Sixth Amendment — Right to Jury Trial — Mandatory Minimum Sentences — Alleyne v. United States

Under the Sixth Amendment, a criminal conviction must "rest upon a jury determination that the defendant is guilty of every element of the crime" in question beyond a reasonable doubt.[1] Since *McMillan v. Pennsylvania*,[2] however, judges have been able to find so-called "sentencing factors" at postconviction hearings without running afoul of the jury-trial guarantee.[3] Originally, legislatures were free to draw the line between elements and sentencing factors in drafting criminal codes.[4] However, in *Apprendi v. New Jersey*,[5] the Supreme Court held that any fact that increases a defendant's sentence "beyond the prescribed statutory maximum" is an element for the jury, regardless of the legislature's designation.[6] By contrast, in *Harris v. United States*,[7] the Court reaffirmed *McMillan*'s conclusion that a fact that increases only a mandatory minimum sentence may constitute a sentencing factor.[8] Last Term, in *Alleyne v. United States*,[9] the Court overruled *Harris* and determined that "*Apprendi* applies with equal force to facts increasing [a] mandatory minimum."[10] *Alleyne* continues the judiciary's recent trend of reining in the expansive sentencing authority asserted by legislatures over the past several decades. More specifically, *Alleyne* is the next major chapter in the rollback of structured sentencing regimes and legislative designation of sentencing factors that began thirteen years ago in *Apprendi*.

On October 1, 2009, Allen Ryan Alleyne and an accomplice set out to rob a convenience store manager as he made the store's daily bank deposits.[11] The two men positioned themselves along the manager's usual route and pretended to experience car trouble; when the manager stopped, Alleyne's accomplice withdrew a gun and forced him to

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1 United States v. Gaudin, 515 U.S. 506, 510 (1995).

2 477 U.S. 79 (1986).

3 *See id.* at 81, 85–86, 93. Judges may find these facts, which impact the severity of defendants' sentences, *see* Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000), by a preponderance of the evidence. *See* United States v. O'Brien, 130 S. Ct. 2169, 2174 (2010). The statute at issue in *McMillan* imposed a mandatory minimum sentence of five years' imprisonment if a judge found, as a sentencing factor, that a defendant had "visibly possessed a firearm" while committing certain felonies. *See* 477 U.S. at 81 (quoting 42 PA. CONS. STAT. § 9712(a) (2007)).

4 *See* Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 477 (1993).

5 530 U.S. 466 (2000).

6 *Id.* at 490.

7 536 U.S. 545 (2002).

8 *See id.* at 568–69; *McMillan*, 477 U.S. at 85–86.

9 133 S. Ct. 2151 (2013).

10 *Id.* at 2160, 2163.

11 *Id.* at 2155; Brief for Petitioner at 4, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335).

turn over the deposits.[12] The government charged Alleyne in the Eastern District of Virginia[13] with a number of federal crimes, including "using or carrying a firearm in relation to a crime of violence" in violation of 18 U.S.C. § 924.[14] Under this statute, defendants face one of three mandatory minimum sentences: five years in prison for a basic conviction, seven years "if the firearm [was] brandished," or ten years "if the firearm [was] discharged."[15]

At trial, the verdict form allowed the jury to indicate whether Alleyne had (1) used or carried, (2) possessed, or (3) brandished a firearm.[16] Although it could select more than one option, the jury checked only the first box.[17] Nevertheless, the presentence report concluded that Alleyne should receive the seven-year mandatory minimum for brandishing.[18] Alleyne objected, arguing that because the jury failed to find brandishing, any increase in his minimum sentence based on the judge's factfinding would violate his Sixth Amendment rights.[19] The court disagreed, relying on *Harris*'s determination that a judge could find brandishing as a sentencing factor.[20] Judge Payne ultimately found brandishing and sentenced Alleyne to seven years' imprisonment on the firearms count.[21]

The Fourth Circuit affirmed in a per curiam decision.[22] According to the court, *Harris* "foreclose[d] any argument" that factfinding at sentencing contravenes the jury-trial guarantee.[23] Because courts review sentencing determinations under a "clear error" standard on appeal, and because Judge Payne's finding was not "otherwise clearly erroneous," the Fourth Circuit upheld Alleyne's sentence.[24]

The Supreme Court vacated and remanded "for resentencing consistent with the jury's verdict."[25] Writing for the Court, Justice

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[12] *Alleyne*, 133 S. Ct. at 2155; Brief for Petitioner, *supra* note 11, at 4.

