated. The relevant parts of the Fifth Amendment, state:

> ...No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War as public danger;...nor to be deprived of life, liberty, or property, without due process of law.... (Emphasis added).

Substantive due process applies applies to substantive "fundamental rights"

enumerated in the United States Constitution. Obergefell, at ____U.S. ___, 135 S.Ct. 2616. These fundamental rights are those "'deeply rooted in this Nation's history and tradition....'" (Citation omitted). Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997).

THE STANDARDS OUTLINED IN TEAGUE Vs LANE FOR DETERMINING WHICH OF THE COURT'S RULINGS MAY BE APPLIED RETROACTIVELY

The first step, under Teague, is to determine if the rule is new. Teague, at 489 U.S. 301, 109 S.Ct. 1070 states that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (Emphasis in original). Teague, at 489 U.S. 307, 109 S.Ct. 1073, goes on to state:

> Justice Harlan identified only two exceptions to his general rule of nonrectroactivity for cases on collateral review. First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Mackey, 401 U.S., at 692, 91 S.Ct., at 1180. Second, a new rule should be applied retroactively if it requires the observance of "those procedures that ... are 'implicit in the concept of ordered liberty.'" Id., at 693, 91 S.Ct., at 1180 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.)).

The Court, in Montgomery, cited several of its rulings, when applying Teague, when it determined that the first Teague exception is that if the new constitutional rule constitutes a change in substative law, it is to be applied retroactively. It also notes that the second exception is when a new constitutional rule creates watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Montgomery, at 577 U.S. ___, 136 S.Ct. 728.

Since the Teague ruling, the courts have only noted the two previously cited exceptions when determining retroactivity. See, Butler v. McKeller, 494 U.S. 407, 415-416, 110 S.Ct. 1212, 1218, 108 L.Ed.2d 347 (1990); Tyler v. Cain, 533

U.S. 656, 665, 121 S.Ct. 2478, 2483-2484, 150 L.Ed.2d 632 (2001); Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); Whorton v. Bockting, 549 U.S. 406, 416, 127 S.Ct. 1173, 1180-1181, 167 L.Ed.2d 1 (2007); Danforth v. Minnesota, 552 U.S. 264, 266, 128 S.Ct. 1029, 1032-1033, 169 L.Ed.2d 859 (2008). There are many more of the Court's ruling deciding whether a new constitutional rule should be applied retroactively, relying on the two Teague standards. There are also thousands of district court and circuit courts that have applied only the two Teague standards to determine retroactivity cases.

HOW MONTGOMERY INDICATES THAT THE COURT HAS EXPANDED TEAGUE TO INCLUDE A THIRD RULE FOR DETERMINING RETROACTIVITY

As previously noted, Montgomery has cited the two Teague standards for determining issues of retroactivity. Montgomery, at 577 U.S. ___, 136 S.Ct. 728. After citing some of the very same cases cited in Teague, and Justice Harlan's rationale, the Court, in Montgomery, when deciding on whether to apply Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), after noting that "Miller's holding has a procedural component," at 577 U.S. ___, 136 S.Ct. 734, stated, at 577 U.S. ___, 136 S.Ct. 734-735:

> ...Louisiana contends that because Miller requires this process, it must have set forth a procedural rule. This argument, however, conflates a procedural requirement necessary to implement a substantive guarantee with a rule that "regulate[s] only the manner of determining the defendant's culpability." Schriro, supra at 353, 124 S.Ct. 2519, 159 L.Ed.2d 442. 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. See Mackey, 401 U.S., at 692, n. 7, 91 S.Ct. 1160, 28 L.Ed.2d 404 (opinion of Harlan, J.) ("Some rules may have both procedural and substantive ramifications, as I have used those terms here"). (Emphasis in original).

After giving some examples, the Court stated, at 577 U.S. ___, 136 S.Ct. 735:

> Those procedural requirements do not, of course, transform substantive rules into procedural ones. (Emphasis added).

Even though the Court, notes the above concept in Mackey, Petitioner cannot find any case, prior to Mongtomery that applied the concept that even if there is a procedural component and a substantive component to a new constitutional rule, the new rule is still substantive in nature. All the Court's rulings simply place new rules in either the procedural or substantive category, and then apply the relevant Teague standards.

It is Petitioner's contention that the Court's Montgomery ruling has expanded Teague to include a third criteria when determining if a new constitutional rule may be applied retroactively. The new standard being that if a new constitutional rule has a substantive as well as a procedural component, it may be applied retroactively.

THE RATIONALE AS TO WHY ALLEYNE MAY BE APPLIED RETROACTIVELY, BASED ON THE COURT'S MONTGOMERY RULING

Petitioner is aware that Alleyne is the progeny of the Court's ruling of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and thus, the application of Alleyne is partially dependent on some of the rationale applied in that case.

