

ORIGINAL

IN THE OHIO SUPREME COURT

STATE OF OHIO,	:	CASE NO.: 2012-0216
	:	
Plaintiff/Appellant	:	
	:	ON APPEAL FROM THE
vs.	:	NINTH DISTRICT COURT OF
	:	APPEALS, SUMMIT COUNTY
DAVID WILLAN	:	
	:	COURT OF APPEALS
Defendants/Appellee	:	CASE NO.: CA-24894
	:	

CROSS-APPELLEE WILLAN'S MOTION FOR RECONSIDERATION

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REQUEST FOR RECONSIDERATION

Now comes David Willan, Cross-Appellee, by and through the undersigned attorneys, and pursuant to Rules of Practice of The Supreme Court of Ohio 18.02, and hereby respectfully requests that this Court reconsider its June 11, 2013 Decision. In the Decision, the Court reversed the Ninth District Court of Appeals Decision and found that former Ohio Revised Code Section 2929.14(D)(3)(a) mandates a ten year mandatory minimum sentence for individuals convicted of certain violations of ORC § 2923.32. Mr. Willan asks the Court to reconsider its Decision that the statute cannot be understood in more than one way and is, therefore, unambiguous. Mr. Willan also asks this Court to reconsider its Decision in light of the recent Supreme Court of the United States (“SCOTUS”) decision in *Alleyne v. United States*, 570 U. S. ____ (2013), Case No. 11–9335, decided June 17, 2013.

WILLAN DECISION

In *Willan*, the Court determined by a four to three majority that ORC § 2929.14(D)(3)(a) was unambiguous and was capable of no other interpretation than the one advanced by the State. The Court held that “there is only one reasonable construction of R.C. 2929.14(D)(3)(a): a mandatory ten-year prison term is required ‘if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree.’ Because Willan fell squarely within the scope of this provision, the trial court correctly imposed the mandatory ten-year prison term.”

LAW AND ARGUMENT

I. ORC § 2929.14(D)(3)(a) Is Ambiguous Because It Is Capable Of Being Understood In More Than One Way

ORC § 2929.14(D)(3)(a) is ambiguous because it is susceptible to more than one interpretation. An “alternative and plausible interpretation” of ORC § 2929.14(D)(3)(a) was provided by all three judges of the Ninth District Court of Appeals. It was the only unanimous portion of their Decision. Three Justices of this Court believed that the interpretation of the Court of Appeals was credible. In her dissent, Justice Lanzinger cites the definition of ambiguity from *Webster's Third New International Dictionary*. “‘Ambiguity’ is defined as ‘the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time.’ *Webster's Third New International Dictionary* 66 (1986).” The definition is applicable here where of the six of the ten Judges that have examined the language have found it to be ambiguous or capable of being understood in more than one way. Or, as stated by Justice Lanzinger, it is ambiguous because it is susceptible to an “alternative and plausible interpretation.” That six Judges can find an alternative interpretation of the statute reasonable is the essence of ambiguous. While a particular Judge may find one interpretation more compelling than another interpretation, that six Judges found a statute to be ambiguous, or capable of being understood in more than one way, is persuasive that the language is, in fact, ambiguous.

Given that there is legitimate and reasoned disagreement about the interpretation of the statute, the principle of lenity must be considered. The rule of lenity, as articulated by the dissent, is a principle that is especially important here where the notice of the potential penalties for a violation ORC § 2923.32 did not include a ten-year mandatory minimum. This is clear from reading ORC § 2923.32, which only provides for an enhancement in the case of certain

human trafficking offenses. In fact, the penalty provisions of ORC § 2923.32 were amended in the same bill that created ORC § 2929.14(D)(3)(a). 1995 Ohio SB 2 amendment to § 2923.32 made a violation of the statute a second-degree felony unless one of the predicate acts was a first, second or third degree felony, which elevated the crime to a first degree felony. 1995 Ohio SB 2's amendment to § 2923.32 specifically dealt with how the level of the degree of the predicate act impacts the penalty but did not include any mention of a mandatory ten-year sentence when one of the predicate act was a first degree felony. See 1995 Ohio SB 2.