[13] *See* Brief for the United States at 2, *Alleyne*, 133 S. Ct. 2151 (No. 11-9335).

[14] *Alleyne*, 133 S. Ct. at 2155.

[15] 18 U.S.C. § 924(c)(1)(A) (2012).

[16] *See* Brief for the United States, *supra* note 13, at 3.

[17] *See Alleyne*, 133 S. Ct. at 2156; Brief for the United States, *supra* note 13, at 3.

[18] *See Alleyne*, 133 S. Ct. at 2156. Although the facts suggested that only Alleyne's accomplice had physically brandished the firearm, courts may hold defendants vicariously liable for § 924 violations by co-conspirators. *See, e.g.*, United States v. McLee, 436 F.3d 751, 758 (7th Cir. 2006).

[19] *Alleyne*, 133 S. Ct. at 2156.

[20] *Id.*

[21] *See id.*

[22] *See* United States v. Alleyne, 457 F. App'x 348, 349 (4th Cir. 2011) (per curiam). The panel on appeal consisted of Judges Wilkinson, King, and Agee.

[23] *Id.* at 350.

[24] *Id.* The court also rejected Alleyne's additional arguments regarding the sufficiency of the government's evidence and constructive amendment of the indictment. *See id.* at 349–50.

[25] *Alleyne*, 133 S. Ct. at 2164.

Thomas[26] overruled *Harris*, holding that its "distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum" is untenable in light of the Court's decision in *Apprendi* and the Sixth Amendment's original meaning.[27] Under *Apprendi*, any fact that necessarily raises the defendant's "penalty" is an element for the jury.[28] According to the Court, an increase in the minimum sentence *is* such a penalty increase; therefore, any fact that leads to that increase is an element for the jury.[29]

The Court began by setting forth the syllogism underlying its conclusion: Raising a mandatory minimum clearly "alters the prescribed range of sentences" facing a defendant.[30] And this range "*is* the penalty affixed to the crime."[31] Accordingly, *Apprendi*'s holding applies to facts that increase a minimum sentence.[32] Turning to historical practice, the Court observed that "criminal statutes have long specified both the floor and ceiling of sentence ranges," suggesting "that both define the legally prescribed penalty" for a given crime.[33] The Court also remarked that a minimum sentence necessarily "aggravate[s]" a defendant's punishment by increasing its expected duration or severity, which further convinced the Court that such a minimum is part of *Apprendi*'s penalty and therefore "must be submitted to the jury."[34]

The Court went on to note that this rule allows defendants "to predict the legally applicable penalty from the face of the indictment" and "preserves the historic role of the jury as an intermediary between the State and criminal defendants."[35] The Court also addressed the dissent's observation that Alleyne's "7-year minimum sentence could have been imposed with or without a judicial finding of brandishing, because the jury's finding already authorized a sentence of five years to life."[36] In the Court's view, "this fact is beside the point": when a judge's findings increase a mandatory minimum, that judge improperly appropriates the role of the jury.[37]

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[26] Justices Ginsburg, Breyer, Sotomayor, and Kagan joined those portions of Justice Thomas's opinion that constituted the opinion of the Court.

[27] *Alleyne*, 133 S. Ct. at 2155.

[28] *Id.* (citing Apprendi v. New Jersey, 530 U.S. 466, 483 n.10 (2000)).

[29] *Id.* The Court did not consider the "narrow exception to this general rule for the fact of a prior conviction," first recognized in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Alleyne*, 133 S. Ct. at 2160 n.1.

[30] *Alleyne*, 133 S. Ct. at 2160.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 2161 (emphasis omitted).

