NO. 21-_____

In the Supreme Court of the United States

AMONEO D. LEE,

Petitioner,

v.

SHANNON MEYER, WARDEN, LANSING CORRECTIONAL FACILITY; AND DEREK SCHMIDT, ATTORNEY GENERAL OF THE STATE OF KANSAS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 8, 2021 *COUNSEL FOR PETITIONER*

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QUESTIONS PRESENTED

1. Whether AEDPA's one-year statute of limitations should be equitably tolled because the Petitioner is innocent of the non-capital Hard 40 sentence?

2. Whether the rule announced in *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2162-63, 186 L.Ed.2d 314 (2013), announced a new substantive rule of constitutional law that must be applied retroactively to cases on collateral review?

3. Whether the rule announced in *Alleyne v. United States* announced a watershed rule of criminal procedure that must be retroactively applied to cases on collateral review?

PARTIES TO THE PROCEEDINGS

Petitioner

- Amoneo Lee

Respondents

- Shannon Meyer, is Warden of the Lansing Correctional Facility in Lansing, Kansas, where the Petitioner, Amoneo Lee, is currently held in custody
- Dan Schnurr, the Warden of the Hutchinson Correctional Facility, was the warden of the correctional facility where the Petitioner was in custody at the time the 2254 petition was filed in the district court, and was the appellee below.

LIST OF PROCEEDINGS

State v. Lee, Kansas Supreme Court, Docket No. 79,008, Opinion issued March 5, 1999 (affirming convictions).

Lee v. State, Kansas Court of Appeals, Docket No. 96,286, Opinion issued July 20, 2007 (affirming summary denial of K.S.A. 60-1507 postconviction petition).

State v. Lee, Kansas Court of Appeals, Docket No. 101,638, Opinion issued January 21, 2011 (affirming summary denial of motion to correct illegal sentence under *Apprendi*).

State v. Lee, Kansas Supreme Court, Docket No. 113,562, Opinion issued April 29, 2016 (reversing the grant of the motion to correct illegal sentence under *Alleyne*).

Lee v. State, Kansas Court of Appeals, Docket No. 117,813, Opinion issued May 18, 2018 (affirming summary denial of K.S.A. 60-1507 postconviction petition under *Alleyne*).

Lee v. Schnurr, United States District Court for the District of Kansas, Docket No. 5:20-cv-03231-SAC, Opinion issued May 7, 2021 (dismissing 2254 petition and denying certificate of appealability).

Lee v. Schnurr, United States Court of Apepals for the Tenth Circuit, Docket No. 21-3098, Opinion issued September 9, 2021 (dismissing appeal and denying certificate of appealability).

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The Tenth Circuit's order denying the certificate of appealability, App.1a, is reported at 858 Fed. Appx. 278. The district court's denial of habeas relief, App.5a, is not reported but can be found at 2021 WL 1840054. The Kansas Court of Appeals' decision denying relief under *Alleyne*, App.20a, is not reported but can be found at 2018 WL 2271398. The Kansas Supreme Court's decision reversing the grant of relief under *Alleyne*, App.30a, is reported at 304 Kan. 416, 372 P.3d 415 (2016). The Kansas Court of Appeals' decision affirming denial of relief under *Apprendi*, App.35a, is not reported but can be found at 2011 WL 433533. The Kansas Court of Appeals' decision denying post-conviction relief, App.38a, is not reported but can be found at 2007 WL 2080436. The Kansas Supreme Court's decision on direct appeal, App.42a, is reported at 266 Kan. 804, 977 P.2d 263 (1999).

JURISDICTION

The order denying a certificate of appealability was issued by the Tenth Circuit on September 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1), as interpreted in *Hohn v. United States*, 524 U.S. 236, 241, 118 S. Ct. 1969, 1972, 141 L. Ed. 2d 242 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI

> 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. Const., amend. XIV, § 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.

28 U.S.C. § 2244(d)(1). (*infra* at App.67a)

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Following a jury trial, Petitioner was convicted of First Degree Murder and Criminal Possession of a Firearm in Sedgwick County case number 96CR1375. (App.41a). On April 15, 1997, Petitioner came before the district court for sentencing.

