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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. Dick Ray Hamilton, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Criminal Action No. 640-2011

HEADNOTES

Criminal Law; Constitutional Law; Mandatory Minimum Sentences; Collateral Attack

1. In *Alleyne v. United States*, ___ U.S. ___,133 S.Ct. 2151 (2013), the Supreme Court of the United States 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.

2. *Alleyne* renders 42 Pa.C.S.A. § 9712.1, and other statutes that feature analogous mandatory minimum sentencing provisions, unconstitutional. *Commonwealth v. Newman*, 99 A.3d 86 (Pa. Super. 2014).

3. Mandatory minimum provisions may not be severed from remaining portion of the statute in question. The unconstitutional proof of sentencing provision poisons the statute in its entirety and it will not survive constitutional muster. *Id*.

4. It is manifestly the province of the General Assembly, rather than the courts, to determine what new procedures must be created in order to impose mandatory minimum sentences in Pennsylvania following the United States Supreme Court's decision in *Alleyne. Newman*, 99 A.3d at 102.

5. A trial court may not permit a jury, on a verdict slip, to determine beyond a reasonable doubt a fact that increases the penalty of a crime, as required by a mandatory minimum provision. This would result in an impermissible legislative function and will not cure the unconstitutionality of a mandatory minimum sentencing statute. *See Commonwealth v. Valentine*, 101 A.3d 801 (Pa. Super. 2014).

6. Statute governing sentences for offenses against infant persons, which was basis for allowing the trial court to impose mandatory minimum sentence of ten to 20 years' imprisonment, after defendant was found guilty of two counts of involuntary deviate sexual intercourse (IDSI), violated *Apprendi v. New Jersey* 530 U.S. 466 (2001), and thus was facially unconstitutional; facts that increased mandatory minimum sentences had to be submitted to the jury and proved beyond a reasonable doubt. *See Commonwealth v. Wolfe* 106 A.3d 800; 18 Pa.C.S.A. § 3123(a)(7); 42 Pa.C.S.A. § 9718(a)(1).

7. It is undisputed that then when the United States Supreme Court renders a decision that results in a "new rule" "that rule applies to all criminal cases still pending on direct review." *Schriro v. Summerling*, 542 U.S. 358, 351 (2004).

8. If a defendant's direct appeal was still pending when *Alleyne* was announced, they are entitled to retroactivity application of it. *Newman*, 99 A.3d at 87.

9. A challenge to a sentence premised upon *Alleyne*, requiring that any fact that increases the penalty for a crime beyond the prescribed statutory minimum sentence be submitted to a jury, implicates the legality of the sentence and cannot be waived on appeal. *Id*.

10. An appellate court cannot sua sponte review a legality of the sentence under *Alleyne*, when it lacks jurisdiction to engage in such review, such as when the claim is raised in an untimely PCRA Petition where no time-bar exception applies. *Commonwealth v. Miller*, 102 A.3d 988 (Pa. Super. 2014).

11. Unless specifically stated by the United States Supreme Court or Pennsylvania Supreme

Court, a new rule of law such as the one announced in *Alleyne*, will not apply retroactively to cases in which the sentence has become final. *Id*.

12. In determining what types of new rules should be held to be retroactive, the United States Supreme Court has separated rules into categories as either substantive or procedural. *Whorton v. Bockting*, 549 U.S. 406 (2007).

13. Unlike new constitutional rules that are substantive, a procedural rule will only be applied retroactively in a collateral proceeding when it is a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288 (1989).

14. The new rule of law created in *Alleyne* is procedural in that it regulates "only the matter in determining the defendant's culpability" and because the rule does not implicate the fundamental fairness of a trial or sentencing, it is not a watershed rule of criminal procedure. *Commonwealth v. Frank Johnson*, 1073 WDA 2014 (Pa. Super. 2015) (non-precedential decision).

15. Because the rule of law announced in *Alleyne* is not a watershed rule of criminal procedure, if a defendant's judgment was final when *Alleyne* was decided, the defendant is not entitled to retroactivity even if properly raised in a timely PCRA. *Id*.

16. If a new rule is announced during a defendant's direct appeal or before the judgment becomes final, it can be applied retroactively regardless if it is a procedural or substantive rule. *See Griffith v. Kentucky*, 479 U.S. 314 (1987).

17. Where the Defendant's direct appeal was decided by the Superior Court on March 22, 2013, but he filed a timely Petition for Allowance of Appeal to the Pennsylvania Supreme Court that was not affirmed until October 16, 2013, he is still entitled to retroactively of the new rule *Alleyne* announced on June 17, 2013, because his judgment was not yet final. Furthermore, the Defendant may raise such an issue in a timely PCRA.

18. A properly raised *Alleyne* issue is not harmless for purposes of the harmless error doctrine. *Wolfe*, 106 A.3d 803-806.

Appearances:

Paul Bradford Orr, Esq., *PCRA Counsel for Defendant*

Lauren E. Sulcove, Esq., *First Assistant District Attorney*

OPINION *sur* PA. R.A.P. 1925(a) AND ORDER OF COURT

Before Van Horn, J.

STATEMENT OF THE CASE

On March 15, 2012, the above-captioned Defendant, Dick Ray Hamilton, was convicted by a jury of his peers of two (2) counts of Rape of

a Child,[1] two (2) counts of Involuntary Deviate Sexual Intercourse (IDSI) with a Child,[2] two (2) counts of Indecent Assault,[3] and two (2) counts of Endangering the Welfare of Children.[4]

On July 5, 2012, the Honorable Judge Richard J. Walsh sentenced the Defendant to an aggregate minimum of 44 years and a maximum of 100 years in a State Correctional Institution. Included in the Defendant's sentence were four (4) separate mandatory minimum terms of ten (10) years pursuant to 42 Pa. C.S. § 9718. On August 3, 2012, Defendant filed a timely Notice of Appeal. Defendant filed his Concise Statement of Matters Complained of on August 22, 2012, and an Amended Concise Statement of Matters Complained of on August 23, 2012. Judge Walsh issued an Order and Opinion pursuant to Pa.R.A.P. 1925(a) asking the Superior Court to affirm the Defendant's sentence on October 2, 2012. On March 22, 2013, the Superior Court affirmed the sentence. *See Commonwealth v. Hamilton*, 69 A.3d 1299 (Pa. Super 2013) (unpublished memorandum). Defendant filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on April 25, 2013. The Pennsylvania Supreme Court denied the Petition on October 16, 2013. *See Commonwealth v. Hamilton*, 621 Pa. 694 (Pa. 2013). Thus, the Defendant's conviction became final on January 14, 2014, ninety days after the Pennsylvania Supreme Court denied his permission to appeal. *See* 42 Pa.C.S. § 9545(b)(3) (judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review), *see also* U.S. Sup. Ct. R. 13.

