No. _____

In the Supreme Court of the United States

BENJAMIN APPLEBY,
Petitioner,

v.

SAM CLINE, Warden;
ATTORNEY GENERAL OF KANSAS,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the Fourth Amendment of the U.S. Constitution require suppression of evidence if Kansas officers acted outside their territorial jurisdiction by: directing the timing of arrest of Mr. Appleby on a Connecticut offense, so they could interrogate Appleby at the Connecticut station, regarding a Kansas homicide; drafted and signed Connecticut search warrant affidavits for Appleby's DNA and residence, alleging facts involving a Kansas homicide, where search warrants indicated there was probable cause to believe a Connecticut homicide statute was violated; and helped search Appleby's Connecticut residence, where Connecticut did not make any request for assistance, and whether counsel were ineffective for failure to raise this issue below, in violation of Appleby's Sixth Amendment right to effective assistance of counsel pursuant to *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

(2) Did submission of Appleby's confession to the jury violate his Fifth and Fourteenth Amendment rights against self-incrimination, where in conformance with a notice of rights provided to Mr. Appleby, with respect to Connecticut charges he was arrested for, which included the right to consult with an attorney before being questioned, and after Mr. Appleby was advised someone would question Appleby, Appleby asked twice, if he would have an opportunity to talk to an attorney, and minutes later, without being provided an opportunity to contact counsel, Mr. Appleby was escorted to another room within the Connecticut

station, and interrogated by Kansas detectives regarding a Kansas offense?

(3) Does the Sixth Amendment of the U.S. Constitution require resentencing where the trial court found aggravating circumstances, utilizing a preponderance of the evidence standard, as opposed to facts being found by a jury, and imposed a hard 50 sentence, where Mr. Appleby relied on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) in support of his argument in the trial court, and on direct appeal, that the former Kansas hard 50 sentencing scheme was unconstitutional, and the issue was raised during appeal from the denial of Mr. Appleby's state habeas petition, and throughout federal habeas proceedings, relying on *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2153, 186 L. Ed. 2d 314 (2013), where *Apprendi* and *Alleyne* involve the same principles of law.

LIST OF PARTIES

The parties to this case are as stated in the caption, Benjamin Appleby, Petitioner, and Sam Cline, Warden, and Attorney General of Kansas, Respondents. In the court below, Petitioner was referred to as Petitioner-Appellant and the Respondents were referred to as Respondents-Appellees.

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PETITION FOR WRIT OF CERTIORARI

A writ of certiorari is respectfully requested to review the decision of the Tenth Circuit Court of Appeals, denying a Certificate of Appealability to challenge the U.S. District Court of Kansas decision denying his habeas petition pursuant to 28 U.S.C. §2254 and dismissing his appeal.

OPINIONS BELOW

The unpublished order of the Tenth Circuit Court of Appeals denying a Certificate of Appealability is reproduced in *Appendix A* ("App. A") attached hereto. The U.S. District Court's Order denying Mr. Appleby's habeas petition filed pursuant to 28 U.S.C. §2254 is reproduced in *Appendix B*. The U.S. District Court Judgment is reproduced in *Appendix C*. The Tenth Circuit Court of Appeals Order denying Mr. Appleby's Petition for Rehearing is reproduced in *Appendix D*.

STATEMENT OF JURISDICTION

The U.S. District Court of Kansas denied Mr. Appleby's habeas petition pursuant to 28 U.S.C. §2254, on December 27, 2016. The decision appears at *Appendix B*. The U.S. District Court Judgment was issued on December 27, 2016. The Judgment appears at *Appendix C*. On September 28, 2017, the Tenth Circuit Court of Appeals denied Mr. Appleby a Certificate of Appealability. The decision appears at *Appendix A*. On October 23, 2017, the Tenth Circuit denied Mr. Appleby's timely Petition for Rehearing. The decision appears at *Appendix D*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Constitutional provisions involved in this case are the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [U.S. Const. Amend. IV];

the Fifth Amendment:

> "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 or public danger; nor shall any person be subject for the same offence 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. Const. Amend. V];

the 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 defence." [U.S. Const. Amend. VI];

and the Fourteenth Amendment:

> "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 Unites 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 its laws. [U.S. Const. Amend. XIV, § 1].

STATEMENT OF THE CASE

Kansas officers contacted Connecticut officers in attempt to locate Mr. Appleby during a criminal investigation in September 2004, regarding a Kansas homicide, and were advised Connecticut had an unrelated outstanding arrest warrant for Appleby from 1998. Kansas Officers requested Connecticut authorities wait to arrest Appleby, so they could be present to question Appleby. Appleby was arrested in November, 2004. At the Connecticut police station, Kansas officers allegedly *Mirandized* Appleby and interrogated him using props and psychological techniques, while a Kansas officer stood guard. Appleby made inculpatory statements.

Prior to Appleby's arrest, a Kansas Detective drafted and signed search warrant affidavits to obtain search warrants in Connecticut for Appleby's DNA and residence, regarding the Kansas homicide. A Kansas officer helped execute the search warrant for Appleby's Connecticut residence. DNA evidence was collected and forwarded to a Kansas lab for testing. Connecticut officers were not otherwise involved in the Kansas investigation. The affidavits in support of the search warrants alleged probable cause to believe a violation of Conn. Stat. 53a-54c occurred, based on facts alleging a Kansas homicide. During state habeas proceedings in response to Appleby's claim of ineffective assistance of counsel for failing to raise a suppression issue regarding officers acting outside their territorial jurisdiction, trial counsel testified she was not concerned with Kansas officials actions in Connecticut. Appellate counsel did not consider this issue.