[35] *Id.*

[36] *Id.* at 2161–62.

[37] *Id.* at 2162. By analogy, the Court explained, a judge cannot sentence a defendant for assault if the jury convicted him only of larceny, even if both carry the exact same punishment. *Id.*

Accordingly, the Court overruled *Harris*.[38] It briefly dismissed any stare decisis concerns by noting that "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."[39] The Court also clarified that its decision does not affect judges' otherwise "broad discretion" to sentence defendants "*within* the range authorized by law."[40]

Writing for himself and three other Justices, Justice Thomas[41] elaborated on the history surrounding sentencing factors. He began by canvassing relevant case law, including *McMillan*, *Apprendi*, and *Harris*.[42] He then examined the traditional connection between crime and punishment, focusing on the common law's use of determinate sentences for each crime.[43] Finally, he argued that these "widely recognized principles" led to a practice of charging and submitting to a jury "every fact that was a basis for imposing or increasing punishment."[44]

Justice Sotomayor concurred,[45] writing separately to address the stare decisis implications of overruling *Harris*.[46] Absent some "special justification," she acknowledged, the mere conclusion that a prior case was wrongly decided is insufficient to warrant overruling it.[47] However, she identified two such special justifications here: First, overruling *Harris* would not implicate serious public or private reliance interests because *Harris* concerned a procedural rule.[48] Second, *Harris*'s "underpinnings" were unsound[49]: five Justices in *Harris* itself believed that the case was incompatible with *Apprendi*, and later cases rendered *Harris* "even more of an outlier" by extending *Apprendi*.[50]

Justice Breyer concurred in part and concurred in the judgment, agreeing that the time had come to overrule *Harris*.[51] He noted that he originally concurred in *Harris* (even though he found *Apprendi* hard to distinguish) because he believed that *Apprendi* was wrongly

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Similarly, under *Apprendi*, a judge's factfinding cannot raise the maximum available sentence, even if the judge ultimately selects a sentence within the original statutory range. *Id.*

38 *Id.* at 2163.

39 *Id.* at 2163 n.5.

40 *Id.* at 2163 (emphasis added).

41 Justices Ginsburg, Sotomayor, and Kagan joined Justice Thomas.

42 *See Alleyne*, 133 S. Ct. at 2156–58 (plurality opinion).

43 *See id.* at 2158.

44 *Id.* at 2159.

45 Justices Ginsburg and Kagan joined Justice Sotomayor.

46 *See Alleyne*, 133 S. Ct. at 2164 (Sotomayor, J., concurring).

47 *Id.* (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)) (internal quotation marks omitted).

48 *See id.*

49 *Id.* at 2164 (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)) (internal quotation marks omitted).

50 *Id.* at 2164–65.

51 *See id.* at 2166 (Breyer, J., concurring in part and concurring in the judgment).

decided.[52] Despite his continued disagreement with *Apprendi*, he indicated that the case had become settled law.[53] For this reason, he argued, "the law should no longer tolerate" the *Apprendi-Harris* conflict.[54] Justice Breyer also took issue with the dissent's reading of *Apprendi*, calling it "highly anomalous" to make juries find "facts that *permit* a judge to impose a higher sentence" without making them find "facts that *require* a judge to impose a higher sentence."[55]

Chief Justice Roberts dissented,[56] arguing that the majority had mistaken the Sixth Amendment's "protection for defendants from the power of the Government" as a "protection for judges from the power of the legislature."[57] According to the Chief Justice, the Constitution requires a jury to determine only those facts that increase a defendant's penalty "beyond the prescribed statutory *maximum*."[58] Not only is this common law rule supported by historical authorities and the Framers' intent,[59] but it also helps "give intelligible content to the right of jury trial"[60] by "guard[ing] against judicial overreaching."[61] The Chief Justice saw "no such risk of judicial overreaching" in *Alleyne* because the jury's verdict alone authorized a sentence of five years to life.[62] In other words, the finding of brandishing was not "essential" to Alleyne's seven-year sentence.[63]

