BETWEEN A ROCK AND A HARD 50:

THE EFFECT OF THE *ALLEYNE* DECISION ON KANSAS' SENTENCING PROCEDURES

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I. INTRODUCTION

On May 31, 2009, controversial late-term abortion provider George Tiller was shot by Scott Roeder as Tiller was serving as an usher at his church.[1] After committing the murder, Roeder threatened two witnesses with his handgun and drove off.[2] At his trial, Roeder at no point denied the murder, but instead declared that the murder was justified because of the lives it would ultimately save.[3] A jury convicted him in 37 minutes.[4] After the jury's conviction, Judge Warren Wilbert handed down a Hard 50 sentence.[5]

Under Kansas law, a Hard 50 sentence is appropriate when the trial court determines that a first-degree premeditated murder was committed and that certain enumerated aggravating circumstances were present, most notably whether the murder was particularly heinous in nature.[6] If aggravating factors are present and are not outweighed by mitigating factors, the judge can sentence the defendant to 50 years without parole, which is 25 years more than

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1. Joe Stumpe & Monica Davey, *Abortion Doctor Shot to Death In Kansas Church*, N.Y. TIMES, May 31, 2009, *available at* http://www.nytimes.com/2009/06/01/us/01tiller.html?pagewanted=all&_r=0.

2. *Id.*

3. Monica Davey, *Abortion Foe Found Guilty in Doctor's Killing*, N.Y. TIMES, Jan. 29, 2010, *available at* http://www.nytimes.com/2010/01/30/us/30roeder.html.

4. Ron Sylvester, *Scott Roeder gets Hard 50 in murder of abortion provider George Tiller*, THE WICHITA EAGLE, Mar. 31, 2010, *available at* http://www.kansas.com/2010/04/01/1249310/roeder-to-be-sentenced-thursday.html.

5. *Id.*

6. State v. Warledo, 286 Kan. 927, 928 (2008).

the standard statutory minimum.[7] In implementing the Hard 50 sentence in Roeder's case, the judge determined that the required aggravating factors were present. Without the presence of any mitigating circumstances, the judge sentenced Roeder to 52 years without parole: 50 years for the murder and one year for the threatening of each witness.[8]

The constitutionality of the Hard 50 law has been constantly challenged in Kansas courts and constantly upheld as consistent with *Apprendi v. New Jersey*.[9] *Apprendi* prohibited judges from enhancing sentences beyond statutory maximums based on facts not determined by a jury, with the limited exception of prior criminal history.[10] The Hard 50 law was an enhancement of a minimum sentence, and until recently, was in compliance with *Apprendi*. However, the 2013 United States Supreme Court case *Alleyne v. United States* effectively ruled a similar New Jersey law unconstitutional.[11] The Supreme Court held that because mandatory minimum sentences increase the penalty for a crime, any fact that increases that minimum sentence is an element, which must be submitted to a jury and proved beyond a reasonable doubt.[12] In response, Kansas legislature called a special session to make the necessary changes to the Hard 50 law.[13] The new Hard 50 law gives the authority to decide whether the aggravating and mitigating factors exist to a jury.[14] The legislature also called for the empanelling of new juries to resentence those who already received the Hard 50 sentence and whose appeals are currently pending.[15]

Scott Roeder has not exhausted his appeals, and as such, will qualify for a new sentencing trial. Estimates indicate that at least fifteen other inmates will qualify for new sentencing trials as well.[16] If, upon resentencing, a jury does not find the presence of aggravated circumstances or that any aggravating circumstances are outweighed by mitigating circumstances, Roeder could be

7. State v. Engelhardt, 280 Kan. 113, 144 (2005) (noting that "[w]ithout the imposition of a hard 50, [defendant] still would have not been eligible for parole for 25 years").

8. Sylvester, *supra* note 4.

9. *Warledo*, 286 Kan. at 954–55. *See also* State v. Johnson, 284 Kan. 18, 22 (2007); State v. Conley, 270 Kan. 18, 30–36 (2000).

10. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

11. *See* Alleyne v. United States, 133 S. Ct. 2151 (2013).

12. *Id.* at 2151.

13. Peter Hancock, *Brownback calls for special legislative session to address questions on 'Hard 50' law*, LAWRENCE J.-WORLD, July 26, 2013, *available at* http://www2.ljworld.com/news/2013/jul/26/brownback-calls-special-session/.

14. Dion Lefler, *Kansas House approves bill revising Hard 50 sentencing law*, THE WICHITA EAGLE, Sept. 3, 2013, *available at* http://www.kansas.com/news/politics-government/article1121946.html.

15. *Id.*

16. Hurst Laviana, *Killers could get shorter sentences under new Hard 50 law*, THE WICHITA EAGLE, Sept. 7, 2013, *available at* http://www.kansas.com/news/local/crime/article1122267.html.

eligible for parole after 25 years, which would allow him freedom as he reaches his late seventies, instead of almost assuredly dying in prison.

This article thoroughly examines the Hard 50 law and its evolution over the past twenty four years. Part I discusses the history of the Hard 50 law and its use in Kansas criminal sentencing. It also analyzes constitutional challenges to the Hard 50 law by Kansas defendants and constitutional challenges to similar laws in other states, including notable cases such as *Apprendi v New Jersey* and *Alleyne v. United States*. Part II dissects Kansas' response to the *Alleyne* decision and *Alleyne's* potential retroactive effect. Finally, Part III reflects on the public policy ramifications of Kansas' new Hard 50 law.