The Tenth Circuit Court of Appeals found the U.S. District Court observed trial counsel's performance was not objectively unreasonable because they sought to suppress evidence from Appleby's interview on other grounds, and Appleby was not prejudiced because K.S.A. 22-2401(a), which places a geographic limitation on the exercise of all law enforcement powers, did not prohibit Kansas detectives from questioning Appleby in Connecticut, and although Kansas detectives collaborated with Connecticut officers, it was Connecticut officers who executed the arrest warrant, which was issued by that state, for charges filed in that state, and Appleby agreed to talk to Kansas detectives. The Tenth Circuit observed the district court found this was a reasonable application of *Strickland* and no reasonable jurist would debate the district court's resolution of the claims. (App. A at 13) The U.S. District Court agreed with the decision of the state courts rejecting Appleby's extra-territorial argument, finding nothing unlawful in Kansas detectives' actions, and counsels' performance was not deficient for failing to raise this issue in a motion to suppress." (App. B at 30).

Appleby filed a pretrial motion to suppress his statement. At a hearing on the motion, Officer Jewiss testified when he transported Appleby to the station, he advised Appleby a search of his residence was being conducted. Appleby asked what it was for, and Jewiss responded he would not talk to him further about the case, somebody else would. At the station, Jewiss began processing on the Connecticut arrest warrant. Appleby asked if he was going to have the opportunity to contact an attorney, and Jewiss told him, "absolutely." Appleby asked what the *cases* were about, *the arrest, or*

search warrant. Jewiss informed Appleby he would not be questioning him, and could not talk to him about *either* case.

Appleby asked if he could confer with an attorney and whether he had the right to say, "no," to DNA swabs authorized by a search warrant. Jewiss testified, "specific about the search warrant...no,..." and "my answer to him about an opportunity to speak to an attorney, is as it is written in the notice of rights I read him, and he signed, he certainly will." After DNA swabbing, Jewiss continued processing Appleby. Appleby asked two more times whether he would have the opportunity to contact an attorney. Jewiss told him he would. Jewiss' report provided: "Appleby continued to ask if he would be able to contact his attorney about his arrest," and "I continued to tell him he certainly would."

Appleby asked about a lawyer before and after advisement of *Miranda* rights, and after he signed an acknowledgment of rights. The notice of rights Jewiss provided Appleby regarding the Connecticut offenses included he may consult with his attorney before being questioned; may have an attorney present during questioning, and cannot be questioned without consent. Before Jewiss finished processing Appleby, Jewiss told Appleby "there was somebody else upstairs for him to talk to...about an unrelated matter." Jewiss was not specific about who or what they wanted to talk about, or mention state or crime, and Appleby supposedly agreed, and did not ask for an attorney. Jewiss did not give Appleby a chance to talk to a lawyer.

Jewiss turned Appleby over to Kansas detectives for questioning, minutes after providing Appleby with his

rights. Jewiss handed the Kansas Detectives Appleby's wallet. If Appleby asked for an attorney after his interview, Jewiss would have allowed him to contact one. After the interview, Jewiss escorted Appleby downstairs where processing continued through the next day. Jewiss knew Appleby had an attorney, John Quinn. Appleby gave Kansas Detectives Quinn's number when asked for DNA in 2003. Kansas detectives did not contact Quinn. Quinn considered himself Appleby's lawyer at the time of arrest, and was retained regarding DNA requests. If Appleby called, Quinn would have told him not to talk until he was present.

Detective Jewiss told Kansas detectives Appleby had not invoked his right to counsel, but asked about an attorney when they obtained DNA. Kansas Detective Langer did not clarify with Appleby whether he wanted a lawyer. Appleby was allegedly *Mirandized*, and said he would answer questions. Detectives interviewed Appleby as an "uncharged suspect." Appleby made inculpatory statements.

The trial court denied Appleby's motion to suppress. On direct appeal, the Kansas Supreme Court agreed with the trial court's finding Appleby clearly communicated his desire to contact his attorney without substantial further delay, but did not make it clear he wanted the attorney to assist with questioning. *Appleby*, at 1052. The U.S. District Court denied habeas relief on this ground. (App. B at 35-38) The Tenth Circuit Court of Appeals denied a certificate of appealability. (App. A at p.5-8) A timely petition for rehearing was denied. (App. D).

At the time of Appleby's sentencing, the hard 50 sentencing scheme permitted sentencing courts to find aggravating circumstances based on a preponderance of the evidence. The trial court imposed a hard 50 sentence for capital murder, and a consecutive sentence of 228 months for attempted rape. The trial court used mitigation evidence as a non-statutory aggravating factor. The State argued evidence supported the aggravating factor the crime was committed in an especially heinous, atrocious and cruel manner. As mitigation evidence, expert testimony established the crime was committed when Appleby was under the influence of extreme mental or emotional disturbance and Appleby's capacity to conform his conduct to the requirements of the law was substantially impaired, which are statutory mitigating factors. See K.S.A. 21-4637(b) and (f).

In a pretrial motion, Appleby contended the Kansas hard 50 sentencing procedure violates his Sixth and Fourteenth Amendment rights to trial by jury. The trial court rejected Appleby's challenge and held the hard 50 scheme was constitutional.

Appleby raised the Sixth Amendment issue on direct appeal. *State v. Appleby*, 289 Kan. 1017, 1069, 221 P.3d 525 (2009). After Mr. Appleby's K.S.A. 60-1507 motion was denied, Appleby appealed to the Kansas Court of Appeals, and filed his brief on January 22, 2013. *Appleby v. State*, 318 P.3d 1019 (Kan. App. February 28, 2014) (*unpublished opinion*). On June 17, 2013, *Alleyne* was decided. In response to *Alleyne*, the Kansas Legislature called a special session on September 12, 2013, to amend the procedure under K.S.A. 2012 Supp. 21-6620, for imposing a life sentence

with a mandatory minimum term of imprisonment of 50 years (hard 50 sentence), rather than 25 years, when a Defendant is convicted of premeditated first degree murder, requiring the jury to find beyond a reasonable doubt, one or more of the aggravating factors enumerated in K.S.A. 2012 Supp. 21-6624, exist, and the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, in order to support the hard 50 sentence. See 2013 Sp. Sess. K.S.A. 21-6620(c). Relying on *Alleyne*, Appleby filed a motion raising the Sixth Amendment issue, requesting permission to file a supplemental brief. The request was denied. Appleby filed a petition for review in the Kansas Supreme Court on March 28, 2014. The Kansas Supreme Court denied his petition for review on January 15, 2015. Appleby raised the issue in a §2254 petition, and in his application for certificate of appealability in the Tenth Circuit.

