DISTRICT COURT; LARIMER COUNTY, COLORADO 201 La Porte Avenue Fort Collins, CO 80521-2761 (970) 498-6100	DATE FILED: February 19, 2020 9:11 PM FILING ID: 6C9573C33E92A CASE NUMBER: 2018CR1645
PEOPLE OF THE STATE OF COLORADO vs. **Defendant:** **PABLO**	**▲ COURT USE ONLY ▲**
CLIFFORD E. RIEDEL District Attorney; Eighth Judicial District of Colorado Brian J. Hardouin, #41442 Deputy District Attorney 201 La Porte Avenue, Suite 200 Fort Collins, CO 80521-2763 Phone: (970) 498-7200; Fax: (970) 498-7250	Case No: **D0352018CR1646** Courtroom: **3A**
PEOPLE'S RESPONSE TO COURT'S ORDER FOR STATUS CONFERENCE	

COMES NOW CLIFFORD E. RIEDEL, the District Attorney in and for the Eighth Judicial District of the State of Colorado, by Brian J. Hardouin, his duly appointed, Deputy District Attorney, in and for the County of Larimer, State of Colorado, respectfully asks the Court to deny the motion and states the following in support:

STATEMENT OF FACTS

c

said i

On July 24, 2019, the Court sentenced the Defendant to four years in the Department of Corrections on Count 3 – Incest (F4) with a consecutive ten year to life sex offender intensive supervised probation on Count 4 – Sexual Assault on a Child (F4).

ARGUMENT AND AUTHORITY

I. One Multi-Count Case

In *Allman v. People*, a jury convicted the defendant of multiple financial related crimes for defrauding an at risk adult out of over fifty-nine thousand dollars. 451 P.3d 826, 829 (Colo. 2019). The trial court sentenced the Defendant for a total of fifteen years in the Department of Corrections (DOC) on all but one count. On the last count, the court sentenced the Defendant to ten years of probation to run consecutive to the DOC sentence but concurrent to parole. *Id*. The reason given for the consecutive probationary sentence was to ensure that the defendant paid the significant restitution owed as a result of his criminal conduct. *Id*. at FN8.

On appeal, the defendant challenged the trial court's authority to sentence him to both imprisonment and probation in one multi-count case. *Id*. at 832-33. The Court reviewed the relevant statutory framework and found that the legislature has empowered trial courts with significant discretion to fashion sentences that consider the individual facts and circumstances of a case. *Id*. at 833. However, that power is not unlimited. *Id*. The legislature has devised a scheme where either the ends of justice are met by placing a defendant on probation or the protection of the community is better served by imprisonment but not both. *Id*. Therefore, the Supreme Court held "when a court sentences a defendant for multiple offenses in the same case, it may not impose imprisonment for certain offenses and probation for others." *Id*. at 835.

II. Prospective or Retroactive

Not all appellate decisions apply retroactively. Courts are loathe to upset final convictions and sentences out of concern that they will disrupt the finality upon which the American criminal justice system depends. Instead, retroactivity is reserved only for those decisions that affect substantive constitutional rights or undermine the truth-seeking function of a criminal trial.

In *United States v. Timmreck,* the defendant challenged the voluntariness of his guilty plea because he was unaware of the mandatory parole term resulting from his conviction. 441 U.S. 780 (1978). A unanimous United States Supreme Court denied relief, cautioning that:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.
>
> 441 U.S. at 784.

The Supreme Court continued to stress the necessity of finality in *Teague v. Lane,* 489 U.S. 288 (1989). There the Court found:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none.*
>
> 489 U.S. at 309. (Emphasis original to quote, internal quotes omitted)

The Court went on to reason that:

> The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application." In many ways the application of new rules to cases on collateral

> review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."
>
> 489 U.S. at 310. (Internal citations omitted and emphasis original to quote)

A. General Framework

With those priorities in mind, the Supreme Court developed a framework for considering whether a new criminal rule will apply retroactively to a case. *Id*.; *Edwards v. People*, 129 P.3d 977 (Colo. 2006) (Colorado adopted *Teague* as its test for applying new rules retroactively). The resulting three step analysis works as follows: (1) whether the defendant's conviction is final; (2) whether the rule in question is in fact new; and (3) if the rule is new, whether it meets either of the two *Teague* exceptions to the general bar on retroactivity. *Id.* at 983; *Beard v. Banks*, 542 U.S. 406, 411 (2004).