On May 21, 2014, Defendant filed a timely Petition under the Post Conviction Relief Act (PCRA). The Commonwealth filed an Answer to the PCRA Petition on July 28, 2014. A hearing was held on December 1, 2014, and the parties were instructed to submit Memorandums of Law. The Commonwealth submitted its Memorandum of Law on January 5, 2015, and the Defendant submitted his on January 9, 2015. On February 12, 2015, this Court issued an Order and Opinion denying the Defendant's PCRA Petition. Defendant filed a timely Notice of Appeal on March 11, 2015, and his Concise Statement of Matters Complained of on April 1, 2105.

ISSUES RAISED

Defendant raises the following issues in his Concise Statement:[5]

1. This Court erred in denying Appellant's PCRA Petition because trial counsel failed to call numerous witnesses; including material factual

1 18 Pa. C.S. § 3121(c).
2 18 Pa. C.S. § 3123(b).
3 18 Pa. C.S. § 3126(a)(7).
4 18 Pa. C.S. § 4304(b).
5 Concise Statement of Errors Complained of on Appeal, 4/1/2015.

witnesses, expert witnesses, and character witnesses.

2. Trial counsel also failed to object to the Commonwealth's testimony at trial, in the presence of the jury, of alleged prior bad acts by the Appellant; and failed to preserve same as the basis for a new trial due to newly discovered evidence.

3. The Defendant was sentenced, in part, pursuant to the mandatory sentencing statute found at 42 Pa. C.S. § 9718, which has subsequently been held unconstitutional, by both the United States Supreme Court and Pennsylvania Supreme Court, to four separate mandatory minimum terms of ten (10) years, in addition to other unconstitutional sentencing issues.

BACKGROUND

The following summary of the case is taken from the Honorable Richard J. Walsh's October 2, 2012 1925(a) Opinion and Order following the Defendant's direct appeal:

> The evidence at trial established that Defendant systematically abused A.B. and A.W., who were both under ten years old at the time. A.W. was also developmentally disabled. The abuse occurred inside Defendant's mobile home, where he was supposed to be babysitting the victims.
>
> Police charged Defendant with ten counts, all related to the sexual abuse. For his part, Defendant admitted to police during questioning and to the jury during trial that he exposed himself to the victims. He claimed that he was medically incapable of performing intercourse, and generally denied the other allegations of physical sexual abuse.
>
> The jury rejected Defendant's explanation, and convicted him of eight of the ten counts. After a Megan's Law hearing, the Court found Defendant to be a sexually violent predator. We sentenced him to [serve an aggregate of] 44 to 100 years in a state correctional institution on July [8], 2012. Defendant did not file a post-sentence motion. Instead he filed a direct appeal on August 3, 2012.

Opinion and Order 10/2/12, at 1-2. Additionally, this Court would note that the Defendant made various other sexual abuse admissions regarding A.B. and A.W. during police questioning. The audio statement to police was entered as Commonwealth's Exhibit 6 and played to the jury during the first day of trial. N.T. 3/14/12, at 162.

DISCUSSION

I. Post Conviction Relief Act

The Post Conviction Relief Act (PCRA) was enacted to provide individuals who are convicted of crimes for which they are innocent, or those serving illegal sentences, with a means to obtain collateral relief. *See* 42 Pa.C.S. § 9543. First, the defendant must demonstrate he was convicted of a crime under the law of Pennsylvania, and that he is currently serving a sentence or waiting to do so. *See* 42 Pa. C.S. §9543(a)(1). Second, the petitioner must prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated statutory factors. *See* 42 Pa. C.S. §9543(a)(2). Third, a petitioner must demonstrate the issues raised under the Act have not been previously litigated or waived, and finally, that the failure to litigate such issues could not have resulted from a rational, strategic, or tactical decision by counsel. *See id.* at §9543(a)(1), (3)-(4). "Inherent in this pleading and proof requirement is that the petitioner must not only state what his issues are, but also he must demonstrate in his pleadings and briefs how the issues will be proved." *Commonwealth v. Rivers*, 786 A.2d 923, 927 (Pa. 2001).

Defendant raises three issues in his PCRA Petition. This Court exhaustively addressed the Defendant's first two issues in our February 12, 2015 Opinion and Order and found them to be wholly without merit. Consequently, the Court declines to address them again and would incorporate our previous Opinion by reference. However, Defendant's third issue was not raised in his PCRA Petition but this Court finds itself constrained to nonetheless address the merits of Defendant's assertion.

II. *United States v. Alleyne*

Although the Defendant fails to comprehensively outline the central question raised in his third issue, because we find it appears to be one of first impression this Court will do so. Further, it is not one so vague that this Court cannot identify the issue. The question presented to this Court is whether a Defendant may assert that he was unconstitutionally sentenced to a mandatory minimum term in light of United States Supreme Court decision in *United States v. Alleyne*, 133 S. Ct. 2151 (2013), on collateral review when his judgment of sentence **was not final until after Alleyne was decided**. (emphasis added). The unique and perplexing plight we are asked to resolve is how to remedy a situation where the Superior Court affirmed this Court's decision prior to *Alleyne* but the Pennsylvania Supreme Court did not dismiss Defendant's Petition for Allowance of Appeal, and thus make

the Defendant's judgment final, until well after Alleyne was decided. Further, the Court is tasked with addressing how and when it might be appropriate to raise an *Alleyne* issue on collateral relief in a **timely PCRA** given the fact that such issues go to the legality of the sentence and may not be waived on appeal. (emphasis added). The Pennsylvania Superior Court briefly touched on this issue in *Commonwealth v. Miller*, 102 A.3d 988, 995-996 (Pa. Super. 2014), but was accurately and elegantly able to sidestep addressing the crux of legality of the sentencing concerns implicated by *Alleyne* by asserting that the PCRA Court lacked jurisdiction because that petition was clearly untimely and no time bar exception applied.[6] Unfortunately, because the PCRA Petition before this Court was timely filed and we undoubtedly have jurisdiction, the *Miller* decision provides minimal guidance. Given the multiple layers of analysis necessary to combat the question before this Court, we find it instructive to review the decision in *Alleyne* and the relevant Pennsylvania case law that has followed.