The lack of notice is also clear from the appellate court decisions cited in Mr. Willan's brief that did not impose or even discuss a mandatory ten-year minimum sentence. See, e.g., *In State v. Williams*, 2012 Ohio 1240; 2012 Ohio App. LEXIS 1087 (2nd App. Dist.), *State v. Orosz*, 2009 Ohio 4922; 2009 Ohio App. LEXIS 4164 (6th App. Dist.), *State v. Foreman*, 2008 Ohio 4408; 2008 Ohio App. LEXIS 3711, ¶ 6, *State v. Skaggs*, 2004 Ohio 6653; 2004 Ohio App. LEXIS 6024 (6th App. Dist.). All of these cases involved ORC § 2923.32 convictions with first degree felonies as incidents in the pattern of corrupt activity and none of the prosecutors, trial Judges or appellate Judges came to the conclusion that ORC § 2929.14(D)(3)(a) required a mandatory ten-year sentence.

Unaddressed by the Court in its Decision is the confusion the language generates regarding to which felony the mandatory minimum applies. The Court reads the relevant part of the statute as: "if the court imposing sentence upon an offender *for a felony* finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree,... the court shall impose upon the offender for the felony violation a ten-year prison term." The progression of the statutory language clearly indicates that the Court is sentencing the offender for a felony *before* it finds that the offender is

guilty of corrupt activity. The felony first mentioned, the one that the court is imposing sentence upon, is unknown if it is not given any context by the preceding language. It is the unknown felony that appears to require the ten-year mandatory sentence, not the secondary finding of corrupt activity or the even later referenced pattern of corrupt activity. The only other “the felony violation” for which “the court shall impose upon the offender” “a ten-year prison term” is the felony of the first degree which is the incident of corrupt activity, not a violation of ORC §2923.32.

This is especially concerning given that for the remainder of ORC § 2929.14(D)(3)(a), the “the felony violation” receiving the ten-year prison term “ is clearly delineated. For example, as it relates to ORC § 2925.02 in the beginning of the statute, it is clear what felony brings a ten-year mandatory sentence: ORC § 2925.02. The statute provides that “if the offender commits a felony violation of section 2925.02” and the specification applies, the ten-year mandatory sentence applies to the violation of ORC § 2925.02.

This confusion is compounded by the omission of any explanation from the Court of the distinction between “corrupt activity” and “engaging in a pattern of corrupt activity.” The Court’s ultimate holding is that “a mandatory ten-year prison term is required ‘if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree.’” The Court highlights the language of ORC § 2923.32 which provides that no “person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity.” It also quotes ORC § 2923.31 which defines corrupt activity and includes ORC § 1707.44. “Corrupt activity” is not the crime of engaging in a pattern of corrupt activity. When an individual “is guilty of corrupt

activity,” it means that he has committed a crime enumerated in ORC § 2923.31. It does not by its plain language mean a conviction under ORC § 2923.32. This also highlights an important distinction between ORC §§ 2929.14(D)(3)(a) and 2929.13(F)(10). In addition to actually referencing ORC § 2923.32, § 2929.13(F)(10) clearly applies the discussed prison term to a single felony. The prison term unmistakably applies to a “violation of section 2923.32.”

Finally, in Mr. Willan's discussion of the doctrine of *eiusdem generis*, he was not relying upon it to provide meaning to the words “corrupt activity.” Instead, the doctrine was relied upon to give meaning to the language “for a felony” at the beginning of the language. The doctrine provided support to Mr. Willan's previously articulated position that norms of grammatical and linguistic interpretation require that the only felonies to which the phrase “for a felony” can refer, given the preceding context, are drug felonies. It is the words “for a felony” that must be given some context by the doctrine of *eiusdem generis*. “For a felony” are the words of general meaning that follow the discussion of words of a “particularly enumerated class.” That enumerated class are drug offenses. Therefore, when the language at issue here begins “if the court imposing sentence upon an offender *for a felony*,” it is the phrase “for a felony” that gains its meaning from the preceding enumerated list of drug offenses.

