No. _____

In The
Supreme Court of the United States

KORY ALEXANDER,

Petitioner,

v.

ALEX JONES, Acting Warden,
Menard Correctional Center,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Kory Alexander was charged by indictment with first degree murder with the specific allegation that he personally discharged a firearm during the commission of the offense. The personal discharge allegation increased the mandatory minimum sentence to which Alexander was exposed by twenty-five years. The jury returned a general verdict of guilty of first degree murder, but found on a special interrogatory that the State had not proven Alexander personally discharged a firearm. The trial court entered a conviction for first degree murder. Under Illinois law, a defendant cannot be convicted of a lesser included offense at a jury trial unless the jury is instructed on the lesser offense.

In *Alleyne v. United States*, this Court held that any fact that increases the minimum sentence for an offense is an element of a distinct and aggravated crime. This case presents the question of whether the Illinois Appellate Court unreasonably applied *Alleyne v. United States* when it held that personal discharge of a firearm was not an element of an aggravated form of first degree murder, but rather was a "sentencing factor" that was not relevant to the question of guilt.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

United States Court of Appeals for the Seventh Circuit
Alexander v. Jones, No. 20-1822 (7th Cir. Nov. 23, 2020) (unreported) (*denying certificate of appealability in habeas proceedings*)

U.S. District Court for the Northern District of Illinois
Alexander v. Lawrence, No. 19-cv-538 (N.D. Ill. March 11, 2020) (unreported) (*denying habeas relief*)

Supreme Court of the United States
Alexander v. Illinois, No. 17-1177 (U.S. March 26, 2019) (reported at 138 S. Ct. 1336 (2018) (*denying certiorari in direct appeal*)

Supreme Court of Illinois
State of Illinois v. Alexander, No. 122852 (Ill. Nov. 22, 2017) (reported at 93 N.E.3d 1088) (*denying leave to appeal on direct appeal*)

Appellate Court of Illinois, First District
State of Illinois v. Alexander, No. 1-14-2170 (Ill. App. Ct. June 5, 2017) (reported at 82 N.E.3d 96) (*affirming conviction on direct appeal*)

RELATED PROCEEDINGS—Continued

Circuit Court of Cook County, Illinois
State of Illinois v. Alexander, No. 12-CR-2253 (Cir. Ct. Cook Co. June 6, 2014) (unreported) (*entered judgment of conviction for first degree murder*)

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Kory Alexander respectfully petitions this Court for a writ of certiorari to review the order of the Seventh Circuit Court of Appeals denying Alexander a certificate of appealability.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit denying Alexander's Petition for a Certificate of Appealability is not reported. It is reprinted in the Appendix hereto at App. 1.

The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division is reported in the unofficial reporter at *Alexander v. Jones*, 2020 WL 1166177 (N.D. Ill. Mar. 11, 2020), and is reprinted in the Appendix hereto at App. 2.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on November 23, 2020. On March 19, 2020, this Court by general order extended the deadline to petition for a writ of certiorari to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature of the cause of the accusation . . . ." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in relevant part that "no State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

720 IL. Comp. Stat. 5/9-1(a)(1) and (a)(2)—First Degree Murder:

> (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another.

730 IL. Comp. Stat. 5/5-8-1(a)(1)(d)(iii)—Enhancements for Use of a Firearm:

> [F]or First Degree murder,
>
> . . .
>
> (iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.

STATEMENT OF THE CASE

On November 22, 2011, Darion Mason was killed by gunshot to the head. App. 3. The State of Illinois charged Kory Alexander with first degree murder for Mason's death. App. 4. The murder counts on which the State proceeded to trial contained the specific allegation that Alexander personally discharged a firearm during the commission of the offense. App. 4-5; App. 56. The counts stated as follows:

> **Count Three**
>
> Kory Alexander committed the offense of first degree murder in that he, without lawful justification, intentionally or knowingly shot and killed Darion Mason while armed with a firearm, and during the commission of the offense he personally discharged a firearm

> that proximately caused death in violation of Chapter 720 Act 5 Section 9-1(a)(1) of the Illinois Compiled Statutes.
>
> **Count Six**
>
> Kory Alexander committed the offense of first degree murder in that he, without lawful justification, shot and killed Darion Mason while armed with a firearm, knowing that such act created a strong probability of death or great bodily harm to Darion Mason, and during the commission of the offense he personally discharged a firearm that proximately caused death in violation of Chapter 720 Act 5 Section 9-1(a)(2) of the Illinois Compiled Statutes.

App. 51-52.

The allegation that Alexander personally discharged a firearm during the commission of the offense increased the mandatory minimum sentence to which Alexander was exposed by twenty-five years, from twenty years' imprisonment to forty-five years' imprisonment. *See* 730 ILCS 5/5-8-1(a)(1)(d)(iii); App. 5.