The U.S. District Court found Appleby did not raise this challenge in the 1507 motion and appeal; rejected Appleby's argument *Alleyne* constitutes an intervening change in law, excusing the failure to raise the issue in 1507 proceedings, and that *Alleyne* should be applied retroactively to his case because he raised the issue under *Apprendi* on direct appeal; distinguished *State v. Soto*, 299 Kan. 102, 322 P.3d 334 (2014) because *Alleyne* was decided during Soto's direct appeal; found *Alleyne* was decided after Appleby's conviction became final so Appleby may not rely upon *Alleyne*; the fact *Alleyne* is an extension of *Apprendi* did not change when the *Alleyne* rule was announced; Appleby's argument for retroactive application of *Alleyne* lacked legal support, as the Supreme Court has not made

Alleyne's new rule retroactive to cases on collateral review, and the Tenth Circuit determined *Alleyne* does not apply retroactively to cases on collateral review; rules based on *Apprendi* do not apply retroactively on collateral review, citing *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), thus it is unlikely the Supreme Court will declare *Alleyne* retroactive in the future; section §2254(d)(1) requires federal courts to measure state-court decisions against U.S. Supreme Court precedents as of "the time the state court renders its decision," citing *Cullen v. Pinholster*, 563 U.S. 170, 182, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011); and the Kansas Supreme Court's decision was a reasonable determination of law when Appleby's conviction and sentence became final. (App. B, at 32-34).

The Tenth Circuit found no reasonable jurist could debate the district court's conclusion federal courts measure state-court decisions against Supreme Court precedent "as of the time the state court renders it's decision." (App. A, at 9).

The Kansas Supreme Court affirmed Mr. Appleby's conviction for capital murder and reversed his conviction for attempted rape on November 20, 2009. *Appleby*, 289 Kan. 1017. On October 4, 2010, Appleby filed his state habeas petition (K.S.A. 60-1507 Motion) alleging ineffective assistance of counsel for failure to raise suppression issues. On August 2, 2012, the trial court denied Appleby's K.S.A. 60-1507 Motion. Appleby filed a Motion to Reconsider on August 31, 2012. On September 20, 2012, the trial court denied Appleby's Motion to Reconsider. Appleby filed a notice of appeal on September 20, 2012. On February 28,

2014, the Court of Appeals affirmed the trial court's denial of his K.S.A. 60-1507 motion and motion to reconsider finding: (1) the record supports the Kansas Court of Appeals' conclusion counsels' performance was not deficient for failing to raise suppression issues; (2) the Kansas Supreme Court's decision rejecting Appleby's challenge to his hard 50 sentence was a reasonable determination of law at the time Appleby's conviction became final; (3) the Kansas Supreme Court applied a legal standard consistent with federal law and applied it in an objective manner and Appleby's references to an attorney did not constitute a clear and unambiguous assertion of his Fifth Amendment right protected by *Miranda*, and interrogation was not imminent. *Appleby*, 318 P.3d 1019. Appleby filed a petition for review in the Kansas Supreme Court on March 28, 2014. The Kansas Supreme Court denied his petition for review on January 15, 2015. On February 25, 2015 , Appleby filed a petition pursuant to 28 U.S.C. §2254 in the U.S. District Court of Kansas. The District Court summarily denied Appleby's petition on December 27, 2016, and denied a certificate of appealability. (App. B). The Tenth Circuit denied Appleby's Application for certificate of appealability on September 28, 2017. (App A). The Tenth Circuit denied Appleby's timely filed petition for rehearing on October 23, 2017. (App. D). A timely notice of appeal was filed on January 10, 2017.

REASONS FOR GRANTING THE WRIT

I. A petition for writ of certiorari is sought because Kansas officers acted outside their territorial jurisdiction requiring suppression of evidence under the Fourth Amendment, because Connecticut search warrants were not supported by probable cause to believe a Connecticut offense occurred, Connecticut officers who assisted Kansas officers in obtaining warrants, lacked sufficient personal information of the Kansas investigation, and counsel were ineffective for failure to raise this issue below in violation of Appleby's Sixth Amendment right to effective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Tenth Circuit found no reasonable jurist would debate the district court's resolution of the claims, attorneys were ineffective for failing to pursue suppression issues based on Kansas detectives' extra jurisdictional work in Connecticut. (App A 12-13). The Tenth Circuit overlooked Kansas officers notified Connecticut officers and requested they wait to arrest Appleby so they could be present to question Appleby, a tactical effort used to obtain a confession as opposed to simply interviewing Appleby as private citizens. Officers allegedly *Mirandized* Appleby and used props and psychological techniques during questioning, while a Kansas officer stood guard. A Kansas Detective drafted and signed Connecticut search warrant affidavits for Appleby's DNA and residence. Search

warrant affidavits alleged probable cause to believe a violation of Conn. Stat. 53a-54c occurred, based on facts alleging a Kansas homicide. A Kansas officer helped Connecticut officers search Appleby's Connecticut residence. DNA evidence was collected and forwarded to a Kansas lab for testing. Connecticut officers were not otherwise involved in the Kansas investigation, and lacked sufficient personal information to obtain warrants for a Kansas offense. There was no probable cause to believe a Connecticut offense occurred.

K.S.A. 22-2401a(2) (2004 Supp.) which provides:

> "(2) Law enforcement officers employed by any city may exercise their powers as law enforcement officers:
>
> (a) Anywhere within the city limits of the city employing them and outside of such city when on property owned or under control of such city; and
>
> (b) in any other place when a request for assistance has been made by law enforcement officers from that place or when in fresh pursuit of a person."