The language of ORC § 2929.14 (D)(3)(a) is more than complex as it does not provide a natural reading that gives a defendant notice of potential penalties. This goes beyond the mere possibility of clearer phrasing. The language is capable of being understood in more than one way. It is ambiguous and should not be interpreted to increase a penalty and provide for a mandatory minimum sentence that is equal to the maximum sentence available for a violation of ORC § 2923.32. For these reasons, Mr. Willan respectfully requests that this Court reconsider its June 11, 2013 Decision.

II. A Mandatory Minimum Sentence Of Ten Years For Mr. Willan’s Conviction Under ORC § 2923.32 Violates His Sixth Amendment Right As Expressed In The June 17, 2013 Decision Of The United States Supreme Court In Alleyne V. United States

On June 17, 2013, the SCOTUS handed down its decision in *Alleyne v. United States*, 570 U. S. ____ (2013), Case No. 11–9335. In that decision, the Court found that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury. The Court had held since its ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that facts that raise the sentence over the statutory maximum sentence for a crime must be found by a jury beyond a reasonable doubt and not by a judge. After *Apprendi*, the Court ruled in *Harris v. United States*, 536 U.S. 545 (2002) that the same principle did not apply to facts that raise the mandatory minimum sentence. In *Alleyne*, the Court overruled *Harris* and extended this principle of *Apprendi* to facts that must be found to increase a mandatory minimum “because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, *Harris* was inconsistent with *Apprendi*. It is, accordingly, overruled.” *Alleyne*, slip op at 15.

This holding of *Alleyne* is based upon the guarantees of the Sixth Amendment, which “provides that 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 that each element of a crime be proved to the jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U. S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U. S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime.” *Alleyne*, 570 U. S. ____, *11.

ORC § 2923.32(B)(1), engaging in a pattern of corrupt activity, provides that the punishment for a violation is a felony of the second degree or a felony of the first degree if “at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder...” or if it relates to certain crimes involving human trafficking. ORC § 2929.14(A)(1) and (2) provide that the minimum sentences for felonies of the first and second degree are three and two years, respectively. This Court ruled in the instant case that those minimum sentences for a violation of ORC § 2923.32(B)(1) are increased to a mandatory minimum sentence of ten years (now eleven years after 2011 Ohio HB 86) when the conviction is for “corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree.” *Willan*, ¶ 1.

Alleyne requires that the trigger for the mandatory minimum sentence be considered an “element” of the offense that must be determined by a jury beyond a reasonable doubt. Therefore, for a conviction under ORC § 2923.32 to require a mandatory minimum sentence of ten years, the jury must find beyond a reasonable doubt that one of the incidents of corrupt activity is a felony of the first degree. It is not simply enough that a defendant also be convicted of felonies of the first degree that *may* by definition be incidents of corrupt activity. The jury must make a factual finding that one of the incidents of corrupt activity *is* a felony of the first degree.

The statute addressed in this case, former ORC § 2929.14(D)(3)(a), impermissibly calls for a judge to make such a factual finding. The statute as read by the majority in *Willan* states that “if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree,” the offender is subject to a mandatory minimum sentence of ten years. This

is exactly the type of factual finding by a judge that was found violative of the Sixth Amendment in *Alleyne*. The language addressed by this Court in *Willan* is the only portion of the statute that calls for a judicial finding. The remainder of the statute is phrased: “if defendant is convicted of” or “if the offender is guilty of.”

The State cannot argue here that the Judge does not need to make a factual finding because the Verdict Form provides all the facts necessary to the finding because there is no such finding in the Verdict Form. In Mr. Willan’s Indictment, Count One was the violation of ORC § 2923.32 and it included two specifically enumerated incidents of corrupt activity, both aggravated theft. See Indictment pp. 2-3. Count One also swept within its orbit much of the remaining Counts of the Indictment, including Counts Two through Six and Twenty-Eight through Thirty, all of which Mr. Willan was originally convicted at trial. Counts Two through Six charged False Representation in the Registration of Securities, Count Twenty-Eight charged Securities Fraud, Count Twenty-Nine charged Aggravated Theft, and County Thirty charged Theft from the Elderly.¹ Counts Two, Five, Twenty-Eight, Twenty-Nine and Thirty were all reversed by the Court of Appeals on insufficiency grounds. Only Counts Three, Four and Six for False Representation in the Registration of Securities remain, related to the filing of a form on three occasions.