After hearing evidence, Judge Ballinger found that a single aggravating circumstance was established, and sentenced Petitioner to a Life sentence with a minimum mandatory of 40 years (a "Hard 40"). Under the Hard 40 statute, the burden on the State was preponderance of the evidence. (App.21a).

The Petitioner's convictions were subsequently affirmed by the Kansas Supreme Court on direct appeal. (App.41a-58a).

On July 28, 2008, the Petitioner filed a motion to correct illegal sentence, pursuant to K.S.A. 22-3504, in the underlying criminal case. Following summary denial, the Petitioner argued that the Hard 40 sentencing scheme under which he was sentenced was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny. The Kansas Court of Appeals affirmed. (App.34a-36a).

On August 11, 2014, Petitioner filed a second motion to correct illegal sentence, and argued his Hard 40 sentence was unconstitutional under *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 186

L.Ed.2d 314. That motion was granted, and the State of Kansas appealed.

In *State v. Lee*, 304 Kan. 416, 418, 372 P.3d 415 (2016), the Kansas Supreme Court reversed the order granting Petitioner's motion to correct illegal sentence because a motion to correct illegal sentence could not be used to attack the constitutionality of a sentencing statute. (App.29a-33a).

On September 1, 2016, the Petitioner filed another K.S.A. 60-1507 petition, and asserted his Hard 40 sentence was unconstitutional under *Alleyne*. The Petitioner asserted that *Alleyne* was fully retroactive to cases on collateral review because 1) *Alleyne* constituted a new substantive rule of constitutional law; or; 2) alternatively, *Alleyne* constituted a watershed rule of criminal procedure under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

The district court summarily denied relief. That decision was affirmed by the Kansas Court of Appeals. (App.20a-28a). The Kansas Supreme Court denied review on February 28, 2019.

Petitioner filed a petition pursuant to 28 U.S.C. § 2254 in the District of Kansas, on September 13, 2020, and raised claims that his Hard 40 sentence was unconstitutional under *Alleyne*, and *Alleyne* was fully retroactive to cases on collateral review under both prongs of *Teague*.

On May 7, 2021, the federal district court dismissed the petition as barred by the statute of limitations, and denied a certificate of appealability. (App.5a-11a).

Following a timely filed notice of appeal, on September 9, 2021, the Tenth Circuit Court of Appeals

denied a certificate of appealability and dismissed the appeal. (App.1a-4a).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for at least two reasons. First, the Tenth Circuit concluded that a prisoner cannot be actually innocent of a non-capital sentence for purposes of applying the "miscarriage of justice" exception to AEDPA's one-year statute of limitations because actual innocence is limited to factual innocence. (App.3a). This is contrary to the reasoning and rational of previous decisions of this Court.

In the context of capital sentencing, this Court has held that a prisoner can be actually innocent of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S. Ct. 2514, 2522, 120 L. Ed. 2d 269 (1992). Actual innocence in this context is predicated upon a showing "that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.*

The rationale underlying *Sawyer* is equally applicable in the present case because the Petitioner's eligibility for his mandatory minimum Hard 40 sentence—judge made finding of a single aggravating circumstance by a preponderance of the evidence standard—is unconstitutional under *Alleyne*. Accordingly, the statute upon which Petitioner's Hard 40 sentence rests is void ab initio. As there is no condition upon which Petitioner could be sentenced to the Hard 40, he is actually innocent of the Hard 40 under the rationale of *Sawyer*.

To date, this Court has declined to answer the question of whether the actual innocence standard applies to defaulted constitutional claims involving a non-capital sentence. *Dretke v. Haley*, 541 U.S. 386, 393–94, 124 S. Ct. 1847, 1852, 158 L. Ed. 2d 659 (2004). This case presents the opportunity for this Court to answer that question.

Further, the Tenth Circuit's decision conflicts with decisions of the Second, Fourth, Fifth, and Ninth Circuits, which have held that a prisoner can be actually innocent of a non-capital sentence if that sentence is predicated upon an invalid sentencing enhancement.