K.S.A. 22-2401(a) places a geographic limitation on the exercise of all law enforcement powers, including the execution of search warrants. *State v. Sodders*, 255 Kan. 79, 81, 872 P.2d 736 (1994)(superseded by statute). K.S.A. 22-2401a does not prevent Kansas officers from interviewing suspects outside their jurisdiction, as long as they are acting as private citizens. Kansas officers were not acting as private citizens. Kansas Officers requested Connecticut

officers wait to arrest Appleby on an unrelated six-year-old arrest warrant until they could be present to interrogate Appleby, giving them a tactical advantage not otherwise available. In the middle of booking, Kansas Officers were provided with Appleby's wallet, and allegedly *Mirandized* Appleby, and interrogated him, while a Kansas officer stood guard. When Appleby did not confess, they moved him to a room set up with props, and a confession was obtained.

K.S.A. 22-2401a does not permit Kansas officers to assist officers in other jurisdictions in obtaining search warrants, where the other jurisdiction did not request assistance. Connecticut did not request assistance and officers were not in fresh pursuit.

The Fourth Amendment provides the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

In *U.S. v. Green*, 178 F.3d 1099 (10th Cir. 1999), the Tenth Circuit held in part, the Fourth Amendment was satisfied, and suppression of the fruits of a search was not required, though city police officers conducting the search were acting outside their jurisdiction in violation of Kansas law. The Fourth Amendment was satisfied where officers obtained a warrant, grounded in probable cause and phrased with sufficient particularity, from a magistrate of the relevant jurisdiction. *Id.,* at *1105.* In *U.S. v. Occhipinti*, 998 F.2d 791, 799 (10th Cir. 1993) the Court held a search

where KBI officers actively participated along with an undersheriff acting outside the county of his jurisdiction did not violate Kansas law. In *U.S. v. Price*, 75 F.3d 1440 (10th Cir. 1996), the record overwhelmingly established active participation by KBI officers in the execution of the residential search warrant. *Id.*, at 1443.

Connecticut officers, unlike officers in *Price* and *Occhipinti*, were not actively participating in the investigation which was the subject of search warrants and lacked sufficient personal information to obtain warrants for the Kansas offense. Affidavits alleged probable cause to believe a violation of Conn. Stat. 53a-54c occurred, based on facts alleging a Kansas homicide. There was no probable cause to believe a Connecticut offense occurred.

In *State v. Vrabel*, 301 Kan. 797, 810-14, 347 P.3d 201 (2015), the Kansas Supreme Court found suppression of evidence was not the appropriate remedy, where city officers exercised their police powers to arrange and fund a controlled drug buy in another jurisdiction in violation of K.S.A. 22-2401a, where the aggrieved person made no illegal search and seizure claim, nor alleged a willful and recurrent violation of the law by officers involved in a drug buy. In *State v. Robinson*, 303 Kan. 11, 122, 363 P.3d 875, 964-65 (2015), cert. denied, 137 S. Ct. 164, 196 L. Ed. 2d 138 (2016), suppression of evidence seized during an officers' trash pulls in violation of K.S.A. 22-2401a, was not a remedy available where the defendant was not prejudiced and the search was conducted in violation of statute only, which did not vest Robinson

with an individual right, and the violation resulted in no cognizable injury to Defendant's substantial rights.

Here, officers acted outside their territorial jurisdiction, resulting in cognizable injury to Appleby's substantial rights. Connecticut officers executed search warrants and signed applications prepared by Kansas officers containing facts involving a Kansas homicide, for which they did not have sufficient personal knowledge, as they were not involved in the investigation. The search warrant applications alleged facts from a Kansas homicide supported probable cause to believe a violation of Conn. Stat. 53a-54c occurred. Kansas officers arranged the timing of arrest in Connecticut to interrogate Appleby, and the interrogation method was inapposite to police acting as private citizens. The searches and seizure were in violation of K.S.A. 22-2401a, and violated Appleby's rights under the Kansas Constitution Bill of Rights, §15, and Fourth Amendment of the U.S. Constitution. Suppression of evidence was warranted under K.S.A. 22-3216, or the Fourth Amendment exclusionary rule. Without DNA or a confession, there is a reasonable probability the result of trial or appeal would have been different, and acquittal occurred, or reversal on appeal occurred. Appleby was prejudiced by counsels' deficient performance in failing to raise these issues.

II. A petition for writ of certiorari is requested because Mr. Appleby's confession was submitted to a jury in violation of his Fifth and Fourteenth Amendment rights against compelled self-incrimination where in conformance with a notice of rights provided to Mr. Appleby upon arrest, including the right to consult with an attorney before being questioned, Appleby asked if he would have an opportunity to talk to an attorney, was advised he certainly would, and minutes later, without being provided an opportunity to contact counsel, was escorted to another room and interrogated.

The Tenth Circuit Court of Appeals found:

> "The Kansas Supreme Court applied legal standards consistent with federal law in a reasonable manner...no reasonable jurist could debate the district court's resolution of the claim. Initially the district court noted the Kansas Supreme Court reasonably applied *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed. 2d 362 (1994) , in declining to broadly construe any mention of an attorney as a request for counsel for purposes of interrogation...The Kansas Supreme Court evaluated the circumstances of Appleby's inquiries to determine whether he invoked his Fifth Amendment right to counsel and, applying *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed. 2d 158 (1991) and *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173

> L.Ed. 2d 955 (2009), concluded he did not...The Kansas Supreme Court analyzed the timing, content, and context of Appleby's inquiries and concluded he failed to unambiguously invoke his Fifth Amendment right to counsel for purposes of interrogation... As the district court observed, the Kansas Supreme Court determined Appleby's request for counsel in response to the DNA swab sought only limited assistance for purposes of refusing the DNA swab, not to assist with custodial interrogation. His other references to an attorney, the Kansas Supreme Court ruled, generally inquired during the book-in process on the Connecticut charges whether he would have an opportunity to talk to a lawyer. At that time, he did not know about the Kansas case, nor had he been questioned on any charges from Connecticut or Kansas...The Connecticut detective...told him someone else would be questioning him. Under these circumstances, the district court concluded that the Kansas Supreme Court's decision was consistent with, and a reasonable application of, federal law. No reasonable jurist could debate the district court's conclusion. Consequently, Appleby fails to show he is entitled to a COA on this claim." (App. A, at 5-8).

