

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Dexter Leemon Johnson — PETITIONER
(Your Name)

vs.
Terry Royal, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Oklahoma Court of Criminal Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dexter Leemon Johnson
(Your Name)

P.O. Box 97
(Address)

McAlester, Oklahoma 74502
(City, State, Zip Code)

(918) 423-4700
(Phone Number)

QUESTION(S) PRESENTED

1. PETITIONER WAS DENIED THE RIGHT TO A JURY VERDICT OF GUILT BEYOND A REASONABLE DOUBT
2. PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAWS
3. TRIAL JUDGE COMMITTED PREJUDICIAL PLAIN ERROR BY FAILING TO INSTRUCT JURY AS TO 22 O.S.A. § 837
4. PETITIONER'S SENTENCE AND CONVICTION EXCEED(S) THE MAXIMUM AUTHORIZED BY THE LAWS AND PRECEDENT RAISED BY THE EVIDENCE PRESENTED AT TRIAL

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

COURT

The opinion of the State Trial (MUSKOGEE Co.) court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was MAY 21, 2018.
A copy of that decision appears at Appendix C. MAY 21, 2018

[] A timely petition for rehearing was thereafter denied on the following date: W/A, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including W/A (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

22 O.S.A. § 837. When it appears that a defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degree only.

22 O.S.A. § 836. A defendant in a criminal case is presumed innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

22 O.S. § 856. In charging the jury, the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must in addition inform the jury that they are the exclusive judges of all questions of fact...

CONSTITUTIONAL AND STATUTORY PROVISIONS

21 O.S. § 652. Shooting with intent to kill.

12 O.S.A. § 990A. Appeal to Supreme Court by filing petition in error -- Rules -- Record on appeal -- Premature appeal -- Designation of record.

6th Amend. U.S. Const. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the ~~same~~ district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

14th Amend. U.S. Const.

STATEMENT OF THE CASE

On February 27-28, 1996, Petitioner was tried and convicted for ONE COUNT of shooting with intent to kill, in violation of 21 O.S. § 652.

after a series of unsuccessful appeals in State and Federal Courts due to procedural bars, on August 2, 2016, he filed an appeal-out-of-time requesting a re-sentencing appeal, Case No. CF-1994-995. Said appeal-out-of-time was filed on the ground that appellate counsel denied Petitioner substantial equality and fair process on direct appeal by failing to include in his direct appeal the following grounds: (1) Under 22 O.S.A. § 837 Petitioner could only be convicted of the lesser included offense of assault and battery with a dangerous weapon by use of a firearm due to the fact the crime charged was distinguished into degrees at trial;

and (2) trial judge committed fundamental error by failing to instruct jury as to 22 O.S.A. § 837. Petitioner cited the specific criminal appellate procedure statute that appellate counsel failed to comply with and cited pertinent case law that specified that failure by an attorney to comply with criminal appellate procedure is fatal to appeal.

Yet, on November 17, 2017, the trial court denied petitioner's appeal-out-of-time, without citing any case law or statutes to support said conclusory denial. See Appendix B.

On December 18, 2017, Petitioner appealed the trial court's denial of his appeal-out-of-time to Oklahoma Court of Criminal Appeals, Case No. PC-2017-1277. He argued the same issues as in his appeal-out-of-time and

cited the same case law and statutes in support thereof. (As it regards appealing the trial court's denial of an appeal-out-of-time, it is standard procedure for a defendant to adduce or present the same argument to the appellate court as in the trial court due to the fact the appellate court is who has the authority to grant or deny an appeal out of time.)

On April 6, 2018, the OCCA affirmed the trial court's denial of Petitioner's appeal-out-of-time. See Appendix A. In its order affirming the trial court's denial of relief, the OCCA stated "the jury did not find any reasonable doubt concerning the degree of offense..." and disregarded Petitioner's substantiated claim of his appellate counsel failing to comply with criminal appellate procedure. See Appendix A.