II. BACKGROUND INFORMATION

A. The History of the Hard 50 Law

Prior to the Supreme Court's decision in *Alleyne v. United States*, Kansas law dictated that if a defendant is convicted of premeditated murder, "the trial court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 50 years without eligibility for parole."[17] This procedure has been commonly referred to as the Hard 50 law or a Hard 50 sentence.[18] The trial court is to decide whether a Hard 50 sentence is appropriate after weighing the evidence, including both aggravating and mitigating circumstances.[19] Aggravating circumstances include whether the defendant was convicted of a previous felony, whether the defendant created a risk of death to more than one person, whether the defendant committed the crime for the financial reasons, and whether the defendant committed the crime to avoid a lawful arrest.[20] The presence of aggravating circumstances can also turn on whether the crime was carried out in a particularly heinous, atrocious or cruel manner.[21] Factors that suggest a crime was heinous are:

> (1) prior stalking of or criminal threats to the victim;
> (2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;
> (3) infliction of mental anguish or physical abuse before the victim's death
> (4) torture of the victim;
> (5) continuous acts of violence begun before or continuing after the killing;
> (6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or

17. State v. Washington, 280 Kan. 565, 568 (2005).
18. *Id.*
19. *Id.*
20. KAN. STAT. ANN § 21-6624 (2012).
21. *Id.*

> (7) any other conduct in the opinion of the court that is especially heinous, atrocious or cruel.[22]

The Kansas Supreme Court defined "heinous" to mean "extremely wicked or shockingly evil" and "cruel" to mean "pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others."[23] In an effort to protect the integrity of the Hard 50 sentence, courts have dictated that mere shooting deaths are not enough to rise to the high standards required to impose the sentence.[24] The Kansas Supreme Court wanted to avoid interpreting all circumstances around first-degree premeditated murder as aggravating, as that would give every defendant a minimum of 50 years imprisonment without parole, and lead to a lack of flexibility in the criminal sentencing procedures.[25]

Even if the trial judge found aggravating circumstances, mitigating circumstances could outweigh them, and as a result, the judge would not hand down the Hard 50 sentence. Such mitigating factors include the defendant's lack of prior criminal activity, influence of extreme mental or emotional disturbances, the minor level of defendant's participation, the high level of duress, the lack of capacity to understand the criminality of the conduct, the age of the defendant, and the presence of post-traumatic stress, among others.[26] It is important to note that the mitigating circumstances include the language "shall include, but are not limited to. . . ."[27] The aggravating circumstances do not include this language, giving judges more leniency in determining mitigating circumstances, and as a consequence, limiting the number of Hard 50 sentences.[28] However, the language of heinous, atrocious, or cruel can be construed more broadly, as the statute does not limit that interpretation, and a judge can find a particular murder to be heinous for reasons not enumerated in the statute.[29] From a practical standpoint, this makes sense, as it would be inappropriate and unfeasible for the statute to attempt to define every heinous act.

The judge also had discretion to determine the relative importance of an aggravating or mitigating circumstance.[30] "In weighing aggravating and mitigating circumstances for the determination of whether to impose a hard 50 sentence, one aggravating circumstance can be so compelling as to outweigh several mitigating circumstances and vice versa."[31] The lack of limitations on

22. *Id.*
23. State v. Willis, 254 Kan. 119, 130 (1993).
24. State v. Holmes, 278 Kan. 603, 638 (2004).
25. *See id.* at 606.
26. KAN. STAT. ANN. § 21-4637 (1994) (current version at KAN. STAT. ANN. § 21-6625).
27. *Id.*
28. KAN. STAT. ANN § 21-6624 (2012) (stating "[a]ggravating circumstances shall be limited to the following. . . .").
29. *Id.*
30. *See* State v. Warledo, 286 Kan. 927, 928 (2008).
31. *Id.*

mitigating circumstances and actions considered heinous, as well as latitude in determining the magnitude of the various circumstances, provided judges with quite a bit of autonomy in determining whether a Hard 50 sentence was appropriate.

Kansas has had some version of the Hard 50 law in place since 1990.[32] In its first form, the minimum sentencing was 40 years rather than 50.[33] However, it was the jury rather than the trial judge that determined whether aggravating or mitigating circumstances existed.[34] *State v. Stafford* demonstrated Kansas' commitment to using a jury in sentencing hearings, indicating that the trial judge "may summon a special jury of 12 persons which shall determine the question of whether a mandatory term of imprisonment of 40 years shall be imposed."[35] A jury had to find aggravating circumstances by a unanimous vote.[36] Once that finding was made, the aggravating circumstance found by the jury had to be made in writing and signed by the jury foreman.[37] If the jurors found that no aggravating circumstances existed or that mitigating circumstances outweighed the aggravating circumstances, then the defendant was sentenced as provided by law.[38] At the time of *United States v. Willis* in 1993, Kansas was the only state with the Hard 40 sentence of mandatory imprisonment.[39]

In the mid 1990s, a shift from juries to judges took place. By 1996, K.S.A. 21-4638 stated in relevant language that "the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years or sentenced otherwise provided by law."[40] This language eliminated the jury requirement in Hard 40 sentencing, placing the burden on a judge to make the necessary determinations. In 1999, the legislature amended the statute to add for the imposition of Hard 50 sentences, instead of Hard 40 sentences, for certain crimes committed after July 1, 1999.[41] There are 140 prison inmates in Kansas who are currently serving Hard 40 or Hard 50 sentences for premeditated first-degree murder.[42] None of these inmates have been eligible for parole, because at most, twenty-three years of the 50-year sentences have elapsed.

32. Laviana, *supra* note 16.

33. *Id.*

34. State v. Stafford, 255 Kan. 807, 807 (2005) (noting that the Hard 40 sentence was recommended by the jury).

35. *Id.* at 820.

36. *Id.*

37. *Id.* at 820–21.

38. *Id.* at 821.

39. State v. Willis, 254 Kan. 119, 130 (1993).

40. State v. Brady, 261 Kan. 109, 112 (1996) (quoting KAN. STAT. ANN. § 21-4638 (current version KAN. STAT ANN. § 21-6623)).

41. State v. Livingston, 272 Kan. 853, 858 (2001).

42. Laviana, *supra* note 16.

To understand when the Hard 50 sentence is implemented, it is important to analyze several cases in which the sentence was imposed. In *State v. Washington*, the defendant shot a woman eleven times.[43] Washington shot her several times first, wounding her, and then she ran away crying for help.[44] Washington caught up with her, changed the magazine in the gun, and shot her repeatedly, fulfilling one of the enumerated aggravating circumstances (infliction of physical abuse before the victim's death).[45] Another time the prosecution successfully sought the Hard 50 sentence was in *State v. Warledo*. Warledo killed his mother by stomping on her as she lay on the floor of her kitchen.[46] He then set fire to her body.[47] This fulfilled two aggravating circumstances: mental anguish or physical abuse and desecration of the victim's body.[48] Clearly, the crime was committed in a heinous fashion. In fact, there was never any question that this particular crime was heinous; rather, the jury had to determine whether this act was premeditated, which is a requirement for the judge to impose a Hard 50 sentence.[49] *Warledo* and *Washington* are just two of a litany of criminal cases in which defendant was sentenced to 50 years without parole and had his sentencing upheld upon appeal.

