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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Commonwealth of Pennsylvania v.
Stephen Eugene Shifler, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Criminal Action No. No. 263-2013

HEADNOTES

Criminal Law; Constitutional Law; Mandatory Minimum Sentences

1. Pursuant to 42 Pa.C.S. § 9712.1(a) a defendant who is convicted of PWID and "at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance," will be sentenced to the mandatory minimum of five years imprisonment.

2. 42 Pa.C.S. § 9712.1(c) directs trial judges, at sentencing, to apply the mandatory minimum sentence of five years if they find by a preponderance of the evidence facts to support § 9712.1(a).

3. In *Alleyne v. United States*, ___ U.S. ___,133 S.Ct 2151 (2013), the Supreme Court of the United States recently held that any facts that increase the penalty for a crime are elements and must be decided by a jury beyond a reasonable doubt pursuant to the Sixth Amendment. Mandatory minimum sentences increase a crime's penalty, and therefore any facts that increase the mandatory minimum are elements and must be found by a jury beyond a reasonable doubt.

4. 42 Pa.C.S. § 9712.1(c) violates the Sixth Amendment and is unconstitutional pursuant to *Alleyne*.

5. Unless or until the legislature amends 42 Pa.C.S. § 9712.1(c) in accordance with *Alleyne*, mandatory minimum sentences should not be imposed pursuant to 42 Pa.C.S. § 9712.1. Instead courts should engage in "traditional, individualized sentencing." *Commonwealth v. Hanson*, 82 A.3d 1023, 1040 (Pa. 2013).

Appearances:
Joseph D. Caraciola, Esq., *Counsel for Defendant*
Zachary Mills, Esq., *Assistant District Attorney*

OPINION AND ORDER OF COURT

Before Van Horn, J.

STATEMENT OF THE CASE

The issue before the Court is the applicability and constitutionality of 42 Pa.C.S. § 9712.1 in light of *Alleyne v. United States*, ___ U.S. ___,133

S.Ct 2151 (2013).

The above captioned Defendant, Stephen Shifler, was arrested and charged with one count of Possession with Intent to Deliver a controlled substance on January 11, 2013, which prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance." 35 P.S § 780-113(a)(30). The Commonwealth put Defendant on notice of its intention to seek a mandatory minimum sentence pursuant to 42 Pa.C.S. § 9712.1 (mandatory minimum sentences for drug offenses committed with firearms). On January 3, 2014, Defendant filed a Motion for Extraordinary Relief arguing that 42 Pa.C.S. § 9712.1 is unconstitutional according to the recently decided Supreme Court of the United States decision *Alleyne v. United States* and therefore inapplicable to the Defendant. The Defendant submitted a brief in support and the Commonwealth filed a brief in opposition. Defendant filed a response to the Commonwealth's opposition brief and argument was held on April 4, 2014. The issue is now ripe for decision in this Opinion and Order of Court.

DISCUSSION

The Commonwealth notified the Defendant of its intention to seek a mandatory minimum sentence of five years pursuant to 42 Pa.C.S. § 9712.1 because firearms were allegedly discovered near illegal substances in the Defendant's home. However, 42 Pa.C.S. § 9712.1(c)'s constitutionality has been seriously called into question according to *Alleyne v. United States*,___ U.S. ___,133 S.Ct 2151 (2013), and the issue before the Court now is how, if at all, to apply § 9712.1 in the instant case. The relevant portions of 42 Pa.C.S. § 9712.1 are subsections (a) & (c) which state:

> (a) Mandatory sentence.--Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64),1 known as The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement.

. . .

> **(c) Proof at sentencing**.--Provisions of this section shall not be an element of the crime, and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

42 Pa.C.S. §§ 9712.1(a) & (c). Defendant argues that all of 42 Pa.C.S. § 9712.1 is unconstitutional pursuant to *Alleyne* and therefore should not apply to him. The Commonwealth agrees that § 9712.1(c) is likely unconstitutional, but argues that § 9712.1(a) and the remainder of the statute are constitutional, severable, and should still be applied to the facts of this case.