On April 30, 2018, Petitioner appealed the OCCA's denial to Oklahoma Supreme Court via petition in error pursuant to 12 O.S. § 990A, Case No. DF-116973. He argued "he was convicted upon a standard of proof higher than that of proof beyond a reasonable doubt" but did not present said argument as an independent ground. His grounds were: (1) Due to trial judge distinguishing crime charged into degrees, 22 O.S.A. § 837 entitled him to be convicted only of lesser included offense, (2) He was denied equal protection of the laws, (3) trial judge committed fundamental error by failing to instruct jury as to 22 O.S.A. § 837, (4) appellate counsel failed to comply with criminal appellate procedure, and (5) Due to there being reasonable doubt as to degree, 22 O.S.A. § 837 rendered trial judge and jury without jurisdiction to convict Petitioner of crime charged.

On May 21, 2018, Okla. S. Ct. dismissed case due to lack of jurisdiction (please keep in mind 22 O.S.A. § 837 is a state statute). See Appendix C.

QUESTION I. PETITIONER WAS DENIED
THE RIGHT TO A JURY VERDICT OF GUILT
BEYOND A REASONABLE DOUBT

The Petitioner was tried and convicted for ONE COUNT of Shooting with intent to Kill, 21 O.S. § 652.

During trial the crime charged was distinguished into degrees when the trial judge included in the jury instructions the instruction for the lesser included offense of assault and battery with a dangerous weapon by use of a firearm. See Trial Record, Page 270, lines 11-19; also see Instruction Number 20. "Where the crime charged is distinguished into degrees, defendant is entitled to the benefit of a reasonable doubt as to the degree." See McClathery v. State, 12 Okla. Crim. 173, 152 P. 1136, at 1137 (Okla. Crim. App. 1915); Smith v. State, 12 Okla. Crim. 489, 159 P. 668, at 668-69 (Okla. Crim. App. 1916).

The only way Petitioner would have actually got the benefit of a reasonable doubt as to degree was if the trial judge would have instructed the jury as to 22 O.S.A. § 837, which states in pertinent part: "When... there is reasonable ground of doubt in which of two or more degrees defendant is guilty, he can be convicted of the lowest of such degree only." Instructing the jury as to 22 O.S.A. § 837 would have made it clear to jurors that they had a legally binding obligation to convict Petitioner of only the lesser included offense, i.e., said instruction would have formally instructed jurors that, by law, they could no longer consider nor convict Petitioner of the crime charged due to reasonable doubt as to degree.

But the trial judge did not instruct the jury as to 22 O.S.A. § 837. Said omission by the trial judge in effect deprived Petitioner of his statutory right to

he presumed innocent until the contrary is proved (see 22 O.S.A. § 836), shifted the burden of proof from the State to Petitioner (in that the jury was allowed to rely on substantial evidence of the lesser included offense to convict Petitioner of crime charged, thereby relieving State of its burden to prove beyond a reasonable doubt every element of crime charged), and required Petitioner to prove innocence beyond a reasonable doubt before he could be acquitted, all of which was prejudicial error. See *Smith v. State*, 12 Okla. crim. 489, 159 P. 668, at 668-69 (Okla. crim. App. 1916).

The first paragraph of the lesser included offense instruction states verbatim: "The Defendant is charged with shooting with intent to kill. You ^{are} instructed that, in addition to the state's having submitted evidence concerning the crime of shooting with intent to kill, evidence has also

been introduced concerning the crime of Assault and Battery with a Dangerous Weapon by use of a firearm." See Instruction Number 20. Without instructing the jury as to 22 O.S.A. § 837 as a qualifying or explanatory instruction or measure, as well as a requirement of due process, the wording of the first paragraph of the lesser included offense instruction constituted (1) an invasion of the province of the jury by the trial judge (the trial judge weighed the evidence for jurors when he stated what the evidence proved), (2) a declaration of Petitioner's guilt of the crime charged AND of lesser included offense by the trial judge, and (3) a directed verdict for the State by the trial judge, all of which is prohibited by Oklahoma

Statutes (22 O.S.A. § 856 states in pertinent part: court must... inform the jury that they are the exclusive judges of all questions of fact) and precedent, see, e.g., *Mougell v. State*, 260 P.2d 447, at 452, 97 Okla. Crim. 180 (Okla.