The Fifth Amendment to the United States Constitution provides: "No person shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination is made applicable to the states through the Fourteenth Amendment Due Process Clause. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The

right against self-incrimination includes a right to have a lawyer present during custodial interrogation, and to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If a suspect indicates, in any manner, during a custodial interrogation he wishes to consult with an attorney, "there can be no questioning." *Id.*, at 445. The interrogation must cease until an attorney is present, the suspect must be allowed to confer with his attorney and have him present during any further questioning. *Id.*, at 474.

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) established a bright-line rule when a suspect has "expressed his desire to deal with police only through counsel, he is not subject to further interrogation until counsel has been made available," unless he initiates the contact. If police subsequently initiate an encounter in the absence of counsel (assuming there is no break in custody), the suspect's statements are presumed involuntary and inadmissible as substantive evidence at trial, even where the suspect executes a waiver. This is designed to prevent police from badgering a defendant into waiving previously asserted *Miranda* rights." *McNeil*, at 176-177. A valid waiver of a previously asserted right cannot be established by showing only the suspect responded to further police-initiated interrogation, even if the suspect has been advised of his rights. *Edwards*, at 484.

Davis provides if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of circumstances would have understood only the suspect might be invoking right to

counsel, cessation of questioning is not required but, rather, the suspect must unambiguously request counsel; the suspect must articulate the desire to have counsel present sufficiently clearly that a reasonable officer in the circumstances would understand statement to be a request for an attorney. *Davis*, at 458-59.

In *Montejo*, the Supreme Court stressed "what matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and if he consents, what happens during interrogation." *Id.*, at 797. The *Montejo* Court noted it "had never held a person can invoke *Miranda* rights anticipatorily, in a context other than custodial investigation." *Id., citing McNeil*, at 182. The request must be for assistance with the custodial interrogation, not subsequent proceedings. *McNeil*, at 178. "Once a suspect invokes *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present." *Id*. An accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel. *Smith v. Illinois*, 469 U.S. 91, 92, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).

If a statement is obtained in the absence of counsel, after the accused requests counsel, courts employ a two-step analysis to determine its admissibility *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983). The first question is whether the defendant initiated further conversation. *Id.*, at 1045-46. If he did, the next question is whether the defendant knowingly and voluntarily waived his rights.

Smith, at 95. Appleby did not initiate interrogation after his requests, so his statement should not have been admitted as evidence at trial.

When Appleby was arrested, he asked Detective Jewiss why there were so many officers at his house. Jewiss informed Appleby a search warrant was being executed, and he was not going to talk to him any further about the case, somebody else would. Prior to being provided with the notice of rights, Appleby asked Jewiss what the *cases* were about, *the arrest,* or *search warrant*. Jewiss informed Appleby he would not be questioning him, and could not talk to him about *either* case. At the station, Appleby asked if he could say, "no," to DNA swabbing, and if he could contact an attorney. Jewiss testified, "my answer to him about an opportunity to speak to an attorney is as it is written in the notice of rights I read him, and he signed, he certainly will." After DNA swabbing, Appleby asked if he was going to have the opportunity to contact an attorney and Jewiss told him he would. Jewiss testified Appleby was only asking about procedures. Jewiss' report provided: "Appleby continued to ask if he would be able to contact his attorney about his arrest," and Jewiss "continued to tell him he certainly would." Appleby requested counsel before and after his rights were provided, and after signing the notice of rights acknowledgment. His rights included the right to assistance of counsel for interrogation. After being provided with the acknowledgment form, Appleby asked if he would have an opportunity to talk to an attorney. As *Davis* requires, Appleby articulated the desire to have counsel present sufficiently clearly that Detective Jewiss, in the circumstances, would understand his statements to be requests for an

attorney for assistance of counsel for interrogation. See *Davis*, at 458-59.

The trial court found although Appleby's requests were never phrased as a demand, "they clearly communicated a desire to call his attorney without substantial further delay." *Appleby*, 289 Kan. at 1037. Yet, the trial court concluded the purpose of Appleby's request was not clear, because at the time he made those requests, no one indicated to him his arrest was connected to the Kansas murder investigation. *Id.* The trial court found Appleby's lack of intent to obtain a lawyer to assist with any pending custodial interrogation is an inference supported by his later (a) saying affirmatively he wanted to speak to Kansas detectives, (b) making an explicit *Miranda* waiver for them, (c) speaking with them for two and a half hours, and (d) never mentioning a lawyer during that interview. *Id.* Consequently, the trial court denied Appleby's motion to suppress finding based on Appleby's statements, and the context in which they were made, "he did not ask for counsel for the purpose of assisting with an imminent custodial interrogation." *Id.*, at 1037-38.

Factors (a) to (d) above, may have been relevant in determining whether there was a valid waiver, had Appleby reinitiated conversation with officers, but these factors are not dispositive of whether Appleby unambiguously requested counsel for interrogation. Following *Edwards*, at 484-85, once Appleby expressed his desire to deal with police only through counsel, he was not subject to further interrogation until counsel has been made available, unless he initiated the contact. Officers subsequently initiated an encounter

in the absence of counsel, there was no break in custody, and Appleby's statements should have been presumed involuntary and inadmissible as substantive evidence at trial, even where he executed a waiver. Factors (a) through (d) mentioned above, occurred after Appleby asserted his *Miranda* rights at a time in which *McNeil* instructs he should not have been approached for interrogation.