B. Constitutional Challenges to the Hard 50 Law

The constitutionality of the Hard 50 law has been attacked for as long as it has been implemented.[50] Defendants argue that it violates the Due Process Clause of the Fourteenth Amendment as well as the Sixth Amendment guarantee to a trial by jury.[51] Defendants also consistently argue that the Hard 50 law is unconstitutional because it violates *Apprendi v. New Jersey* in that it increases a sentence based on facts that had not been decided by a jury beyond a reasonable doubt.[52] Until recently, every attack on its constitutionality was unsuccessful.

In *Apprendi*, defendant shot into the home of an African-American family and made comments that suggested that such action was racially motivated.[53] Relevant New Jersey law dictated that second-degree possession of a firearm for an unlawful purpose carries a sentencing range of five to ten years.[54] The State law also provides for an enhanced sentence if a trial judge finds, by a

43. State v. Washington, 280 Kan. 565, 566 (2005).
44. *Id.* at 569.
45. *Id.*
46. State v. Warledo, 286 Kan. 927, 930 (2008).
47. *Id.*
48. *Id.* at 934.
49. *Id.* at 930.
50. *Id.* at 954–55. *See also* State v. Johnson, 284 Kan. 18, 22 (2007); State v. Conley, 270 Kan. 18, 30–36 (2000).
51. *Conley*, 270 Kan. at 30–36.
52. Apprendi v. New Jersey, 530 U.S. 466 (2000).
53. *Id.* at 469.
54. *Id.*

preponderance of the evidence, that the defendant committed the crime with racial motivation.[55] The court found that the shooting was, in fact, racially motivated and with the intention of intimidating another on the basis of race.[56] The jury did not make this determination. Upon that finding, the trial court sentenced Apprendi to twelve years in prison.[57] Apprendi appealed to the United States Supreme Court, and the Supreme Court granted certiorari.[58]

The Supreme Court found that the New Jersey statute was unconstitutional, stating that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt."[59] The Fourteenth and Sixth Amendments afford a defendant a jury determination that he is guilty, beyond a reasonable doubt, of every element of the crime charged.[60] In *Apprendi*, the state tried to disguise racial motivation as a sentencing factor, when it was in fact an essential element of the offense. "The defendant's intent (potential racial motivation) in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'"[61] As an essential element of the offense, the Constitution requires that it be found by a jury beyond a reasonable doubt.[62] This burden of persuasion is much higher than the preponderance of the evidence requirement often utilized by judges.

Four years later in *Blakely v. Washington*, the Court reinforced its commitment to *Apprendi*.[63] The Court found that when the trial court sentenced defendant to three years more than the statutory maximum, it had deprived defendant of its Sixth Amendment right.[64] Blakely pled guilty to kidnapping his estranged wife.[65] His admissions created a sentencing range with a maximum sentence of 53 months.[66] Upon hearing his wife's testimony of the kidnapping, the judge determined that Blakely had acted with "deliberate cruelty."[67]

Blakely was sentenced to 90 months in prison, which represented a 37-month increase from his recommended maximum.[68] Because the facts supporting the enhanced sentence were not admitted by the defendant and were

55. *Id.* at 471.
56. *Id.*
57. *Id.*
58. *Id.* at 474.
59. *Id.* at 490.
60. *Id.* at 466.
61. *Id.* at 493 (parenthetical added).
62. *Id.* at 466.
63. *See* Blakely v. Washington, 542 U.S. 296 (2004).
64. *Id.* at 305.
65. *Id.* at 296.
66. *Id.*
67. *Id.* at 300 (noting that deliberate cruelty is a "statutorily enumerated ground for departure in domestic violence cases").
68. *Id.*

not found by a jury beyond a reasonable doubt, the sentence violated the Sixth Amendment.[69] The court also focused on the argument that the facts used to extend his sentence were not among those admitted by the defendant.[70] This provides an alternative to the idea that anything used to increase a maximum sentence must by proved to a jury beyond a reasonable doubt. A judge may, instead, use a defendant's own admissions in his sentencing factors without depriving the defendant of his constitutional rights.

McMillan v. Pennsylvania also provided more depth with regard to the difference between a sentencing factor and an essential element of the crime.[71] The Pennsylvania Mandatory Minimum Sentencing Act states that the sentencing judge can find, by a preponderance of the evidence, that a defendant visibly possessed a firearm during the commission of a crime.[72] This finding creates a statutory minimum sentence of five years imprisonment.[73] The Act specifically stated that visible possession is not an element of the crime.[74] The Supreme Court found that "the Pennsylvania Legislature has made visible possession of a firearm a sentencing factor that comes into play only after the defendant has been found guilty of one of the enumerated crimes beyond a reasonable doubt."[75] The Court also pointed out that the statute only raises a minimum sentence and neither raised the maximum nor created a separate offense.[76] The Act simply limited the sentencing court's discretion in selecting a sentence, as it decreased, rather than increased, the sentencing range.[77] *McMillan* is analyzed in *Apprendi* and is never overruled.[78]

Finally, *Harris v. United States* sheds more light into sentencing factors.[79] 18 U.S.C. § 924(c)(1)(A) indicates that

> a person who in relation to a drug trafficking crime uses or carries a firearm 'shall, in addition to the punishment provided for such crime, (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to. . . not less than 7 years; and (iii) if the firearm is discharged, be sentenced to. . . not less than 10 years.[80]

The United States District Court for the Middle District of North Carolina determined that Harris had brandished the firearm, meriting a seven-year