Apprendi, at 530 U.S. 475, 120 S.Ct. 2354, notes that:

> The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is.

See also, Apprendi, at 530 U.S. 476, n. 3, 120 S.Ct. 2355, n. 3. However, later on, the Court used language that implicates substantive due process. Apprendi, at 530 U.S. 478; 120 S.Ct. 2356, states:

> As we have, unanimously, explained; Gaudin, 515 U.S., at 510-511, 115 S.Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]e guard against a spirit of oppression and tyranny on the part of rulers...." (Emphasis added).

The Court, in Deshaney v. Winnebago County Dep't of Social Services, 489 U.S.

189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), used similar language when describing the substantive due process component of the Fourteenth Amendment. It states:

> ...Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing "its] power, or employing it as an instrument of oppression," Davidson v. Cannon, supra, at 348; see also Daniels v. Williams, at 331 ("'"to secure the individual from the arbitrary exercise of powers of government,"'" and "to prevent governmental power from being 'used for purposes of oppression'") (internal citations omitted in original); Pratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., in result) (to prevent the "affirmative abuse of power").

See also, County of Sacramento v. Lewis, 523 U.S. 833, 840-847, 118 S.Ct. 1708, 1713-1717, 140 L.Ed.2d 1043 (1989). Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996), citing this Court's ruling of Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), also describes substantive due process violations, in relation to unconstitutional actions of the government, as follows: "Substantive due process serves as a vehicle to limit various aspects of potentially oppressive government action." (Emphasis added). Grinage, at 1349, goes on to note:

> ...For example, it can serve as a check on legislative enactments thought to infringe on fundamental rights otherwise not explicitly protected by the Bill of Rights; or as a check on official misconduct which infringes on a 'fundamental right;'...." (Emphasis added).

The "fundamental right" addressed in Apprendi was the Sixth Amendment right to a jury trial, and the right to have have a jury determine, beyond a reasonable doubt, that a defendant is guilty of the crimes that a trial judge is considering to use to determine the mandatory maximum sentence. Apprendi, at 530 U.S. 476-477, 120 S.Ct. 2355-2356. In Alleyne, the issue was the same as in Apprendi, but applying it to a mandatory minimum sentence. Alleyne, at 570 U.S. , 133 S.Ct. 2156, 2158. Citing Apprendi, the Alleyne Court, at 570 U.S. ___, 133 S.Ct. 2161, noted:

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

The above shows that Alleyne is addressing the finding of that defendant's guilt of an additional "substantive offense", without a finding of facts, by a jury, beyond a reasonable doubt, and then using the finding of guilt of other crimes to increase the sentence for the original conviction. This is why the Alleyne Court stated, at 570 U.S. ___, 133 S.Ct. 2162:

> As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. (Emphasis added).

Finding a defendant guilty of a crime for which he was not charged, and convicted, constitutes a substantive violation, and not procedural. Only a jury can find facts, and elements, of other charges, unless a defendant requests a trial before a judge, on those charges. This is a substantive violation of the Sixth Amendment, under the Fifth and Fourteenth Amendments of the Constitution. The Sixth Amendment is a "fundamental right". Duncan v. Louisiana, 391 U.S. 145, 148-149, 88 S.Ct. 1444, 1449, 20 L.Ed.2d 491 (1958). The Sixth Amendment is, also, one of those substantive rights enumerated in the Bill of Rights. Gideon v. Wainwright, 372 U.S. 335, 341-342, 83 S.Ct. 792, 794-795, 9 L.Ed.2d 799 (1963). See also, Strumpf v. Robinson, 722 F.3d 739, 748 (6th Cir. 2013), citing Patterson v. New York, 432 U.S. 197, 201, 202, 92 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

The Court, in Montgomery, at 577 U.S. ___, 136 S.Ct. 729, states:

> ...The Court now notes 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. (Emphasis added).

* * *

> This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have effect regardless of when a conviction became final. (Emphasis added).

Montgomery, at 577 U.S. ____, 136 S.Ct. 729, cited, with approval, the definition of a "substantive constitutional rule," as:

> ...Justice Harlan defined substantive constitutional rules as "those that place as a matter of constitutional interpretation certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe."

For Alleyne to fulfill the Montgomery standards, to show that it should be applied retroactively on collateral review, Alleyne must constitute a "new substantive rule of constitutional law." Montgomery, at 577 U.S. ___, 136 S.Ct. 729. Alleyne fulfills these standards, as the following illustrates.

First, Alleyne is "new". For the first time, the Court decided, as it relates to mandatory minimum sentences, that facts that are actually elements of other crimes must be found by a jury beyond a reasonable doubt. Alleyne, at 570 U.S. ___, 133 S.Ct. 2156-2158.