Chief Justice Roberts also took aim at the majority's rule, arguing that it is not supported by historical evidence and does nothing "to preserve the role of the jury as a safeguard between the defendant and the State."[64] In particular, the majority would still allow a judge to find brandishing — even if a jury had not — and impose a higher sentence as a result.[65] All that the majority had prohibited was a legislative *requirement* that a judge take such action.[66] Therefore, the Chief

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52 *See id.*
53 *See id.*
54 *Id.*
55 *Id.* at 2167.
56 Justices Scalia and Kennedy joined Chief Justice Roberts.
57 *Alleyne*, 133 S. Ct. at 2168 (Roberts, C.J., dissenting).
58 *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) (emphasis added).
59 *Id.*
60 *Id.* at 2169 (quoting Blakely v. Washington, 542 U.S. 296, 305 (2004)) (internal quotation mark omitted).
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* at 2170.
65 *See id.*
66 *See id.*

Justice reasoned, any "infringement" was "on the province of the judge, not the jury," and a Sixth Amendment claim was inapposite.[67]

Justice Alito also dissented, criticizing the Court for giving short shrift to stare decisis concerns.[68] According to Justice Alito, the Court, if anything, should overrule *Apprendi*, given the "strong reasons to question" *Apprendi*'s historical conclusions regarding the Sixth Amendment's original meaning.[69] In a footnote, Justice Alito responded to Justice Sotomayor's concurrence, arguing that *Harris* was not undermined by future cases and still benefited from the force of stare decisis despite its fractured outcome.[70]

Alleyne represents the next major chapter in *Apprendi*'s sentencing revolution. During the late twentieth century, legislatures asserted and enjoyed a high degree of authority over criminal sentencing, including the denomination of sentencing factors and the regulation of judges' sentencing discretion.[71] However, in a series of landmark sentencing decisions comprising *Apprendi* and its progeny, the Court significantly curtailed this authority.[72] Throughout these cases, the Justices disagreed sharply over the proper scope of the Sixth Amendment, leading the Court to vacillate between three competing understandings of the jury-trial guarantee.[73] Despite continuing this underlying doctrinal disagreement,[74] *Alleyne* is a significant development in the *Apprendi*

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[67] *Id.* at 2171. In the final section of his opinion, the Chief Justice offered a rebuttal to several of the majority's arguments, noting the question-begging nature of the Court's central conclusions and disagreeing with the relevance of its assault/larceny hypothetical. *See id.* at 2171–72.

[68] *Id.* at 2172 (Alito, J., dissenting).

[69] *Id.*; *see also id.* at 2172–73.

[70] *See id.* at 2173 n.*. Justice Alito also criticized Justice Sotomayor for focusing on only two of the factors that are relevant in stare decisis inquiries (reliance interests and developments in the law) while failing to account for others (unworkability and changed circumstances). *See id.*

[71] *See* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 368 (2010); Rosenberg, *supra* note 4, at 477.

[72] *See* Kate Stith, Feature, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1477 (2008).

[73] *See* Benjamin J. Priester, *Structuring Sentencing:* Apprendi*, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 884 (2004) (describing the Justices' "interpretive impasse"). Under the first understanding, the jury-trial right reaches any fact that raises a defendant's expected punishment by increasing either end of the sentencing range. *See, e.g.*, *Alleyne*, 133 S. Ct. at 2155; Harris v. United States, 536 U.S. 545, 577–78 (2002) (Thomas, J., dissenting). Under the second, a jury must find only those facts without which a judge could not have imposed an equivalent sentence. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 304 (2004); *Harris*, 536 U.S. at 560–62 (plurality opinion). Under the third, the Sixth Amendment permits a legislature to designate almost any fact that alters a mandatory sentencing range as a sentencing factor, which a judge may find by a preponderance of the evidence. *See, e.g.*, *Blakely*, 542 U.S. at 328–29 (Breyer, J., dissenting); Apprendi v. New Jersey, 530 U.S. 466, 562–63 (2000) (Breyer, J., dissenting).

