Would the Supreme Court's Decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), Lead to a Lower Sentence Today?

I. Overview

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Supreme Court extended the logic of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that raises a statutory maximum must be charged in an indictment and proved to a jury beyond a reasonable doubt), to overrule *Harris v. United States*, 536 U.S. 545 (2002) (plurality declining to apply the same rule to facts that set or raise a mandatory minimum). The *Alleyne* Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id.*, 133 S. Ct. at 2155. The Court explained:

- "A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense." *Id.* at 2161.

- "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. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2163.

In addition, since the aggravating fact is an element, it must be charged in the indictment.[1]

Alleyne makes virtually every sentence imposed under the mandatory (pre-*Booker*) guidelines potentially unconstitutional.[2] However, if a defendant previously subject to a mandatory guideline range was sentenced today, the Sixth Amendment problem would be avoided by the remedy adopted in *United States v. Booker*, 543 U.S. 220 (2005), i.e., the guideline range would be advisory only, and the sentence would be required to be no greater than necessary to satisfy the purposes of sentencing in light of all of the factors and purposes set forth in 18 U.S.C. § 3553(a). If your client was subject to a mandatory guideline range, argue that the sentence would be lower if imposed today because the guidelines are no longer mandatory. *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

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[1] In *Alleyne* itself, the government took the unusual step (at that time) of charging the enhancing fact (brandishing a firearm). The jury acquitted. The government then asked the judge to find by a preponderance of the evidence at sentencing that Alleyne brandished a firearm, or aided and abetted a confederate's brandishing of a firearm, and the judge did so.

[2] The only sentences that would certainly be constitutional would be those that resulted from a binding plea agreement under Rule 11(c)(1)(C) or a plea agreement under Rule 11(c)(1)(B) wherein the defendant expressly admitted to the base offense level and every applicable enhancement (excluding criminal history).

But, because the Supreme Court has not created (and probably could not create) the same remedy for a Sixth Amendment violation in the imposition of a statutory mandatory minimum, you cannot make that argument in a commutation petition with respect to a mandatory minimum previously imposed under circumstances that would violate *Alleyne*. Rather, the argument is that the mandatory minimum would be reduced or eliminated to the extent that it rested on judge-found facts in violation of *Alleyne*.

II. How a Sentence Would Be Lower Today If It Was Imposed in Violation of the Subsequent Decision in *Alleyne*

An *Alleyne* violation will have occurred only in cases in which the client was convicted under certain statutes, namely, 18 U.S.C. § 924(c) (possession, use or carriage of a firearm), or 21 U.S.C. § 841 (drug trafficking).

A. Enhancements Under 18 U.S.C. § 924(c)

Section 924(c) is violated when a person "uses or carries" a firearm "during and in relation to," or "possesses" a firearm "in furtherance of," a "crime of violence" or "drug trafficking crime." A § 924(c) offense is a separate substantive offense, but it is typically prosecuted in conjunction with the underlying drug trafficking crime or crime of violence (*e.g.*, robbery). The basic conviction under § 924(c) triggers a mandatory minimum sentence of 5 years, and increases based on additional elements to 7, 10, 25, 30 years, or life. Courts have assumed that the statutory maximum for any § 924(c) offense (though unstated in the statute) is life. The § 924(c) sentence must be imposed to run consecutively to any other sentence, including a sentence for an underlying drug trafficking crime or crime of violence. Consequently, the impact of the § 924(c) sentence on the overall sentence should be clear from the presentence report and judgment.

If the defendant received a § 924(c) sentence of just 5 years, there is no *Alleyne* violation because even before *Alleyne*, the basic offense had to be charged in the indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant. The following discussion does not apply to sentences of 5 years.

If a defendant received a § 924(c) sentence of 7 years or more, there would have been an *Alleyne* violation if the enhancement above 5 years was based on a judge finding facts that triggered a higher mandatory minimum. A special penalty structure applies if the § 924(c) conviction is the defendant's second or subsequent § 924(c) conviction. This discussion begins with first § 924(c) convictions, then addresses second or subsequent convictions.