The first step of the analysis looks to whether a conviction is deemed "final." *Edwards*, 129 P.3d at 983. Convictions are "final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed.' " *Banks*, 542 U.S. at 411. *People v. Hampton*, 876 P.2d 1236, 1239 (Colo.1994). Here, there is no question that the Defendant's conviction is final and comes before the court on collateral review. The Defendant challenges a final conviction and sentence issued on July 24, 2019. C.A.R. 4(b) establishes a timeline for filing a notice of appeal in criminal cases and requires that notice be filed within forty-nine days after entry of judgment. *People v. Baker*, 104 P.3d 893, 895 (Colo. 2005)(unless notice of appeal is timely filed, the court of appeals lacks jurisdiction to hear the appeal.). In the present case, the Defendant never preserved his right to appeal so his conviction and sentence are final.

The second step asks whether *Allman* announced a "new rule.". Generally, a new rule is not retroactively applicable to cases that have become final before its announcement. *Teague,* 489 U.S. at 310. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301 To make this determination, a court must "assay the legal landscape" when a sentence became final and ask whether the new rule announced was dictated by then existing precedent so that the error would have been "apparent to all reasonable jurists." *Banks,* 542 U.S. at 413.

Under this test, *Allman* announced a new rule of law. First, the *Allman* court observed that, "[t]he probation statute itself is silent as to the propriety of sentencing a defendant to both imprisonment and probation in a multi-count case." *Allman,* 451 P.3d at 833. Only after a complicated dissertation of the sentencing statute did the Court arrive at its final decision. *Id.* Second, at the time of the *Allman* decision, the judicial department identified two thousand, nine hundred and thirty (2930) cases having a DOC and probation component in the same case. Exhibit #1. Of those, two hundred and twenty-two (222) occurred in Larimer County alone. Exhibit #1. Unless all of those sentencing courts decided to ignore the law, *Allman* "broke new ground" because it was not "apparent to all reasonable jurists."

Under the third step, the issue is whether the *Allman* decision "meets either of the two *Teague* exceptions to the general bar on retroactivity." *Edwards,* 129 P.3d at 983. The first of these exceptions is a "watershed rule" which is rule that "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 985 (citations omitted). This definition is "extremely narrow." *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004). It must be more than a rule "aimed at improving the accuracy of" criminal trials, *Sawyer v. Smith,* 497 U.S. 227, 242 (1990), or even promoting "the objectives of fairness and accuracy." *Saffle v. Parks,* 494 U.S.

484, 495 (1990). To fit within this exception, the new rule must be a "groundbreaking occurrence" that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *United States v. Mandanici,* 205 F.3d 519, 528 (2d Cir.2000). In fact, the Supreme Court has given only one example of such a watershed rule: *Gideon v. Wainwright,* 372 U.S. 335 (1963), which applied the Sixth Amendment right to counsel to the states and held that indigent defendants have the right to court-appointed counsel in all criminal prosecutions. *Edwards,* 129 P.3d at 979. Being mindful that this exception to the nonretroactivity rule is exceedingly narrow, even the the rule announced in *Crawford* does not constitute a watershed rule. *Id*.

The Defendant offers nothing to support an assertion that *Allman* announced a watershed rule, nor is there any such support. Instead, the "extremely narrow" watershed exception does not apply here because *Allman* does not involve the accuracy of a conviction at all, but rather sentencing.

The second exception to the general rule of nonretroactivity is where a new rule of criminal procedure is substantive in nature. *Schriro v. Summerline,* 542 U.S. 348, 351 (2004). A new rule is substantive if it "alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. In *Penry v. Lynaugh,* the Supreme Court recognized that the second exception set forth in *Teague* "should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 492 U.S. 302, 330 (1989)(abrogated in *Atkins v. Virginia,* 536 U.S. 304 (2002) on other grounds).

Stated another way, substantive rules encompass only "categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power

to impose." It follows that when a State enforces a proscription or penalty barred *by the Constitution*, the resulting conviction or sentence is, by definition, unlawful." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729–30 (2016)(Emphasis Added).

B. Application to Sentencing

As previously discussed, the *Allman* decision rested entirely on the court's interpretation of the statutory framework for sentencing. *Allman*, 451 P.3 at 833-34. Therefore, the sentencing power of the courts in no way implicates the truth-seeking function of a criminal trial. *People v. Dist. Court of City & Cty. of Denver*, 673 P.2d 991, 996 (Colo. 1983).

In *District Court*, the defendant was charged with first degree murder and a crime of violence sentencing enhancer. The charges seemed from the defendant confronting his soon to be ex-wife and shooting her five times at close range. *Id*. at 993. The parties entered into an agreement where the defendant would plead guilty to second degree murder and the People agreed not to ask for greater than a 10-year DOC sentence. *Id*. The court sentenced the defendant to four years in DOC but suspended it on the condition of completing a work release program and community service.

