No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ISAIAH GLENNDELL TRYON,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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November 26, 2018

CAPITAL CASE

QUESTION PRESENTED

After invalidating one of four (4) aggravating factors found by the jury, the Oklahoma Court of Criminal Appeals reweighed the remaining aggravating circumstances against the evidence the court determined was mitigating and concluded that the aggravating factors outweighed the mitigating circumstances and affirmed the death sentence.

The question presented is in light of *Ring v. Arizona* and *Hurst v. Florida* does the Sixth Amendment prohibit a state appellate from reweighing aggravating and mitigating circumstances and determining that death is the appropriate punishment because those factual determinations must be made by a jury and found beyond a reasonable doubt?

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OCTOBER TERM, 2018

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To: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case.

OPINION BELOW

The Oklahoma Court of Criminal Appeals issued a published opinion in this case, *Tryon v. State,* 2018 OK CR 20, 423 P.3d 617. (Appendix A)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The judgment of the Oklahoma appellate court was entered May 31, 2018. (Appendix A) A Petition for Rehearing and Motion To Recall Mandate was filed on June 20, 2018 and subsequently denied in an unpublished order on June 29, 2018. (Appendix B and C) Petitioner sought an extension of time to file this Petition for a Writ of Certiorari from the original ninety (90) days under the *Rules of the Supreme Court of the United States,* Part III, Rules 13.1, 13.2 and 13.3. That request was granted on September 21, 2018. The Court granted a sixty (60) day extension to and including November 26, 2018.

CONSTITUTIONAL AND RELEVANT STATUTORY PROVISIONS

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and 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.

United States Constitution, Amendment XIV:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

OKLA. STAT. TIT. 21, § 701.10:

Sentencing Proceedings for First Degree Murder - State Seeking Death Penalty

A. Upon conviction or adjudication of guilt of a defendant of murder in the first degree, wherein the state is seeking the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without parole or life imprisonment. The proceeding shall be conducted by the trial judge before the same trial jury as soon as practicable without presentence investigation.

B. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court.

C. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in Section 701.7 et seq. of this title. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. In addition, the state may introduce evidence about the victim and about the impact of the murder on the family of the victim.

OKLA. STAT. TIT. 21, § 701.11:

Jury Instructions for Sentencing - Aggravating Circumstances in Jury and Nonjury Cases.

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.

OKLA. STAT. TIT. 21, § 701.13:

Review of Death Penalty Sentence:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

E. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for resentencing by the trial court.

STATEMENT OF THE CASE

1. Facts of the case.

Isaiah Tryon was convicted of first degree murder in violation of Okla. Stat. tit. 21, 701.7 and sentenced to death by an Oklahoma jury. Mr. Tryon and Tia Bloomer began a relationship in approximately 2008 when she was fourteen (14) or fifteen (15) years old and Mr. Tryon was approximately eighteen (18) years old. (Tr.IV 997) They had a son, Royal, together. (Tr.VIII 2019) Ms. Bloomer lived with Mr. Tryon's family on and off before and after Royal was born. (Tr.VIII 2018) She wanted Mr. Tryon to be able to support her and the baby so together they worked toward Mr. Tryon getting his GED. She herself finished high school after Royal was born and took college courses in addition to working.

Mr. Tryon and Ms. Bloomer sometimes fought and she would leave, then forgive him and call him to go pick her and the baby up. (Tr.VIII 2081) They always got back together. (Tr.VIII 2082) There was pressure put on them by their families. (Tr.VIII 2079-2080) Their relationship was at times violent. (Tr.VIII 2065) Detective Jeffrey Padgett suspected that Mr. Tryon was responsible for choking Ms. Bloomer several days before the stabbing. However, she had named someone else as being responsible for the choking and was not cooperating with the police. (Tr.VIII 841-843)

In March 2012 Mr. Tryon was living in an apartment with his mother, Ms. Bloomer and Royal, his sister and her boyfriend. (Tr.IV 998-999) His brother Rico lived in the same complex as did their cousin Eric "Evil" Wilson. (Tr.IV 999) In the days before the stabbing, Ms. Bloomer had left Mr. Tryon for several reasons including her frustration that he was using his disability money to take care of his mother instead of taking care of her and Royal. To try and live up to what Ms. Bloomer wanted from him Mr. Tryon had spent the days before the stabbing going to job fairs and employment agencies with Rico and his cousin Eric trying to find a job. (Tr.IV 1000)

However, his efforts towards finding a job to try and support Ms. Bloomer and Royal were frustrated by Mr. Tryon's almost constant drug use. Rico Wilson testified that he saw Mr. Tryon snorting cocaine and smoking PCP that week. (Tr.IV 1002) On the evening of March 15th he observed his brother sitting on the stairs feeling down because of losing Ms. Bloomer and Royal.