1. first § 924(c) conviction

Over the years, there have been some changes to § 924(c), but the possible enhancements, based on elements stated in the statute, are as follows for a first § 924(c) conviction:

***Alleyne* element triggering enhancement**	**Mandatory minimum**
The firearm was brandished.	7 years
The firearm was discharged.	10 years
The firearm was a short-barreled rifle/shotgun or a semiautomatic assault rifle.	10 years
The firearm was a machinegun, destructive device or a firearm with a silencer or muffler.	30 years

Before *Alleyne*, the government usually did not charge these elements in the indictment. If, however, the *Alleyne* element was charged, and a jury found it (*i.e.*, through a verdict form) or the defendant admitted it in the process of entering his guilty plea, there is no *Alleyne* violation. Even if the *Alleyne* element was stated in the indictment, the defendant may have pled guilty without admitting it because, at that time, no one recognized the *Alleyne* element as an element of the offense. If that happened, there was an *Alleyne* violation.

In the usual case, where the government did not charge the *Alleyne* element, there may be an *Alleyne* violation. There will be an *Alleyne* violation if the defendant did not agree to the *Alleyne* element in the process of entering his guilty plea, *e.g.*, in a plea petition or agreement, in an agreed-to factual basis, or in an admission made during the plea colloquy. If the record does not reflect that the defendant agreed to the *Alleyne* element in the process of entering his plea, and instead that the *Alleyne* element was established during the sentencing procedure – *i.e.*, by the judge making a finding at sentencing or by adopting a presentence report stating the *Alleyne* element – there is an *Alleyne* violation.

This final point bears emphasis. Consider the following common situation. The defendant did not admit the *Alleyne* element in a plea agreement or plea colloquy; the presentence report then asserted the *Alleyne* element; the defendant did not dispute the presentence report's assertions; and the district court, accordingly, adopted the presentence report and the *Alleyne* element stated in it. The defendant's silence in the face of the presentence report's assertion of the *Alleyne* element cannot be taken as his admission of that element. *See Mitchell v. United States*, 526 U.S. 314, 326-30 (1999) (defendant has the right to remain silent

at sentencing and no negative inference may be drawn from that silence in determining the facts). That *Alleyne* element remains a judge-found fact that violated *Alleyne*.

These same principles apply when the defendant disputed the *Alleyne* element and the court found, over his objection, that the element existed. The judge-found element violated *Alleyne*.

When an *Alleyne* violation occurred, the defendant's sentence was unconstitutionally enhanced by the number of years that the sentence exceeded 5 years. That is, if the defendant was sentenced to 10 years based on the court's finding that the firearm was discharged, then the sentence is 5 years longer than it would have been today under the same circumstances.

2. second or subsequent § 924(c) violation

A second or subsequent conviction for § 924(c) requires a consecutive sentence of 25 years. *See* 18 U.S.C. § 924(c)(1)(C). That punishment in excess of 5 years is not an *Alleyne* violation because even before *Alleyne*, each second or subsequent § 924(c) violation had to be charged and proved to a jury beyond a reasonable doubt. (Note that "second or subsequent" is something of a misnomer because there is no requirement that the first conviction is final before any second or subsequent violation, and multiple violations are almost always charged in the same indictment, a practice known as "stacking.").

Section 924(c) also dictates a sentence of mandatory life for a second or subsequent § 924(c) violation that involved a machinegun, destructive device, or a firearm equipped with a silencer or muffler. The punishment in excess of the basic 5 years plus 25 years for each second or subsequent conviction, if based on a judicial finding of fact of the type of firearm, is an *Alleyne* violation. *United States v. O'Brien*, 560 U.S. 218 (2010).

3. Eligibility despite the firearm conviction

Even if there was an *Alleyne* violation, the defendant will nonetheless be ineligible for sentence commutation if his offense conduct was actually violent. One of the eight people whose sentences were commuted in December 2013 was convicted of possessing a firearm, and another received a guideline enhancement based on a firearm someone else possessed. Thus, in most cases, unless the defendant himself actually used a firearm, he should not be disqualified.

There are cases in which the defendant did not use the firearm, but simply possessed it, and not necessarily on his person but in a closet, in the attic, or in the trunk of a car. In other cases, the defendant was merely present when a confederate possessed or used a firearm, or was not even present when a confederate possessed or used a firearm. Many defendants were

convicted based on someone else's use or possession of a firearm under a conspiracy or aiding and abetting theory.

Also note that the Supreme Court recently held that a person is not guilty of aiding and abetting a § 924(c) offense if s/he did not "actively participate[] in the underlying drug trafficking ... crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond v. United States*, 133 S. Ct. 1240 (2014). If the client was convicted under § 924(c) on an aiding and abetting theory, and he did not actively participate in the underlying offense with advance knowledge that a confederate would use or carry a firearm, you should note that he likely would not be convicted today under *Rosemond*.