I. Relevant Jurisprudence

a. Supreme Court of the United States

Alleyne was decided by the Supreme Court of the United States in 2013. In *Alleyne*, the defendant and an accomplice robbed a store manager. Alleyne, 133 S. Ct. at 2155. The accomplice "approached the manager with a gun and demanded the store's deposits." *Id*. Consequently, the defendant was charged with using a firearm in relation to a crime of violence pursuant to 18 U.S.C. § 924 (c)(1)(A). 18 U.S.C. § 924 (c)(1)(A) states that anyone who uses or carries a firearm in relation to a crime of violence shall:

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is *brandished*, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

8 U.S.C. § 924 (c)(1)(A) (emphasis added). The defendant was found guilty and sentenced to 7 years imprisonment. *Alleyne*, 133 S. Ct. at 2156. The defendant objected to the sentence because the jury indicated on the verdict slip that he had "'[u]sed or carried a firearm during and in relation to a crime of violence,' but did not indicate a finding that the firearm was

'[b]randished.'" *Id*. Therefore, the jury did not find that the defendant "brandished" a firearm, beyond a reasonable doubt. *Id*. The defendant argued that raising his mandatory minimum sentence to 7 years "based on a sentencing judge's finding that he brandished a firearm would violate his Sixth Amendment right to a jury trial." *Id*. Citing prior case law, the trial court overruled the defendant's objection because "brandishing was a sentencing factor that the court could find by a preponderance of evidence without running afoul of the Constitution." *Id*. The trial court found evidence to support a finding of brandishing and sentenced the defendant to 7 years. *Id*.

The appellate court affirmed, yet the Supreme Court vacated the sentence reasoning that "[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." *Id*. at 2158. "[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id*. at 2162. The Supreme Court further reasoned:

> Here, the sentencing range supported by the jury's verdict was five years' imprisonment to life. The District Court imposed the 7–year mandatory minimum sentence based on its finding by a preponderance of evidence that the firearm was 'brandished.' Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt. The judge, rather than the jury, found brandishing, thus violating petitioner's Sixth Amendment rights.

Id. at 2163-64. Consequently, any facts that prompt a mandatory minimum sentence cannot be decided by a judge. They must be submitted to a jury and found beyond a reasonable doubt.

Alleyne overruled *Harris v. United States*, called *McMillan v. Pennsylvania* into question, and bolstered the holding of *Apprendi v. New Jersey*. *McMillian v. Pennsylvania* initially distinguished "elements" from "sentencing factors," and held that "facts found to increase the mandatory minimum sentence are sentencing factors and not elements of the crime." *Alleyne*, 133 S. Ct. at 2157; *see McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). Similar to the instant case, *McMillian* considered (and ultimately rejected) a constitutional challenge to Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa.C.S. § 9712. *McMillan*, 477 U.S. at 80; *see Alleyne*, 133 S. Ct. at 2156. "Visible Possession" of a firearm was considered a

sentencing factor, not an element of a crime. *McMillan*, 477 U.S. at 80. Therefore, "*McMillan* sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm." *Harris v. United States*, 536 U.S. 545, 550 (2002).

Apprendi v. New Jersey was decided in the year 2000. The court held that any fact that increases the sentence for a crime *beyond the statutory maximum* must be submitted to the jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added). *Harris v. United States* was decided after McMillian and Apprendi in 2002, and attempted to reconcile the two cases. "*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime-and thus the domain of the jury-by those who framed the Bill of Rights." *Harris*, 536 U.S. at 557. The *Harris* court reasoned that *Apprendi* was consistent with *McMillian* because *McMillian* only permitted a judge to find, by a preponderance of the evidence, a "fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)." *Id*. "Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id*. at 567. Accordingly, Harris distinguished between facts that increase the maximum sentence and facts that only increase the mandatory minimum and held that "judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment." *Alleyne*, 133 S. Ct. at 2155; see *Id*. at 558.