Crim. App. 1953)(this court has repeatedly held that ~~that~~ the trial judge has no right to invade the province of the jury even by directed verdict or indication by act or word of guilt of the accused in a criminal trial), and prohibited by 6th Amendment of U.S. Constitution, see, e.g., Sullivan v. Louisiana, 113 S. Ct. 2078, 2080, 508 U.S. 275, 277-78 (1993) citing Spaff v. U.S., 156 U.S. 51, 105-106, 15 S. Ct. 273, 294-295 (1895); also see U.S. v. Martin Linen Supply Co., 430 U.S. 564, 572-573, 97 S. Ct. 1349, 1355-1356 (1977).

As stated above, in the first paragraph of the lesser included offense instruction the trial judge declared Petitioner's guilt of the crime charged and of lesser included offense by announcing to the jury "what the evidence proved." See Instruction Number 20. Due to said declaration of Petitioner's guilt by the trial judge, Petitioner could not be acquitted UNLESS he proved beyond a reasonable

doubt his innocence or that "no crime was committed." Since a verdict of not guilty is not based upon a belief of innocence, see, e.g., *Rogers v. State*, 127 P.2d P.365, at 379 (Okla. Crim. App. 1912) (a verdict of not guilty is not a verdict of innocence), requiring Petitioner to prove beyond a reasonable doubt his innocence or that no crime was committed constituted the "denial of his right to a jury verdict of guilt beyond a reasonable doubt." Said denial occurred because the trial judge's declaration of Petitioner's guilt (in the lesser included offense instruction) unavoidably relieved the State of its burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged as required by Due Process Clause of 14th Amendment of U.S. Constitution. See *In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73 (1970). (The State did not have to prove the elements of the crime charged to

secure a conviction because the trial judge directed the jury to find petitioner guilty by telling jurors what the evidence proved.)

"Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly a structural error. Because said right involves basic protections whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair," Sullivan v. Louisiana, 113 S. Ct. 2078, 2083, 508 U.S. 281-82 (1993) citing Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 3105-3106 (1986).

Due to petitioner suffering the herein described and adduced structural error, he respectfully asks this Court to remand his case to the appropriate State Court

with instructions to either dismiss his case with prejudice, grant him a new trial, or modify his conviction to the lesser included offense of assault and battery with a dangerous weapon by use of a firearm and grant him time served due to the fact he has served more than the 10-year maximum for said offense.

Moreover, Petitioner is entitled, by law, to be acquitted of crime charged. According to precedent, the "court does not ask a jury to consider a lesser included ^{offense} if no jury could rationally find both that the lesser offense was committed and the greater offense WAS NOT," *Grant v. State*, 58 P.3d 783 (Okla. Crim. App. 2002), modified on rehearing, certiorari granted, vacated 124 S.Ct. 162. Accordingly, the lesser offense instruction was issued because there was a legally valid determination that Petitioner's guilt of crime charged was not satisfactorily shown. Under 22 O.S.A. § 836, "a defendant is entitled to be acquitted (of crime charged) in case of a reasonable doubt as to whether his guilt is satisfactorily shown." Hence, by law, Petitioner is entitled to be acquitted of crime charged due to the fact evidence showed the lesser offense was committed and greater offense was not.

QUESTION II. PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAWS

In order to succeed on a claim of denial of equal protection of the laws, a criminal defendant must persuade the court: (1) criminal defendants received different treatment under (a) a state statute and (b) state case law. *Dodd v. State*, 982 P.2d 1086, at 1088 (Okla. Crim. App. 1999).

In *McClatchery v. State*, 12 Okla. Crim. 173, 152 P. 1136, at 1137 (Okla. Crim. App. 1915) and *Smith v. State*, 12 Okla. Crim. 489, 159 P. 668, at 668-69 (1916), the OCCA held that "Where the crime charged is distinguished into degrees, defendant is entitled to the benefit of a reasonable doubt as to the degree." As evinced by the above, the precedent set in *McClatchery* and *Smith* has been applicable, controlling and operative as a rule of law in Oklahoma ever since 1915. Both cases

involved the issuance of a jury instruction that had the effect of distinguishing the crime charged into degrees. In both cases the OCCA held that it was prejudicial error to distinguish the crime charged into degrees without giving or entitling defendant to the benefit of a reasonable doubt as to the degree. The OCCA reasoned that, distinguishing the crime charged into degrees without entitling the defendant to the benefit of a reasonable doubt as to the degree would have the effect of (1) shifting burden of proof from State to defendant, (2) depriving defendant of presumption of innocence, and (3) requiring the jury, before finding for acquittal, to believe from the evidence beyond a reasonable doubt that defendant was innocent. See *Smith v. State*, 12 Okla. Crim. 489, 159 P. 668, at 668-69 (Okla. Crim. App. 1916). Both cases were reversed. The precedent set in both cases is

applicable to and enforceable by 22 O.S.A. §837 (both cases are found in the NOTES OF DECISIONS under 22 O.S.A. §837).