The Trial

Sometime around midnight on November 22, 2011, Darion Mason was shot and killed while sitting in the driver's seat of his car. App. 3. Mason was parked in front of his house waiting for his mother when the shooting occurred. App. 3. Mason's mother was the only witness to the shooting. App. 3; App. 21. She testified

that as she approached Mason's car just prior to the shooting, she observed a silhouette in the back seat, but she could not identify who that person was. App. 3; App. 21.

An officer who had driven in the direction of the shooting after hearing the gunshots saw Kory Alexander in the area. App. 3-4. Alexander fled from the officer after being told to stop. App. 4. A second officer eventually apprehended Alexander several blocks from where the shooting occurred. App. 3-4. Retracing Alexander's path, investigating officers recovered a black hooded sweatshirt, a brown cloth glove, a leather glove, and black handgun. App. 4. Both gloves were right-handed. App. 58. Ballistics connected the handgun that was recovered to the bullet that killed Mason. App. 4; App. 27. Gunshot residue was discovered on one of the gloves, but no residue was found on the other glove, the sweatshirt, or Alexander's hands. App. 4; App. 27. At least three DNA profiles were found on the sweatshirt, with a major DNA profile matching the DNA profile of an individual who was in an Illinois State Police database that included criminal offenders. App. 4; App. 27-28. Alexander could not be excluded from the minor DNA profile on the sweatshirt, or from contributing to DNA that was found on the gloves. App. 4; App. 27-28. One of the first officers who arrived on the scene saw a car drive the wrong way down the one-way street where the murder occurred. App. 23.

After the close of evidence, the trial court instructed the jury on the law. In doing so, the court provided the jury with two verdict forms for first degree

murder: one for "guilty" and one for "not guilty." App. 29. The jury was also provided a special verdict form and asked to find whether the State had proved, or not proved, the allegation that Alexander personally discharged a firearm that proximately caused death to another. App. 6; App. 29. The jury returned a general verdict of guilty of first degree murder, but found on the special interrogatory that the State had *not* proven that Alexander personally discharged the firearm that proximately caused another's death. App. 53-54. The trial court entered judgment on first degree murder and sentenced Alexander to forty years' imprisonment, a term of imprisonment within the sentencing range for first degree murder. App. 47. Had the State proven the personal discharge allegation, the minimum sentence available to Alexander would have been forty-five years' imprisonment. *See* 730 ILCS 5/5-8-1(a)(1)(d)(iii); App. 5.

Direct Appeal

On appeal, Alexander challenged his conviction on the basis that he was charged with an aggravated form of murder that included personal discharge of a firearm as an essential element. App. 20. The jury's answer on the special interrogatory negated that element of the offense, and, therefore, the jury's verdict was an acquittal. Alexander's argument relied on this Court's holding in *Alleyne v. United States*, 570 U.S. 99 (2013), that any fact that increases the mandatory minimum sentence for a crime is an element of a separate and distinct aggravated offense. The allegation contained

in Alexander's indictment that he personally discharged a firearm during the commission of first degree murder increased the minimum sentence to which Alexander was exposed by twenty-five years. App. 5. Thus, the allegation was an element of a separate, aggravated form of murder, and the State was required to prove that element beyond a reasonable doubt in order to sustain a conviction because under Illinois law a defendant cannot be convicted of a lesser included offense unless the jury is instructed on both the charged offense and the lesser offense. *See People v. Brocksmith*, 642 N.E.2d 1230, 1233 (Ill. 1994) (it is the sole right of the defendant to decide whether to instruct the jury on a lesser offense); *People v. Walton*, 880 N.E.2d 993, 999 (Ill. App. Ct. 2007) (defendant cannot be convicted at jury trial of lesser offense unless lesser offense instruction is tendered).

The Illinois Appellate Court rejected Alexander's interpretation and application of *Alleyne*. App. 19. First, the court reframed Alexander's argument as one challenging inconsistent verdicts, and, therefore, found the argument foreclosed by this Court's decision in *United States v. Powell*, 469 U.S. 57 (1984). App. 34. Second, the appellate court held that the allegation that Alexander personally discharged a firearm was a sentencing enhancement, not an element of the charged offense. App. 36-40. Said another way, the appellate court concluded that there was no aggravated form of first degree murder in Illinois. App. 35.

The Illinois Supreme Court declined to hear Alexander's appeal. Alexander subsequently filed a Petition

for a Writ of Certiorari with this Court. That petition was denied.

***Habeas* Proceedings**

Alexander filed a petition for a writ of *habeas corpus* under 28 U.S.C. § 2254, arguing that his Sixth and Fourteenth Amendment rights, as interpreted in *Alleyne v. United States*, were violated when he was convicted of the lesser offense of first degree murder despite that the jury found the State failed to prove that he personally discharged a firearm, an essential element of the charged offense. App. 2; App. 6. Again, Alexander argued that, under *Alleyne*, the personal discharge allegation was an element of the distinct and separate offense of aggravated first degree murder, which the state was unable to prove beyond a reasonable doubt. App. 6. Therefore, his conviction should be overturned. The petition was denied by the district court on March 11, 2020. App. 15.