In 2013, the *Alleyne* court established that *Harris* was actually inconsistent with *Apprendi*. *See Alleyne*, 133 S. Ct. at 2155. Concluding that *Harris* was wrongly decided, the *Alleyne* court held that mandatory minimum sentences also increase a crime's penalty, and therefore any facts that increase the mandatory minimum are elements and must be decided by a jury beyond a reasonable doubt. *Id*. at 2155, 2158. Thus, *Alleyne* expanded *Apprendi's* jury-determination rule to mandatory minimum sentences.

b. Pennsylvania Appellate Courts

Our Pennsylvania Superior Court and Supreme Court have addressed, primarily in dicta, the unconstitutionality of certain mandatory minimum statutes in light of *Alleyne*. Both the Defendant and the Commonwealth cite *Commonwealth v. Watley*, a recent post-*Alleyne* Superior Court *en banc* decision, decided November 25, 2013. In *Watley*,

with facts similar to the instant case, the trial court imposed a mandatory minimum sentence of 5 years pursuant to 42 Pa.C.S. § 9712.1. *Watley*, 81 A.3d 108, 112 (Pa. Super. 2013) (en banc). The defendant was convicted of possession with intent to deliver, conspiracy to commit possession with intent to deliver, possession, false identification to law enforcement, and two counts of firearms not to be carried without a license. *Id*. at 110. Although the defendant did not challenge the constitutionality of § 9712.1 because *Alleyne* was decided during the pendency of his appeal, the Superior Court stated:

> We are aware that during the pendency of this first as-of-right direct appeal, the United States Supreme Court decided *Alleyne* . . . Therein, the Supreme Court held that the defendant's jury trial rights were infringed where the federal court applied a federal mandatory minimum statute for brandishing a firearm where the fact of brandishing was not presented to the jury or established beyond a reasonable doubt.

Watley, 81 A.3d at 116. "The *Alleyne* decision, therefore, renders those Pennsylvania mandatory minimum sentencing statutes that do not pertain to prior convictions constitutionally infirm insofar as they permit a judge to automatically increase a defendant's sentence based on a preponderance of the evidence standard." *Id*. at 117 (citing 42 Pa.C.S. § 9712(c); 42 Pa.C.S. § 9712.1(c); 42 Pa.C.S. § 9713(c); 42 Pa.C.S. § 9718(c); 42 Pa.C.S. § 9719(b); 18 Pa.C.S. § 7508(b); 18 Pa.C.S. § 6317(b)). Also, in a footnote citing and discussing both sections (a) and (c) of § 9712.1, the court opined that "[t]his statute is no longer constitutionally sound in light of *Alleyne v. United States* . . . which overruled *Harris v. United States* . . . and *McMillan v. Pennsylvania*, . . ." Id. at 112 n.2. In the same footnote, the court cited *Commonwealth v. Stokes* for its proposition that "§ 9712 [mandatory minimum for crimes of violence committed with firearms] would be unconstitutional if *Harris* and *McMillan* were overruled." *Id*.

Despite this discussion, the Superior Court reasoned that application of the mandatory minimum was still proper in the case before it because the jury also found the defendant guilty of two separate firearms violations, and thus found that the defendant possessed the firearms. *Id*. at 118-21. Additionally, the court reasoned that the defendant never disputed whether the firearms were in close proximity to the drugs. *Id*. at 120. In essence, he never contested the facts that were necessary to apply the mandatory minimum. The court stated:

> The firearms in question were undisputedly located within the same vehicle as the Ecstasy; indeed, one of the guns

> was found in the same glove compartment as the drugs. Hence, the jury did determine beyond a reasonable doubt the facts necessary to subject Appellant to the mandatory minimum, *i.e.*, that Appellant possessed the firearms when he committed the PWID offense.

Id. at 118-19. Overall, the "jury's finding on the two firearms charges in this matter is directly aligned with the requirement under § 9712.1 that the defendant possess a gun." *Id*. at 120-21.