(Tr.IV 1006) He believes Mr. Tryon was high that night because of the way he was talking. (Tr.IV 1006)

Eric Wilson testified that he was with Mr. Tryon every day in the days prior to the stabbing. (Tr.IV 1054) They went out looking for jobs but having no luck finding jobs they would go home and get high. (Tr.IV 1054) According to Mr. Wilson they were drinking, smoking PCP and snorting lines of cocaine. (Tr.IV 1055-1059) Mr. Tryon smoked two (2) vials of PCP on the 13th and the 14th. He snorted cocaine on the 13th but not the 14th. (Tr.IV 1059) Mr. Tryon stayed at Eric Wilson's apartment on the night of the 14th. When they got up on the 15th they started getting high again. (Tr.IV 1060) Mr. Tryon again used two (2) vials of PCP that covered six cigarettes. Mr. Wilson explained that when you are using PCP you can smoke a regular cigarette and it would renew the PCP high. (Tr.IV 1061) Mr. Tryon also snorted cocaine and ingested alcohol on the 15th. (Tr.IV 1062) They began drinking gin around 9:00 that night after using PCP all day. (Tr.IV 1063) Mr. Tryon left around 3:00 a.m. or 4:00 a.m. on the 16th. (Tr.IV 1063-1064)

During his custodial interview Mr. Tryon admitted he knew that Ms. Bloomer had business to take care of that day but he did not know he would run into her at the Downtown Bus Station. (State's exhibit 58, 25:14) When he arrived at the station he stood outside and smoked a cigarette, possibly re-triggering some of the PCP in his system. (State's exhibit 58, 25:22) He went into the bus station to get a schedule and saw her talking to a man who drew caricatures at the bus station. Mr. Tryon approached Ms. Bloomer to try and

talk to her but she told him to get away from her. (State's exhibit 58, 25:38, 31:55) Mr. Tryon told Detective Benavides that his emotions got away from him and when she told him "I don't want to talk to you" he pulled out a knife and began stabbing her. (State's exhibit 58, 31:55-32:21). He thought he had stabbed her six (6) times. (State's exhibit 58, 29:22)

The surveillance video from the bus station shows Mr. Tryon approaching Ms. Bloomer while she was sitting with the caricature artist and attempting to talk to her. (State's exhibit 4, 0:50-1:25) She got up and walked away from him then began to leave the station at which time he began to stab her. (State's exhibit 4, 1:25-1:35) Numerous people were in the bus station and witnessed some or all of the stabbing.

Dr. Inas Yacoub performed the autopsy on Ms. Bloomer. (Tr.IV 941) Based on the diagram she prepared during the autopsy Dr. Yacoub testified that she observed wounds on Ms. Bloomer's right side of the face and ear, on her neck, the right breast, right torso and right hand. (Tr.IV 952) She also had injuries on the back of the neck and the upper back. Dr. Yacoub counted seven (7) major stab wounds but could not determine what order the wounds were received. (Tr.IV 957, 967) The wound to the right breast entered the chest cavity and damaged a lung and vital structures such that it alone would have been fatal. (Tr.IV 962) Dr. Yacoub's conclusion was that Ms. Bloomer's cause of death was multiple stab wounds. (Tr.IV 986)

At trial the State alleged the existence of four (4) statutory aggravating circumstances under Okla. Stat. tit. 21, § 701.12: 1) the homicide was

especially heinous, atrocious or cruel; 2) Mr. Tryon was serving a sentence of imprisonment at the time of the homicide; 3) Mr. Tryon had a prior violent felony conviction; and 4) Mr. Tryon constitutes a continuing threat to society. All but the heinous, atrocious or cruel aggravators were supported, at least in part, with Mr. Tryon's single felony conviction for four (4) counts of shooting with intent to kill for which he entered a "no contest" plea and received a deferred sentence.[1] Because of a probation violation Mr. Tryon's deferred sentence was accelerated to a suspended sentence (and became a conviction at that time) on November 21, 2011 to four ten (10) year suspended sentences with supervised probation for the first two (2) years.