The second Montgomery requirement is fulfilled because Petitioner has shown that Alleyne not only addressed the procedure for determining a statutory mandatory, minimum sentence; it also contains a substantive component, which Petitioner is seeking application.

Next, the last Montgomery standard is that the new rule has to be one of "constitutional law". It is clear that Alleyne is one of "constitutional law," the Sixth Amendment, as well as the Fifth Amendment, which is substantive, and the substantive component of the Fourteenth Amendment.

The "new rule" announced in Alleyne "controls the outcome of a case". When a

trial court takes on the role of the jury, and uses facts, which are actually elements of other crimes, to determine a sentence, and it alters the mandatory minimum sentence beyond what is permitted, it "controls the outcome of a case".

Petitioner reminds the Court that even though Alleyne has a procedural component, that since it also has a substantive component, it can still be treated as substantive. Montgomery, at 577 U.S. ___, 136 S.Ct. 734-735. Alleyne shows how to, procedurally, fulfill the substantive part of the Sixth Amendment, via, the Fifth and Fourteenth Amendments. As noted by the Court: "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 not longer punish." Montgomery, at 577 U.S. ___, 136 S.Ct. 735, applying Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), retroactively.

Petitioner believes that he has shown that Alleyne fulfills the requirements of the Court's criteria sent forth in Montgomery to apply Alleyne retroactively on his collateral review.

THE ALLEYNE STANDARDS APPLIED TO PETITIONER'S CLAIM THAT THE TRIAL COURT VIOLATED ALLEYNE WHEN IT DETERMINED HIS SENTENCE

In applying Alleyne to Petitioner's sentencing, it must be kept in mind the Court's ruling of Apprendi, because Alleyne is applying some of the rationale of Apprendi, as it relates to maximum, statutory sentences, to statutory mandatory, minimum sentences. Alleyne at 570 U.S. ___, 133 S.Ct. 2158, 2160.

What is central to applying Alleyne is what constitutes "sentencing factors", as opposed to "elements". Alleyne at 570 U.S. ___, 133 S.Ct. 2160, notes:

> ...Apprendi concluded 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 (internal quotation marks omitted); id., at 483, n. 10, 120 S.Ct. 2348 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed

were by definition 'elements' of a separate legal offense"). (Emphasis added). (Footnote omitted).

Applying the above concept, Alleyne, at 570 U.S., 133 S.Ct. 2162, concludes:

> As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. (Emphasis added).

The following shows that Petitioner's sentencing judge relied on "facts" to determine his statutory mandatory minimum sentence, that were actually "elements" that form "a constituent part of a new offense" that was not "submitted to the jury." The "facts" found by Petitioner's trial judge resulted in it altering the legally prescribed punishment of his statutory mandatory, minimum sentence, which Alleyne prohibits. Alleyne, at 570 U.S. ___, 133 S.Ct. 2160.

The first thing to keep in mind is the charge that Petitioner pled guilty, which was "Count 3", as stated in the "INFORMATION FELONY":

> CRIMINAL SEXUAL CONDUCT - (PERSONAL INJURY) did engage in sexual penetration to-wit: vaginal penetration with Kelly Gee, causing personal injury to said victim and using force or coercion to accomplish sexual penetration; contrary to MCL 750.520b(1)(f); MSA 28.788(2)(1)(f).

The statute under which Petitioner pled guilty, M.C.L.A. 750.520b(1)(f), states the elements as:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:
>
> (i) When the actor overcomes the victim through the actual application of physical force or physical violance.
>
> (ii) When the actor coerces the victim to submit by threatening to use force or physical violence on the victim, and the victim believes that the actor

> has the present ability to execute these threats.
>
> (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
>
> (v) When the actor, through concealment or by the element of surprise, is able to overcome the victim. (Emphasis added).

Petitioner's plea transcript notes that his guilty plea was based on M.C.L.A. 750.520b(1)(f)(i), only. The trial court asked Petitioner if he understood that his plea was based on he having "sexual intercourse or sexual penetration using force or coercion and it caused personal injury. (Emphasis added). (Plea Transcript [PT], pp 3-4). Petitioner acknowledged he understood this. (PT, p 4). The court fulfilled the requirement that Petitioner give facts that support the elements of his conviction by way of his plea, by having Petitioner state what occurred. Petitioner stated that, "I just had forcible sex with her." (PT, p 9). The court asked Petitioner that when he had "sexual intercourse" with Complainant, was it "forced" and if he "overpowered her." Petitioner responded by stating, "Yes, sir." (PT, p 10). A second time, the court asked Petitioner if the sex was "forced", and Petitioner stated, "Yes, sir." (PT, p 10). Later, Petitioner acknowledged that he had sex with Complainant by overpowering her, with physical force. (PT, p 11).

