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The Court: Right and Wrong on Criminal Justice

By THE EDITORIAL BOARD

The Supreme Court handed down two significant criminal justice rulings on Monday that were mixed in how they will affect fairness and Americans' basic rights.

The first ruling, in *Alleyne v. United States*, clarified a murky area of sentencing law. Under a 2000 decision, in *Apprendi v. New Jersey*, any factual determination that allows a sentence to be increased beyond the statutory maximum must be proved to a jury beyond a reasonable doubt. But, in 2002, the court said that that did not apply if a mandatory minimum sentence is increased.

The new ruling, written by Justice Clarence Thomas and joined by four justices on the opposite end of the court's ideological spectrum — Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan — sensibly abandons that distinction, overturning the 2002 case.

The defendant, Allen Alleyne, was convicted of robbery and of using or carrying a firearm during the crime. On top of a 46-month sentence on the robbery count, the judge tacked on seven years instead of the mandatory minimum sentence of five years for carrying a gun, based on a finding by a preponderance of evidence that the firearm was "brandished." The majority found that the longer minimum sentence violated the defendant's Sixth Amendment right to a trial by jury because the question of brandishing should have been determined by a jury beyond a reasonable doubt.

Under the Fifth Amendment, the subject of the other ruling, no one can be compelled to be a witness against himself in a criminal case. Thus, the prosecution cannot raise a defendant's decision not to testify in court as evidence of guilt. Nor, under the *Miranda* ruling, can prosecutors use a suspect's decision to remain silent as evidence of guilt. In a troubling departure, the court's conservative majority said the right to silence does not apply before suspects are arrested and read *Miranda* warnings.

The defendant in this case, Genovevo Salinas, voluntarily went with police officers for questioning before being charged with murder in Texas. After answering questions for an hour, he fell silent rather than answer whether shotgun shells found at the crime scene would match a shotgun found at his home. The prosecutor cited his refusal to answer as "a very important piece of evidence," and Mr. Salinas was convicted of murder. The Supreme Court's plurality ruling said that the prosecutor's damaging remark was perfectly fine because Mr. Salinas "did not expressly invoke the privilege against self-incrimination" during the police questioning.

Justice Breyer noted in a cogent dissent that the court has previously applied the Fifth Amendment without requiring express invocation of the right to remain silent. Mr. Salinas, “not being represented by counsel, would not likely have used the precise words ‘Fifth Amendment’ to invoke his rights because he would not likely have been aware of technical legal requirements, such as a need to identify the Fifth Amendment by name,” Justice Breyer wrote.

By elevating form over substance and ignoring the real-life circumstances of the police interrogation, the majority gave police officers excessive leverage and badly undermined the Fifth Amendment’s protection.