On appeal, the Colorado Supreme Court found that, in a one count case, a sentencing court must pick between probation and prison but not both. *Id*. at 996. It further held that, "In light of the important need for stability in sentencing and because issues of sentencing illegality are not essentially related to the truth-finding function of a criminal trial, this opinion shall have prospective effect only." *People in the Interest of C.A.K.*, 652 P.2d 603 (Colo.1982); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980)." *Id*.

United States Supreme Court followed suit in *Schriro v. Summerline*. There, the Court determined that the new rule announced regarding the application of the death penalty would not

apply retroactively. *Schriro,* 542 U.S. at 358. In *Ring v. Arizona*, the court handed down a new rule that aggravating factors needed for a death penalty sentence must be determined by the jury, rather than a judge. 536 U.S. 584, 589 (2002). Applying the *Teague* analysis, the court held that *Ring's* holding was properly classified as procedural. It did not alter the range of conduct or the class of persons subject to the death penalty in Arizona, but only the method of determining whether the defendant engaged in that conduct. *Schriro,* 542 U.S. at 354. *Ring* did not announce a watershed rule of criminal procedure nor does judicial factfinding seriously diminish the accuracy of a trial. *Id*. at 356.

Four years later, the Colorado Supreme Court again found that rules regarding sentencing do not trigger retroactive effect. *People v. Johnson*, 142 P.3d 722 (Colo. 2006). In *Johnson*, the court was faced with the question of whether the decisions in *Blakely v. Washington*, 542 U.S. 296 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applied retroactively. *Johnson*, 142 P.3d at 727. The Court concluded that *Blakely* and *Apprendi* did not by stating "it is difficult to conclude that it is "central to an accurate determination of innocence or guilt." *Id*.

The only sentencing decision found to have retroactive application has been *Miller v. Alabama*, 567 U.S. 460 (2012) prohibition on juveniles being sentence to life without the possibility of parole. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The Court went out of its way to point out that its finding was unique to the circumstances found in the *Miller* decision. That decision announced a new substantive rule only because it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—*i.e.*, juvenile offenders whose crimes reflect the transient immaturity of youth. *Id*. at 734. The Court further pointed out that a state may remedy a *Miller* violation by extending parole eligibility to juvenile

offenders. *Id*. at 736. This would neither impose an onerous burden on a state nor disturb the finality of state convictions. *Id*.

Allman's statutory interpretation of the sentencing statutes stands in stark contrast to the substantive right found in *Miller*. First, the *Allman* decision did not affect "a class of defendants because of their status." The *Allman* decision does not depend of the status of a defendant. It does not prescribe as off-limits certain penalties due to age, mental ability or class. Rather, it reached a statutory interpretation that neither implicated state nor federal constitutional concerns. Second, the retroactive application of *Allman* will cause an onerous burden on the state to either resentence defendants or by unwinding convictions because the parties are no longer gaining the benefit of their bargain as evidenced by the case presently before the Court.

On top of that, the revisiting of final convictions will further implicate the rights of victims guaranteed by the Colorado Constitution. Colo. Const. art. II, § 16a. "The general assembly hereby finds and declares that the full and voluntary cooperation of victims of and witnesses to crimes with state and local law enforcement agencies as to such crimes is imperative for the general effectiveness and well-being of the criminal justice system of this state. It is the intent of this part 3, therefore, to assure that all victims of and witnesses to crimes are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants." C.R.S. 24-4.1-301. Those rights include "[t]he right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process." C.R.S. 24-4.1-302.5(1)(a). Where is the fairness, where is the respect, and where is the dignity for a victim when a defendant is allowed to unwind a final conviction and sentence that was legal at the time the case was resolved? The law as it was understood by the Defendant, his Counsel, the People and the Court.

Where is the fairness, where is the respect, and where is the dignity for a victim when a Defendant seeks to attack his own agreement, but only to the extent that it advantages himself due to a change in the law not in effect at the time of his sentence?

WHEREFORE, the People request that the Defendant's motion be denied.

Dated this 19th day of February, 2020.

Respectfully submitted,

CLIFFORD E. RIEDEL
District Attorney

By */s/ Brian J. Hardouin*
Brian J. Hardouin, #41441
Deputy District Attorney

Certificate of Service

I certify that a copy of the above and foregoing was e-filed via CC E-File(x), to counsel of record this 19th day of February, 2020.
/s/*Brian J. Hardouin*