69. *Id.* at 296.
70. *Id.*
71. McMillan v. Pennsylvania, 477 U.S. 79 (1986).
72. *Id.* at 81.
73. *Id.*
74. *Id.* at 85–86.
75. *Id.* at 80–81.
76. *Id.* at 81.
77. *Id.* at 81–82.
78. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).
79. Harris v. United States, 536 U.S. 545 (2002).
80. *Id.* at 550–51 (citing 18 U.S.C. § 924(c)(1)(A)).

prison sentence.[81] The judge opined that the provision described one crime: using or carrying a firearm in relation to a drug trafficking crime.[82] Thus, the essential element of the crime related to the presence of the firearm, not the manner in which it was used.[83] The manner it was used did not affect innocence or guilt; what affected innocence or guilt was whether a firearm was used at all. The manner in which the firearm was used merely affected the minimum of his sentence; thus, the judge deemed the manner of the firearm's use to be a sentencing factor.[84]

The Supreme Court, using *McMillan* as authority, found that 18 U.S.C. § 924(c)(1)(A) simply raised the minimum sentence the defendant could receive.[85] Compare this particular statute to the statute at issue in *Apprendi*, which dealt with maximum sentences.[86] The language "not less than 7 years" in the statute sets a floor, rather than a ceiling. The language of the statute is key. If it read "no more than 7 years," the court would be altering the maximum sentence using facts that were not submitted to a jury. As discussed in *Apprendi*, such action goes against the Constitution. However, Justice Kennedy was quick to distinguish *Harris* and *Apprendi*.

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would be considered an element of an aggravated crime by the Framers of the Bill of Rights. That cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding.[87]

Justice Breyer concurred with the opinion, joining it to the extent that *Apprendi* does not apply to minimum sentences.[88] However, Breyer foreshadowed that a proper challenge to increasing minimum sentences could be successful in the future. Breyer believed "[m]andatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines."[89] He went on to say that mandatory minimums "generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency."[90]

Kansas' Hard 50 rule, when originally viewed in the light of *Apprendi*, *McMillan*, and *Harris*, remains constitutional. The Hard 50 law creates a

81. *Id.* at 551.
82. *Id.*
83. *Id.*
84. *Id.* at 551–52.
85. *Id.* at 556.
86. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).
87. *Harris*, 536 U.S. at 547.
88. *Id.* at 569–70 (Breyer, J., concurring).
89. *Id.* at 570.
90. *Id.*

minimum sentence, rather than a maximum sentence. The maximum sentence in Kansas for first-degree murder is life in prison.[91] As such, *Apprendi* does not reach the Hard 50 statutory scheme. The Hard 50 law does not affect, in any way, the statutory maximum of life in prison. Similar to *McMillan* and *Harris*, it limits the discretion of the trial court by shrinking the available sentencing range. Interpreting the Hard 50 law as the court in *Harris* would, the crime is the first-degree, premeditated murder. In Kansas, the essential elements of the crime of first-degree, premeditated murder are intent and premeditation.[92]

An example of the interpretation of Kansas' murder statute can be found in *State v. Thompkins*. "'Intentionally' means conduct that is purposeful and willful, not accidental, while 'premeditation' means that there was a design or intent before the act.'"[93] These are the essential elements that a jury must find beyond a reasonable doubt or that a defendant must plead guilty to. Meanwhile, the judge determines the sentencing factor of heinousness. It is this interpretation of the Hard 50 law that helped it maintain constitutionality from 1990 to 2013, despite many challenges. However, the 2013 Supreme Court case of *Alleyne v. United States* proved too large an obstacle to overcome.

C. Alleyne v. United States

While the Hard 50 law passed through *Apprendi* tests and was consistent with *McMillan*, the Supreme Court's ruling in *Alleyne v. United States* does in fact render Kansas' Hard 50 law unconstitutional.[94] Alleyne and an accomplice plotted to rob a store manager as the manager drove to the bank.[95] Alleyne faked car trouble, and as the manager pulled over to help, Alleyne's accomplice drew a gun and the manager surrendered his store's deposits.[96] Alleyne was charged under 18 U.S.C. § 924(c)(1)(A), the same statute at issue in *Harris v. United States*.[97] The jury convicted Alleyne, finding that he had used or carried a firearm during and in relation to a crime of violence.[98] The jury was silent on whether the firearm was brandished.[99]

The presentence report recommended a seven-year sentence, consistent with the sentencing for brandishing.[100] Alleyne objected to the presentence

91. State v. Warledo, 286 Kan. 927, 955 (2008).

92. KAN. STAT. ANN. § 21-5402 (2013).

93. State v. Thompkins, 263 Kan. 602, 609 (1998), *superseded by statute*, KAN. STAT. ANN. § 21-4635 (1994) (current version at KAN. STAT. ANN. § 21-6620), *as recognized in* State v. Vontress, 266 Kan. 248 (1998)).

94. Alleyne v. United States, 133 S. Ct. 2151 (2013).

95. *Id.* at 2155.

96. *Id.*

97. *Id. See also* Harris v. United States, 536 U.S. 545 (2002).

98. *Alleyne*, 133 S. Ct. at 2156.

99. *Id.*

100. *Id.*

report, arguing that the jury never found brandishing beyond a reasonable doubt.[101] The District Court, adhering to *Harris*, informed defendant that brandishing was indeed a sentencing factor and sentenced him to seven years imprisonment.[102] Alleyne appealed and the Court of Appeals affirmed.[103] The Supreme Court granted certiorari to determine whether *Harris* should be overruled.[104]

The *Alleyne* court said that "[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense."[105] Facts that raise a maximum and facts that raise a minimum "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment."[106] The Court further explains:

> But for a finding of brandishing, the penalty is five years to life in prison; with a finding of brandishing, the penalty becomes seven years to life. Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range *is* the penalty affixed to the crime. . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.[107]

It defies logic to separate the floor of a range from the penalty that is attached to a crime.[108] It also defies logic to attempt to argue that increasing the minimum does not aggravate the punishment.[109]