Thus, at a minimum, the conflict in the circuits on the issue of whether a prisoner can be actually innocent of a non-capital sentence makes it debatable whether Petitioner's innocence of the Hard 40 sentence qualifies under the miscarriage of justice standard for purposes of applying ADEPA's statute of limitations.

Under these circumstances, a certificate of appealability should have issued in this case. *See Buck v. Davis*, —— U.S. ——, 137 S.Ct. 759, 774, 197 L.Ed.2d 1 (2017) (this Court does not engage in a full review of the merits on the issue of whether a certificate of appealability should issue; rather, this Court considers only whether the district court's ruling was debatable).

Second, this Court should grant this petition because the Tenth Circuit has decided an important question of federal law—*Alleyne* is not retroactive to cases on collateral review—that should be finally settled by this Court. (App.4a).

The Tenth Circuit's decision conflicts with the rational underlying this Court's decision in *Welch v. United States*, 136 S. Ct. 1257, 1263–64, 194 L. Ed. 2d 387 (2016), which held the decision in *Johnson v. United States*, 576 U.S. __, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), was fully retroactive to cases on collateral review because *Johnson* constituted a substantive constitutional ruling.

The constitutional invalidity of Kansas' Hard 40 statute under *Alleyne* has at least two functions this Court in *Welch* described as "substantive" for *Teague* purposes: 1) it altered the range of conduct or the class of persons the Hard 40 law was intended to punish; and 2) it modified the elements of premeditated murder at least in those cases where the Hard 40 is sought.

At a minimum, the issue of whether *Alleyne* is retroactive to cases on collateral review is debatable. This is illustrated by this Court's decision in *Welch*.

In *Welch*, 136 S. Ct. 1257, 1263–64, 194 L. Ed. 2d 387 (2016), this Court held that "[o]btaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and 'a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief.'"

In *Welch*, a justice in the Eleventh Circuit had denied a certificate of appealability on the issue of whether the decision in *Johnson*, announced a new rule of substantive law that was to be applied retroactively to cases on collateral review. 136 S.Ct. at 1265. This Court subsequently granted certiorari, vacated the

order denying the certificate, and held *Johnson* must be retroactively applied.

In the present case, Petitioner has relied upon the holding and rationale of *Welch* through state and federal post-conviction proceedings to assert that *Alleyne* announced a new rule of substantive criminal law that must be retroactively applied to cases on collateral review. While this Court has not yet addressed the issue of *Alleyne*'s retroactivity, that alone cannot be the basis for denying a certificate of appealability.

At the time the certificate was denied by the Eleventh Circuit in *Welch*, the Supreme Court had not reached the issue regarding whether *Johnson* should be retroactively applied; however, the subsequent action in granting certiorari, and vacating the Eleventh Circuit's denial of the certificate is a strong indication the retroactivity issue itself constituted a "debatable" issue for purposes of issuing a certificate of appealability. The same reasoning applies in the present case, and is another compelling reason for this Court to grant this petition.

A. Equitable Tolling Is Appropriate Because Petitioner Is Innocent of the Hard 40.

In *McQuiggin v. Perkins*, 569 U.S. 383, 397, 133 S. Ct. 1924, 1934, 185 L. Ed. 2d 1019 (2013), this Court held that for purposes of "a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." This Court went on to hold that the miscarriage of justice exception may equitably toll AEDPA's one-year statute of limitations based upon a claim of actual innocence. In *McQuiggin*, the petitioner asserted a

claim of factual innocence as a gateway through which he could assert defaulted constitutional claims, such as ineffective assistance of counsel.

However, actual innocence claims are not limited to assertions of factual innocence based upon newly discovered evidence. They can be predicated upon a claim that the petitioner is innocent of the sentence as well.

The concept of claiming actual innocence of the sentence was first articulated by this Court in *Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S. Ct. 2514, 2522, 120 L. Ed. 2d 269, a case where the defendant received a death sentence. In *Sawyer*, this Court held that the "actual innocence" standard can include those situations where the defendant can establish he is "innocent" of the death penalty. This Court explained it in this way: "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met."

Some circuits have extended this concept of "actual innocence" to non-capital sentences. *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 172 (2d Cir. 2000); *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999); *Haley v. Cockrell*, 306 F.3d 257, 264–66 (5th Cir. 2002), *vacated on other grounds* 541 U.S. at 388–89; *Allen v. Ives*, 950 F.3d 1184, 1189 (9th Cir. 2020).