When Petitioner was tried and convicted in February 1996, 22 O.S.A. §837 was an operative Oklahoma Statute. 22 O.S.A. §837 states verbatim: "When it appears that a defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degree only." A statute is to be given a construction which renders every word and sentence OPERATIVE, *Swanson v. City of Tulsa*, 633 P.2d 1256 (Okla. Cr. 1981) quoting *Simmons v. Benson*, 206 Okla. 539, 244 P.2d 1126 (1952). 22 O.S.A. §837 clearly states that "When... there is reasonable ground of in which of two or more degrees defendant is guilty, he can be convicted of the

lowest of such degree only." According to the clear language and construction of 22 O.S.A. §837, this is so no matter whether said reasonable ground of doubt as to degree is found by the jury or judge. Under long-standing Oklahoma precedent, as a matter of law a trial judge has a duty to distinguish the crime charged into degrees whenever there is substantial evidence of the commission of a lower degree of the crime charged; and where there is a reasonable doubt as to degree, the doubt should be resolved in favor of the ~~accused~~ accused, Smith v. State, 56 P.2d 923, at 925, 59 Okla. Crim. 111 (Okla. Crim. App. 1936).

During trial the trial judge distinguished the crime charged into degrees when he included in the jury instructions the instruction for the lesser included offense of assault and battery with a dangerous weapon by use of a firearm. See Trial Record, Page 270, lines 11-19; also see 20.

Instruction Number 20. As evinced by his conviction for shooting with intent to Kill, Petitioner did not get the benefit of a reasonable doubt as to the degree after the crime charged was distinguished into degrees; and did not get his case reversed due to prejudicial error resulting from him not receiving the benefit of a reasonable doubt as to degree; and did not get a new trial; and did not get his conviction and sentence reduced on the ground that the physical facts and testimony were sufficient to sustain only a conviction for the lesser included offense (during closing arguments the State announced to the jury that it proved beyond a reasonable doubt the elements of the lesser included offense, see, e.g., Trial Record, Pages 285-286, lines 21-25 and line 1).

But the defendants in *McClatchery v. State*, 12 Okla. Crim. 173, 152 P. 1136, at 1137

(Okla. crim. App. 1915) and Smith v. State, 12 Okla. crim. 489, 159 P. 668, at 668-69 (Okla. crim. app. 1916), DID GET new trials on the ground that they did not get the benefit of a reasonable doubt as to degree (after the crime charged was distinguished into degrees) and on the ground that they did not get convicted of the lowest degree of crime charged after reasonable doubt as to degree was found. And in Kilpatrick v. State, 75 Okl. Cr. 28, 128 P.2d 246, at 246 (1942), the defendant got his conviction and sentence reduced on the ground that the evidence was sufficient to ~~sustain a conviction~~ sustain a conviction for the lesser included offense, which conclusively proves that said defendant got rightfully treated in accordance with 22 O.S.A. § 837 (unlike Petitioner).

As made evident herein, Petitioner clearly received different treatment than other criminal defendants under Oklahoma case 22.

law (see, e.g., McClatchery v. State, *ibid.*,
Smith v. State, *ibid.*, and Kilpatrick v. State, *ibid.*)
and under 22 O.S.A. § 837 (see, e.g., Kilpatrick v.
State, 75 Okl. Cr. 28, 128 P.2d 246, at 246 (1942)).
Therefore, Petitioner was indeed denied equal
protection of Oklahoma laws. See, e.g., Dodd v.
State, 982 P.2d 1086, 1088 (Okla. Crim. App. 1999). The
fact that Oklahoma State Courts denied Petitioner
equal protection of Oklahoma laws automatically
means they denied him equal protection under
the 14th Amend. of U.S. Const.