The dissent argued that the seven-year minimum sentence could have been imposed regardless of a judicial finding of brandishing.[110] This is because the jury authorized a sentence of five years to life. As such, the judge would have been well within his discretion to impose the seven-year sentence. However, the majority argues that, while this is undoubtedly truthful, it is inconsequential.[111] It still creates a new offense and must be submitted to the jury. Relying on hypotheticals that could lead to the same outcome does not make increasing the minimum constitutional. For example, a judge making the determination of innocence or guilt instead of the jury may, hypothetically, not affect the sentencing. The jury may have made a similar finding of culpability. Nevertheless, regardless of effect, the judge's actions did not comport with the constitutional requirements of trial by jury. In *Alleyne*, the fact found by the

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 2158.
106. *Id.*
107. *Id.* at 2160.
108. *Id.*
109. *Id.* at 2161.
110. *Id.* at 2169 (Roberts, C.J., dissenting).
111. *Id.* at 2162.

judge, whether it materially altered the ultimate sentence or not, produced a higher range which indicates that it is an element of a distinct crime.[112] This distinct crime must be submitted to the jury.[113] Accordingly, *Harris* was officially overruled and Alleyne's case was remanded for resentencing.[114]

III. EFFECT OF *ALLEYNE*

A. Legislative Response

Kansas courts had consistently relied on what is now an antiquated analysis of *Apprendi* to uphold the Hard 50 law as constitutional. With the new interpretation of *Apprendi* and extending its holding to facts which increase the minimum sentence, the Hard 50 law was no longer going to withstand constitutional scrutiny. In fact, the Supreme Court on June 24, 2013, just one week after the *Alleyne* decision, granted certiorari to Kansas defendant Matthew Astroga, who had been sentenced under the Hard 50 scheme.[115] Astorga was found guilty of shooting Ruben Rodriguez.[116] Astroga had a prior second-degree murder conviction and the court deemed that he "knowing or purposely killed or created a great risk of death to more than one person."[117] The Supreme Court vacated the Kansas Supreme Court judgment and remanded it for further consideration in light of *Alleyne v. United States*.[118]

Kansas legislature took it upon itself to move quickly in response. The Attorney General of Kansas Derek Schmidt formally requested a special session for the purpose of remedying the Hard 50 law.[119] The Attorney General stated that waiting until January to deal with the Hard 50 issue would guarantee an increase in "the number of convicted killers who will be eligible for parole after only 25 years instead of after 50 years."[120] The bill passed through the Senate 40-0 after passing through the House 122-0.[121] The bill called for the court to conduct a separate proceeding following the determination of the defendant's guilt.[122] If any person who served on the jury

112. *Id.* at 2163–64.

113. *Id.* at 2164.

114. *Id.* at 2153.

115. Astorga v. Kansas, 133 S. Ct. 2877 (2013).

116. State v. Astorga, 295 Kan. 339, 341 (2012).

117. *Id.* at 352.

118. Astorga v. Kansas, 133 S. Ct. 2877 (2013).

119. John Hanna, *Kansas panel will meet before special session to review 'Hard 50' plans*, KAN. CITY STAR, Aug. 7, 2013, http://www.kansascity.com/news/local/article324836/Kansas-panel-will-meet-before-special-session-to-review-%E2%80%98Hard-50-plans.html.

120. *Brownback calls 'Hard 50' special session,* KWCH, July 26, 2013, *available at* http://articles.kwch.com/2013-07-26/special-session_40821156.

121. *Kansas 'Hard 50' bill goes to governor; Stegall confirmed to Court of Appeals*, KAN. CITY STAR, Sept. 4, 2013, *available at* http://www.kansascity.com/2013/09/04/4457864/kansas-hard-50-bill-goes-to-governor.html.

122. 2013 Bill Text KS H.B. 2002A (2013) (amending KAN. STAT. ANN. § 21-6620 (2012)).

is unable to serve on the proceeding, an alternate juror could be used.[123] If alternate jurors are not an option or the jury has been discharged, the court should impanel a new jury, and any decision of the jury shall be beyond a reasonable doubt.[124] As it was between 1990 and 1994, if the jury was unable to come to a unanimous vote, then the defendant would be sentenced as a matter of law.[125] These amendments to the law apply to all cases after the law's passing and all cases on appeal.[126] Those who have not exhausted their appeals will be eligible for resentencing.[127]

It is clear going forward that any determination of aggravating or mitigating factors must go to a jury. This has several implications. For one, juries are harder to convince than judges. The jury verdict must be unanimous, meaning the prosecution has to convince twelve people that the defendant's first-degree premeditated murder was in the presence of aggravating factors, instead of having to just convince a singular judge. Also, judges are quicker to convict than juries.[128] When the evidence favors the defendant, juries acquit just as judges do. But when the evidence seems to be more in equipoise, juries are more likely to "incorporate values in their decision making and acquit when the judge would convict."[129] The juries in Hard 50 cases have already convicted the defendant of first-degree premeditated murder, but that does not mean that the jury would be quick to find the presence of aggravating circumstances.

Studies have demonstrated that juries require stronger evidence than judges do.[130] Thus, the burden on the prosecution will be higher. If that burden is not met, the defendant receives the standard eligibility for parole after 25 years, potentially cutting the sentence in half. For example, in the Tiller case, jurors recognized that Roeder committed first-degree premeditated murder. However, juries may be more reticent to find aggravating circumstances. Ideological beliefs could create different definitions of heinous, for instance. Jurors with pro-life leanings may understand that Roeder is guilty of murder, but fail to agree with the judge that the murder was heinous. All it takes is one hesitant juror to prevent a Hard 50 sentence, and the defendant will then be eligible for parole in half the time.

The new bill quickly affected court proceedings. Judge William Woolley was forced to delay sentencing for Anson Bernhardt, who was convicted of kicking his girlfriend to death.[131] He kicked her 20 to 30 times with steel-toed

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Daniel Gibelber & Amy Farrell, *Judges and Juries: The Defense Case and Differences in Acquittal Rates*, 33 LAW & SOC. INQUIRY 31, 31 (2008).
129. *Id.* at 31–32.
130. *Id.* at 32.
131. Hurst Laviana, *Judge: High court ruling prevents him from imposing Hard 50*

boots, and then left her to die in front of a local high school.[132] He admitted as much in trial. The judge recognized that he was unable to impose a Hard 50 sentence against Bernhardt. The prosecutor in that hearing is now moving forward with a plan to empanel a new jury to decide whether aggravating factors are present.[133] Certain prosecutors disagreed with Judge Woolley's decision, arguing that the Hard 50 law was constitutional, even in light of Alleyne.[134] In his brief, Assistant Sedgwick County District Attorney Matthew Dwyer wrote:

> The Hard 50 scheme is constitutional and does not violate Alleyne. The Hard 50 scheme only sets out the procedure to determine parole eligibility. There is no sentencing range on a conviction for first-degree murder. There is no floor; no ceiling. The sentence is life. Accordingly, Alleyne does not apply.[135]

Judge Woolley clearly disagreed with this assessment, as did the Attorney General when he called the Special Session in anticipation of Kansas' Hard 50 law's demise.