The district court determined that *Alleyne* did not apply to Alexander's case because Alexander was sentenced on first degree murder without the enhancement and his sentence fell within the applicable range of penalties for first degree murder. App. 12-13. The district court further found that the circuit court had followed *Alleyne* by separately submitting the first-degree murder charge and firearm enhancement to the jury. App. 13. The court also agreed with the Illinois Appellate Court that there was no aggravated form of murder in Illinois because the Illinois Supreme Court

had labelled personal discharge of a firearm as a sentencing enhancement, as opposed to an element, in *People v. Sharpe*, 839 N.E.2d 492 (2005). App. 12. As such, Alexander's claim of error did not fall within *Alleyne*, and, additionally, was foreclosed by this Court's decision in *United States v. Powell* holding that there are no constitutional concerns raised by inconsistent verdicts. App. 13.

Alexander subsequently petitioned the Seventh Circuit for a certificate of appealability, which the Seventh Circuit denied on November 23, 2020. App. 1. In a summary order, the court stated that it reviewed the district court's order denying *habeas* relief, and that it had determined that Alexander had not made a substantial showing of the denial of a constitutional right. App. 1.

REASONS FOR GRANTING THE PETITION

I. This case presents the important constitutional question of whether a fact alleged in an indictment which increases the minimum sentence for a crime necessarily constitutes an element of a separate aggravated offense for which the defendant can be found guilty or not guilty, as indicated in *Alleyne v. United States*.

Kory Alexander is being held in violation of the Sixth and Fourteenth Amendments to the Constitution because the jury's verdict in his case was actually

an acquittal. App. 2; App. 6. He was charged with first degree murder with personal discharge of a firearm, a crime that carries a minimum sentence forty-five years' imprisonment, twenty-five years in excess of the minimum sentence for the lesser offense of first degree murder. App. 4-5; App. 56. Despite the jury's finding negating an essential element of the charged offense, the trial court entered judgment on the lesser offense of first degree murder and sentenced Alexander to serve a term of forty years' imprisonment. App. 47; App. 53-54. The Illinois Appellate Court affirmed the conviction, holding that Alexander was not charged with an aggravated form of first degree murder, that no such aggravated offense exists in Illinois, and, accordingly, that the personal discharge allegation is a sentencing enhancement, not an element of an aggravated form of first degree murder. App. 34-40.

This case tests the important constitutional distinction between elements and sentencing enhancements that this Court outlined in *Alleyne v. United States*, 570 U.S. 99 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466, 470. In *Apprendi*, the Court pronounced that there was no "principled basis for treating" a fact that increased the maximum term of imprisonment differently than the facts constituting the base offense. *Apprendi*, 530 U.S. at 476. Instead, the "historic link" between crime and punishment compelled the conclusion that a fact that increased the maximum sentence was an element, not a sentencing enhancement. *Id*. at 483, n.10. In *Alleyne*, the Court extended its holding in *Apprendi* and held that facts that increase the

minimum sentence for a crime "are therefore elements . . . ." *Alleyne*, 570 U.S. at 108. Once again, the basis for the Court's decision was the historic link between crime and punishment—*i.e.*, that the facts alleged in the indictment, and found by the jury, triggered the punishment. *Id*. at 108-09. "This linkage of facts with particular sentence ranges (defined by both the minimum and the maximum) reflects the intimate connection between crime and punishment." *Id*. at 109. This intimate connection "demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime . . . ." *Id*. at 113.

The Illinois Appellate Court and the district court in Alexander's *habeas* proceedings disagree that the Court's decision in *Alleyne* applies to this case. Although both courts acknowledged that the personal discharge allegation, if proven, increased the minimum sentence to which Alexander was exposed, the courts characterized the aggravating fact as a sentencing enhancement. App. 12; App. 35-36, 38-40. Both courts also explicitly found that the aggravating fact was *not* an element of the charged offense. App. 11-14; App. 35-40. The decisions run directly contrary to this Court's decision in *Alleyne*. Resolution of the conflict between the holding in *Alleyne* and the decisions in Alexander's case is necessary to clarify the constitutional distinction between sentencing enhancements and elements of the offense. The Court should grant *certiorari* to address this important constitutional question.

A. The Illinois Appellate Court's Interpretation of *Alleyne* Ignores this Court's Holding that Aggravating Facts Are Elements of Aggravated Offenses.