B. Convictions arising under 21 U.S.C. § 841(a)

Section 841 of Title 21 is violated by trafficking drugs. The statutory sentencing ranges are set forth in § 841(b). Absent any enhancement, the range is 0 to 20 years. *See* 21 U.S.C. § 841(b)(1)(C). But two types of facts that, under *Alleyne*, are now recognized as necessarily elements of the offense can enhance that range: (1) the quantity of the drugs enhances the range from 0-20 years to 5-40 years or 10-years to life; and (2) "death or serious bodily injury" resulting from the use of the drug enhances any range to 20 years to life, or life if the prosecutor also files a § 851 enhancement. Since relatively few cases involve the "death or serious bodily injury" element, this discussion will focus on the drug quantity element, but the analysis would be the same for the "death or serious bodily injury" element. (Regarding the latter, *see* Would an Enhancement for Accidental Death or Serious Bodily Injury Resulting from the Use of a Drug No Longer Apply Under the Supreme Court's Decision in *Burrage v. United States*, 134 S. Ct. 881 (2014), and *Alleyne v. United* States, 133 S. Ct. 2151 (2013)?)

Enhanced penalties can also be triggered by a third type of fact: prior convictions that alleged by the prosecutor through an information filed under 21 U.S.C. § 851. Those enhancements cannot result in an *Alleyne* violation because the fact of a prior conviction is not subject to *Apprendi* and its progeny. *Almendarez-Torres v. United States*, 524 U.S. 223 (1998). But there are other reasons that a § 851 enhancement may not apply today. *See* How a Person Whose Sentence Was Previously Enhanced Based on a "Felony Drug Offense" under 21 U.S.C. § 851 Would Receive a Lower Sentence Today.

The main focus here is on drug quantity because virtually every drug case involving a long sentence will feature an enhancement based on drug quantity. Note that there are other ways to show that a mandatory minimum based on quantity would be reduced or eliminated under today's laws and charging policies, and you should explore these first. *See* How a Sentence for a Drug Offender May Be Lower If Imposed Today.

The first step in this analysis is to ascertain how that drug quantity was determined: through a trial, a plea, or the sentencing process? If and only if the drug quantity was determined through the sentencing process, there may be an *Alleyne* violation.

1. Quantity determined through trial

If the jury made a finding of the drug quantity (*i.e.*, through a verdict form), then there is no *Alleyne* violation.

If the jury simply found the defendant guilty of violating § 841, without determining the quantity, then the quantity must have been determined through the sentencing process and there may be an *Alleyne* violation (see No. 3, below).

2. Quantity determined through the plea process

There is no *Alleyne* violation if the defendant:

1. admitted the quantity in a plea petition or plea agreement;

2. admitted the quantity by accepting a recitation of the factual basis that stated the quantity; or,

3. otherwise admitted the quantity during the plea colloquy.

This assumes the quantity admitted was the same quantity upon which the sentence was based, but that will not always be the case. For example, at a plea, the defendant might admit to 5 grams of crack cocaine (which until the Fair Sentencing Act of 2010 triggered a 5-year mandatory minimum), but through the sentencing process it might be determined that the quantity was 50 grams (which until the Fair Sentencing Act of 2010 triggered a 10-year mandatory minimum). In that situation, the *material* drug quantity was in fact determined through the sentencing process, so the situation must be assessed under No. 3, below.

3. Quantity determined through the sentencing process

You are likely to encounter cases in which quantity was found by a judge in violation of *Alleyne*. As described below, all circuits took the same approach before *Apprendi* was decided in 2000, and different circuits took different approaches thereafter at different points in time. There is no way of knowing what happened in an individual case without looking at the record.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that any fact that raises a statutory maximum must be charged in an indictment and proved to a jury beyond a

reasonable doubt (or admitted by the defendant as part of a guilty plea). But before *Apprendi* was decided, drug quantity was rarely, if ever, charged in the indictment or proved to a jury because it was not considered an element.

In *Harris v. United States*, 536 U.S. 545 (2002), a plurality of the Court held that *Apprendi* did not apply to a fact that set or raised a mandatory minimum. *Harris* was a § 924(c) case where the fact had no effect on the statutory maximum. The threshold quantities of drugs specified in subparagraphs (A), (B) and (C) of 21 U.S.C. § 841(b)(1) raise both the minimum and the maximum. Thus, despite *Harris*, one would think that drug quantity would be required to be charged in an indictment and proved to a jury beyond a reasonable doubt

Four circuits reached that conclusion before *Alleyne*, holding that drug quantity must be charged in an indictment and proved to a jury beyond a reasonable doubt because a drug quantity finding raises not only the mandatory minimum but the statutory maximum, and is thus an element under *Apprendi*, regardless of *Harris*.[3] Six other circuits adopted a mix and match approach, holding that there was no *Apprendi* violation as long as the mandatory minimum based on a quantity found by a judge under one section of the statute did not exceed the statutory maximum based on the quantity charged in the indictment and found by the jury or admitted by the defendant under a different section of the statute.[4] (Some courts used the same mix and match approach for "death or serious bodily injury resulted." *See, e.g.*, *United States v. Spero*, 375 F.3d 1285 (11th Cir. 2004).)