Questions remain about whether *Alleyne* applies retroactively to all prisoners serving a Hard 40 or Hard 50 sentencing. There are 140 prisoners serving Hard 40 or Hard 50 sentences in Kansas, not counting those who have died while in prison.[136] Some of those inmates were sentenced between 1990 and 1994, when the Hard 40 sentences were determined by a jury beyond a reasonable doubt.[137] These sentences will not be affected by the *Alleyne* ruling, as the procedure complied with the Sixth Amendment's requirement of trial by impartial jury. Then there are sixteen prisoners who have not yet exhausted their appeals.[138] According to the bill passed through the Special Session, these prisoners are to be resentenced. There is also the group of people whose appeals are exhausted, but were sentenced by a scheme which has now been ruled unconstitutional. This group of people represents the majority of the prisoners serving Hard 40 or 50 sentences.[139] Kansas' new bill does not address whether this group of people will have their *Alleyne* claims heard.

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sentence, THE WICHITA EAGLE, Sept. 14, 2013, *available at* http://www.kansas.com/news/local/crime/article1122665.html.

132. *Id.*

133. *Id.*

134. *See* Hurst Laviana, *Murder sentencing delayed by questions over status of Kansas Hard 50 law*, THE WICHITA EAGLE, August 15, 2013, http://www.kansas.com/news/article1120896.html.

135. *Id.*

136. Laviana, *supra* note 16.

137. *Id.*

138. *Id.*

139. *Id.*

B. Retroactivity and Teague v. Lane

A ruling on retroactivity would clear up any issues as to the sentencing of those prisoners who have exhausted all their appeals. Retroactivity was the subject of *Teague v. Lane*.[140] In *Teague*, the defendant, a black man, was convicted of attempted murder by an all white jury.[141] During the jury selection, the prosecutor used ten preemptory challenges to exclude African Americans.[142] He unsuccessfully appealed that he was deprived of a "jury of his peers."[143] Upon exhausting his appeals, he filed for habeas relief.[144] During this time, *Batson v. Kentucky* went through the courts and set forth limitations on racial biases in preemptory challenges.[145] The majority adopted Justice Harlan's approach to retroactivity for cases on collateral review. "Justice Harlan advocated a different approach to retroactivity. He argued that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review."[146] There are two exceptions to this rule. The first is that a new rule should be "applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[147] Second, a new rule should be "applied retroactively if it requires the observance of 'those procedures that. . . are implicit in the concept of ordered liberty.'"[148]

This relatively restrictive ruling reflects the criminal justice system's commitment to finality. Neither Kansas nor the Supreme Court has explicitly ruled on the retroactivity of the *Alleyne* decision, but prisoners engaging in a collateral review of their sentences will have a high threshold to meet to convince a court that *Alleyne* should be retroactive. To determine this threshold, it is necessary to analyze the retroactivity of several similar cases, including *Apprendi*, *Ring v. Arizona*, *United States v. Booker*, and *Blakely*.

C. Apprendi *retroactivity*

The Florida Supreme Court found that Apprendi did not apply retroactively.[149] The Florida Supreme Court used the framework in *Witt* which held that "a change of law would not be deemed retroactive 'unless the change: (a) emanates from this Court of the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental

140. Teague v. Lane, 489 U.S. 288 (1989).
141. *Id.* at 292–93.
142. *Id.* at 293.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 303.
147. *Id.* at 307 (citing Mackey v. United States, 401 U.S. 667, 692 (1973)).
148. *Id.* (citing Mackey, 401 U.S. at 692).
149. Hughes v. State, 901 So. 2d 837 (Fla. 2005).

significance.'"[150] Both parties conceded that the changes set forth by *Apprendi* meet the first two prongs, but the Florida Supreme Court found that those changes do not meet the third standard.[151] The third standard can be broken up into two categories.[152] The first category is one in which the constitutional changes "place beyond the authority of the state the power to regulate certain conduct or impose penalties."[153] Both parties conceded that *Apprendi* does not fit into that category.[154] The second category is whether the changes are sufficient enough to necessitate retroactivity.[155] The test for that has three elements. The court looks at "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect of a retroactive application of the rule on the administration of justice."[156] Applying this test, the Florida Supreme Court found that the regime previous to *Apprendi* did not undermine the integrity of the process or present dangers of convicting the innocent.[157] The court also found applying *Apprend*i retroactively would have a detrimental effect on the administration of justice.[158] Quoting the Fifth Circuit, the court stated:

> [V]irtually every sentence involving a crime of violence that has been handed down in Florida for almost two decades has included a judicially-determined victim injury component to the guidelines score. Justice O'Connor's observation that the effect of *Apprendi* to guidelines sentencing would be 'colossal' barely describes the cataclysm in Florida if such sentences are invalidated because the jury did not make the 'victim injury' finding.[159]

The Florida court also looked at other federal courts of appeals and found that not one has applied *Apprendi* retroactively nor had any state courts that considered the issue.[160] The Supreme Court of Kansas briefly touched on *Apprendi* and its retroactivity in *State v. Gould*, finding that it had no retroactive application.[161] The court noted both that the *Apprendi* decision was to be applied to all cases on direct appeal or that are not final and that *Apprendi* has no effect on downward departures.[162] In Gould's case, his appeal was pending and the new statutory guidelines mandated by *Apprendi* applied and caused his sentence to be vacated and remanded.[163]