In *Alleyne*, 570 U.S. at 116, the Court held that any fact that increases the minimum sentence for a crime is an element of a distinct and aggravated offense that must be proved to the jury beyond a reasonable doubt. In *Alleyne*, the defendant was charged with carrying a firearm in relation to a crime of violence. *Id*. at 103. In the jury verdict form, the jury indicated that the defendant had used or carried a firearm in relation to the crime, but did not indicate that the defendant had "brandished" the firearm. *Id*. at 104. The sentence for "brandishing" a firearm in relation to a crime of violence increased the mandatory minimum sentence to seven years' imprisonment. *Id*. At sentencing, the district court judge made a finding that the defendant had brandished the weapon, and sentenced the defendant to the seven-year mandatory minimum on that count. *Id*. This Court reversed, extending *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000), and concluding that a defendant's Sixth Amendment rights, in conjunction with the Due Process Clause, require that any fact that increases a mandatory minimum sentence must be submitted to the jury and found beyond a reasonable doubt. *Alleyne*, 570 U.S. at 104. The foundation of the Court's holding was the conclusion that any fact that increases the mandatory minimum sentence for a crime "is an element of a distinct and aggravated crime . . . " *Id*. at 116. "The essential point," the Court

reasoned, "is that the aggravating fact produced a higher range, which, in turn conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and be found beyond a reasonable doubt." *Id*.

Alexander asked the Illinois Appellate Court to apply *Alleyne* in finding that Alexander was charged with, and acquitted of, an aggravated form of first degree murder. App. 19; App. 30. The court rejected Alexander's argument, and, accordingly, declined to find that personal discharge of a firearm was an element of the charged offense. App. 39-40. Instead, the appellate court characterized the allegation that Alexander personally discharged a firearm as a sentencing enhancement independent of the question of guilt. App. 36. The court declined to apply *Alleyne*, finding that the Court's holding was inapplicable to Alexander's situation. App. 35. Instead, in reaching its decision the court relied on Illinois case law pre-dating *Alleyne* in which the Supreme Court of Illinois and the Illinois Appellate Court rejected the argument that personal discharge of a firearm was an element of first degree murder. App. 36-37. Ultimately, the court concluded that there was no aggravated form of murder in Illinois. App. 36. And it specifically found that *Alleyne* "do[es] not call for the conclusion that murder by personal discharge of a firearm is a separate, aggravated offense for first degree murder, which requires the state to prove personal discharge of a firearm in order to sustain the murder conviction itself." App. 35.

The appellate court also concluded that Alexander's claim of error was foreclosed by this Court's decision in *United States v. Powell*, 379 U.S. 48 (1964). App. 34-35. In applying *Powell*, the court reframed Alexander's argument as one based "exclusively on using the inconsistent special interrogatory to challenge the guilty verdict on the first degree murder charge." App. 35 The court concluded that Alexander's conviction could not be overturned merely because his conviction of first degree murder was legally inconsistent with "acquittals on other charges." App. 34.

On *habeas* review, the district court agreed with the appellate court's reasoning, and found that the court did not unreasonably apply *Alleyne* when it concluded that Alexander was not charged with an aggravated form of murder. App. 12. Further, the district court agreed that personal discharge of a firearm was a sentencing enhancement, not an element of a distinct and aggravated offense. App. 13. The court acknowledge that "*Alleyne* holds that the Constitution 'requires that each element of a crime be proved to a jury beyond a reasonable doubt,' " but reasoned that "Alexander's argument fails because . . . personal discharge of a firearm is not an element of first degree murder in Illinois; rather, personal discharge of a firearm is a sentencing enhancement to first-degree murder that, if found beyond a reasonable doubt by the jury, results in a higher sentencing range." App. 11. In expressing agreement with the appellate court, the district court noted that the Supreme Court of Illinois had previously held in *People v. Sharpe*, 839 N.E.2d 492, 520 (2005), that

personal discharge of a firearm is not an element of first degree murder even where the victim dies from a gunshot. App. 11-12. The district court also noted that Alexander's sentence fell within the permissible range of penalties for first degree murder without a finding on the aggravating fact. App. 13. Finally, the district court agreed that *United States v. Powell* foreclosed Alexander's claim of error. App. 13-14.

Both the district court's order denying *habeas* relief and the Illinois Appellate Court's order affirming Alexander's conviction are directly at odds with this Court's holding in *Alleyne v. United States*, 570 U.S. 99 (2013). The Seventh Circuit should have issued a certificate of appealability to correct the misapplication of *Alleyne* and to address Alexander's constitutional claim. An appeal from the denial of a petition for a writ of *habeas corpus* can only be taken if a certificate of appealability is issued by the district court that denied the petition or, failing that, a judge of the Court of Appeals. *See* 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b). To obtain a certificate of appealability, a petitioner must make a substantial showing of the denial of a constitutional claim. 28 U.S.C. § 2253(c)(2). Where the district court rejected the constitutional claim on the merits, the petitioner need only demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 388 (2003). Here, reasonable jurists could debate whether Alexander's petition should have been resolved in a different manner. Indeed, other jurisdictions have interpreted and applied

Alleyne in a manner consistent with Alexander's constitutional claim.