In its analysis, the court discussed and ultimately distinguished its holding from *Commonwealth v. Johnson*, a pre-*Alleyne* Superior Court case which also provides this Court with guidance about the appropriate applicability of § 9712.1. In *Johnson*, the defendant was found guilty of attempted murder, aggravated assault, recklessly endangering another person, intimidation of a witness, retaliation against a witness, and unlawful possession of a firearm. *Commonwealth v. Johnson*, 910 A.2d 60, 62 (Pa. Super. 2006). Attempted murder generally has a maximum sentence of 20 years, yet he was sentenced to 17 ½ years to 40 years. *Id*. at 66. A finding of "serious bodily injury" was necessary to impose the 40 year sentence for attempted murder, and defendant argued that his sentence of 17 ½ years to 40 years was illegal because "there was not sufficient evidence to support a finding of 'serious bodily injury.'" *Id*. at 67.

The Superior Court in *Johnson* agreed. The trial court had reasoned that "'serious bodily harm' had been established when the jury found appellant guilty of the companion offense of aggravated assault." *Id*. However, the Superior Court determined such a finding was insufficient because "it was not the prerogative of the trial court, but solely the responsibility of the jury in this case to find, beyond a reasonable doubt, whether a serious bodily injury resulted from the instant attempted murder." *Id*. Consequently, the defendant's sentence was illegal because "the jury verdict here was limited to a finding of guilt on the crime of attempted murder generally, for which the maximum sentence is twenty years." *Id*. at 67-68. In support of its decision the court reasoned that:

> (1) appellant was not charged with attempted murder resulting in serious bodily injury, (2) appellant was not on notice that the Commonwealth sought either to prove that a serious bodily injury resulted from the attempted murder or to invoke the greater maximum sentence, and (3) the jury was never presented with, nor rendered a decision on, the question of whether a serious bodily injury resulted from the attempted murder.

Id. at 67.

Although *Johnson* addressed a sentence that exceeded the maximum, unlike *Watley*, *Johnson* is similar to the instant case because the Defendant is not charged with any firearm crimes. He is only charged with one count of Possession with Intent to Deliver a Controlled Substance; therefore, the jury is not in a position to render a decision on the question of whether Defendant was in possession of a firearm in connection with the drug offense.

Additionally, the Superior Court decided *Commonwealth v. Munday* on October 10, 2013. The court vacated the defendant's mandatory minimum sentence pursuant to *Alleyne*. *Commonwealth v. Munday*, 78 A.3d 661, 662 (Pa. Super. 2013). The defendant was convicted by non-jury trial of various firearm and drug offenses, and the mandatory minimum of 5 years was imposed pursuant to 42 Pa.C.S. § 9712.1. *Id*. at 663. The Superior Court determined that application of the mandatory minimum violated the defendant's due process rights and his rights under the Sixth Amendment (assuming the judge followed § 9712.1(c) in applying it). *Id*. at 666. The Court reasoned:

> *Alleyne* undeniably establishes, despite our legislature's express statutory language to the contrary in this instance, that when a mandatory minimum sentence is under consideration based upon judicial factfinding of a 'sentencing factor,' that 'sentencing factor' is, in reality, 'an element of a distinct and aggravated crime' and, thus, requires it be proven beyond a reasonable doubt.

Id. (citing *Alleyne*, 133 S.Ct. at 2163). The court specifically declined to address "whether section 9712.1 is facially invalid in light of *Alleyne*." *Id*. The court concluded:

> [T]he imposition of the mandatory sentencing provision of 42 Pa.C.S. § 9712.1 in this case violated the rule in *Apprendi* as interpreted by *Alleyne*. Because the 'sentencing factor' at issue was not determined by the factfinder to have been proven beyond a reasonable doubt . . . we vacate the judgment of sentence and remand for resentencing.

Id.