[74] As reflected in *Alleyne*'s 4–1–4 decision, the three competing understandings remain in tension. *Compare Alleyne*, 133 S. Ct. at 2155, *with id.* at 2166–67 (Breyer, J., concurring in part and concurring in the judgment), *and id.* at 2168–69 (Roberts, C.J., dissenting).

line of cases. In particular, it continues the judiciary's trend of scaling back so-called structured sentencing reforms and reining in legislative authority over sentencing factors.

Before *Apprendi*, legislative control of sentencing manifested itself in two related and interdependent ways. First, in writing criminal codes, legislatures were almost completely free to decide whether a particular fact would constitute an element of a crime (decided by a jury) or a sentencing factor (decided by a judge).[75] Accordingly, legislatures could "remov[e] decisions that strongly affect[ed] criminal defendants from the jury" for resolution "by a standard of less than proof beyond a reasonable doubt."[76] The New Jersey statute at issue in *Apprendi* is a prime example of such a transfer of decisionmaking authority. Under this law, a judge could enhance a convicted defendant's sentence upon finding, as a sentencing factor, that the crime in question had been committed in order to intimidate someone on the basis of race, sex, or another protected characteristic.[77]

Second, legislatures cabined judicial discretion through various structured sentencing regimes. For much of the twentieth century, judges possessed "virtually unlimited" sentencing discretion[78]: once a jury convicted a defendant, a judge was free to impose any sentence within the legislatively established range for the defendant's crime.[79] However, in the 1960s and 1970s, various social forces "coalesced into a general movement toward 'structured sentencing,'" through which legislatures regulated this discretion.[80] One particularly salient example of structured sentencing was the proliferation of various state and federal sentencing guidelines.[81] Other reforms included "determinate

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[75] *See* Rosenberg, *supra* note 4, at 477.

[76] *Id.*

[77] *See Apprendi*, 530 U.S. at 468–69.

[78] Priester, *supra* note 73, at 869; *see also Apprendi*, 530 U.S. at 481 (noting the nineteenth-century transition "from statutes providing fixed-term sentences to those providing judges discretion within a permissible range").

[79] *See Apprendi*, 530 U.S. at 481 ("[J]udges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case."); Priester, *supra* note 73, at 869 ("[S]o long as the judge imposed a lawful sentence in compliance with the statute, appellate review ordinarily was unavailable."). This grant of discretion was consistent with the "rehabilitative model of criminal punishment" prevailing at the time, Priester, *supra* note 73, at 869, which emphasized "individualized sentences," Bowman, *supra* note 71, at 370.

[80] Bowman, *supra* note 71, at 375. In part, such regulation reflected growing doubts regarding "the ability of the rehabilitative sentencing model to rehabilitate" and concerns over "unjustifiable [sentencing] disparities" produced by unlimited discretion. *Id.* at 374–75. In the words of one prominent proponent of sentencing reform, judges' "almost wholly unchecked and sweeping" discretion was "terrifying and intolerable for a society that professes devotion to the rule of law." MARVIN E. FRANKEL, CRIMINAL SENTENCES 5 (1973).

[81] *See* John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 242 (2006). Under the Federal Guidelines, for example, a judge would sentence a defendant within a relatively narrow range

sentencing systems," "mandatory minimums," and "the abolition of parole."[82] In part, legislators turned to structured sentencing in an effort to realize the benefits of both individualized punishment and determinate sentencing at the same time.[83]

Thus, by the late twentieth century, legislatures had come to play an active role in the sentencing process. However, *Alleyne* was not decided against this backdrop. Instead, the Court has limited these two legislative roles (determination of sentencing factors and implementation of structured sentencing reforms) through a recent series of cases.[84] The first blow landed in *Apprendi*. There, the Court determined that only a jury can make a factual finding that increases a defendant's maximum statutory sentence: any such facts are necessarily elements of the crime under the Sixth Amendment.[85] On the one hand, some of *Apprendi*'s language sounded quite expansive: the Court thought it "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed *range* of penalties to which a criminal defendant is exposed."[86] On the other hand, *Apprendi*'s narrow holding made its effect on structured sentencing reforms like guidelines and minimums unclear,[87] particularly in light of *Harris*.[88]

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that was calculated based on the severity of the crime (the "offense level") and the defendant's criminal history. *See* M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 540–42 (2005). The former depended on the specific facts of the defendant's crime — some of which were elements for the jury and others of which the judge could find. *See* Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 324–25 (1994). Although judges had some ability to depart from the sentencing range that resulted from plotting a defendant's offense level and criminal history on the Guidelines grid, this discretion was highly limited. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 40 (2000).