In perhaps the most ground breaking criminal procedure decision in a decade, the United States Supreme Court rattled the very core of mandatory minimum sentencing guidelines in *Alleyne*. The majority's opinion in *Alleyne* held that an aggravating fact that increases a mandatory minimum sentence must be submitted to the jury for a finding beyond a reasonable doubt rather than be decided by a judge by a preponderance of the evidence. *Id*. at 2162-63. In a rather swift opinion, the majority in *Alleyne* essentially eviscerated the constitutionality of hundreds of mandatory minimum state statutes across the country that were premised on these aggravating facts being submitted to a judge. Pennsylvania's criminal code was no exception. The consequences of *Alleyne* were quickly recognized by Pennsylvania trial courts across the state. An array of frequently encountered statutes which included mandatory minimum sentencing guidelines, such as sentences for offenses committed with firearms,[7] sentences for certain drug offenses committed with firearms,[8] sentences for offenses against infant persons,[9] and certain drug trafficking sentences and penalties[10] became seemingly unconstitutional overnight.

III. Options for Pennsylvania Trial Courts

Facing this sentencing dilemma, trial courts scrambled to identify a possible solution. The statutes in question all featured an initial subsection requiring a mandatory minimum sentence if certain criteria are established

6 The Court also noted that even if the defendant's PCRA petition was timely that the defendant was sentenced to a mandatory minimum based on prior convictions for violent crimes and *Alleyne* was clear that its decision did not apply to prior convictions. *Id*. at 996 n.5. Therefore, all of the *Miller* majority opinion was dicta.
7 42 Pa. C.S. § 9712.1 .
8 42 Pa. C.S. § 9712.
9 42 Pa. C.S. § 9713.
10 18 Pa. C.S. § 7508.

followed by a subsequent proof at sentencing subsection. For example, Sentences for certain drug offenses committed with firearms pursuant 42 Pa. C.S. § 9712.1 states:

> (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.

However, the ramifications of *Alleyne*, on its face, only clearly rendered the proof at sentencing subsection unconstitutional, not necessarily the entirety of all mandatory minimum statutes. One possible solution for trial courts was to simply sever the unconstitutional provision of the statute and enforce the remainder. The Pennsylvania Statutory Construction Act[11] permits severability in certain situations, stating:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application,

11 1 Pa. C.S. § 1925.

> that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Severing the invalid provision of the statute (the proof at sentencing section) from the valid remaining sections would allow trial courts to enforce the remaining portions of the statute rather than conclude the entire statute was unconstitutional. Instead courts could permit the jury, on the verdict slip, to determine beyond a reasonable doubt if the mandatory minimum sentence criteria was satisfied. The other possible solution for courts would be to decide that the unconstitutional proof of sentencing provision invalidates the entire statute because the "the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one." *Id*. Consequently, trial courts could ignore consideration of any mandatory minimum sentence statutes and instead engage in "traditional, individualized sentencing." *Commonwealth v. Hanson*, 82 A.3d 1023, 1040 (Pa. 2013).

IV. Conflicting Pennsylvania Trial Court Opinions

Presented with the two aforementioned alternatives, trial courts fractured in their responses. In *Commonwealth v. Kyle Hopkins*, 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 in declaring 18 Pa.C.S. § 6317, mandatory minimum sentence for certain drug crimes that occur in school zones, unconstitutional pursuant to *Alleyne*. 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. The Court of Common Pleas of Lycoming County agreed, finding in two cases considered *en banc* that the unconstitutional portions of the statute were not severable. *See Commonwealth v. Cory Derr*, CR-1620-2011 (Lycoming County, February 6, 2014); *Commonwealth v. Shareaf Williams*, CR-1217-2013 (Lycoming County, February 6, 2014). However, the Court of Common Pleas of Centre County in *Commonwealth v. Jaleel Aatiq Brown*, CR-1249-2013 (Centre County, March 2014), found that the statute in question could be severed.

This Court also issued conflicting opinions when faced with this issue. On April 21, 2014, this Court granted Defendant's Motion for Extraordinary Relief in *Commonwealth v. Shifler*, CR -263-2013, finding

that 42 Pa. C.S. § 9712.1(c) was both unconstitutional and not severable. Specifically, the Court found that the valid provisions of 9712.1 were so essentially and inseparably connected with 9712.1(c) that severance was not possible and that adopting the Commonwealth's solution would be asking the Court to rewrite the statute. In contrast, on June 10, 2014, the Honorable Douglas W. Herman issued a conflicting opinion in *Commonwealth v. Murray*, 28-CR-189-2013 (June 10, 2014). In Murray, Judge Herman addressed 18 Pa. C.S. § 7508, and found that the proof of sentencing subsection was severable because the section was procedural in nature and severance was consistent with the General Assembly's legislative intent.

V. Appellate Court Decisions

A. *Commonwealth v. Newman*

After a year of uncertainty for trial courts, the Pennsylvania Superior Court affirmatively and precisely addressed the issue. In *Commonwealth v. Newman*, 99 A.3d. 86 (Pa. Super. 2014), the Superior Court reviewed the Commonwealth's argument that 42 Pa. C.S. § 9712.1(c), the same unconstitutional statutory provision at issue in this Court's decision in *Shifler*, could be severed and thus did not invalidate the entire statute and that the proper remedy would be to remand for the empanelling of a sentencing jury for the determination, beyond a reasonable doubt, as to whether the conditions had been satisfied such that a mandatory minimum sentence should be imposed. In rejecting this argument, the *Newman* Court found that "subsections (a) and (c) of Section 9712.1 are essentially and inseparably connected" and could not be severed. *Id*. at 101. Further, the Court found if it were to remand the case for a sentencing jury to decide the issue, it would essentially be legislating and writing law. *Id* at 102. The Superior Court quoted this Court's Opinion in *Shifler* stating:

> Finally, we note that *Alleyne* and the possibility of severance of Section 9712.1 have arisen in several of our courts of common pleas. Although we are not bound by those decisions, we find a review of their analyses salutary:
>
> 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.
>
> 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 the 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 sentence. Right now, the Court can only impose § 9712.1(a)'s mandatory minimum sentence by using 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 the province of the legislature, not this Court, to make such procedural determinations.
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> ***Commonwealth v. Shifler,* No. CP–28–CR–0000263–2013, entered April 21, 2014, slip. op. at 16–17 (Judge Carol L. Van Horn, Franklin County), on appeal at 42 MAP 2014.** (emphasis added).