150. *Id.* at 840 (quoting Witt v. State, 387 So. 2d 922, 931 (Fla. 1980)).
151. *Id.*
152. *Id.*
153. *Id.* (quoting Witt v. State, 387 So. 2d 922, 929 (Fla. 1980)).
154. *Id.*
155. *Id.*
156. *Id.* (quoting Witt v. State, 387 So. 2d 922, 926 (Fla. 1980)).
157. *Id.* at 844 (quoting Johnson v. New Jersey, 384 US. 719, 728 (1966)).
158. *Id.* at 845.
159. *Id.* (quoting McCloud v. State, 803 So. 2d 821, 827 (Fla. Dist. Ct. App. 2001)).
160. *Id.* at 846.
161. State v. Gold, 271 Kan. 394, 395 (2001).
162. *Id.* at 414.
163. *Id.*

D. United States v. Booker *retroactivity*

Booker was found guilty of crack possession with intent to distribute.[164] The amount of crack in his duffel bag affected the recommended sentencing.[165] The jury, in addition to finding him guilty of possession with intent to distribute, stipulated that he had 92.5 grams in his duffel bag.[166] The sentencing guidelines recommended a range of 210 to 262 months in prison.[167] However, the judge ordered a post-trial sentencing hearing and, by a preponderance of the evidence, found that Booker had an additional 566 grams of crack.[168] Booker received a higher sentence of 30 years in jail.[169]

The Supreme Court reaffirmed its holding in *Apprendi*, holding that additional facts, which affect sentencing guidelines and are found by a judge by a preponderance of the evidence, violate the Sixth Amendment.[170] In this case, the judge acted improperly and invaded the province of the jury. The Supreme Court was silent on the matter of retroactivity.

The Seventh Circuit addressed *Booker's* retroactivity in *McReynolds v. United States*. The Court reiterated basic retroactivity principles, stating that "[a] procedural decision may be applied retroactively if it establishes one of those rare 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'"[171] The Seventh Circuit ultimately opined that the changes dictated in *Booker* did represent the aforementioned "watershed" change.[172] Instead, "the only change would be the degree of flexibility judges would enjoy in applying the guideline system."[173] Such a change did not rise to the point where retroactivity was deemed necessary.

E. Ring v. Arizona *retroactivity*

Ring was found guilty of felony murder, with the underlying felony being armed robbery.[174] Under Arizona law, such a finding did not support the death penalty, unless a judge determined in a separate sentencing hearing that the aggravating circumstances outweighed the mitigating circumstances, similar to the Kansas Hard 50 analysis.[175] The trial judge concluded that aggravating circumstances were present and the only mitigating circumstance, a minimal

164. United States v. Booker, 543 U.S. 220, 226 (2005).
165. *Id.*
166. *Id.*
167. *Id.*
168. United States v. Booker, 543 U.S. 220, 226 (2005).
169. *Id.*
170. *Id.* at 220.
171. McReynolds v. United States, 397 F.3d 479, 480 (7th Cir. 2005) (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).
172. *Id.*
173. *Id.*
174. Ring v. Arizona, 536 U.S. 584, 591 (2002).
175. *Id.* at 592 (citing ARIZ. REV. STAT. ANN. § 13-703 (2001)).

criminal record, did not outweigh the aggravating circumstances.[176] After these findings, he sentenced Ring to death.[177] The Supreme Court applied *Apprendi*, and because the death penalty is the maximum sentence a criminal defendant can receive, found that the sentencing violated the Sixth Amendment's trial by jury requirement.[178]

The issue of *Ring's* retroactivity was appealed successfully up to the Supreme Court.[179] The Supreme Court differentiated between substantive changes and procedural changes.[180] As a rule of thumb, substantive changes apply retroactively because these changes bring the potential that a prisoner is currently serving time for an offense that is no longer a crime.[181] Procedural changes, as a general matter, do not apply retroactively.[182] Simply being fundamental does not demand retroactivity, but rather an even higher threshold.[183] The test was whether the change was one of such importance that without retroactive application, "the likelihood of an accurate conviction is *seriously* diminished."[184]

A rule change is substantive if it "alters the range of conduct or the class of persons that the law punishes."[185] Meanwhile, a rule change is procedural if it affects "only the manner of determining the defendant's culpability. . . ."[186] The Supreme Court's holding in *Ring* did not modify the type of conduct that results in a death penalty, nor did it criminalize something that was previously not criminal. Rather, it dictated that authority in death penalty sentencing is vested in a jury, rather than a judge. The Court clarified and further distinguished substance from procedure: "This Court's holding that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive."[187]

F. Blakely v. Washington *retroactivity*

Blakely was one of the earlier Supreme Court cases in which the Court applied the *Apprendi* rule to invalidate a state's sentencing procedure.[188] The Florida Supreme Court took a look at Blakely's retroactivity in the summer of

176. *Id.* at 595.
177. *Id.*
178. *Id.* at 597.
179. *See* Schriro v. Summerlin, 542 U.S. 348 (2004).
180. *Id.* at 353.
181. *Id.*
182. *Id.*
183. *Id.* at 352.
184. *Id.* (citing Teague v. Lane, 489 U.S. 288, 313 (1989)).
185. *Id.* at 353.
186. *Id.* (emphasis omitted).
187. *Id.* at 354.
188. *See* Blakely v. Washington, 542 U.S. 296 (2004).

2013.[189] Like Florida's analysis of Apprendi, this court found that *Blakely* did not "constitute a development of fundamental significance."[190] All three factors used to determine retroactivity weighed against the implementation of a retroactive application.[191]

G. Retroactivity as Applied to Kansas' Hard 50 Law

With the Florida court finding that *Apprendi* does not apply retroactively and various courts rejecting the retroactivity of similar cases in *Booker* and *Blakely*, it will be difficult for prisoners who have exhausted their appeals to convince courts to apply *Alleyne* retroactively in their collateral attacks. It is reasonable to assume that because *Apprendi* was not applied retroactively, *Alleyne* will not be applied retroactively either, as both involve similar challenges to judicial findings in criminal sentencing. Using an analysis similar to that used by the *Schriro* court, *Alleyne* would not apply retroactively. The Alleyne decision would constitute a "new rule," and thus would apply to all defendants who had not yet exhausted all of their appeal options.[192] As previously stated, a procedural change is one that regulates the process of determining a defendant's guilt or innocence.[193] The procedural change in *Ring* involved a similar shift from judges to juries, albeit in the context of the death penalty. *Ring* mandated a shift from judges to juries in determining aggravating circumstances in death penalty cases, while Alleyne mandated that same shift with regard to statutory minimums. The similar language would cause a reasonable person to infer that *Alleyne* will be treated with the same lack of retroactivity. However, the Kansas Supreme Court has not yet ruled on its retroactivity, and it is conceivable, though unlikely, that it will find *Alleyne* claims to be retroactive.