The Court's holding in *Alleyne* is clear: any fact that increases the mandatory minimum sentence for a crime is an element of a separate aggravated offense that is made up of the core crime and the aggravating fact. *Alleyne*, 570 U.S. at 99, 116. This constitutional principle is the foundation of Alexander's constitutional claim. Indeed, the very purpose of *Alleyne* was to distinguish between sentencing enhancements and elements. In concluding that any fact that increases the mandatory minimum sentence for a core crime is necessarily an element of a distinct offense, the Court stated, "[t]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id*. at 113. The Court noted that the importance of considering an aggravating fact to be an element of the substantive offense lies in the defendant's right to know the applicable range of penalties for his conduct. *Id*. at 113-14. For this reason, a defendant's Sixth Amendment rights and due process rights would be violated if he were convicted and sentenced for the aggravated form of the offense, even if the sentence fell within the applicable range of penalties for the base offense. *See id*. at 115. The essential point is that the aggravating fact is an element of a distinct offense.

This Court restated this constitutional principle in *Burrage v. United States*, 571 U.S. 204, 206-07 (2014), when it concluded that a fact that increased the

penalty for heroin distribution was an element of a distinct and aggravated drug offense. In *Burrage*, the government charged the defendant with unlawful distribution of heroin and alleged in the indictment that death resulted from the use of that substance. *Id*. at 206-07. The "death results" provision exposed the defendant to a 20 year mandatory minimum sentence. *Id*. at 207. Applying *Alleyne*, the Court concluded that "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." *Id*. at 210. Accordingly, the Court determined that the defendant in *Burrage* was charged with a two-element offense: (i) knowing or intentional distribution of heroin, and (ii) death caused by the use of that drug. *Id*. at 210. Because the "death results" provision had not been proved in that case, the defendant's conviction on the aggravated offense was reversed. *Id*. at 219 (stating, "[T]he Government concedes that there is no evidence that [the deceased] would have lived but for his heroin use. Burrage's conviction with respect to count 2 of the superseding indictment is therefore reversed . . . ."). In a footnote, the Court recognized that heroin distribution under 21 U.S.C. § 841(a)(1) *without* a finding on the "death results" element under § 841(b)(1) is a lesser included offense. *Id*. at 210, n.3 ("Violation of § 841(a)(1) is thus a lesser included offense of the crime charged in count 2."); *see also United States v. Pizarro*, 772 F.3d 284, 292 (4th Cir. 2014) ("*Burrage* concluded that a violation of § 841(a)(1), without a finding on the 'death results' aggravating

element, is a lesser-included offense of the aggravated offense that includes the 'death results' element under § 841(b)(1).").

The decision in *Burrage* is not anomalous. Several state high courts have applied *Alleyne* in a manner consistent with both Alexander's constitutional claim and *Burrage*, and inconsistent with the Illinois Appellate Court. These high courts have concluded that facts that increase the mandatory minimum sentence are elements of aggravated offenses that are distinct and separate from the core offense.

In *State v. Allen*, 431 P.3d 117, 121 (Wa. 2018), the Supreme Court of Washington held that an aggravating fact which increased the mandatory minimum sentence for the base crime of first degree murder combined with the crime of first degree murder to create a new, aggravated form of murder. The defendant in *Allen* was tried for the offense of first degree murder with two separate aggravating facts alleged, with neither aggravating fact being proved. *Id*. at 119-20. After appeal, the cause was remanded for a new trial due to prosecutorial misconduct. *Id*. The Supreme Court of Washington held that on remand the defendant could not be retried with the aggravating facts, stating the "aggravating circumstances . . . are elements of the offense of aggravated first degree murder . . . Therefore, [defendant] cannot be retried on the aggravating circumstances." *Id*. at 121.

In *Williams v. State*, 242 So. 3d 280, 288 (Fla. 2018), the Supreme Court of Florida held that a fact

that aggravated the sentence for first degree murder was an element of a distinct, aggravated offense. There, the juvenile defendant was convicted of murder, but, because the jury was instructed on different types of murder, it was unclear whether the jury convicted the defendant on principal liability or as a non-principal in a felony murder. *Id*. at 282-89. If the defendant was guilty as the principal and had actually killed, intended to kill, or attempted to kill the victim, the minimum sentence was increased. *Id*. at 287-88. Applying *Alleyne*, the court held, "Because a finding of actual killing, intent to kill, or attempt to kill 'aggravates the legally prescribed range of allowable sentences,' . . . this finding is an 'element' of the offense . . . ." *Id*. at 288.

The Supreme Court of Pennsylvania similarly applied *Alleyne* in holding that a drug law that increased the mandatory minimum sentence where drugs were distributed in a school zone constituted "an aggravated offense of drug trafficking with the required fact—here, proximity of the drug activity to a school—constituting an element of the offense." *Com. v. Hopkins*, 117 A.3d 247, 258 (Pa. 2015).