2. Disposition of Petitioner's direct appeal.

On direct appeal the Oklahoma Court of Criminal Appeals invalidated the serving a sentence of imprisonment aggravating circumstance finding that because Mr. Tryon was serving a suspended sentence, his sentence of imprisonment was not executed prior to Ms. Bloomer's death. *Tryon* at ¶117, 423 P.3d at 649. In light of the invalid aggravating circumstance the state appellate court conducted a harmless error analysis under *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006) and determined "the invalid aggravator could not have skewed the sentence imposed, and no constitutional violation occurred." *Tryon* at ¶ 148, 423 P.3d at 656. In making that determination the court stated it was conducting "an independent reweighing of the aggravating and mitigating evidence to determine the validity

[1] A deferred sentence in Oklahoma is not a conviction if probation is successfully completed.

of Appellant's death sentence." *Id.* at ¶ 149, 423 P.3d at 656. The court described the remaining aggravating circumstances:

> The evidence supporting all three aggravating circumstances was strong. The evidence detailed earlier showed not only Appellant's prior felony convictions for four counts of Assault with a Dangerous Weapon but also numerous instances of prior violent acts towards police officers, family members, the victim, other inmates and the public supporting the continuing threat aggravator. Appellant's murder of Tia Bloomer in a crowded public place while serving a sentence of supervised probation likewise supports this aggravator as does the callous and brutal nature of the killing itself...Moreover, as discussed in Proposition XIII, the evidence showed the victim endured conscious physical suffering as Appellant stabbed her repeatedly in the bus station, thus supporting the especially heinous, atrocious, or cruel aggravator. (citation omitted).

Id. at ¶ 150, 423 P.3d at 657. In relation to the mitigating evidence that was admitted the court described exactly what the court considered in reweighing:

> Appellant presented abundant mitigation evidence from his family members covering virtually every aspect of his life. This included first-hand accounts concerning Appellant's drug abuse; learning disabilities; educational background; prior incarcerations; prior head injuries; suicide attempts; family background; mental health treatment and institutionalization; prior incarcerations of his mother, father and siblings; gang involvement; the crowded conditions at the family home; the fact the family constantly moved; the non-stop drug activity at the family home; the routine absence of Appellant's mother from the family home while on multi-day drug binges; Appellant's mother buying drugs from Appellant and his brother; Sheryl's[2] physical abuse of her children; Appellant's drug dealing; Appellant's love for his son; the nature of Appellant's relationship with the victim; and the nature of Appellant's relationship with his mother.
>
> The defense also presented expert testimony from Dr. Fabian, a neuropsychologist, that Appellant was low functioning (but not mentally retarded) and suffered both from mental illness and brain damage. Appellant presented this testimony along with anecdotal evidence from family members concerning his cognitive and developmental limitations, his mental health treatment and his

[2] Petitioner's mother.

> experience taking—then discontinuing—medications prescribed specifically for his mental issues. Dr. Musick, a sociology professor, was presented by the defense as an expert witness to discuss the risk factors and events from Appellant's life history which impacted his development. This was offered to explain Appellant's pattern of illegal behavior culminating in his murder of Tia Bloomer.

Id. at ¶¶ 151-152, 423 P.3d at 657. The court's summary of what it considered mitigating did not fully encompass the entirety of what the jury was instructed it could consider as mitigating evidence including Mr. Tryon's remorse for the homicide, the fact that he was only twenty-two (22) years old when he killed Ms. Bloomer and the abject poverty in which he was raised.

The court concluded that the valid aggravating circumstances outweighed the mitigation evidence and supported the death penalty. *Id.* at ¶ 153, 423 P.3d at 657. Petitioner filed a Petition For Rehearing arguing that the court's reweighing of aggravating factors and mitigating circumstances violated *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The court rejected the argument finding that *Hurst* "did not address the authority of a state appellate court to conduct reweighing." The court further stated:

> Our determination on appeal whether the remaining valid aggravating circumstances outweighed the mitigating circumstances presented in this case was not a factual determination. Rather, this decision amounted to "a balancing process which is not amenable to the 'beyond a reasonable doubt' standard of proof. *Underwood v. State*, 2011 OK CR 12, ¶ 62, 252 P.3d 221, 246.