Petitioner cited McClatchery v. State, *ibid.*,
Smith v. State, *ibid.*, and 22 O.S.A. § 837 in his
appeal-out-of-time to trial court (Case No. CF-
1994-995), in his petition in error to OCCA
(Case No. PC-2017-1277) and in his petition in
error to Oklahoma Supreme Court (Case No. DF-
116973). All three courts overlooked or ignored
the differential treatment and arbitrary
discrimination Petitioner suffered in relation to
the herein adduced Oklahoma precedent and
statute (22 O.S.A. § 837).

QUESTION III. TRIAL JUDGE COMMITTED PREJUDICIAL PLAIN ERROR BY FAILING TO INSTRUCT JURY AS TO 22 O.S.A. § 837

Due process of law requires that the jury be instructed on all matters of law necessary to determine material issues raised by the evidence. See, e.g., *Carter v. State*, 507 P.2d 932, 934 (Okla. Crim. App. 1973) (it is fundamental that the trial court must instruct on all material issues raised and having some basis of support in the evidence); *Dennis v. State*, 556 P.2d 617, 621 (Okla. Crim. App. 1976) (trial court is bound to give instructions on those issues of law which have a bearing on the case).

22 O.S. § 856 states in pertinent part:
"In charging the jury, the ^{court} MUST state to them all matters of law which it thinks

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necessary for their information in giving their verdict..."

Whenever the issue of reasonable doubt as to degree of crime is raised by the evidence in any criminal trial in Oklahoma State Courts, 22 O.S.A. § 837 is always applicable, enforceable, and controlling. Also, as it pertains to the issue of reasonable doubt as to degree or distinguishing the crime charged into degrees, in criminal trials, 22 O.S.A. § 837 ~~is~~^{is} necessary information to give the jurors so that they can give a verdict based on the evidence and law. Because its inclusion in the instructions directly impacts the verdict by expressly informing jurors that, by law, they only have the authority to convict the defendant of the lowest degree of crime charged due to reasonable doubt as to which of two or more degrees defendant is guilty. See 22 O.S.A. § 837.

During trial the crime charged was distinguished into degrees when the trial

judge included in the jury instructions the instruction for the lesser included offense of assault and battery with a dangerous weapon by use of a firearm. See Trial Record, Page 270, lines 11-19; also see Instruction Number 20.

"Where the crime charged is distinguished into degrees, defendant is entitled to the benefit of a reasonable doubt as to the degree." See *McClatchery v. State*, 12 Okla. Crim. 173, 152 P. 1136, at 1137 (Okla. Crim. App. 1915); *Smith v. State*, 12 Okla. Crim. 489, 159 P. 668, at 668-69 (Okla. Crim. App. 1916). The only way Petitioner would have actually got the benefit of a reasonable doubt as to degree (as he was entitled to) was if the trial judge would have instructed the jury as to 22 O.S.A. § 837.

But the trial judge failed to instruct the jury as to 22 O.S.A. § 837, which was plain error. Because said omission by the trial judge constituted an

obvious, inexcusable deviation from the legal rule that (1) makes it the duty of the trial judge to instruct on those issues raised and having some basis of support in the evidence, Carter v. State, 507 P.2d 932, 934 (Okla. Crim. App. 1973), and (2) obligates the trial judge to give instructions on those issues of law ~~which~~ which have a bearing on the case, Dennis v. State, 556 P.2d 617, 621 (Okla. Crim. App. 1976). Said omission by the trial judge was also a deviation from and a violation of the Oklahoma Statute that "requires trial court to state to jury all matters of law which it thinks necessary for their information in giving their verdict..." See 22 O.S. § 856. The issue of reasonable doubt as to degree was raised by the production of substantial evidence of the commission of a lesser included offense. Ibid. 22 O.S.A. § 837 was relevant to

Petitioner's case because it is the statute that governs the issue of reasonable doubt as to degree in criminal trials. 22 O.S.A. §837 was necessary information for jurors in giving their verdict because it would have informed jurors that, by law, they only had the authority to either acquit Petitioner of crime charged or convict him of the lesser included due to reasonable doubt as to degree. offense Accordingly, the trial judge's failure to instruct the jury as to 22 O.S.A. §837 was a plain error, i.e., was (1) an actual error, that is, deviation from a legal rule, (2) that was plain or obvious, and (3) affected Petitioner's substantial rights, that is, affected the outcome of the proceedings. See *Gones v. Workman*, 98 F. Supp. 3d 1179, 1204 (W.D. Okla. 2015).