[82] Pfaff, *supra* note 81, at 242. Not all commentators agree on whether each of these reforms should be labeled a part of the "structured sentencing" movement. *Compare, e.g.*, Bowman, *supra* note 71, at 376 (arguing that mandatory minimums are "commonly, but erroneously, lumped into the category of structured sentencing"), *with, e.g.*, Robert P. Mosteller, *New Dimensions in Sentencing Reform in the Twenty-First Century*, 82 OR. L. REV. 1, 17 (2003) ("Another form of structured sentencing is the mandatory minimum . . . .").

[83] Priester, *supra* note 73, at 898.

[84] *See* Stith, *supra* note 72, at 1477 (noting that this series "reset the balance of authority in federal sentencing").

[85] *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Accordingly, the New Jersey hate crimes statute discussed above was unconstitutional. *See id.* at 491–92.

[86] *Id.* at 490 (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)).

[87] *See* Priester, *supra* note 73, at 878–79. As Professor Frank Bowman notes, "[o]ne of the peculiarities of the *McMillan-Harris* sequence is that much of the debate in these cases was plainly driven by their potential effect on guidelines and other structured sentencing systems, yet none of these cases involved such systems." Bowman, *supra* note 71, at 407 (footnote omitted).

[88] *See* Priester, *supra* note 73, at 884. As discussed, shortly after *Apprendi*, the *Harris* Court declined to overrule *McMillan* and extend *Apprendi* to mandatory minimums. *See id.* at 865.

The Court's landmark decisions in *Blakely v. Washington*[89] and *United States v. Booker*[90] ultimately reaffirmed and expanded *Apprendi*, further revolutionizing the sentencing landscape. In *Blakely*, the Court considered the constitutionality of Washington's state sentencing guidelines in a prosecution for second-degree kidnapping, a "class B felony."[91] Under Washington law, any class B felony carried a general sentence range of zero to ten years.[92] However, Washington's guidelines statute further constrained the sentence by creating a narrower "standard range" for each particular offense from which the judge could deviate only by making additional factual findings at sentencing.[93] The Court held that allowing upward departures from the standard range based on such factfinding violated the Sixth Amendment in light of *Apprendi*.[94] Less than a year later, the Court extended this reasoning to cover the Federal Guidelines in *Booker*.[95] The Court held that those guidelines, which mirrored the Washington guidelines in all material respects,[96] similarly violated the Sixth Amendment.[97]

As the next major development in the *Apprendi* line, *Alleyne* followed in the footsteps of these cases in a number of important ways. First, like each of these cases, *Alleyne* placed hard limits on the legislature's ability to shift facts back and forth between the "elements" and "sentencing factors" categories.[98] Second, like *Blakely* and *Booker*, *Alleyne* affected a touchstone of structured sentencing: whereas the former two cases reined in guidelines, the latter cabined mandatory

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89 542 U.S. 296 (2004).

90 543 U.S. 220 (2005).

91 542 U.S. at 299.

92 *See id.*

93 *See id.*; Bowman, *supra* note 71, at 408–09. The standard range for second-degree kidnapping with a firearm was forty-nine to fifty-three months. *Blakely*, 542 U.S. at 299.

94 *See Blakely*, 542 U.S. at 303–05. In doing so, the Court considered the relevant maximum penalty to be that which could be imposed solely based on a jury verdict or guilty plea — in other words, the guidelines' standard range. *See id.* at 303–04.

95 *See* 543 U.S. at 233.