Citing with approval the Tenth Circuit Court of Appeals opinion in *Matthews v. Workman*, 577 F.3d 1175, 1195 (10th Cir. 2009) the court wrote "The Tenth

Circuit has recognized that the balancing of aggravating and mitigating circumstances is 'not a finding of fact...but a 'highly subjective, largely more judgment regarding the punishment that a particular person deserves.'"[3]

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO ANSWER THE IMPORTANT QUESTION WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE THE REWEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES BY A STATE APPELLATE COURT VIOLATES THE SIXTH AMENDMENT RIGHT TO JURY TRIAL IN LIGHT OF *RING V. ARIZONA AND HURST V. FLORIDA.*

A. Oklahoma's death sentencing scheme requires a finding that aggravating factors outweigh mitigating circumstances before a death sentence may be considered.

The maximum sentence allowed under Oklahoma law for first degree murder is life without parole. The death penalty can only be considered by a jury if it finds the existence of at least one aggravating factor and finds any aggravating factors outweigh the mitigating circumstances. Oklahoma is a weighing state meaning the jury is tasked with determining whether the statutory aggravating circumstances outweigh the mitigating circumstances. The jury then, and only then, is authorized to consider imposing a death sentence. *See* Okla. Stat. tit. 21, § 701.11. The existence of at least one aggravator must be found by the unanimous jury beyond a reasonable doubt before the jury engages in the weighing process. That is the only finding in the penalty phase of a capital trial under Oklahoma law that the jury has to find beyond a reasonable doubt. Neither the decision of whether the aggravating

[3] The *Matthews* opinion quotes *United States v. Barrett*, 496 F.3d 1079, 1107 (10th Cir. 2007). *Barrett* considered the federal sentencing guidelines and did not address the issue being addressed by the Oklahoma Court of Criminal Appeals.

circumstances outweigh the mitigating circumstances nor the ultimate determination of the appropriate sentence is subject to any burden of proof.

During the penalty phase of a capital trial the jury is instructed on the alleged statutory aggravating circumstances and told it must find at least one aggravating circumstance beyond a reasonable doubt before it can consider the death penalty. *Oklahoma Uniform Jury Instruction-Criminal 2d.* 4-76. The jury is also instructed that "the death penalty shall not be imposed" unless it unanimously find that the aggravating factors outweigh the mitigating circumstances. *Oklahoma Uniform Jury Instruction-Criminal 2d.* 4-80. The aggravating factors found by the jury beyond a reasonable doubt are memorialized in a verdict form. *Oklahoma Uniform Jury Instruction-Criminal 2d.* 4-84.

Oklahoma jurors are instructed that mitigating circumstances are; 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead the jurors individually or collectively to decide against imposing the death penalty. *Oklahoma Uniform Jury Instruction-Criminal 2d.* 4-78. For the mitigating circumstances jurors are instructed on specific circumstances supported by the evidence presented at trial in mitigation. *Oklahoma Uniform Jury Instruction-Criminal 2d.* 4-79. That instruction further tells the jurors that they can consider anything else they might find mitigating. What the jury, individually or collectively, considered mitigating is not memorialized in a

verdict form. Therefore there is no discernable way to determine what the jury considered in the weighing process.

In order to consider a sentence of death the jury must find that the aggravating factors outweigh the mitigating circumstances. Okla. Stat. tit. 21, § 701.11. It is this determination that allows the jury to consider the death penalty and absent that finding, a death sentence is not a sentencing option. *Paxton v. State*, 1993 OK CR 59, ¶ 40, 867 P.2d 1309, 1323 ("It is sufficient that the jury is instructed to weigh the mitigating and aggravating evidence, and only when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed). Therefore, in Oklahoma the jury must make two critical findings in order to impose the death penalty. First, the jury must find that an aggravating factor exists beyond a reasonable doubt. The second and just as important critical factor that the jury must find is that the aggravating factor(s) outweigh the mitigating circumstances.

B. The court's reweighing of aggravating factors and mitigating circumstances violates the Sixth Amendment as explained in *Ring v. Arizona* and *Hurst v. Florida* that any fact necessary to increase the statutory maximum sentence must be made by a jury.

The Court invalidated the "serving a sentence of imprisonment" aggravating circumstance then engaged in an "independent reweighing of the aggravating and mitigating evidence to determine the validity of Appellant's death sentence." *Id.* at ¶ 149. The state court's "independent reweighing" runs afoul of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). In

Ring this Court extending the holding in *Apprendi v. New Jersey* that any fact necessary to increase the statutory maximum of a sentence must be found by a jury beyond a reasonable doubt.