What the record shows is that Petitioner's plea was based on a violation of M.C.L.A. 750.520b(1)(f)(i) only, which states that first degree Criminal Sexual Conduct (CSC) is committed, "When the actor overcomes the victim through the actual application of physical force or physical violence." There was no other basis to support the plea. Thus, any other "facts" used to calculate

Petitioner's statutory mandatory, minimum sentences are really "elements" that "necessarily forms a constituent part of a new offense and must be submitted to the jury." (Emphasis added). Alleyne, at 570 U.S. ____, 133 S.Ct. 2162. The following indicates how the trial court determined Petitioner's sentence in violation of Alleyne.

The first Alleyne violation is where Petitioner was scored "10" points under Offense Variable (OV)-4. M.C.L.A. 777.34. This OV is based on "psychological injury to a victim". There is nothing stated in M.C.L.A. 750.520b(1)(f), for which Petitioner pled guilty, that notes that "psychological injury to a victim" is an element of his conviction, nor did Petitioner admit to any psychological injury to Complainant, or any other facts in the following claims in the other OVs. Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004), citing Apprendi at 530 U.S. 488, 120 S.Ct. 2361. Thus, concluding that there was psychological injury to the victim "necessarily forms a constituent part of a new offense and must be submitted to the jury," which it was not. Alleyne, at 570 U.S. ____, 133 S.Ct. 2162. Therefore, OV-4 could not be used to determine his statutory mandatory, minimum sentence. It should have been scored as "0".

Next, Petitioner was scored "50" points for "aggravated physical abuse" to Complainant, under OV-7. To score "50" points, it must be shown that, "A victim was treated with terrorism, sadism, torture, or excessive brutality." M.C.L.A. 777.37(1)(a). Again, this, as can be seen, is not an element of Petitioner's plea conviction, and he did not admit to any such "facts"/"elements". This, also, "forms a constituent part of a new offense and must be submitted to the jury." Alleyne, at 570 U.S. ____, 133 S.Ct. 2162. Therefore, this could not be considered to determine Petitioner's statutory mandatory, minimum sentence. Thus, Alleyne was violated. OV-7, because of this Alleyne violation, must be

scored as "0".

The next Alleyne violation was when Petitioner was scored "5" points for OV-10. This OV is scored for "exploitation of a vulnerable victim." M.C.L.A. 777.40. Section "(1)(c)" of this statute states that to score "5" points it must be shown that "The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." None of these are part of the elements of M.C.L.A. 750.520b(1)(f), for which Petitioner pled guilty, and which he did not admit, at his plea taking. Therefore, Alleyne was violated because these facts are "elements" that "necessarily forms a constituent part of a new offence and must be submitted to the jury." Alleyne, at 570 U.S. ___, 133 S.Ct. 2162. Thus, it was error for the court to consider these "elements". The score for OV-10 must be "0".

Lastly, Petitioner was scored "50" points for OV-11, M.C.L.A. 777.41. To score "50" points, it is required to show that "Two or more criminal sexual penetrations occurred." M.C.L.A. 777.41(1)(a). 777.41(2)(c) notes: "Do not score points for the 1 penetration that forms the basis of a first or third-degree criminal sexual conduct offense." Therefore, to score "50" points, the trial court had to be scoring the dismissed charges, pursuant to his plea conviction. Thus, these other penetrations are not part of the elements of M.C.L.A. 750.520b(1)(f), for the one charge which Petitioner pled guilty. It is obvious, Petitioner contends, that from the reading of the cited statute, that what the trial court was considering were "elements" that "necessarily forms a constituent part of a new offense and must be submitted to the jury." Because it was not, Alleyne was violated. Alleyne, at 570 U.S. ___, 133 S.Ct. 2162. OV-11 should be scored "0" points.

The result of the cited Alleyne violations can be seen when comparing the

difference in sentencing Petitioner in accordance with Alleyne, as opposed to not. Under Petitioner's original scoring, not applying Alleyne, his OVs add up to a total score of "125". This placed his OV score at level "VI". Since Petitioner's PRV score was level "E", this made Petitioner's statutory mandatory, minimum guidelines range at 223-375 months, or life. When the cited OVs that violated Alleyne are discounted, it leaves an OV score of "10". This makes Petitioner's OV range level "I", which changes his sentence range to "E"-"I", with a statutory mandatory, minimum sentence of 81 to 135 months. This is proof that Alleyne was violated, because the considering of the "elements" of other crimes "increase[d] the punishment above what is otherwise legally prescribed." Alleyne, at 570 U.S. ___, 133 S.Ct. 2128.

Petitioner believes that he has shown that his sentencing court violated the sentencing rule outlined in Alleyne when it used "elements" of other crimes to determine his statutory mandatory, minimum sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth Beagle

Kenneth Beagle

Date: 7-30-2018