Id. Ultimately, the *Newman* Court found that *Alleyne* rendered 42 Pa. C.S. § 9712.1 unconstitutional and vacated the defendant's judgment of sentence and remanded for the re-imposition of sentence **without consideration of any mandatory minimum sentence** provided by Section 9712.1. (emphasis added).

B. *Commonwealth v. Valentine*

On October 3, 2014, the Superior Court was again faced with this issue, this time concerning the alleged illegality of imposing a mandatory minimum sentence pursuant to 42 Pa.C.S. §§ 9712 (enhancing minimum sentence for offenses involving firearms) and 9713 (enhancing minimum sentences of offenses involving public transportation). See *Commonwealth v. Valentine*, 101 A.3d 801 (Pa. Super. 2014). The *Valentine* Court relied almost exclusively on Newman to conclude that the proof of sentencing subsection could not be severed and that as a result the statutes in their

entirety were unconstitutional. Specifically, the Court instructed:

> Here, the trial court permitted the jury, on the verdict slip, to determine beyond a reasonable doubt whether Appellant possessed a firearm that placed the victim in fear of immediate serious bodily injury in the course of committing a theft for purposes of the mandatory minimum sentencing provisions of 42 Pa.C.S.A. § 9712(a), and whether the crime occurred in whole or in part at or near public transportation, for purposes of the mandatory minimum sentencing provisions of 42 Pa.C.S.A. § 9713(a). The jury responded "yes" to both questions. In presenting those questions to the jury, however, we conclude, in accordance with Newman,that the trial court performed an impermissible legislative function by creating a new procedure in an effort to impose the mandatory minimum sentences in compliance with *Alleyne*.
>
> The trial court erroneously presupposed that only Subsections (c) of both 9712 and 9713 (which permit a trial judge to enhance the sentence based on a preponderance of the evidence standard) were unconstitutional under Alleyne, and that Subsections (a) of 9712 and 9713 survived constitutional muster. By asking the jury to determine whether the factual prerequisites set forth in § 9712(a) and § 9713(a) had been met, the trial court effectively determined that the unconstitutional provisions of § 9712(c) and § 9713(c) were severable. Our decision in Newman however holds that the unconstitutional provisions of § 9712(c) and § 9713(c) are not severable but "essentially and inseparably connected" and that the statutes are therefore unconstitutional as a whole. Id. at ——— – ———, 13–14. ("If Subsection (a) is the predicate arm ... then Subsection (c) is the enforcement arm. Without Subsection (c), there is no mechanism in place to determine whether the predicate of Subsection (a) has been met.").

Id. at 8.

Therefore, the Superior Court's holding in *Valentine* not only decisively reaffirmed *Newman*, but also expanded and strengthen it. The statute invalidated in Newman, 42 Pa. C.S. § 9712.1, dealt with enhancing the minimum sentence where a firearm is found on a drug dealer, an accomplice, or in the vicinity of the contraband. In contrast, the initial statute invalidated in *Valentine*, 42 Pa.C.S. § 9712, enhanced the minimum

sentence where a firearm is possessed in crimes of violence pursuant to 42 Pa.C.S.A. § 9714(g). Thus, § 9712 is a broader and more commonly invoked statute than that of the more narrow § 9712.1, which deals with firearms only when they are involved in drug transactions. In addition, *Valentine* also expanded the holding in Newman to § 9713. (offenses involving public transportation).

C. *Commonwealth v. Wolfe*

In *Commonwealth v. Wolfe*, 106 A.3d 800, 805 (Pa. Super. 2014), the Superior Court applied the analysis utilized in *Newman* and *Valentine* to 42 Pa. C.S. § 9718, sentences for offenses against infant persons. This is the precise statute in dispute in the current case before this Court. The *Wolfe* Court concluded that 42 Pa. C.S. § 9718 contained the same statutory format as the statutes struck down in *Newman* and *Valentine* and therefore must also be facially unconstitutional.

Additionally, the *Wolfe* Court was careful to recognize and address the idea that the fact triggering the mandatory minimum sentence was also an element of the crime of which the Defendant was charged.[12] Thus, at trial, the Commonwealth had already been required to prove beyond a reasonable doubt that the victim was under the age of sixteen (16). The Court then made it clear however, that it was only concerned with the imposition of the mandatory minimum sentence, and not the Defendant's conviction. Such a distinction is important not only because the IDSI statute under which the Defendant in *Wolfe* was convicted is the same as the one at issue in the case at bar, but also because it represented a significant change from the Superior Court's previous decision on the issue in *Commonwealth v. Matteson*, 96 A.3d 1064 (Pa. Super. 2014).

In *Matteson*, the Superior Court held that the trial court did not err in imposing the mandatory minimum because the requirements of *Alleyne* had been meet already in obtaining the Defendant's conviction. Essentially, the Court argued that *Alleyne's* burden of proof had been met at the conviction stage. Specifically, the *Matteson* Court stated:

> Here, Matteson was charged with aggravated indecent assault of a child, which requires, *inter alia*, that the victim is less than 13 years of age. *See* 18 Pa.C.S.A. § 3125. The victim testified that she was 11 years old at the time of the incident. N.T., 10/28/13, at 1. The jury received an

12 The Court stated: "Compare 42 Pa.C.S.A. § 9718(a)(1) (stating, '[a] person convicted of the following offenses when the victim is less than 16 years of age shall be sentenced to a mandatory term of imprisonment[ ]'), with 18 Pa.C.S.A. § 3123(a)(7) (stating that a person is guilty of IDSI if he or she engages in 'deviate sexual intercourse" with a complainant "who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other[ ]')."Id. at 805.