The Verdict Form for Count One reads, in part: “We further find that at least one of the incidents of corrupt activity was False Representation in the Registration of Securities, Aggravated Theft or Theft from the Elderly.” Nowhere on Count One’s Verdict Form is the finding that one of the offenses in the pattern of corrupt activity is a felony of the first degree.

¹ The Court’s Decision herein incorrectly stated that the “corrupt-activity count was predicated on, inter alia, five first-degree-felony counts of making false representations for the purpose of registering securities.” *Willan*, ¶ 2.

Further, the Verdict Form does not allow a judge to conclusively determine that the jury found that the remaining Counts Three, Four and Six for False Representation in the Registration of Securities were considered as “incidents of corrupt activity.” The Verdict Form does not indicate that the jury found that all of the crimes of False Representation in the Registration of Securities, Aggravated Theft or Theft from the Elderly were part of the pattern of corrupt activity. Instead, the Verdict Form only conclusively indicates that the jury found that one of them was. Since five of the eight counts, all of the Aggravated Theft or Theft from the Elderly counts and two of the False Representation in the Registration of Securities, were reversed by the Court of Appeals on insufficiency of the evidence grounds, there is no longer a jury finding, beyond a reasonable doubt, that any of the crimes listed in the Verdict Form were an incident of corrupt activity. Therefore, after the Court of Appeals decision, the only way a Court may reach the conclusion that one of the incidents of corrupt activity was False Representation in the Registration of Securities is to make a finding that Counts Three, Four and Six² are incidents in the pattern of corrupt activity. This is the type of judicial fact-finding that is now prohibited by *Alleyne*.

If the Verdict Form had included an “and” instead of an “or,” it may indicate that the jury had determined that False Representation in the Registration of Securities was a part of the pattern of corrupt activity. However, based on the way the Verdict Form is written, there is no finding by the jury that any of False Representation in the Registration of Securities were an

² A further complicating factor in allowing a judge to make this finding is that the Verdict Forms for False Representation in the Registration of Securities cannot be relied upon to make a new finding that Mr. Willan is guilty of a first-degree felony. The Verdict Forms provide that the value of the registration is one hundred thousand dollars or more. This amount no longer makes the crime a felony of the first degree. See § 1707.99(E), which provides that if the value of the securities is one hundred fifty thousand dollars or more, the offender is guilty of a felony of the first degree.

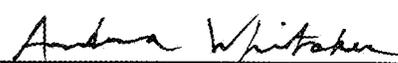
incident of any pattern of corrupt activity. Regardless of whether it is an “and” or an “or”, the Verdict Form does not conclusively demonstrate that the three remaining False Representation in the Registration of Securities were an incident of corrupt activity in the pattern of corrupt activity found in Count One.

Mr. Willan’s case must be considered in light of *Alleyne*. This is because he raised *Alleyne* and the issue of judicial fact finding in his Merit Brief (see 11/14/12 Brief, Section H, pp. 36-39) and this Court has not yet issued its mandate nor is his conviction final. Much of the Court of Appeals’ Decision remains untouched by this Court’s ruling. He must be resentenced by the trial court in accordance with the portion of Court of Appeals’ Decision not reversed by this Court. Mr. Willan respectfully requests that this Court reconsider its June 11, 2013 Decision in light of the Supreme Court of the United States’ Decision in *Alleyne*.

CONCLUSION

The *Alleyne* decision requires a reconsideration of this Court's ruling. The Supreme Court of the United States has issued a timely ruling that implicates important Sixth Amendment rights that must be considered here. In addition, Mr. Willan requests that the Court reconsider the application of the rule of lenity to ORC § 2929.14(D)(3)(a) and also reconsider whether the progression of the statutory language indicates that the mandatory ten-year sentence applies to a felony other than a violation of ORC 2923.32. That is, the mandatory ten-year sentence applies only when the Court is imposing a sentence "for a felony," not the felony of a violation of ORC 2923.32.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing was served by regular U.S. mail this 21st day of June, 2013 upon:

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