Alexander's case is analogous to *Hopkins*, *Williams*, and *Allen*. Alexander was charged with the core crime of first degree murder along with the allegation that he personally discharged a firearm during the commission of the offense. The personal discharge allegation aggravated the possible range of penalties by increasing the mandatory minimum sentence by twenty-five years. App. 5. Therefore, applying *Alleyne*

and *Burrage*, and consistent with the interpretation of *Alleyne* in *Hopkins*, *Williams*, and *Allen*, the aggravating fact is an element of a separate and aggravated form of first degree murder. Said another way, first degree murder is a lesser-included offense of first degree murder by personal discharge of a firearm. This conclusion is not only consistent with the Court's decision in *Alleyne* and its application of *Alleyne* in *Burrage*, but is directly in line with the decisions of the supreme courts of Washington, Florida, and Pennsylvania discussed above. Had the Illinois Appellate Court applied *Alleyne* correctly, it would have been compelled to reverse Alexander's conviction because, under Illinois law, Alexander could not have been convicted of the lesser-included offense of first degree murder since no lesser offense instruction was tendered. *See People v. Brocksmith*, 642 N.E.2d 1230, 1233 (Ill. 1994) (it is the sole right of the defendant to decide whether to instruct the jury on a lesser offense); *People v. Walton*, 880 N.E.2d 993, 999 (Ill. App. Ct. 2007) (defendant cannot be convicted at jury trial of lesser offense unless lesser offense instruction is tendered).

This Court should grant Alexander's petition to clarify the scope and reach of its decision in *Alleyne*, and to correct the misapplication of *Alleyne* by the Illinois Appellate Court and the district court in Alexander's *habeas* proceedings.

II. The Illinois Appellate Court's Application of *Alleyne* Conflicts with the Decisions of Multiple State Courts of Last Resort.

As discussed above, multiple state courts of last resort and the Illinois Appellate Court have come to different conclusions on the question of whether a fact that increases the minimum sentence for a crime is necessarily an element of an aggravated offense that a defendant can be convicted or acquitted of. The split in authority goes to the heart of the constitutional question addressed in *Alleyne*, and the Court should take this opportunity to clarify the scope and reach of its decisions in *Alleyne* and *Burrage*. As discussed above, the highest courts in Washington, Florida, and Pennsylvania have all applied *Alleyne* in a manner consistent with Alexander and inconsistent Illinois Appellate Court. Namely, those high courts have concluded under facts analogous to Alexander's that any fact that increases the minimum sentence for a crime is an element of a distinct and aggravated crime made up of the core crime and the aggravating fact. *See State v. Allen*, 431 P.3d 117, 121 (Wa. 2018); *Williams v. State*, 242 So. 3d 280 (Fla. 2018); *Com. v. Hopkins*, 117 A.3d 247, 258 (Pa. 2015). By contrast, the Illinois Appellate Court explicitly held in Alexander's case that personal discharge of a firearm was *not* an element of an aggravated form of first degree murder—a crime which, the court said, did not exist—but instead was a sentencing enhancement that was separate from the question of Alexander's guilt. The Illinois Appellate Court has affirmed that holding on at least three separate

occasions. *See People v. Ware*, 131 N.E.3d 1071, 1084 (Ill. App. Ct. 2019), *appeal denied*, 132 N.E.3d 292 (Ill. 2019) (describing personal discharge of a firearm as a sentencing enhancement); *People v. Jaimes*, 130 N.E.3d 502, 517 (Ill. App. Ct. 2019), *appeal denied*, 135 N.E.3d 546 (Ill. 2019) ("The personal discharge allegation is not an element of the offense of first degree murder . . . ."); *People v. Mohamed*, 2018 IL App. (1st) 160670-U, ¶ 33, 2018 WL 1440388, at *6 (Ill. App. Ct. 2018) (unpublished opinion) (upholding that the personal discharge allegation is a sentencing enhancement not an element of an aggravated offense). The district court in this case came to the same conclusion as the Illinois Appellate Court, finding that "personal discharge of a firearm is not an element of first-degree murder in Illinois; rather, personal discharge of a firearm is a sentencing enhancement to first-degree murder that, if found beyond a reasonable doubt by the jury, results in a higher sentencing range." App. 11. The district court's decision and the decisions of the Illinois Appellate Court on this issue cannot be reconciled with the decisions of the Supreme Courts of Washington, Florida, and Pennsylvania.[1]

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[1] The district court's application of *Alleyne* also appears to be inconsistent with the application of *Alleyne* by the court in *United States v. Redwood*, No. 16-CR-80, 2017 WL 85445, at *2 (N.D. Ill. Jan. 10, 2017), where the court concluded that trial proceedings could not be bifurcated to separate evidence that a gun was transferred to a minor from evidence that the defendant knew the gun would be used in a crime of violence because the latter fact, which increased the mandatory minimum sentence, was an element of the charged offense.