Finally, the Pennsylvania Supreme Court decided *Commonwealth v. Hanson* on December 27, 2013. In *Hanson*, after the defendant pled guilty to possession with intent to deliver, the trial judge imposed the mandatory minimum sentence pursuant to § 9712.1(a). *Commonwealth v. Hanson*, 82 A.3d 1023, 1029 (Pa. 2013). The defendant appealed challenging whether he was in physical possession or control of the firearm. *Id*. In deciding that the

Superior Court's decision to apply § 9712.1(a) was incorrect, the court noted in dicta "where there is doubt in the application of a mandatory sentencing statute, the rule of lenity does favor traditional, individualized sentencing based on the defendant's offenses, record, and particular circumstances." *Id*. at 1039. The court next referenced *Alleyne* and discussed how prior to its decision, legislatures were free to delegate the fact-finding authority to sentencing judges when applying mandatory minimum sentences. *Id*. Considering *Alleyne*, the Supreme Court reasoned:

> Based upon the above series of considerations, we will remand the matter for resentencing, with the admonition that imposition of the mandatory sentence under Section 9712.1(a)—based on a correct legal analysis and supported findings—is not foreclosed. Should the court, however, determine that the Commonwealth has not established, by a preponderance of the evidence, that Appellant was in constructive control of the firearm—subsuming supported findings relative to the aspects of scienter which we have delineated—the court should implement individualized sentencing, per the usual practices. *Furthermore, to the degree to which Appellant may attain recourse to the new Alleyne regime consistent with the developed principles of issue presentation and preservation and/or their exceptions, we also do not foreclose that the common pleas court may undertake traditional, individualized sentencing, based on Alleyne.*

Id. at 1040 (emphasis added). In an immediately following footnote, the court reasoned that the case before it "was raised and briefed under a scheme controlled by now-overruled United States Supreme Court decisions. In the absence of developed arguments concerning whether and to what extent the new federal constitutional overlay should apply to this case, we decline to apply *Alleyne* outright at this juncture." *Id*. at 1040 n.25.

c. The Court of Common Pleas and Non-Precedential Superior Court Decisions

At the April 4, 2014 hearing, counsel for the Defendant presented to the Court several recent examples from the Superior Court and other Courts of Common Pleas addressing this issue. In *Commonwealth v. Kyle Hopkin*s, CR-1260-2013 (Chester County, December 17, 2013), the Chester County Court of Common Pleas issued an Order granting the defendant's Motion for Extraordinary Relief and declaring 18 Pa.C.S. § 6317 (mandatory minimum sentence for certain drug crimes that occur in school zones)

unconstitutional pursuant to *Alleyne* and *Watley*. The Court also rejected the Commonwealth's proposal to add a special interrogatory to the verdict slip, concluding that a verdict slip could not fix an unconstitutional statute.

In Lycoming County, an *en banc* panel of the Court of Common Pleas issued an Opinion and Order in two cases on February 6, 2014 where the Commonwealth filed motions to amend the Bills of Information in hope of complying with *Alleyne*. The court denied the motions finding 18 Pa.C.S. § 6317 and § 7508 (mandatory minimums for possessing or trafficking certain amounts of controlled substances) unconstitutional in light of *Alleyne*. *Commonwealth v. Cory Derr*, CR-1620-2011 (Lycoming County, February 6, 2014); *Commonwealth v. Shareaf Williams*, CR-1217-2013 (Lycoming County, February 6, 2014). The court carefully considered yet rejected the Commonwealth's argument that the unconstitutional portions of the statutes were severable. The court also agreed with defense counsel that submitting the issues to the jury would essentially involve the court rewriting the statutes.

In the wake of the Lycoming County Decision, the Montgomery County Court of Common Pleas issued an Order in three cases on March 21, 2014 where the Commonwealth also sought to amend the Bills of Information to include factual allegations to establish the applicability of mandatory minimum sentences pursuant to 42 Pa.C.S. § 9712.1, 18 Pa.C.S. § 6317 and § 7508. *Commonwealth v. Kahil Brockington*, CR-9311-2012 (Montgomery County, March 21, 2014); *Commonwealth v. Khalil Blakeney*, CR-2521-2013 (Montgomery County, March 21, 2014); *Commonwealth v. William Bates*, CR-139-2013 (Montgomery County, March 21, 2014). Citing the Lycoming County decision, the court denied the motions. Without going to so far as explicitly holding the statutes at issue unconstitutional, the court rejected the Commonwealth's proposal to sever the unconstitutional portions of the statutes. The court also reasoned that the legislature, not the court, should be rewriting statutes in accordance with *Alleyne*.