Montejo provides a person cannot invoke *Miranda* rights anticipatorily. *Id.,* at 797. The timing, content, and context of Appleby's invocations (all within 30 minutes prior to interrogation) with two invocations after the provision of notice of rights, including the right to the assistance of counsel with questioning, evidence Appleby's invocations were not anticipatory. Appleby asked Detective Jewiss what the cases were about - the arrest, and residential search warrant, which evidences awareness of two cases. Jewiss advised he would not be questioning him about *either* case. At the time of Appleby's requests, Jewiss indicated he would not question him, *someone else* would. Appleby was aware he was going to be questioned, albeit not by Jewiss, and questioning occurred minutes later. Detective Jewiss reasonably knew Appleby was requesting counsel for assistance with interrogation, given the timing and context of Appleby's requests.

Whether anyone indicated to Appleby his arrest was connected in any way to the Kansas case, is not dispositive of whether Appleby invoked his *Miranda* rights for the purpose of custodial interrogation, as Fifth Amendment rights are not offense specific. See *Arizona v. Roberson,* 486 U.S. 675, 108 S. Ct. 2093, 100

L. Ed. 2d 704 (1988). In *Roberson*, on April 16, 1985, Roberson was arrested at the scene of a burglary. The arresting officer advised him of his *Miranda* rights, and he responded he "wanted a lawyer before answering any questions." *Id.*, at 678. On April 19, 1985, while Roberson was still in custody for the arrest three days earlier, a different officer interrogated Roberson about a different burglary that occurred on April 15. That officer was not aware Roberson had requested assistance of counsel three days earlier. After advising Roberson of his rights, the officer obtained an incriminating statement concerning the April 15 burglary. In the prosecution for that offense, the trial court suppressed that statement. *Id.*, at 679. This Court held the *Edwards* rule a suspect who has invoked his right to counsel is not subject to further interrogation until counsel has been made available to him, applies when a police-initiated interrogation following the suspect's request for counsel occurs in the context of a separate investigation, and the fact the officer who conducted the second interrogation did not know Roberson had requested counsel when he was arrested, could not justify failure to honor the request. Likewise, the *Edwards* rule should apply here, where Kansas police-initiated interrogation, occurred in the context of a separate investigation which followed Appleby's invocations. The Tenth Circuit previously ruled, "Once a suspect has invoked the right to counsel, knowledge of the request is imputed to all officers who subsequently deal with the suspect." *U.S. v. Scalf*, 708 F.2d 1540, 1544 (10th Cir. 1983). Accordingly, once Appleby invoked the right to counsel, knowledge of his requests was imputed to Kansas officers.

Interrogation was imminent at the time of Appleby's requests. Appleby was advised he was going to be questioned by someone, and in response to his notice of rights including right to counsel for interrogation, Appleby twice asked if he would have an opportunity to talk to an attorney. The requests were not anticipatory requests made in a context other than custodial investigation as discussed in *Montejo, supra*. It matters not, which offense Appleby was questioned about, under *Roberson, supra*. Before Appleby's invocations, Jewiss told Appleby he was not going to talk to him about the case, someone else would. Appleby asked what the cases were about - the arrest, and residential search warrant. Jewiss informed Appleby he would not be questioning him about *either* case. The Kansas Supreme Court's conclusion, "when Appleby asked whether he would have a chance to talk to an attorney, he knew he was not going to be questioned by Jewiss, therefore, interrogation was not imminent," (*Appleby*, at 1052) ignores Jewiss' statements although he would not question Appleby about *either* case - someone would. Interrogation occurred minutes after the repeated invocations, which occurred during an approximate 30 minute booking process, wherein Jewiss arguably questioned Appleby regarding any alias.

In *U.S. v. Kelsey*, 951 F.2d 1196, 1198-99 (10th Cir. 1991) police were searching the defendant's home, when Kelsey returned, was found in possession of cocaine and arrested. He was brought in the house with three others. Kelsey asked to see his lawyer three or four times. Police responded if they "allowed him to see his lawyer now, they would not be able to ask further questions and would have to take him to jail,"

and "if he was to talk, they would take it easy on him." Eventually, Kelsey was asked if he wanted to talk and he agreed. During interrogation, Kelsey was given *Miranda* warnings and asked if he wanted to continue. He said he would if the others were released. Kelsey made incriminating statements. The Tenth Circuit held:

> "The fact Kelsey invoked his right to counsel before police were required to inform him of that right is irrelevant...*Edwards* is triggered by "some statement that can reasonably be construed to be expression of a desire for assistance of an attorney in dealing with custodial interrogation." *McNeil, supra*. It is clear from the exchange, police intended to question Kelsey at some point at home, and understood Kelsey was invoking his right to counsel during questioning...Kelsey's request for counsel was sufficient to bring this case within the ambit of *Edwards*." *Id.,* at 1199.

Here, Appleby invoked his right to counsel before and after being provided with his rights, and it was clear from the exchange, someone was going to question Appleby, and Jewiss understood Appleby was invoking his right to counsel during questioning.

Appleby invoked the *Miranda* right to counsel, and under *McNeil*, Appleby should not have been reapproached for interrogation. Once Appleby asserted the right to counsel, any questioning from Jewiss have ceased, and Appleby should not have been approached for further interrogation 'until counsel was made available to him,' *Edwards*, at 484–485. Counsel should have been present. See *Minnick v. Mississippi,*

498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990). Because police subsequently initiated an encounter in the absence of counsel and there was no break in custody, Appleby's statements should have been presumed involuntary and inadmissible as substantive evidence at trial, even where Appleby executed a waiver and his statements would have been considered voluntary under traditional standards. In *Smith*, 469 U.S. 91 at 93, Smith was advised he had a right to consult with an attorney and have an attorney present during questioning, and he responded, "uh, yeah. I'd like to do that." The officer continued reading *Miranda* and asked if Smith wished to talk without an attorney, and he replied, "Yeah and no, uh, I don't know what's what, really." After being told he could agree to talk without an attorney and if he agreed, he could stop questioning at any time, he stated, "all right, I'll talk to you then." *Id.,* at 93. Finding Smith's initial request for counsel was not ambiguous and his subsequent responses could not be used to cast doubt on his initial request, this Court held his statement was inadmissible. *Id.* at 97-99. Like *Smith*, Appleby's subsequent responses to Kansas officers should not have been used to cast doubt on his initial requests for counsel.