In *State v. Allen*, 431 P.3d 117, 121 (Wa. 2018), the state supreme court held that "aggravating circumstances, which increase the mandatory minimum penalty for first degree murder, are elements of the offense of aggravated first degree murder . . . ." The court then held that the defendant could not be retried for the aggravating fact on remand due to double jeopardy principles. *Id*. Previously, the court held that aggravating facts were not elements of the core crime, but, in overruling prior decisions, the court noted it was "compelled to revisit the issue" in light of *Alleyne*. *Id*. (*citing W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 322 P.3d 1207, 1212-13 (Wa. 2014)). In *Williams v. State*, 242 So. 3d 280, 288 (Fla. 2018), the Supreme Court of Florida held that whether the defendant had actually killed, intended to kill, or attempted to kill the victim was an element of a separate and distinct form of first degree murder because a finding on those facts increased the minimum sentence for first degree murder where those facts were not proven, as in felony murder. Similarly, the Supreme Court of Pennsylvania applied *Alleyne* in holding that Pennsylvania's drug law that increased the mandatory minimum sentence where drugs were distributed in a school zone constituted "an aggravated offense of drug trafficking" with the aggravating fact "constituting an element of the offense." *Com. v. Hopkins*, 117 A.3d 247, 258 (Pa. 2015).

The split in state court authority on the question of whether an aggravating fact should be treated as an element of an aggravated crime for purposes of guilt is

not just important to deciding whether Alexander was acquitted, but is also central to questions surrounding whether double jeopardy attaches to aggravating facts. The courts in *Allen* and *Williams*, discussed above, grappled with this question, and the question was also raised by the First Circuit in *United States v. Pena*, 742 F.3d 508, 509-10, 518-19 (1st Cir. 2014), when the Government asked the court to remand the case so a jury could be empaneled to decide whether death resulted from the defendant's heroin distribution. In considering the issue, the First Circuit noted the following with respect to the question of whether double jeopardy principles would apply:

> It is also true that those double jeopardy safeguards do not usually apply to resentencing. But the effect of *Alleyne* and its predecessors is to preclude certain sentences from being imposed unless the elements supporting them have been proven to a jury beyond a reasonable doubt. The Supreme Court has not yet dealt with the double jeopardy issues in this context, much less in these transition cases where what was once thought to be a sentencing issue has been recognized instead to be an element of a crime.
>
> If the prosecution were now to *reindict* Pena for the enhanced "death resulting" crime, it would run into double jeopardy problems, as it would be seeking to reindict Pena with a greater crime after a conviction and sentence for a lesser included offense. The prosecution's argument here raises the risk of doing an end-run around the Double Jeopardy

> Clause, by characterizing the jury as a "sentencing" jury.

Id. (citations omitted) (emphasis in original).

In short, the question of whether double jeopardy attaches to aggravating facts is inextricable from the question of whether aggravating facts need be proved beyond a reasonable doubt only for sentencing purposes, or if the aggravating facts are truly elements of an aggravated offense for which the defendant can be found guilty or not guilty. As demonstrated above, there is a lack of consistency among federal and state courts applying *Alleyne*. As the Seventh Circuit noted when applying *Alleyne* to decide whether safety-valve eligibility must be submitted to a jury:

> The distinction is more than merely positive versus negative phrasing. It goes to the heart of *Alleyne's* purpose, which is to determine what constitutes an "element" of a crime. Under *Alleyne*, a fact that combines with the base offense to create a new, aggravated offense is an element of the crime.

United States v. Fincher, 929 F.3d 501, 505 (7th Cir. 2019) (citations omitted). Though the Court's decision in *Alleyne* appears to be clear, the question among courts applying the decision remains: does a distinction between "sentencing enhancements" and "elements" still exist post-*Alleyne*? The Illinois Appellate Court thinks so, and the district court in Alexander's case upheld that interpretation of *Alleyne*. If the Illinois Appellate Court is correct that *Alleyne* only

requires that aggravating facts be considered elements when defendants are sentenced based on the aggravated range of penalties, then the First Circuit's concern in *Pena* of empaneling "sentencing" juries is well-founded, for it is only for sentencing that a jury must find, or not find, the aggravating facts. But other courts have interpreted *Alleyne* differently, reading the decision to compel the conclusion that an aggravating fact combines with the core crime to create a distinct, substantive offense for which the defendant can be found guilty or not guilty, and to which double jeopardy attaches. For its part, this Court in *Alleyne* indicated that once the aggravating fact was alleged, the defendant was then being charged with and tried for a crime that had the aggravating fact as a constituent part; the aggravating fact was not merely attached to the proceedings as a question for sentencing. The Court stated:

> 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. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. *One reason is that each crime has different elements and a defendant can be convicted only if the*

> *jury has found each element of the crime of conviction.*

Alleyne, 570 U.S. at 114-15 (emphasis added).

Other courts of last resort have interpreted and applied *Alleyne* in a way that is consistent with and supportive of Alexander's constitutional claim, and directly contrary to the Illinois Appellate Court's and the district court's application of *Alleyne* in this case. Whether an aggravating fact is relevant to the question of guilt, or relevant only for sentencing, goes to the heart of the constitutional issue addressed in *Alleyne*. This Court should therefore grant Alexander's petition for a writ of certiorari to resolve the conflicting applications of *Alleyne*.