96 *See id.* Like Washington's guidelines, the Federal Guidelines narrowed a judge's discretion within the larger statutory sentencing range. *See id.* at 227. For example, the drug statute under which Booker was charged authorized a maximum sentence of life in prison, while the Guidelines base range in his case called for 210 to 262 months. *Id.*

97 *See id.* at 226–27. To remedy this unconstitutionality, *Booker* rendered the Guidelines advisory. *See id.* at 245. Because advisory guidelines permit a judge to "exercise[] his discretion to select a specific sentence within a defined range," they do "not implicate the Sixth Amendment." *Id.* at 233.

98 *Apprendi* prohibited legislatures from authorizing judges to increase a defendant's sentence beyond a statutory maximum. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). *Blakely* and *Booker* removed legislatures' ability to create statutory maximums-within-maximums from which a judge could deviate by finding additional facts. *See Booker*, 543 U.S. at 231–33; *Blakely*, 542 U.S. at 304. And before *Alleyne*, even if a jury did not make a factual finding as an element of the crime, a judge could examine the same fact at sentencing and adjust a mandatory minimum accordingly. *See Alleyne*, 133 S. Ct. at 2155–56.

minimums. *Alleyne* thus paralleled *Blakely* and *Booker* in terms of its effect on judicial discretion: all three left judges with greater flexibility at sentencing.[99] Finally, like these prior cases, *Alleyne* took a defendant-friendly view of exactly what constitutes the penalty for a crime.[100] In *Blakely*, the Court indicated that the Washington guidelines' narrower standard range constituted the relevant penalty, despite arguments that the Court should construe the ten-year maximum for all class B felonies as such.[101] Similarly, in *Booker*, the Court looked to the Guidelines' "'base' sentence" rather than the offense statute's maximum penalty.[102] *Alleyne* followed suit, concluding that a penalty includes both a maximum and minimum sentence, despite arguments that only the maximum matters under the Sixth Amendment.

On the one hand, *Alleyne* likely could have a significant impact on sentencing practice, as defendants are often sentenced to the exact amount of the applicable minimum — at least for firearms offenses under § 924.[103] On the other hand, the history in this area cautions against overestimating the degree to which this decision will impact defendants' outcomes. For example, in the years following *Booker*, judges still largely sentenced within the advisory Guidelines range.[104] Similarly, in § 924 cases where juries fail to find brandishing, judges may still tend to impose seven-year sentences if they find brandishing by a preponderance of the evidence (even though such sentences are no longer mandatory). Nevertheless, *Alleyne* represents a significant development in the tug-of-war between the judiciary and the legislature over control of the sentencing process: it is thus the next major chapter in the rollback of structured sentencing reforms and legislative authority over sentencing factors that began in *Apprendi*. Indeed, given the Court's near-total elimination of binding sentencing factors, *Alleyne* may even be the last such chapter.

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[99] Each of these cases eliminated legislative constraints on judges' sentencing power, *see* Stith, *supra* note 72, at 1477, while simultaneously reaffirming judges' "broad" ability to exercise discretion at sentencing, *Booker*, 543 U.S. at 233. In particular, after *Alleyne*, a judge will still be bound by a jury's mandatory minimum–enhancing factual findings. *See Alleyne*, 133 S. Ct. at 2167 (Breyer, J., concurring). But in cases where a jury has not made such findings, a judge is no longer bound by her own factual findings. *See id.* at 2170–71 (Roberts, C.J., dissenting).

[100] Given the Court's language in *Apprendi*, the definition of "penalty" is critical: it determines *Apprendi*'s ultimate reach. *See Apprendi*, 530 U.S. at 490.

[101] *See* 542 U.S at 303–04.

[102] 543 U.S. at 227. Some commentators have argued that *Blakely* and *Booker*'s definition of the relevant maximum penalty conflicted with prior understandings of the concept. *See, e.g.*, Bowman, *supra* note 71, at 412–13; Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1091–92 (2005).

[103] *See* Harris v. United States, 536 U.S. 545, 578 (2002) (Thomas, J., dissenting).

[104] *See* Pfaff, *supra* note 81, at 239–40.