> instruction that it was required to find that the victim was less than 13 years of age. Trial Court Opinion, 3/4/14, at 4. Therefore, by finding Matteson guilty of aggravated indecent assault of a child beyond a reasonable doubt, the jury specifically found the element required to impose the mandatory minimum sentence. *See* [*Commonwealth v.*] *Watley*, 81 A.3d [108,] 121 [(Pa.Super.2013) (*en banc*)] (concluding that the appellant's mandatory minimum sentence under section 9712.1 was not illegal under Alleyne because the jury, by virtue of its verdict of guilty on the possession of firearms charges, rendered a specific finding as to whether the appellant possessed the handguns)[, *appeal denied*, —— Pa. ——, 95 A.3d 277 (2014)]. Thus, the requirements of *Alleyne* have been met, and Matteson's claim is without merit.
>
> In his second claim, Matteson contends that the mandatory minimum provisions of 42 Pa.C.S.A. § 9718 are unconstitutional. Brief for Appellant at 9–10.
>
> As noted above, the language that increases a defendant's sentence based on a preponderance of the evidence standard in section 9718 has been found unconstitutional. *See Watley*, 81 A.3d at 117. However, since the jury found that the Commonwealth proved every element of aggravated indecent assault of a child beyond a reasonable doubt, including a victim under the age of 13, the trial court properly imposed the mandatory minimum sentence.

Id. at 1066-1067. The *Wolfe* Court expressly rejected this previous analysis found in Matteson determining that unless the various subsections of § 9718 were severable such a conclusion could not be reached. Because the Court had already determined § 9718 was facially unconstitutional since it was indistinguishable from the statutes struck down in *Newman* and *Valentine*, it determined that *Matteson* must be abrogated. Consequently the *Wolfe* Court concluded that the trial court erred in imposing the ten-year mandatory minimum and vacated and remanded for resentencing.

D. *Commonwealth v. Hopkins*

The severability issue discussed above is currently in front of the Pennsylvania Supreme Court and was argued in September of 2014. *See Commonwealth v. Kyle Hopkins*, CR-1260-13. It is joined by 33 companion cases including this Court's decision in *Shifler*. However, until

the Pennsylvania Supreme Court rules in *Hopkins*, the Superior Court's decisions in *Newman*, *Valentine*, and *Wolfe* are binding on this Court and make it clear that *Alleyne* renders statutes that impose a mandatory minimum sentence with a proof of sentencing subsection that features a judge making a determination by a preponderance of the evidence unconstitutional. Simply put, the aforementioned statutes or any that feature similar sentencing mechanisms, may not be severed in an attempt to purge the unconstitutional proof of sentencing provision. Because the provisions of these statutes are "essentially and inseparably connected," the now clearly unconstitutional proof of sentencing provision poisons the statute in its entirety and it will not survive constitutional muster. For practical purposes, this means a trial court may not attempt to remedy this issue by simply altering a jury slip to require a determination by reasonable doubt for the mandatory minimum requirement. Because the Superior Court has instructed that sentences must be given without consideration of the mandatory minimum terms mentioned, "traditional, individualized sentencing" must be substituted. *Hanson*, 82 A.3d at 1040.

V. When May an Alleyne Issue Be Raised

A. On Direct Appeal

Having reviewed the Superior Court's decisions in light of *Alleyne*, it is abundantly clear that the aforementioned mandatory minimum statutes or any that feature similar sentencing mechanisms are unconstitutional and therefore void. The next issue this Court must address is when does the rule in *Alleyne* apply retroactively. Before addressing the question of severability of mandatory minimum statutes, the *Newman* Court began its analysis with this precise issue. Newman, 99 A.3d at 89-90. It is undisputed that then when the United States Supreme Court renders a decision that results in a "new rule" "that rule applies to all criminal cases still pending on direct review." *Schriro v. Summerling*, 542 U.S. 358, 351 (2004). In *Newman*, the Superior Court had actually rendered its decision in the Defendant's appeal five days before the United States Supreme Court issued its opinion in *Alleyne*. However, the Court noted that its decision did not become final until the time for petition for allowance of appeal with the Pennsylvania Supreme Court expires. As such, the Court determined it still had jurisdiction to modify its holding and because the case was still pending on direct appeal when *Alleyne* was handed down, the decision may be applied to the defendant's case retroactively.

However, there is one further step that must be taken for a court to consider the retroactively of *Alleyne*. In order to employ retroactive application of a new constitutional rule, a defendant "must have raised the

issue in the court below." *Commonwealth v. Cabeza*, 469 A.2d 146, 148 (1983). Despite finding that the Defendant did not challenge his mandatory minimum sentence under *Alleyne* or other similar theory on direct appeal, the *Newman* Court held that because *Alleyne* implicates the legality of the sentence it cannot be waived on appeal. Therefore, the Court held that the "appellant's case was still pending on direct appeal when *Alleyne* was handed down, and the decision may be applied to appellant's case retroactively." *Id*. at 90.

B. On Collateral Attack- *Commonwealth v. Miller*

On September, 26, 2014, the Superior Court in *Miller*[13] addressed the issue of whether *Alleyne* could be retroactively applied to cases on collateral review. In *Miller*, the defendant initially filed a timely PCRA following his judgment of sentence becoming final on August 6, 2008. The defendant's petition was ultimately found to be meritless and was dismissed by the PCRA court and affirmed by the Superior Court. Defendant did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

Following the Supreme Court's decision in *Alleyne* in 2013, the defendant filed a second PCRA petition on August 8, 2013. The PCRA clearly provides that any petition, including subsequent petitions, must be filed within one year the date of judgment becomes final unless one of three time bar exceptions applies. *See* 42 Pa.C.S. § 9545(b). The defendant attempted to avoid his second PCRA Petition becoming time barred by arguing that the third exception in Section 9545(b) applied, that a new constitutional right was recognized by the Supreme Court in *Alleyne* and by the Pennsylvania Superior Court in *Newman*, and that this right had been held to be applied retroactively in both cases. Unfortunately for the defendant's argument, he had been sentenced to a mandatory minimum based on prior convictions for violent crimes and *Alleyne* was clear that its decision did not apply to prior convictions. *See Miller*, 102 A.3d at 996 n.5 Therefore, *Alleyne* was not applicable to the defendant.