Jones v. United States, 526 U.S. 227, 243, n.6, 119 S.Ct. 1215, 1224, n.6, 143 L.Ed.2d 311 (1999) held that "...under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Applying that fundamental principle to the states, the Court held in *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 153 L.Ed.2d 556 (2000), that: "[t]he Fourteenth Amendment commands the same answer [as *Jones v. U.S.*] in this case involving a state statute."

The evolution of the principle that any fact used to increase the maximum penalty for a crime was taken a step further in *Ring* wherein the Court held that the rules of law that commanded the outcome in *Jones* and *Apprendi* are likewise applicable to capital cases. *Ring*, 536 U.S. at 607, 122 S.Ct. at 2442 ("We see no reason to differentiate capital cases from all others in this regard.") In so holding the Court reaffirmed the principle that if an increase in the maximum sentence available under the law is contingent on a finding of fact, that fact, regardless of the label placed upon it by the State, must be found by a jury beyond a reasonable doubt. *Id.* In his concurring

opinion Justice Scalia expounded on his view of the principle set forth in *Jones*, *Apprendi*, and *Ring*:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610, 122 S.Ct. at 2444.

The *Hurst* Court likewise held that the critical findings necessary to impose a death penalty must be made by a jury. *Id.* at 622. The use of the term "critical findings" by the Court suggests that the jury must find more than just the existence of an aggravating circumstance. Among the findings the *Hurst* Court addressed was the existence of mitigating and or aggravating circumstances. *Id.* In fact, *Hurst* concludes with the statement "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, **not a judge's factfinding**." *Id.* at 624 (emphasis added). *See also Pavatt v. Royal*, 859 F.3d 920, 957 (10th Cir. 2017)("But the implications of *Hurst* seem clear. Appellate reweighing at least under a capital sentence scheme like the one at issue in Oklahoma, requires an appellate court to make a new and critical finding of fact, i.e., whether the remaining valid aggravating circumstances outweigh any mitigating circumstances alleged by the defendant.")(Briscoe, J. concurring in part and dissenting in part). The state appellate court has repeatedly rejected the argument that under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the "finding"

that authorizes a death sentence (and therefore should be subject to the beyond a reasonable doubt standard of proof) is the finding that the aggravating factors outweigh the mitigating circumstances. *Underwood v. State*, 2011 OK CR 12, ¶ 61, 252 P.3d 221, 246; *Torres v. State*, 2002 OK CR 35, ¶¶ 5-7, 58 P.3d 214, 215-216.

In conducting its independent reweighing the court had to make two key determinations or findings. First, the court had to make a preliminary finding of fact of what mitigating evidence to consider in its reweighing. The reweighing court in Oklahoma has no way to know for sure what the jury that sentenced a defendant to death considered in the weighing process. A list of mitigating circumstances supported by the evidence is given to the jury in the jury instructions but jurors are told they may also consider anything else they find to be mitigating in determining the appropriate punishment. (Appendix D) Jurors do not memorialize what evidence they actually considered mitigating or considered in the weighing process. Therefore, in determining what mitigating evidence warrants consideration in the reweighing process the court necessarily substituted its own judgment for that of a jury regarding what mitigating evidence to weigh.

While the court listed several mitigating points supported by the evidence at trial, there is no way to know with any certitude what other evidence the jury might have considered mitigating. The court's independent reweighing then necessarily makes the factual determination of what is relevant mitigating evidence. Additionally, the fairness, sympathy and mercy jurors are instructed

they can consider does not appear to have entered into the state appellate court's reweighing process.

The second finding the court had to necessarily make is the ultimate determination that the aggravating circumstances outweigh the mitigating evidence. A death sentence is supposed to reflect the reasoned moral judgment of a jury, not five (5) judges who were not in the courtroom during the presentation of the mitigation case. In fact, in *Blystone v. Pennsylvania*, 494 U.S. 299, 317, 110 S.Ct. 1078, 1089, 108 L.Ed.2d 255 (1990) the Court observed about the weighing process,

> Thus, a reasoned moral response to the defendant's conduct requires the consideration of the significance of both aggravating and mitigating factors. "[I]n the end it is the jury that must make the difficult, *individualized* judgment as to whether the defendant deserves the sentence of death." (citation omitted)

The ultimate finding that the death sentence is appropriate because the aggravating factors outweigh the mitigating circumstances is a finding of fact that the Sixth Amendment requires that the jury, not a reviewing court, make and one that must be found beyond a reasonable doubt.