The rationale of these cases makes sense. As explained by the Second Circuit in *Spence*, "[i]n the context of capital sentencing, the [Supreme] Court

has clarified that the exception exists . . . to show that the defendant was actually ineligible for (*i.e.*, actually innocent of), the death penalty under state law." 219 F.3d at 171. The miscarriage of justice exception is grounded on the premise that habeas review is critical for correcting a fundamentally unjust incarceration. *Id.* "Because the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." *Id.*

In *Mikalajunas*, 186 F.3d at 495, the Fourth Circuit held that "actual innocence applies in non-capital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision." And in *Jones v. State of Ark.*, 929 F.2d 375, 381 (8th Cir. 1991), the Eighth Circuit held it "would be difficult to think of one who is more 'innocent' of a sentence than a defendant sentenced under a statute that by its very terms does not even apply to the defendant."

Similarly, in *Allen*, 950 F.3d at 1189, the Ninth Circuit concluded that the petitioner's prior marijuana conviction was not a predicate conviction for career offender status under the Guidelines; consequently, "the factual predicate for his mandatory sentencing enhancement did not exist. That is, he is actually innocent of the enhancement. In that case, it is beyond dispute that he is not, and was not, a career offender."

Petitioner recognizes contrary authority from other circuits, which does reflect a circuit split ripe for this Court's review. *See United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993); *Embrey v. Hershberger*,

131 F.3d 739 (8th Cir. 1997); *Hope v. United States*, 108 F.3d 119 (7th Cir. 1997).

The reasoning of the Second, Fourth, Fifth, and Ninth Circuits is in line with this Court's decision in *Sawyer*, *i.e.* the ineligibility for the enhanced sentence renders the prisoner actually innocent of that sentence. Also, the reasoning of those circuits underscores how Petitioner is innocent of the Hard 40 in this case.

In *Alleyne*, this Court repeatedly recognized that its decision substantively changed the elements of any offense where the State seeks to increase the mandatory minimum sentence. This Court held that it is "impossible to dispute that facts increasing the legally prescribed floor aggravated the punishment . . . This reality demonstrates that the 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. 133 S.Ct. at 2161 (emphasis added). "The essential point 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." 133 S.Ct. at 2162-63 (emphasis added).

In the present case, based upon the holding in *Alleyne*, the aggravating circumstances under the Kansas Hard 40 statute are elements of a new and aggravated crime, *i.e.* the core crime of premeditated murder plus one or more aggravating circumstances that must be found by a jury beyond a reasonable doubt. Thus, the aggravating circumstances are much more than even sentencing "enhancements." The aggravating circumstances require a showing separate and apart from the proof required to convict, and they are actual elements of an independent

crime. As a consequence, Petitioner's claim that he is "innocent" of the Hard 40 can be properly asserted under the rationale of *Sawyer*, which, in turn, triggers the "miscarriage of justice" exception to AEDPA's one-year statute of limitations, and provides for equitable tolling.

Under the holding of *Alleyne*, the Hard 40 statute under which the Petitioner was sentenced was unconstitutional and "void ab initio" and "is as no law." *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 731, 193 L.Ed.2d 599 (2016). Any Hard 40 sentence imposed under this unconstitutional statute, including the Petitioner's, "is illegal and void, and cannot be a legal cause of imprisonment." 136 S.Ct. at 730-31.

Thus, as in *Sawyer*, *supra*, the Petitioner's innocence of the Hard 40 is established because he is ineligible to receive that sentence under a statute that, no one questions, is clearly unconstitutional under *Alleyne*.

For the above reasons, this Court should find Petitioner is actually innocent of the Hard 40 for purposes of applying the manifest injustice standard, and toll AEDPA's one year statute of limitations. If the issue is the justice of the incarceration, then there is no reason why the actual innocence exception should not apply to Petitioner's unconstitutional non-capital Hard 40 sentence on habeas review. Since the miscarriage of justice exception is equitable in nature, equity would countenance application of that exception to toll the statute of limitations in Petitioner's case.