IV. PUBLIC POLICY CONSIDERATIONS

The change in the Hard 50 law touches several aspects of public policy. For one, the empanelling of new juries is going to be costly. It is estimated that the state will bear the burden of approximately $875,000.[194] This cost will be borne by the judicial branch hearing the cases and whatever agency that provides the public defenders.[195] While the scenario is unlikely based off of

189. State v. Johnson, 122 So. 3d 856 (Fla. 2013).

190. *Id.* at 863 (quoting Witt v. State, 387 So.2d 922, 931 (1980)).

191. *Id.* (describing the test as "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule").

192. Schriro v. Summerlin, 542 U.S. 348, 351 (2004) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).

193. *Id.*

194. Andy Marso, *Panel pushes retroactive 'Hard 50' despite warnings*, TOPEKA CAPITAL-J., August 26, 2013, *available at* http://cjonline.com/news/2013-08-26/panel-pushes-retroactive-hard-50-despite-warnings.

195. *Id.*

previous retroactivity precedent, this cost will grow exponentially if Kansas applies *Alleyne* retroactively and empanels juries to all defendants serving Hard 50 sentences. It is also estimated that the special session cost taxpayers $40,000 a day.[196]

These cases will also slow down the adjudicative process. Many judges already have full dockets, and the burden of empanelling new juries to sentence defendants from past criminal trials would prevent more current criminal trials from proceeding as quickly as possible. The public's interest in a speedy trial is always weighed against notions of justice and fair play.[197] The Sixth Amendment is a foundation of the criminal justice system, and the aforementioned balancing test justifies the changes in the Hard 50 law as necessary for justice, but does not come without recognition of the negative aspects, such as delay and increased monetary costs.

Most importantly is that the criminals who committed heinous crimes may walk free 25 years earlier than they otherwise would have. For example, Kevin Hernandez was sentenced to a Hard 50 sentence for first-degree murder in 2007.[198] The facts of his case were particularly gruesome. Hernandez lived with his roommate, Adam Hooks.[199] Hooks reported a theft and indicated that Hernandez was the only person who might have had a motive.[200] Later, Hooks disappeared.[201] An officer found Hooks' body in Hooks' car, severed into seven parts.[202] These parts were distributed between a container, four trash bags, and two blankets.[203] Hernandez admitted to repeatedly hitting Hooks with a hammer.[204] Hooks survived the attack with a hammer, and then Hernandez stabbed him twice in the chest to ensure his death.[205] Hernandez subsequently dismembered his body with two knives and razor blades in an attempt to hide the body.[206] Hernandez was twenty at the time of the murder.[207] If Hernandez had received a lighter sentence, he would be eligible for parole after 25 years. If the board then granted parole, he would be released from prison at the age of 45. This is different from a case like Scott Roeder's, who was 52 at the time of Tiller's murder. Even if paroled in 25

196. John Hanna, *Committee to make 'Hard 50' recommendations for special session*, TOPEKA CAPITAL-J., August 7, 2013, *available at* http://cjonline.com/news/2013-08-07/committee-make-hard-50-recommendations-special-session.

197. United States v. Toombs, 574 F.3d 1262, 1270 (10th Cir. 2009).

198. State v. Hernandez, 292 Kan. 598, 598 (2011).

199. *Id.* at 599.

200. *Id.*

201. *Id.*

202. *Id.* at 601.

203. *Id.*

204. *Id.* at 601.

205. *Id.* at 601–02.

206. *Id.* at 602.

207. Marso, *supra* note 194.

years, he would be 77.[208] Younger defendants like Hernandez will have many more years to threaten the public's safety.

Public safety concerns will mount if people like Hernandez are able to obtain freedom after 25 years. People who receive Hard 50 sentences receive them because the crime, in theory, is heinous to the point where communities are safer with these defendants off the streets for as long as possible. With lighter sentencing, these same people's potentially earlier release will have adverse effects on public safety.

Even if the board rejects the defendant's request for parole, parole hearings often require the families of victims to submit information and testimony to the review board.[209] This will cause hardship upon those families who will have to revisit the incident and relay their account of it. Thus, parole hearings would go one of two directions: the prisoner who committed a heinous crime could be released early or the prisoner could be denied parole, but still at the expense of the victim's family that is forced to testify. Both options lead to unpleasant consequences for families who may still be coping with loss.

V. CONCLUSION

While *Alleyne* will likely not apply retroactively, the *Alleyne* decision still affects all those whose appeals are still active. The potential for lighter sentencing for those whose crimes could be defined as heinous has enormous implications. People convicted of first-degree, premeditated murder may evade their life sentences through parole after 25 years, instead of being locked up for a minimum of 50 years, a much more substantial number. Juries are more unpredictable than judges, and presenting the determination of aggravating circumstances to a jury makes it more likely that a defendant will receive a lighter sentence. This will cost the public money and damage its sense of security.

Scott Roeder killed George Tiller in cold blood as he attended his church. He then threatened witnesses before speeding away. He showed no remorse at trial and gave no indication that he would not commit what was, in his mind, justified murder again. Before the change in the Hard 50 law, Roeder likely never would have seen the light of day. With the changes in response to *Alleyne*, Roeder may, one day, get to taste the freedom that he once thought unimaginable.

208. Roxana Hegeman, *Scott Roeder Sentenced To Life in Prison: George Tiller's Murderer Describes Abortion in Court*, THE HUFFINGTON POST, April 2, 2010, *available at* http://www.huffingtonpost.com/2010/04/01/scott-roeder-sentenced-to_n_522654.html.

209. Marso, *supra* note 194.