In Centre County, the issue was presented before the Court of Common Pleas in the form of a motion to declare 18 Pa.C.S. § 6317 unconstitutional. *Commonwealth v. Jaleel Aatiq Brown*, CR-1249-2013 (Centre County March 2014). The court denied the motion, determining that the unconstitutional portion of § 6317 was severable from the remaining portions of the statute. Upon coming to this conclusion, the court relied primarily on the legislative intent to protect children from drugs and secure drug-free school zones. The court also determined that the issue of the drug buy location may be submitted to the jury, and that the Commonwealth was not creating a new crime.

On March 3, 2014, the Superior Court issued a non-precedential

decision in *Commonwealth v. Miller*, 1963 WDA 2012 (Pa. Super. 2014) (non-precedential decision). In *Miller*, the defendant entered a guilty plea and was sentenced to the mandatory minimum pursuant to 18 Pa.C.S. § 7508. On appeal the defendant argued "that the trial court erred in applying the mandatory minimum where the Commonwealth failed to present sufficient evidence as to the weight of the controlled substance." *Commonwealth v. Miller*, 1963 WDA 2012 (Pa. Super. 2014) (non-precedential decision). The Superior Court agreed and remanded for resentencing reasoning that in light of *Munday* and *Alleyne*, because the weight of the controlled substance was not determined by the factfinder beyond a reasonable doubt, the mandatory minimum should not apply.

On March 5, 2014, the Superior Court issued two other non-precedential decisions in *Commonwealth v. Eiland*, 1326 MDA 2013 (Pa. Super. 2014) (non-precedential), and *Commonwealth v. Hovington*, 3515 EDA 2012 (Pa. Super 2014) (non-precedential). In *Eiland*, at a bench trial the defendant was convicted of simple possession, possession with intent to deliver, and possession of drug paraphernalia. *Commonwealth v. Eiland*, 1326 MDA 2013 (Pa. Super. 2014) (non-precedential). At sentencing, the trial court found that the offenses occurred within 1,000 feet of a school and 250 feet of a playground, yet refused to impose a mandatory minimum sentence pursuant to 18 Pa.C.S. § 6317 in light of *Alleyne*. The Commonwealth appealed, but the Superior Court found the trial court's refusal to impose the mandatory minimum was proper because nothing on the record showed that the trial court made its finding beyond a reasonable doubt, and per *Alleyne*, such a finding was necessary.

In *Hovington*, the majority held that the defendant's sentence was illegal pursuant to *Alleyne* and *Munday* because the trial court only found by a preponderance of the evidence facts to support the imposition of the mandatory minimum. *Commonwealth v. Hovington*, 3515 EDA 2012 (Pa. Super 2014) (non-precedential). Judge Wecht wrote a concurring memorandum striking down 42 Pa.C.S. § 9712.1(c) as unconstitutional in its entirety pursuant to *Alleyne*. Judge Wecht reasoned that *Alleyne* clearly makes the statute unconstitutional, but the majority left the bench and the bar in confusion by failing to rule specifically on its constitutionality.

II. Analysis

As outlined in detail above, before *Alleyne* was decided, pursuant to 42 Pa.C.S. § 9712.1(c), a judge was to determine by a preponderance of the evidence if 42 Pa.C.S. § 9712.1(a) was applicable to a defendant. This procedure was properly implemented by our legislature pursuant to *Harris* and *McMillan*. However, in the wake of *Alleyne*, it is clear this procedure

is no longer constitutionally firm as only a jury can determine beyond a reasonable doubt the facts necessary to impose a mandatory minimum sentence pursuant to § 9712.1(a).

a. 42 Pa.C.S. § 9712.1(c) is not severable

The Commonwealth concedes that 42 Pa.C.S. § 9712.1(c) is likely unconstitutional, but argues that § 9712.1(a) and the remainder of the statute survives constitutional scrutiny and is severable. (*See* Commonwealth's Br. in Opposition to Defendant's Motion for Extraordinary Relief, 1/31/2014). Arguably, the Commonwealth can proceed with the mandatory minimum and remain in compliance with *Alleyne*. *Id*. Therefore, the question becomes how, if at all, we can sever section (c) and still apply section (a). With the exception of Centre County, the other Common Pleas Courts have found severability to be an inappropriate solution. This Court agrees.