B. *Alleyne* Announced a New Substantive Rule of Constitutional Law.

In *Welch*, 136 S.Ct. 1257, this Court discussed the retroactivity rules under *Teague*:

> Under *Teague*, as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew substantive rules generally apply retroactively. Second, new "watershed rules of criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect.

136 S.Ct. 1264 (emphasis in original).

This Court has not ruled on the procedural/substantive issue with regard to *Alleyne*. However, in *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), this Court held that the jury trial requirement of *Ring v. United States*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002), was a new procedural rule that was not retroactive.

The *Welch* Court defined what constitutes a new substantive rule for *Teague* retroactivity analysis:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." "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.

136 S.Ct. at 1264-65.

Welch held that the decision in *Johnson v. United States*, 576 U.S. __, 135 S.Ct. 2551, 192 L.Ed.2d 569, announced a new rule of substantive law that was to be applied retroactively to cases on collateral review. 136 S.Ct. at 1265.

In *Johnson*, this Court found the residual clause of the Armed Career Criminal Act violated due process of law. Normally, an individual convicted under the ACCA faces a prison term of up to 10 years. A mandatory minimum sentence of 15 years was triggered, however, if a violator had three or more violent felony convictions, including convictions that fell under the so-called "residual clause" of the ACCA. A prior conviction qualified under the "residual clause" if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." The *Johnson* Court found the residual clause void for vagueness. 136 S.Ct. at 1261.

Accordingly, the *Welch* Court concluded that *Johnson* was substantive because it "changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" 136 S.Ct. at 1265.

Similarly, *Alleyne* changed the substantive reach of K.S.A. 1994 Supp. 21-4635 (the Kansas Hard 40 sentencing statute) because it altered the range of conduct or the class of persons the statute was designed to punish. The effect of *Alleyne* was to eliminate two

entire classes of individuals from being subjected to the Hard 40—those convicted of premeditated murder and those convicted of capital murder who did not receive the death penalty.

This is because the statute subjecting those two classes to the Hard 40 is unconstitutional on its face, which means it "is void, and is as no law." *Montgomery*, 136 S.Ct. at 731. In words that speak directly to the claim raised in this case, the *Montgomery* Court held:

> A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishment the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.

136 S.Ct. at 731.

This Court rejected the argument that *Johnson* was not substantive because the residual clause was invalidated on procedural due process grounds. This Court held that "whether a new rule is substantive or procedural," is determined "by considering the function of the rule, not its underlying constitutional source." 136 S.Ct. at 1265-66. The Court further explained:

> The *Teague* balance thus does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive. It depends instead on whether the new rule itself has a procedural function or a substantive functionthat is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of

> conduct or class of persons that the law punishes.

136 S.Ct. at 1266.

Thus, *Welch* makes clear that a decision altering the range of conduct or class of persons the law punishes is substantive for *Teague* purposes, "even if the reasons for holding that statute invalid could be characterized as procedural." *Id.*

Alleyne is just such a substantive decision. It invalidates K.S.A. 21-4635 under the Sixth Amendment, a constitutional provision this Court has described as having "nothing to do with the range of conduct a State may criminalize." *Schriro*, 542 U.S. at 353. But simply because *Alleyne* invalidates K.S.A. 21-4635 under a "procedural" constitutional amendment does not determine whether that decision is substantive or procedural for *Teague* purposes. Rather, that determination depends upon the function or effect of *Alleyne*. As argued herein, the effect of *Alleyne* is to eliminate two entire classes of offenders from being subjected to the Hard 40. That is a substantive function, which makes *Alleyne* a new rule of substantive law.

Finally, *Alleyne* is substantive because it modified the elements of murder under Kansas law. *Welch*, 136 S.Ct. at 1267. *Alleyne* repeatedly recognized that its decision substantively changed the elements of any offense where the State seeks to increase the mandatory minimum sentence. 133 S.Ct. at 2161-63.

