

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

DAMON L. BEVLY,

Appellant

Case No.: 13-821

On Appeal From the
Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 12AP-471

MOTION FOR RECONSIDERATION OF
APPELLANT DAMON L. BEVLY

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Franklin County Public Defender

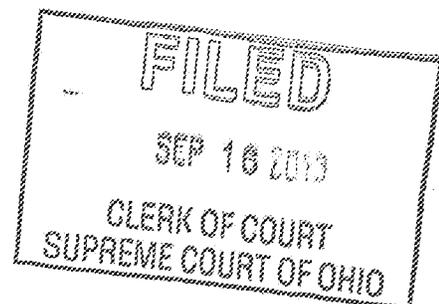
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MOTION FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. 18.02, Appellant Damon L. Bevly respectfully moves this Court to reconsider its decision of September 4, 2013, in which the Court declined to accept jurisdiction of the appeal.

Grounds for this Motion are set forth with particularity in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

This appeal presents the Court with the opportunity to review the constitutionality of R.C. 2907.05(C) (2) (a), a statutory provision that addresses sentencing for the offense of gross sexual imposition. The statute provides that when the victim of this offense is a minor under the age of thirteen, the offense is a third degree felony, carrying with it the presumption that the sentence will include a prison term. But when "evidence other than the testimony of the victim was admitted in the case corroborating the violation", a prison term is *mandatory*.

Trial counsel for the Appellant asserted constitutional challenges to this statute, including the argument that the statute violated the defendant's right to trial by jury as guaranteed by the Sixth Amendment to the United States Constitution. Counsel argued that R.C. 2907.05(C)(2)(a) was unconstitutional under the United States Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 244, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); and *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 656 (2007). These cases stand for the proposition that the guarantees of the Sixth Amendment require jury determination of any fact that increases the maximum punishment authorized for the offense. The defense argued that this line of cases required the determination that R.C. 2907.05(C) (2) (a) is unconstitutional.

The Court of Appeals rejected this analysis. See *State v. Bevely*, 10th Dist. Franklin No. 12AP-471, 2013-Ohio-1352, ¶¶ 14-15. But after the court ruled in *Bevely*, and after Appellant perfected the within appeal, the United States Supreme Court issued decision in *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). *Alleyne* is an extension of the *Apprendi* analysis to a case involving an increase in minimum sentences based upon a factual finding by a court rather than a jury.

Apprendi holds that any facts which increase a criminal defendant's maximum possible sentence are considered "elements" of the criminal offense that must be proved to a jury beyond a reasonable doubt. For example, if a statute makes it illegal to sell a drug and authorizes a ten-year maximum sentence for such an offense, but provides for a

twenty-year maximum sentence for a sale of a larger quantity of the same drug, the jury rather than the judge must make a finding about the quantity before the twenty-year maximum may be imposed.

Two years after *Apprendi*, the Court decided in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). *Harris* held that *Apprendi* did not apply to facts that would increase a defendant's mandatory *minimum* sentence, and therefore that a judge could constitutionally decide to apply a mandatory minimum sentence on the basis of facts not proven to a jury. In *Alleyne*, the Court expressly overruled *Harris*.

At issue in *Alleyne* was a seven-year sentence imposed on a defendant for having “brandished” a firearm while “using or carrying [it] during and in relation to a crime of violence.” *Alleyne* was charged with using or carrying a firearm in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A), which carries a 5–year mandatory minimum sentence, § 924(c)(1)(A)(i), that increases to a 7–year minimum “if the firearm is brandished. At trial, the jury found only that the defendant used or carried the firearm, which carries a five-year mandatory minimum sentence. The judge, relying on *Harris*, found that the defendant had “brandished” the firearm, and thereby increased the defendant’s mandatory minimum sentence to seven years. In a five-to-four decision by Justice Thomas (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan), the Court today held that the defendant’s seven-year mandatory minimum sentence violated his Sixth Amendment right to trial by jury because the question of brandishing was never submitted to the jury. The Court’s opinion explains that the logic of *Apprendi* requires a jury to find all facts that fix the penalty range of a crime. According to the Court, the

mandatory minimum is just as important to the statutory range as is the statutory maximum. According to the Court at page 12 of the slip opinion:

It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed * *
* And because the legally prescribed range *is* the penalty affixed to the crime, *infra*, this page, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.

Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. *Harris, supra*, at 579 (THOMAS, J., dissenting); *O'Brien*, 560 U. S., at ___ (THOMAS, J., concurring in judgment) (slip op., at 2). 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." *Apprendi, supra*, at 522 (THOMAS, J., concurring). Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior? See *McMillan*, 477 U. S., at 88, 89 (twice noting that a mandatory minimum "ups the ante" for a criminal defendant); *Harris, supra*, at 580 (THOMAS, J., dissenting). This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

R.C. 2907.05(C)(2)(a) likewise runs afoul of the Sixth Amendments to the United States Constitution and Section 14, Article I of the Ohio Constitution. The statute elevates a non-mandatory sentence to a mandatory sentence (and thereby increases the minimum penalty) when the court, and not a jury, finds "corroborating evidence." The statute, then, is fraught with problems that run afoul of Sixth Amendment analysis.

The United States Supreme Court decided *Alleyne* after the Court of Appeals ruled in *Bevly*, and after Appellant perfected his appeal to this Court. While the State discussed *Alleyne* in its Amended Memorandum Opposing Jurisdiction, the analysis erroneously claims that the corroboration requirement of R.C. 2907.05(C) (2) (a) does not require fact finding. The critical question—does the evidence corroborate the victim's testimony—requires a weighing of evidence that is inherently factual.

Accordingly, Appellant Damon L. Bevly respectfully urges the Court to grant this motion for reconsideration, and permit the parties to brief and argue the merits of the issues the case presents. In the alternative, Appellant urges the Court to remand this case to the Tenth Appellate District for further briefing and argument in light of the holding of *Alleyne*.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to accept jurisdiction and reverse the judgment of the Franklin County Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion for Reconsideration was served upon the following counsel by hand delivery, this 16th day of September 2013:

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