III. A petition for writ of certiorari is requested because the trial court's imposition of a hard 50 sentence was unconstitutional under the Sixth and Fourteenth Amendments of the U.S. Constitution, because it permitted the sentencing court to find aggravating circumstances utilizing a preponderance of the evidence standard, as opposed to facts being found by a jury beyond a reasonable doubt, and Appleby raised this issue in the trial court, on direct appeal, citing in support, *Apprendi*, and thereafter raised the issue, citing in support, *Alleyne*.

"The Sixth Amendment provides those accused of a crime have the right to a trial by an impartial jury. This right, in conjunction with the Due Process Clause, requires each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne*, at 2156. In imposing a hard 50 sentence, the trial court used mitigating evidence the crime was committed when Appleby was under the influence of extreme mental or emotional disturbance and Appleby's capacity to conform his conduct to the requirements of the law was substantially impaired as an aggravating factor, and such aggravating factors are limited to those in the statute. See *State v. Spain*, 263 Kan. 708, 720, 953 P.2d 104 (1998). The Tenth Circuit found when the Kansas Supreme Court adjudicated Appleby's Sixth Amendment claim on direct appeal, finding the hard 50 sentencing scheme constitutional because it enhanced the *minimum* sentence without exposing a defendant to a greater maximum sentence, its decision complied

with *Apprendi* and *Alleyne* was not decided until nearly four years later. (App. A, at 9-10).

Appleby contended in a pretrial motion and on direct appeal, the Kansas hard 50 sentencing procedure violates his Sixth and Fourteenth Amendment rights to trial by jury. The U.S. District Court found Appleby did not raise the Sixth Amendment issue in his K.S.A. 60-1507 motion and appeal (App. B, at 32), but Appleby raised his Sixth Amendment issue in the trial court, and during direct appeal, under *Apprendi*, and when *Alleyne* was decided during his appeal from the denial of his K.S.A. 60-1507 motion, he raised the issue in a motion requesting to file a supplemental brief in response to *Alleyne*. Appleby would have been precluded from raising an issue in a K.S.A. 60-1507 motion, previously raised on direct appeal. See Kan. Sup. Ct. Rule 183(c). "An intervening change in the law between direct appeal and a collateral attack can constitute an exceptional circumstance under Sup. Ct. Rule 183(c)(3), excusing the failure to raise a constitutional question on direct appeal." *Alires v. State*, 21 Kan. App. 2d 676, 906 P.2d 172 (1995). While the Tenth Circuit has found *Alleyne* does not apply retroactively to cases on collateral review, exceptional circumstances existed for permitting Appleby to raise his claim in the Kansas Court of Appeals, as there had been an intervening change of law on an issue preserved on direct appeal, which should have excused any failure to repeat the issue in his K.S.A. 60-1507 motion.

The U.S. District Court found the Tenth Circuit determined *Alleyne* does not apply retroactively to cases on collateral review. *In re Payne*, 733 F.3d 1027,

1029 (10th Cir. 2013). (App. B, at 34). Even if *Alleyne* does not apply retroactively to cases on collateral review, Appleby raised the Sixth Amendment claim based on the same principles stated in *Apprendi*, in the trial court, during direct appeal, under existing precedent at the time, and Appleby raised the issue again under *Alleyne*, during his appeal of 1507 proceedings. While federal courts measures state court decisions against U.S. Supreme Court precedents as of the time the state court renders its decision, Appleby's argument remains the same, under *Apprendi* and *Alleyne* relying on the same principles of law, and relying on the Sixth Amendment.

In *In Re Payne*, the Tenth Circuit agreed with the Seventh Circuit *Alleyne* does set forth a new rule of constitutional law and provided:

> "This new rule of constitutional law has not been "made retroactive to cases on collateral review by the Supreme Court...The justices have decided other rules based on *Apprendi* do not apply retroactively on collateral review. See *Schriro v. Summerlin*, 542 U.S. 348 (2004). This implies the Court will not declare *Alleyne* to be retroactive... Unless the Justices decide *Alleyne* applies retroactively on collateral review, we cannot authorize a successive collateral attack based on §2255(h)(2)." *Id.*, at 1029-30 citing *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013).

Schriro held the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held a sentencing judge, sitting without a jury, may not find an aggravating

circumstance necessary for the imposition of the death penalty, and the Sixth Amendment required those circumstances be found by a jury, did not announce a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings, and thus *Ring* did not apply retroactively to a death penalty case already final on direct review as judicial fact finding did not so seriously diminish the accuracy such that there was an impermissible large risk of punishing conduct the law did not reach. *Id.* at 354-55.

In the dissenting opinion in *Schriro*, Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg joined, found the holding in *Ring* amounts to a watershed procedural ruling a federal habeas court must apply when considering a constitutional challenge to a final death sentence - a sentence already final on direct review when *Ring* was decided. *Id.*, at 358-59. The dissent noted "*Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) sets forth the relevant retroactivity criteria. A new procedural rule applies retroactively in habeas proceedings if the new procedure is (1) implicit in the concept of ordered liberty," implicating "fundamental fairness," and (2) "central to an accurate determination of innocence or guilt," such that its absence "creates an impermissibly large risk the innocent will be convicted." In the context of a death sentence, where the matter is not one of "innocence or guilt," the second criterion asks whether the new procedure is "central to an accurate determination death is a legally appropriate punishment." *Schriro*, at 358-59.