Alleyne made aggravating circumstances under the Hard 40 statute elements of a new and aggravated crime: the core crime of premeditated murder plus one or more aggravating circumstances must now be found by a jury beyond a reasonable doubt before the

Hard 40 can be imposed. That is a substantive change in the elements of premeditated murder, at least in those cases where the Hard 40 is sought. As such, *Alleyne* constitutes a new substantive rule that must be applied retroactively to Petitioner's case on collateral review.

C. *Alleyne* Is a Watershed Rule of Criminal Procedure.

The second exception to the *Teague* non-retroactivity rule is when this Court announces a "watershed rule of criminal procedure." 489 U.S. at 311. In other words, 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*. These rules implicate the "fundamental fairness of the trial." 489 U.S. at 312.

In addition, the scope of this exception is limited "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 313. This means that "new" constitutional rules "'which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.'" 489 U.S. at 312.

Thus, the second exception applies if infringement of the new rule 1) seriously diminishes "the likelihood of obtaining an accurate conviction," and 2) "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001).

The holding in *Alleyne* fulfills both requirements of the second *Teague* exception. The reasonable doubt standard, first announced by this Court in *In re Win-*

ship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), is a standard that ensures the accuracy of convictions because it goes to the heart of the truth-finding function. The reasonable-doubt standard has been given complete retroactive effect by decisions of this Court.

In *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977), this Court, *citing Ivan V. v. New York*, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), held the major purpose of the reasonable standard is to overcome an aspect of the criminal trial that substantially impairs the truth-finding function; consequently, the holding in *Winship* is given complete retroactive effect. 432 U.S. at 241.

Because the reasonable doubt standard is so fundamental to the truth-finding function of a criminal trial, a new rule announcing the application of that standard must be given full retroactive effect. Accordingly, since *Alleyne* announced a new rule of constitutional criminal procedure, then its holding must be given full retroactive effect because it requires that any facts increasing a mandatory minimum sentence must be found beyond a reasonable doubt by a jury.

Further, *Alleyne* altered "our understanding of the bedrock procedural elements essential to the fairness of a proceeding." 533 U.S. at 665. Prior to *Alleyne*, there was considered disagreement over what constituted elements versus sentencing factors. *Crayton v. United States*, 799 F.3d 623, 628 (7th Cir. 2015) (J. Williams, concurring).

In the present case, the jury found Petitioner guilty beyond a reasonable doubt of the "core crime"

of First Degree Murder, which, under Kansas law, carried a mandatory minimum before parole eligibility of 25 years. Although the aggravating factor that triggered the Hard 40 was a new, aggravated crime under *Alleyne*, it was not found by the jury beyond a reasonable doubt. Rather, it was found by the judge under a preponderance of the evidence standard.

Schriro v. Summerlin, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), addressed the issue of fact-finding by a judge versus a jury. The reasonable doubt standard was not at issue in *Schriro*. Rather, this Court held that the jury trial requirement of *Apprendi* and *Ring* were not retroactive. 542 U.S. at 358. There was no discussion of whether the reasonable-doubt standard would have made *Apprendi* retroactive.

Finally, this Court's recent application of *Teague* in *Welch* and *Montgomery* gives reason to question the *Schriro*'s Court conclusion that *Apprendi* is "procedural" solely because it was grounded upon the Sixth Amendment. As set forth previously, the determinative factor for the substantive/procedural issue is the function and effect of the new decision, not the nature of the constitutional provision that rendered the statute unconstitutional.

Alleyne announced a watershed rule of criminal procedure when it held that any fact triggering a mandatory minimum sentence must be found by a jury beyond a reasonable doubt. Because this Court has given full retroactive effect to the reasonable doubt standard, *Alleyne* must be given full retroactive effect to cases on collateral review.

CONCLUSION

The Tenth Circuit's decision denying the Petitioner a certificate of appealability must be vacated and remanded for further proceedings. It is debatable whether AEDPA's statute of limitations should be equitably tolled, and whether this Court's decision in *Alleyne* should be retroactively applied to cases on collateral review.

On the merits, this Court's decision in *Alleyne* should be retroactively applied under both prongs of *Teague*. As a consequence, this Court should grant the Petitioner's writ of certiorari, and vacate his unconstitutional Hard 40 sentence under *Alleyne*.

Respectfully submitted,

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DECEMBER 8, 2021