However, before dismissing based on the merits of the defendant's argument, the *Miller* Court, in dicta, dealt first with the timeliness of the PCRA petition. The Court stated "even assuming that *Alleyne* did announce a new constitutional right, neither our Supreme Court, nor the United States Supreme Court has held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final." *Id*. at 995. (emphasis added). Further, the *Miller* Court noted that any "new rule" is applied retroactively to cases on collateral review only if the United States Supreme Court or our Supreme Court specifically holds it to be retroactive. *Id*. Thus,

13 102 A.3d 988 (Pa. Super. 2014).

the Defendant failed to satisfy the requirements of the new constitutional exception to the PCRA one year time-bar and this was fatal to his claim.

Perhaps more relevant to the issue at hand was the *Miller* Court's final paragraph where it acknowledged that *Alleyne* goes to the legality of the sentence and cannot be waived on appeal. Furthermore, the Court recognized that it was "endowed with the ability to consider an issue of illegality of sentence sua sponte." *Id*. quoting *Commonwealth v. Orellana*, 86 A.3d 877, 883 n.7 (Pa. Super. 2014). However, the Court concluded by stating that in order for it or the PCRA Court to consider a legality of the sentence claim, it must have jurisdiction. Because the PCRA Petition in *Miller* was clearly untimely, neither the PCRA court or Superior Court had jurisdiction to consider the legality of the sentence question. *Id*.

ANALYSIS

In attempting to apply the aforementioned analysis to the instant case, a comprehensive understanding of the relevant timeline is imperative. The Defendant was found guilty at a jury trial on March 15, 2012, and sentenced on July 5, 2012. On August 3, 2012, the Defendant filed a timely Notice of Appeal. The Superior Court affirmed this Court's decision on March 22, 2013. The Defendant filed a timely Petition for Allowance of Appeal to the Pennsylvania Supreme Court on April 25, 2013. Before the Pennsylvania Supreme Court could address the Defendant's Petition, the United States Supreme Court issued its decision in *Alleyne* on June 17, 2013. Roughly two months later on October 16, 2013, the Pennsylvania Supreme Court denied the Defendant's Petition. The Defendant's conviction became final on January 14, 2014; ninety days after the Pennsylvania Supreme Court denied his permission to appeal. Defendant subsequently filed a timely PCRA petition on May 21, 2014.

At first glance, the holding in *Miller* seems to clearly resolve the issue in the instant matter. *Miller* unequivocally stated that because the Pennsylvania Supreme Court or the United States has not stated so, that *Alleyne* is not to be applied retroactively to cases in which the judgment of sentence had become final. In the instant matter, the Defendant is attempting to raise an *Alleyne* issue on collateral attack so it would appear his argument is meritless. However, such a conclusion is shortsighted and fails to accurately understand Pennsylvania and federal case law in wake of *Alleyne* for multiple reasons.

Newman firmly established that *Alleyne* may be applied retroactively to cases pending on direct appeal when the decision was handed down. It is unequivocally clear in this case that Defendant's direct appeal was pending

long after *Alleyne* was decided. In fact, the Defendant's judgment did not become final until January 14, 2014. In contrast, in cases such as *Miller*, the defendants are reliant on *Alleyne* applying retroactively because they must find a way to defeat the PCRA one year time-bar. Under § 9545(c) the three possible avenues a Defendant may take to avoid the PCRA one year time bar are by showing:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

As the decision in *Alleyne* did not in any way implicate an argument under subsections (i) and (ii), these defendants are beholden to proving subsection (iii).

For example in *Miller*, the defendant's judgment became final on August 6, 2008, and his first PCRA petition was ultimately dismissed and affirmed by the Superior Court on May 4, 2012. Thus, when the defendant filed his second PCRA petition based on *Alleyne* on August 8, 2013, his petition was clearly untimely in the absence of a time-bar exception. Because the *Miller* Court ultimately ruled that *Alleyne* did not apply retroactively, the Defendant's argument regarding the PCRA time-bar was extinguished. The Superior Court has used this analysis to extinguish various other appeals in recent unpublished decisions which featured patently untimely PCRA petitions. *See Commonwealth v. Hurley*, 2866 EDA 2014 (Pa. Super. 2014) (Defendant's time limit to file a petition for collateral relief expired on February 8, 2010, and he attempted to file untimely PCRA on April 4, 2014 and later included Alleyne arguments on appeal) (non-precedential decision); *Commonwealth v. Howard*, 2790 EDA 2014, (Pa. Super. 2014) (Defendant's time limit to file a petition for collateral relief expired on March 24, 2008, and he attempted to file an untimely PCRA petition based on Alleyne on June 23, 2014.) (non-precedential decision).

Alleyne, no doubt, ushered in hundreds, perhaps thousands, of

appeals from inmates across the state who had been sentenced under statutes featuring mandatory minimum provisions like those outlined above. A vast majority of these appeals deal with individuals whose cases became final long before *Alleyne* was law. Practically speaking, if decisions such as *Alleyne* applied retroactively to all cases on collateral review, there would be chaos in the courts. Trial courts would be forced to resentence thousands of individuals, likely suffocating the judiciary and bringing the wheels of justice to a virtual standstill. As best explained by the First Circuit United States Court of Appeals:

> *Alleyne*, though, was not the law when [the Defendant] was convicted and sentenced. Like thousands of others, he was tried in full accord with the law as it stood prior to *Alleyne*. Generally, new rules of law do not apply to cases concluded before the new law is recognized. (Internal citations omitted). Otherwise, every change could unsettle hundreds or thousands of closed cases, and courts might even hesitate to adopt new rules for fear of unsettling too many final convictions and settled expectations. *See Jenkins v. Delaware*, 395 U.S. 213, 218, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969) (stating that the "incongruities" resulting from "the problem inherent in prospective decision-making ... must be balanced against the impetus the technique provides for the implementation of long-overdue reforms, which otherwise could not be practically effected"); John C. Jeffries, Jr., The Right–Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 98–99 (1999) (questioning whether Warren Court-era constitutional protections such as Miranda would have been erected if "every confessed criminal then in custody had to be set free").

Butterworth v. United States, 775 F.3d 459, 463 (1st Cir. 2015) cert. denied, 135 S.Ct. 1517 (2015). The PCRA time-bar and the retroactively analysis echoed in Miller are instrumental to avoid such issues.