After *Alleyne*, the mix and match approach is no longer permissible. If the quantity upon which a mandatory minimum was based was determined by the judge making a finding at

[3] *See United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005); *United States v. Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003); *United States v. Graham*, 317 F.3d 262 (D.C. Cir. 2003); *United States v. Martinez*, 277 F.3d 517 (4th Cir. 2002).

[4] See *United States* v. *Goodine*, 326 F.3d 26, 33 (1st Cir. 2003); *United States v. Solis*, 299 F.3d 420 (5th Cir. 2002); *United States* v. *Leachman*, 309 F.3d 377, 382–83 (6th Cir. 2002); *United States* v. *Washington*, 558 F.3d 716, 719 (7th Cir. 2009); *United States* v. *Webb*, 545 F.3d 673, 677–78 (8th Cir. 2008); *United States* v. *Clay*, 376 F.3d 1296, 1301 (11th Cir. 2004). For example, suppose the indictment charged the defendant with conspiracy to distribute 100 grams of heroin in violation of 21 U.S.C. § 841(b)(1)(B) & § 846. The statutory range for that offense is 5-40 years. A jury convicted the defendant of that offense at trial, but at sentencing, the government contended that the defendant should receive a mandatory minimum of 10 years because he allegedly conspired to distribute at least 1 kilogram of heroin, the statutory range for which is 10 years to life. 21 U.S.C. § 841(b)(1)(A). Based on multi-level hearsay contained in a law enforcement report, the judge found by a preponderance of the evidence that the defendant conspired to distribute 1 kilogram of heroin, and imposed the 10-year mandatory minimum as the government requested. Under the mix and match approach, the court of appeals upheld the sentence because the 10-year minimum based on the judge-found quantity did not exceed the 40-year maximum for the quantity found by the jury.

sentencing or by adopting a presentence report establishing the quantity, there was an *Alleyne* violation.

The point about the presentence report bears emphasis. Consider the following common situation: the defendant did not admit the quantity in the plea hearing; the presentence report then asserted the quantity; the defendant did not dispute that quantity; and the district court, accordingly, adopted the presentence report and the quantity stated in it. The defendant's silence in the face of the presentence report's assertion of the quantity cannot be taken as his admission of that element. *See Mitchell v. United States*, 526 U.S. 314, 326-30 (1999) (defendant has the right to remain silent at sentencing and no negative inference may be drawn from that silence in determining the facts). That quantity remains a judge-found fact that establishes an *Alleyne* violation.

The same principles apply when the defendant disputed the quantity and the court found the quantity over his objection. The court-determined quantity violated *Alleyne*.

What impact does this have on the statutory range that would be imposed today? If, for example, the defendant admitted that he conspired to distribute 900 kg. of marijuana, *see* 21 U.S.C. § 841(b)(1)(B)(vii) (a quantity subject to a 5-year mandatory minimum), and contested that he conspired to distribute any more than that, but he was sentenced to 10 years based on the court's finding that the quantity was 1,000 kg. or more of marijuana, *see* 21 U.S.C. § 841(b)(1)(A)(vii) (the minimum quantity subject to a 10-year mandatory minimum), the minimum sentence is 5 years longer than it would have been today in the same circumstance.

Drug quantities also trigger higher guideline ranges by increasing the base offense level under § 2D1.1. If, prior to *Booker*, the judge imposed a sentence above the enhanced statutory mandatory minimum and within the guidelines range, the sentence was driven by a combination of the *Alleyne* violation with respect to the quantity that set the mandatory minimum, and the fact that the guidelines were mandatory which itself is an *Alleyne* violation. As noted in Part I, in addition to showing that the mandatory minimum would be lower today, show that the judge would impose a below-guideline sentence today because the guidelines are now advisory and the guideline range is greater than necessary to satisfy the purposes of sentencing in light of all of the factors and purposes set forth in 18 U.S.C. § 3553(a). *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.