In support, the Commonwealth argues that subsection (c) only deals with the method of proof regarding mandatory minimums and is severable from the remainder of § 9712.1. (*See* Commonwealth's Br. in Opposition to Defendant's Motion for Extraordinary Relief, 1/31/2014). The Commonwealth cites 1 Pa.C.S. § 1925, the Statutory Construction Act, which mandates severability unless "the court finds that the valid provisions of the statute are so essentially and inseparably connected with" the void provision. 1 Pa.C.S. § 1925. The Commonwealth also cites *Com., Dep't of Ed. v. First School* for the proposition that, "[t]he public policy of this Commonwealth favors severability." *Com., Dep't of Ed. v. First School,* 370 A.2d 702 (Pa. 1977).

Pursuant to 1 Pa.C.S. § 1925, the Commonwealth argues that subsection (c) is not essentially and inseparably connected, and the remaining statutory provisions are capable of being executed in accordance with legislative intent. (*See* Commonwealth's Br. in Opposition to Defendant's Motion for Extraordinary Relief, 1/31/2014). In passing § 9712.1, the Commonwealth avers that the legislature intended to give defendants who possess firearms in connection with their drug-dealing harsher penalties. *Id*. Subsection (c) is merely the previously constitutional method for establishing proof, and it bears no connection to the subject matter of the statute itself. *Id*. Moreover, *Alleyne* has provided constitutional directives on what the method of proof must be – a jury finding of beyond a reasonable doubt. *Id*. The Commonwealth analogizes the issue with theft charges where valuations of property go to a jury and argues that severing § 9712.1(c) away from the entire statute permits the Court to both fulfill the constitutional requirements of *Alleyne* and comply with legislative intent. *Id*. Moving forward, the Commonwealth proposes that the mandatory issue of the Defendant's possession of a firearm in connection with his alleged

drug offense be submitted on the verdict slip as a special question for the jury. *Id*.

Undoubtedly, the legislature intended to give defendants who possess firearms in connection with their drug offenses harsher penalties. However, the legislature also intended those penalties to be imposed according to a very specific procedure – the issue of firearm possession must be decided by a judge, at sentencing, by a preponderance of the evidence. The Commonwealth asks the Court to have the issue of firearm possession decided by a jury, at trial, beyond a reasonable doubt.

The Court recognizes the difficulty *Alleyne* has caused and the creative solution the Commonwealth offers in response. However, we find that the valid provisions of § 9712.1 are so essentially and inseparably connected with § 9712.1(c) that severance is not possible. If the Court severs § 9712.1(c), we are left without a method of finding the facts necessary to apply the mandatory minimum. Right now, the Court can only impose § 9712.1(a)'s mandatory minimum sentence pursuant to an unconstitutional procedure. At best, the Commonwealth's solution would have the Court arbitrarily pick which legislative directives to follow while ignoring others. At worst, the Commonwealth asks the Court to essentially rewrite the statute and replace the unconstitutional procedure with a procedure that has not been legislatively or specifically judicially directed. It is clearly in the province of our legislature, not this Court, to make such procedural determinations.

Defendant noted at argument that the Commonwealth has provided no authority in support of its proposition that the mandatory issue of gun possession be submitted on the verdict slip as a special question for the jury. Defendant is correct, and the Court cannot consider this a viable solution without any further guidance.