III. In Clarifying its Holding in *Alleyne*, this Court Must Also Address the District Court's Application of *United States v. Powell* to Foreclose Alexander's Constitutional Claim.

Intertwined with the question of whether personal discharge of a firearm is an element of the charged offense in Alexander's case is the issue of whether Alexander's constitutional claim is foreclosed by this Court's decision in *United States v. Powell*. Because the Illinois Appellate Court and the district court concluded that there was no such crime as aggravated first degree murder in Illinois, those courts applied *Powell* to conclude that Alexander was merely complaining of inconsistent verdicts, a complaint foreclosed by this

Court's decision in *Powell*. App. 13-14; App. 34-35. Because Alexander believes personal discharge of a firearm is an element of an aggravated form of first degree murder, he disagrees that *Powell* is applicable. Should the Court take up Alexander's case to clarify the reach of *Alleyne*, the Court must clear up whether claims like Alexander's are foreclosed by *Powell*.

In *United States v. Powell*, 469 U.S. 57, 59-60 (1984), the defendant was convicted of one count of using the telephone to conspire to possess with the intent to distribute cocaine, but acquitted of conspiring with others to possess and distribute cocaine in another count. In upholding the defendant's convictions, the Court in *Powell* held that inconsistencies between counts in a criminal verdict generally are not reviewable. *Id*. at 69. The court rationalized that it is an "established principle" that each count is independent of the other as if it were a separate indictment. *Id*. at 62-63.

Unlike *Powell*, this case is not one of inconsistent verdicts between two different counts because the allegation that Alexander personally discharged the firearm that killed Mason was an element of an aggravated form of murder. Said another way, the jury's determination that Alexander did not personally discharge a firearm negated an element of the charged offense, thus creating an *internal* inconsistency within the same count. *Powell*, on the other hand, applies to inconsistent verdicts between separate counts.

The Sixth Circuit's decision in *United States v. Randolph*, 794 F.3d 602 (6th Cir. 2015), is instructive. There, the verdict form first asked the jury the general question of whether the defendant was "Guilty" or "Not Guilty" of the drug trafficking conspiracy charged in Count 1. *Id*. at 607. In a sub-question, the verdict form asked what amount of three different types of drugs were involved in the conspiracy. *Id*. The jury found the defendant guilty of a drug trafficking conspiracy in Count 1, but checked "None" as it related to the amount of drugs "involved" in the conspiracy for that count. *Id*. at 608. In reversing the defendant's conviction and rejecting the argument that *Powell* applied, the court stated, "[W]e are not dealing with inconsistent verdicts. Instead, we have an internal inconsistency in the same count, as it relates to the same defendant, in the same verdict." *Id*. at 611. The Sixth Circuit reasoned that the jury's verdict, when read in its entirety, revealed that the government failed to prove an essential element of the charged drug conspiracy. *Id*. "For the jury to find [the defendant] guilty of the drug conspiracy, an essential element the government was required to prove beyond a reasonable doubt was that the drugs charged in the indictment were 'involved in' the conspiracy." *Id*. at 612.

Here, the Illinois Appellate Court and the district court foreclosed Alexander's *Alleyne* argument by relying on the same flawed reasoning as the district court in *Randolph*. However, as the Sixth Circuit recognized, *Powell* does not apply when there is an inconsistency internal to a count. Here, analogous to *Randolph*, an

internal inconsistency exists within the same count, as it relates to the same defendant, in the same verdict.

Several other circuits have also found that *Powell* is not applicable when a special interrogatory negates an element of the offense. The dicta in the Tenth Circuit's decision in *United States v. Shippley* is helpful:

> This case, by contrast [to *Powell*], involves an inconsistency on the *same count with the same defendant*—an inconsistency that simply could not have been given full effect. Something had to give in our case that didn't have to give in these other cases . . . To enter a guilty verdict, the court would have needed to overlook the special verdict findings that [the defendant] did not conspire to distribute any of the drugs at issue in the case. And nothing in *Powell* . . . speaks either explicitly or implicitly about what a court's to do in these circumstances.

690 F.3d 1192, 1193 (10th Cir. 2012) (emphasis in original). Also compelling is LaFave's commentary in his primer on Criminal Procedure on the topic of special interrogatories in criminal cases: "Unlike the situation where the verdict on one count is inconsistent with the verdict on another count, a special finding negating an element of a single count will be treated as an acquittal of that count, not an inconsistent verdict." *See* WAYNE R. LAFAVE, ET AL., 6 CRIM. PROC. § 24.10(a) (4th ed. 2015).

The Illinois Appellate Court's application of *Powell* was unreasonable because it failed to account for the

fact that the "inconsistency" in Alexander's case was internal to the counts of conviction. That is, an essential element of the offense was not found by the jury, just as in *Randolph*. The principle in *Powell* regarding inconsistent verdicts deals only with verdicts between separate counts, not inconsistencies internal to a single count. Should the Court grant Alexander's petition for a writ of certiorari, it should clarify that the Court's decision in *Powell* does not apply to the facts of this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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