What the *Miller* Court did not address, and the Superior Court has only addressed briefly in a recent unpublished decision, is part of the question before this Court which is whether a court may consider *Alleyne* retroactive **during a timely PCRA petition**, despite the United States Supreme Court or the Pennsylvania Supreme Court having not held *Alleyne* to be retroactive. (emphasis added). A panel in the Superior Court addressed this precise issue in an unpublished memorandum in *Commonwealth v. Frank Johnson*, 1073 WDA 2014 (Pa. Super. 2015) ((non-precedential decision). In *Johnson*, the PCRA petition was timely so the panel could not

assert it lacked jurisdiction as it has in other unpublished decisions pursuant to *Miller*.

The panel began by acknowledging that *Alleyne* had expressly created a new constitutional rule. However, it is clear that even new constitutional rules should generally "not be applied retroactively to cases on collateral review." *See Teague v. Lane*, 489 U.S. 288, 299 (1989). In determining what types of new rules should be held to be retroactive, the United States Supreme Court has separated rules into categories as either substantive or procedural rules.[14] *Whorton v. Bockting*, 549 U.S. 406 (2007). This Court agrees with the *Johnson* panel that the rule created in *Alleyne* is clearly procedural in that it regulates "only the matter in determining the defendant's culpability." *Johnson*, 1073 WDA 2014 at 13. Unlike new constitutional rules that are substantive, a procedural rule will only be applied retroactively in a collateral proceeding when it is a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 489 U.S. at 297. To date, only one rule[15] has ever been recognized as watershed as the rule must be necessary to prevent a large risk of an inaccurate conviction and change the understanding of the procedural elements essential to the fairness of a proceeding. *Commonwealth v. Hughes*, 865 A.2d 761 (Pa. 2004).

The *Johnson* panel ultimately found that *Alleyne* did not announce a watershed procedural rule. Specifically it stated:

> We acknowledge that the *Alleyne* decision involves not just a change in who determines the facts essential to punishment, but also the burden of proof that is to be applied. This, however, is no different from Apprendi, which no Pennsylvania court has found retroactive, and has not been held retroactive by the United States Supreme Court. Moreover, *Alleyne* does not create an entirely new procedure. Rather, it merely applies long standing jury trial procedures into the setting of mandatory minimums, *i.e.*, including facts in an indictment (or information) and requiring proof beyond a reasonable doubt of those facts. Although submission to a jury of certain facts may lead to more acquittals of the now "aggravated crime," it does not undermine the underlying conviction or sentence of the "lesser crime." This is because, in Pennsylvania, absent the jury finding the applicable facts, the defendant could receive the identical sentence for the "lesser crime."

14 A new constitutional rule always applies retroactively in a collateral proceeding if it substantive.

15 The only rule ever recognized as a watershed procedural rule is the right to counsel in a felony criminal prosecution as established in *Gideon v. Wainwright*, 472 U.S. 335 (1963).

> Phrased differently, it is immaterial whether a judge determines the weight of the drugs by a preponderance of the evidence, or a jury finds the weight of the drugs beyond a reasonable doubt. In each situation, the court could have imposed a five to ten year sentence for the conviction of PWID cocaine, irrespective of the then-applicable mandatory minimum sentencing statute. *See* 35 P.S. § 780-113(f). Hence, the fundamental fairness of the trial or sentencing is not seriously undermined.

Id. at 14-15. Therefore, according to the panel in *Johnson*, even raising an *Alleyne* issue in a timely PCRA would not allow the rule to be applied retroactively if the judgment was already final at the time *Alleyne* was decided.

What the *Johnson* panel failed to address, despite potentially having the opportunity, was the full issue before this Court; whether a defendant is entitled to relief when he raises a valid *Alleyne* issue in a timely collateral attack and his petition for allowance of appeal was still pending to our Supreme Court months after *Alleyne* was final, and therefore, his judgment was not final. In *Johnson*, the defendant filed a modified post-sentence motion which the trial court denied and the Superior Court ultimately affirmed on appeal. The defendant then filed a petition for allowance of appeal to the Pennsylvania Supreme Court which was denied on April 30, 2013. The *Johnson* panel acknowledged that *Alleyne* may have been applicable while the defendant's direct appeal was still pending despite the Pennsylvania Supreme Court not accepting his case for review. However, the defendant did not present this argument so the *Johnson* panel declined to directly address the question. *Id*. citing *Commonwealth v. Belak*, 825 A.2d 1252, 1256 n. 10 (Pa. 2003) (declining to address legality of sentence question where issue was not included in petition for allowance of appeal or original brief).

In the instant mater, the legality of Defendant's sentence was raised as an issue, albeit in broad language and not in his direct appeal or amended PCRA Petition. More importantly, unlike *Johnson*, there is no question in this case that the Defendant's case remained on direct appeal and was not final until months after *Alleyne* was handed down. Therefore, this Court finds it imperative to address the issue.

Pursuant to *Wolfe*, there is no question 42 Pa. C.S. § 9718 is unconstitutional. Additionally, analogous to *Johnson*, this Court plainly has jurisdiction as the Defendant's PCRA was timely pursuant to § 9545. Consequently, the dicta in *Miller* provides minimal, if any, guidance. Next, *Johnson* does not control not only because it is a non-precedential decision,

but because the panel addressed only the single question of whether *Alleyne* applied retroactively in a timely PCRA petition. It failed to rectify the question of what would have been the result had the defendant's judgment not been final at the time *Alleyne* was decided.

This Court finds the instant matter analogous to *Newman* which held that *Alleyne* is to be given retroactive effect to cases that were pending on direct appeal at the time the decision in *Alleyne* was issued. Nowhere in the *Newman* or any subsequent decision has it been stated that cases pending on direct appeal at the time of *Alleyne* was decided would lose their retroactively if defendant waited or were unable to raise the issue until collateral review. This analysis is analogous to that employed by courts in evaluating the retroactively of other new rules of constitutional law. For example, the United States Supreme Court held that the new rule in *Batson v. Kentucky,* 476 U.S. 79 (1986),[16] concerning "the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314 (1987). "Simply stated, a new rule of law to which we give full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue was properly preserved there, or, as here, is non-waivable." *Commonwealth v. Gillespie*, 516 A.2d 1180, 1183 (Pa. 1986). Perhaps most instructive, the United States Supreme Court in *Shea v. Louisiana*, 470 U.S. 51, 67 n.5 (1985) stated:

> [a]s we hold, if a case was pending on direct review at the time *Edwards*[17] was decided, **the appellate court must give retroactive effect to Edwards, subject, of course, to established principles of waiver, harmless error, and the like. If it does not, then a court conducting collateral review of such a conviction should rectify the error and apply Edwards retroactively. This is consistent with Justice Harlan's view that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final**. (emphasis added).