Said plain error by the trial judge was prejudicial to Petitioner in that it caused him to receive a conviction and sentence that exceeds the maximum authorized by the laws raised by the evidence at his trial.

As stated *Ibid*, the trial judge distinguished the crime charged into degrees when he included in the instructions the instruction for the lesser included offense of assault and battery with a dangerous weapon by use of a firearm, which carried a maximum of 10 years in prison at the time of Petitioner's conviction. See Trial Record, Page 270, lines 11-19; also see Instruction Number 20. Distinguishing the crime charged into degrees meant there was reasonable ground of doubt as to which of two or more degrees Petitioner was guilty of. In criminal trials, where the issue of reasonable ^{doubt} as to degree is raised by the evidence, 22 O.S.A. § 837 is applicable, controlling, and necessary. Under 22 O.S.A. § 837 a criminal defendant can be convicted only of the lowest degree of crime charged when there is reasonable doubt as to degree. Thus, Petitioner should have been convicted of the lesser included offense of assault and battery with a dangerous weapon by use of a firearm and sentenced to no more than the 10 year maximum for

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said crime.

But since the trial judge failed to instruct the jury as to 22 O.S.A. § 837, the jury rendered a verdict that was contrary to the law and evidence, which in effect denied Petitioner the right to a jury verdict of guilt beyond a reasonable doubt (the State did not have to prove beyond a reasonable doubt the elements of the crime charged because the trial judge directed jurors to find Petitioner guilty by stating to jurors that "there was evidence introduced of the crime charged," see, e.g., Instruction Number 20).

Accordingly, the trial judge's plain error was prejudicial to Petitioner in that it affected the outcome of the trial in a way that was extremely injurious to Petitioner (by law, he should have got 10 years for the lesser included offense due to reasonable doubt as to degree, instead of 150 years for the crime charged, see 22 O.S.A. § 837). Accordingly, trial judge denied Petitioner due process of law, which violated his 14th amend. right under U.S. Constitution.

QUESTION IV. PETITIONER'S CONVICTION
AND SENTENCE EXCEEDS THE MAXIMUM
AUTHORIZED BY THE LAWS AND PRECEDENT
RAISED BY THE EVIDENCE PRESENTED AT TRIAL

Petitioner was tried and convicted for ONE COUNT of shooting with intent to kill, 21 O.S. § 652. Assault and battery with a dangerous weapon by use of a firearm is a lesser included offense of shooting with intent to kill. See *Favro v. State*, 749 P.2d 127, 133 (Okla. crim. app. 1988); *Steele v. Young*, 11 F.3d 1518, 1523 (10th Cir. 1993); also see Instruction Number 20.

At trial the crime charged was distinguished into degrees when the trial judge included in the jury instructions the instruction for the lesser included offense of assault and battery with a dangerous ^{weapon} by use of a firearm. See Trial Record, Page 270, lines 11-19; also see Instruction Number 20. When Petitioner was convicted in February 1996, assault and battery with a dangerous ^{weapon} by use of a firearm carried

a maximum of ten (10) years in prison. See Instruction Number 20.

As stated by long-standing Oklahoma precedent, "Where the crime charged is distinguished into degrees, defendant is entitled to the benefit of a reasonable doubt as to the degree." See *McClatchery v. State*, 12 Okla. Crim. 173, 152 P. 1136, at 1137 (Okla. Crim. App. 1915); *Smith v. State*, 12 Okla. Crim. 489, 159 P. 668, at 668-69 (Okla. Crim. App. 1916). The crime charged will be distinguished into degrees only when there is substantial evidence that it (crime charged) may have been committed under circumstances which would reduce it to a lower degree; and where there is reasonable ground of doubt as to degree, the doubt should be resolved in favor of the accused, *Smith v. State*, 56 P.2d 923, at 925, 59 Okla. Crim. 111 (Okla. Crim. App. 1936). 22 O.S.A. § 837 states in pertinent part: "when... there is reasonable ground of doubt in which of two or more degrees the defendant is guilty, he can be convicted of the lowest of such degree only."