Additionally, Defendant argues that the Commonwealth is asking the Court to rewrite the statute and redefine the crime with which the Defendant has been charged, asserting that the Commonwealth is basically asking the Court to add a third element of physical possession or control of a firearm to the crime of Possession with the Intent to Deliver. (*See* Def's Response to Commonwealth's Brief Opposing Defendant's Request for Extraordinary Relief, 2/04/2014). The Court agrees as the *Alleyne* court plainly stated, "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime." *Alleyne*, 133 S. Ct. at 2161. Once again, such a task should be squarely before our legislature, not the Court.

b. The Court will not apply 42 Pa.C.S. § 9712.1 in the instant

case

Per Defendant's request, the Court finds 42 Pa.C.S. § 9712.1 inapplicable in the instant case in light of *Alleyne*. The Pennsylvania appellate courts that have referenced or considered *Alleyne* have all done so in dicta in the context of appeals. *See Commonwealth v. Ramos*, 83 A.3d 86 (Pa. 2013); *Commonwealth v. Hanson*, 82 A.3d 1023 (Pa. 2013); *Commonwealth v. Lane*, 81 A.3d 974 (Pa. Super. 2013); *Commonwealth v. Munday*, 78 A.3d 661 (Pa. Super. 2013); *Commonwealth v. Barr*, 79 A.3d 668 (Pa. Super. 2013); *Commonwealth v. Armstrong*, 74 A.3d 228 (Pa. Super. 2013). Consequently, these cases have provided little direction for the trial courts about how to apply, if at all, 42 Pa.C.S. § 9712.1 and similar sentencing statutes post *Alleyne*.[1]

Moving forward, *Commonwealth v. Hanson* is seemingly the most instructive and authoritative case. As *Alleyne* was decided when Hanson was already at the Pennsylvania Supreme Court, upon remand, the court essentially gave the trial court a choice to comply or not comply with *Alleyne*. The trial court was directed to apply § 9712.1(a) if appropriate, or engage in "traditional, individualized sentencing, based on *Alleyne*." *Hanson*, 82 A.3d at 1040. The Supreme Court specifically justified its decision by explaining that, "[i]n the absence of developed arguments concerning whether and to what extent the new federal constitutional overlay should apply to this case, we decline to apply *Alleyne* outright at this juncture." *Id*. The Defendant in the instant case has asserted recourse pursuant to *Alleyne*. Therefore, if the Defendant is convicted, the Court will engage in "traditional, individualized sentencing" as instructed by the *Hanson* Court.

c. 42 Pa.C.S. § 9712.1(c) is unconstitutional

Defendant also requests the Court declare 42 Pa.C.S. § 9712.1 unconstitutional. Following the decisions of the Chester County, Lycoming County, and Montgomery County Court of Common Pleas, as well as Judge Wecht's concurring memorandum in *Hovington*, the Court holds § 9712.1(c) unconstitutional pursuant to *Alleyne*. We decline to go so far as to hold 42 Pa.C.S. § 9712.1 in its entirety unconstitutional. However, as subsection (c) cannot be severed, the constitutional propriety of § 9712.1 is called into serious doubt. Accordingly, mandatory minimum sentences should not be imposed pursuant to § 9712.1 unless our legislature corrects the constitutional defects of subsection (c).

1 The Superior Court's non-precedential decisions noted above are similarly unhelpful. *Commonwealth v. Miller,* 1963 WDA 2012 (Pa. Super. 2014) (non-precedential decision); *Commonwealth v. Eiland*, 1326 MDA 2013 (Pa. Super. 2014) (non-precedential); *Commonwealth v. Hovington*, 3515 EDA 2012 (Pa. Super 2014) (non-precedential).

CONCLUSION

For the reasons stated above, Defendant's Motion for Extraordinary Relief is granted, and the Court holds 42 Pa.C.S. § 9712.1(c) unconstitutional.

ORDER OF COURT

AND NOW THIS 21st DAY OF April, 2014, upon consideration of Defendant's Motion for Extraordinary Relief, Defendant's Brief in Support of Motion for Extraordinary Relief, the Commonwealth's Brief in Opposition to Defendant's Motion for Extraordinary Relief, Defendant's Response to Commonwealth's Brief Opposing Defendant's Request for Extraordinary Relief, and upon hearing argument on the matter;

IT IS HEREBY ORDERED THAT the Defendant's Motion is **GRANTED**.

Pursuant to Pa. R. Crim. P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.