Initially, it is now clear that *Alleyne* constitutes a new constitutional rule "as it expressly overruled *Harris v. United States*, 536 U.S. 545 (2002),

16 The *Batson* Rule stated that a state criminal defendant could establish a prima facie case of racial discrimination violative of the Fourteenth Amendment, based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire, and that, once the defendant had made the prima facie showing, the burden shifted to the prosecution to come forward with a neutral explanation for those challenges.

17 *Edwards v. Arizona*, 451 U.S. 477 (1981). The new constitutional rule in *Edwards* stated that a suspect who has invoked his right to counsel is not subject to further interrogation until counsel has been made available to him. *Id*.

and implicitly abrogated *McMillian v. Pennsylvania*, 477 U.S. 79 (1986)." *Johnson*, at 11. *Newman* also clearly recognized that *Alleyne* has created a new rule. *Newman*, 99 A.3d at 90. Because *Alleyne* created a new rule while the Defendant's case was pending on direct review, *Shea* instructs we give it full retroactive effect subject to principles such as waiver, jurisdiction and harmless error. *Shea*, 470 U.S. at 67. This Court has exhaustively stated that we have jurisdiction in this matter. Similarly, because *Alleyne* implicated the legality of the sentence it cannot be waived despite the Defendant's failure to raise at any point prior to this 1925(b) Concise Statement. *Newman*, 99 A.3d at 90 citing *Commonwealth v. Roney*, 866 A.2d 351 (Pa. 2005). Even if the issue had not been raised, this Court is "endowed with the ability to consider an issue of illegality of sentence *sua sponte*." *Orellana*, 86 A.3d at 883.

Alleyne issues are also subject to a harmless error analysis as recognized by *Newman*. "The harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, not a perfect trial." *Commonwealth v. Rasheed*, 640 A.2d 896, 898 (Pa. 1994). In *Wolfe*, the Superior Court dealt with 42 Pa. C.S. § 9718, and found that the *Alleyne* issue was not harmless. This Court agrees and would adopt a similar analysis in the instant matter. *Wolfe*, 106 A.3d at 803-806.

Finally, this Court reemphasizes that the *Teague* analysis extensively laid out by the *Johnson* panel is inapplicable to the instant matter. The analysis in *Teague* applied only to cases already final on direct review when the new constitutional rule was issued. Therefore, whether *Alleyne* created a substantive, procedural or watershed procedural rule is wholly irrelevant here because the Defendant's case was pending on direct appeal when *Alleyne* was decided.

Also very telling in this case is just how strikingly similar the timeline is with that of *Newman*. Here, the Defendant was found guilty at a jury trial on March 15, 2012, and sentenced on July 5, 2012. In Newman, the defendant was found guilty at a jury trial on February 12, 2012, and sentenced on June 13, 2012. In the instant matter the Defendant filed a Notice of Appeal on August 3, 2012, and the defendant in *Newman* did the same on July 7, 2012. Just 7 months and 19 days later the Superior Court affirmed this Court's decision on March 22, 2013 and the Defendant subsequently filed a petition to our Supreme Court. In *Newman*, the Superior Court initially affirmed the trial court's decision roughly 11 months after it was issued on June 12, 2013. Alleyne was decided on June 17, 2013, after both the instant matter and *Newman* had been decided but neither judgment was final for different reasons. Luckily for the defendant in *Newman*, because of the proximity between the original decision in *Newman* and *Alleyne*,

the Superior Court was able retain jurisdiction to modify and rescind its previous holding. However, had the Superior Court been unable to do so, the defendant in *Newman* would have had to follow a similar path as the defendant in the instant case by filing a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Such a petition would almost certainly have resulted in dismissal as did the Defendant's here on October 16, 2013. The defendant in *Newman* would have had to seek the same recourse as the Defendant in the instant matter, by filing a timely PCRA and raising an *Alleyne* issue. Thus, the two cases are analogous and this Court sees no reason why the defendant in *Newman* should be entitled to retroactively of *Alleyne* and not the Defendant in the instant matter when both cases were pending on direct appeal when the *Alleyne* decision was handed down simply because they employed different vehicles to raise the same meritorious issue.

CONCLUSION

Throughout the last year, the Superior Court has unequivocally held that statutes featuring mandatory minimum sentencing provisions such as those featured in *Newman*, *Valentine* and *Wolfe* are unconstitutional in the aftermath of *Alleyne*. Furthermore, attempts to sever provisions of these statutes are fruitless. Ultimately, the Pennsylvania Supreme Court will decide this severability question when it renders its decision in *Hopkins*. Until then, this Court is bound by the aforementioned Superior Court precedent on this issue. Consequently, 42 Pa. C.S. § 9718, the statute under which the Defendant was sentenced to four mandatory minimum sentences is unconstitutional.

With that initial concern resolved we turn to the issue for resolution by this Court. We are cognizant of the fact that the appellate courts have not yet issued a decision regarding the unique and complex issue of first impression that the instant matter presents. Specifically, the issue we must decide is whether a defendant may raise an *Alleyne* issue on collateral attack when his judgment was not yet final when *Alleyne* was decided. Based on *Newman* and all of the aforementioned analysis, we believe the Defendant can properly raise an *Alleyne* issue in his timely PCRA Petition. Because *Wolfe* has already held that 42 Pa.C.S. § 9718 is unconstitutional, this Court asks the Superior Court to vacate the judgment of sentence and remand for resentencing without the application of the mandatory minimum terms included in § 9718. This Court also respectfully requests that the Superior Court affirm this Court's February 12, 2015 Opinion and Order regarding the first two issues raised by the Defendant.

ORDER OF COURT

AND NOW THIS 14th day of May, 2015, pursuant to Pa.R.A.P.1931(c),

IT IS HEREBY ORDERED that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion *sur* Pa.R.A.P. 1925(a).

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.