As pointed out earlier in this QUESTION, due to substantial evidence of the commission of a lesser included offense ~~of~~ of crime charged, the trial judge distinguished the crime charged into degrees (i.e., determined there was reasonable doubt as to degree), which rendered 22 O.S.A. § 837 a necessary, applicable, controlling statute in Petitioner's trial. Under 22 O.S.A. § 837, a defendant can be convicted only of the lowest degree of crime charged when there is reasonable ground of doubt as to which degree he is guilty (i.e., defendant is entitled to the benefit of a reasonable doubt as to degree when crime charged is distinguished into degrees). In Petitioner's case, the lowest degree of crime charged was assault and battery with a dangerous weapon by use of a firearm, which carried a maximum of ten (10) years in prison (when Petitioner was convicted in 1996). See Instruction Number 20.

Hence, Petitioner's sentence of 150 years

and his conviction for shooting with intent to kill BOTH EXCEEDS THE MAXIMUM AUTHORIZED BY THE LAWS AND PRECEDENT RAISED AND SUPPORTED BY THE EVIDENCE AT HIS TRIAL.

22 O.S.A. §837 is a substantive rule enacted by the State of Oklahoma itself. Said substantive rule was violated by the fact that Petitioner was convicted of the higher of the two degrees of crime charged the jury had to choose from (after trial judge distinguished crime charged into degrees). See, e.g., 22 O.S.A. §837. "A court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced," *Montgomery v. Louisiana*, 136 S.Ct. 718, 730-733 (2016). Since Petitioner's conviction and sentence constitute(s) a clear violation of the substantive rule announced in 22 O.S.A. §837, said punishments are contrary to law

and thus void. *Montgomery v. Louisiana*, 136 S.Ct. 718, 730-733 (2016).

Due to the fact Petitioner's conviction and sentence are void (as violation of the substantive rule announced in 22 O.S.A. §837), he ask(s) this Court to remand his case to the proper State Court with instructions to modify his conviction to the lesser included offense of assault and battery with a dangerous weapon by use of a firearm and modify his sentence to ten (10) years time served due to the fact he has done MORE THAN the ten (10) years maximum for said lesser included offense (this is Petitioner's 24th year being locked up for this conviction).

REASONS FOR GRANTING THE PETITION

elf for no other reason, the Court should grant the petition to address the QUESTION of petitioner being denied the right to a jury verdict of guilt beyond a reasonable doubt. Because to decline to address a colorable claim of the denial of such an indispensable legal standard or rule, at any time, would in effect be sanctioning criminal courts (trial and appellate) to permit criminal defendants to be deprived of life or liberty upon a standard of proof that leaves people in doubt whether innocent persons are being condemned, i.e., convicted upon a degree of doubt that does not require the factfinder to find guilt with utmost certainty. Such a diluted standard of proof would run the extremely high risk of causing MORE INNOCENT THAN GUILTY PEOPLE TO BE CONVICTED. To convict more innocent than guilty people would render the 5th, 6th 36.

and 14th Amendments neutralized and futile to the point they would in effect be abolished altogether. Because there is no fairness or equal protection of the laws when the law is not being applied in accordance with rules of law.

Moreover, failure to address Petitioner's colorable claim of being denied the right to a jury verdict of guilt beyond a reasonable doubt would show the American scheme or concept of justice to be a mere sham or illusion, which would evince that this country is not a nation of laws but is instead a nation that condones and permits arbitrary discrimination in the application and enforcement of the laws. A law system that operates in that way is more harmful than helpful to the progress and evolution of a civilized society such as the U.S.A.

For all of the reasons adduced *ibid*, it is of great and grave national importance (to ALL criminal defendants and their families and ~~communities~~ communities) for this Court to address Petitioner's

colorable claim of being denied the right to a jury verdict of guilt beyond a reasonable doubt. Because eliminating even the most tenuous possibility of such a conviction occurring and standing is the only way to ensure that criminal defendants will not be compelled to "endure til death" fundamental miscarriages of justice that are shown to be the product(s) of structural error(s).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dexter L. Johnson

Date: July 2, 2018