The dissent observed the majority did not deny its holding is "implicit in the concept of ordered liberty," rather, the majority focused on whether the rule was "central to an accurate determination" death is a legally appropriate punishment?" *Schriro*, at 359, citing *Teague*, at 313. Justice Breyer's belief was the Eighth Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment the sentence constitutes proper retribution. *Id.*, at 360, citing *Ring*, 536 U.S. at 614 (opinion concurring in judgment). Justice Breyer indicated the right to have a jury sentencing in the capital context is both a fundamental aspect of constitutional liberty and also significantly more likely to produce an accurate assessment of whether death is the appropriate punishment. *Id.*, at 360. Justice Breyer indicated the factfinder's role in determining the applicability of aggravating factors in a death case is a special role that can involve, not simply the finding of brute facts, but also the making of death-related, community-based value judgments. The leading single aggravator charged in Arizona, required the factfinder to decide whether the crime was committed in an especially heinous, cruel, or depraved manner. *Id.*, at 361. Words like, "especially heinous," "cruel," or "depraved," particularly when asked in the context of a death sentence proceeding require reference to community based standards that incorporate values. Justice Breyer indicated a jury is better equipped than a judge to identify and to apply those standards accurately. *Id.*, at 362.

Justice Breyer found *Teague's* basic purpose strongly favors retroactive application of *Ring's* rule. *Schriro*, at 362. *Teague's* retroactivity principles reflect

the Court's effort to balance competing considerations. "On one hand, interests related to certain of the writ's basic objectives-protecting the innocent against erroneous convictions or punishment and assuring fundamentally fair procedures - favor applying a new procedural rule retroactively." *Id.*, at 362. "So too does the legal system's commitment to equal justice to assuring a uniformity of ultimate treatment among prisoners." *Id.* Justice Breyer found where death-sentence-related fact finding is at issue, these considerations have unusually strong force, and the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination than other criminal judgments. *Id.*, at 362.

Schiriro is a death penalty case, but similar reasons in the dissenting opinion support *Alleyne* is a watershed procedural ruling a federal habeas court must apply when considering a constitutional challenge to a sentence where a court determined a fact which was an element of the offense and it increased punishment above what was otherwise legally prescribed. Like the rule in *Ring, supra*, the rule in *Alleyne* is implicit in the concept of ordered liberty," implicating "fundamental fairness." The *Ring* Court found *Apprendi* involves the fundamental meaning of the jury trial guarantee. *Ring*, at 610. This same fundamental right is involved in *Alleyne*.

With regard to the second *Teague* factor, as Justice Breyer found in *Schriro*, the right to have a jury sentencing is significantly more likely to produce an accurate assessment of whether the imposition of such punishment is appropriate. Here, the factfinder's role

in determining the applicability of aggravating factors in a hard 50 case is a special role that can involve, not simply the finding of brute facts, but also the making of community-based value judgments. Just as the leading single aggravator in *Schriro* required the factfinder to decide whether the crime was committed in an especially heinous, cruel, or depraved manner, the factfinder was required to decide here whether the crime was committed in an especially heinous, atrocious, and cruel manner, requiring reference to community based standards that incorporate values. As Justice Breyer indicated in *Schriro*, a jury is better equipped to identify and apply those standards accurately. *Teague's* basic purpose strongly favors retroactive application of *Alleyne's* rule. *Teague's* retroactivity principles reflect the Court's effort to balance competing considerations. Interests related to the writ's basic objectives - protecting the innocent against erroneous convictions or punishment and assuring fundamentally fair procedures - favor applying a new procedural rule retroactively. The legal system's commitment to equal justice to assuring a uniformity of ultimate treatment among prisoners supports retroactive application of *Alleyne*.

Even if *Alleyne* is not found to apply retroactively, Appleby should be resentenced because the principle found in *Alleyne* and *Apprendi* is the same, and Appleby raised the same Sixth Amendment issue prior to the decision in *Alleyne,* citing in support *Apprendi*, involving the same principle in *Alleyne*. In *Apprendi*, the Court held a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. *Id.,* at 483. *Alleyne* did not alter this

principle, so Appleby should be resentenced accordingly, where he raised the issue in the trial court, on direct appeal, appeal from the denial of his K.S.A. 60-1507 motion, and throughout federal habeas proceedings.

Apprendi's definition of "elements," necessarily includes not only facts that increase the ceiling, but also those that increase the floor. *Alleyne*, at 2158. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed, and in a manner that aggravates the punishment. *Id.*. Facts that increase the mandatory minimum sentence are elements and must be submitted to the jury and found beyond a reasonable doubt. *Id.* Consistent with common law and early American practice, *Apprendi* concluded any facts that increase the prescribed range of penalties to which a defendant is exposed, are elements of the crime. *Id.*, at 2160, citing *Apprendi*, at 490. The Supreme Court held the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. *Id.*, at 484. "While *Harris v. U.S.*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) limited *Apprendi* to facts increasing the statutory maximum, the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Alleyne*, at 2160.

"It is indisputable a fact that increases the mandatory minimum alters the prescribed range of sentences to which a Defendant is exposed." *Alleyne*, at 2160, citing *Apprendi*, at 490; *Harris*, at 575. "Increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.*, at 2160, citing *Apprendi,* at 501. "It is impossible

to dissociate the floor of a sentencing range, from the penalty affixed to the crime." *Id.*, at 2160, citing *Harris*, at 569. "A fact that increases a sentencing floor, forms an essential ingredient of the offense." *Id.*, at 2161.

"It is impossible to dispute facts increasing the legally prescribed floor aggravate the punishment." *Id.*, at 2161, citing *Harris*, at 579. "Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's expected punishment has increased as a result of the narrowed range," and "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Id.*, citing *Apprendi*, at 522. "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." *Id.*, citing *Apprendi*, at 478-79. "It also preserves the historic role of the jury as an intermediary between the State and criminal defendants." *Id.*, citing *U.S. v. Gaudin*, 515 U.S. 506, 510-511, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). "Because there is not basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, *Harris* was inconsistent with *Apprendi*, and overruled in *Alleyne*." *Id.*, at 2163. *Apprendi* concluded any facts that increase the prescribed range of penalties to which a defendant is exposed, are elements of the crime. *Id.*, at 2160. The principle of law is the same in *Apprendi* and *Alleyne* and Appleby sufficiently preserved his argument, and resentencing should occur.

CONCLUSION

For the foregoing reasons, Petitioner, Benjamin Appleby respectfully requests a writ of certiorari issue in this case.

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