By token of the state court's "independent reweighing," Mr. Tryon's death sentence rests on the court's finding of fact instead of a jury's findings relating to aggravating and mitigating evidence. The Sixth Amendment does not allow such a sentence to stand as construed by *Ring* and *Hurst*.

C. This case presents a question left unanswered by the Court in *Ring* and *Hurst* as to whether the determination that aggravating factors outweigh mitigating circumstances is a finding of fact that must be made by a jury and found beyond a reasonable doubt.

The Court in *Ring* granted *certiorari* to decide whether the aggravating factor that increased the statutory maximum sentence to death could be found by a judge or if it had to be found by the jury. *Ring* at 597, 122 S.Ct. at 2437. However, the *Hurst* Court spoke in terms of the multiple findings that must be made before a sentence of death may be imposed. Particularly relevant to the question presented in this case, *Hurst* referred to the pivotal "facts" that the Florida trial court had to make that ran afoul of *Ring* and *Apprendi*; that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *Hurst* at 622.

This case presents the question left unanswered by *Ring* and *Hurst* as to whether the Sixth Amendment requires a jury to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. If the Sixth Amendment requires that finding to be made by a jury, can a state appellate court engage in a reweighing process if an aggravating circumstance is invalidated on appeal.

D. The application of *Hurst* in weighing states has produced a split in jurisdictions requiring this Court's clarification.

Currently, at least three other states hold as Oklahoma holds, that the determination that aggravating factors outweigh mitigating circumstances is not a fact that must be found by a jury beyond a reasonable doubt. Alabama,[4] Ohio[5] and Nebraska[6] have all ruled that *Ring* does not require the weighing

[4] *Ex Parte Bohannon*, No. 1150640, 2016 WL 5817692, at 6 (Ala. Sept. 30, 2016).
[5] *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319.

determination to be made by a jury. On the other hand, Delaware[7] and Florida[8] hold that the ultimate determination that the aggravating factors outweigh the mitigating circumstances must be made by a unanimous jury beyond a reasonable doubt.

The Court should grant the writ of certiorari in this case to resolve this split in authority.

E. This case presents a good vehicle for the Court to determine whether appellate courts can reweigh aggravating and mitigating circumstances after invalidating an aggravating circumstance that was considered by the sentencing jury.

Petitioner's case presents a good vehicle for the Court to decide the open question of whether, in light of *Ring* and *Hurst*, an appellate court can reweigh aggravating factors and mitigating circumstances. Petitioner submits that weighing aggravating and mitigating circumstances is a "finding" that must be made by a jury beyond a reasonable doubt. The issue was raised before the state appellate court following the issuance of the direct appeal opinion when the state appellate court reweighed the evidence and affirmed the death sentence. In the reweighing process the state appellate court clearly made findings about what mitigation was relevant to that process. Those findings did not encompass all of the mitigating evidence presented at trial. The court also made a factual finding that the remaining valid aggravating factors outweighed the evidence in mitigation. On rehearing the state court clearly and

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[6] *State v. Gales*, 694 N.W.2d 124, 145 (Neb. 2005).
[7] *Rauf v. State*, 145 A.3d 430, 433-434 (Del. 2016)(*per curium*).
[8] *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016)(*per curium*).

specifically held that reweighing did not constitute fact finding in the *Ring* and *Hurst* context.

The issue is now before the Court having been fully developed below. Accordingly, the case provides a good vehicle for determination of this issue that impacts virtually all active capital jurisdictions in the United States.

CONCLUSION

Petitioner prays the Court grant his petition to decide that the Sixth Amendment of the United States Constitution requires that the finding of what circumstances are mitigating and the ultimate decision that the aggravating factors outweigh mitigating circumstances must be made by a jury and found beyond a reasonable doubt.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

I, Andrea Digilio Miller, member of the bar of this Court, do hereby certify that I have served a copy of the Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals on counsel for the Respondent, State of Oklahoma, by depositing the same in the U.S. Mail, postage prepaid, to Jennifer Miller, Chief of the Criminal Division, Office of the Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this 26th day of November, 2018. All parties required to be served have been served.

ANDREA DIGILIO MILLER