No. _____

In The
Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

JESSE ALLEN JOHNSON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court "h[e]ld that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 465. Instead, to comport with established principles of proportionality, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489. This Court later recognized "[t]hat *Miller* did not impose a formal factfinding requirement. . . ." *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016).

Nevertheless, the Oklahoma Court of Criminal Appeals concluded—in direct conflict with three other state supreme courts—that the Sixth Amendment requires that a jury find beyond a reasonable doubt that a juvenile homicide offender is irreparably corrupt and permanently incorrigible before a sentence of life without parole may be imposed under *Miller*.

The question presented is:

Does the Sixth Amendment require that the individualized sentencing proceeding necessary to impose a life-without-parole sentence upon a juvenile homicide offender be a trial by jury?

LIST OF PARTIES

The Petitioner is the State of Oklahoma. The Respondent is Jesse Allen Johnson.

RELATED PROCEEDINGS

- *State of Oklahoma v. Jesse Allen Johnson*, No. CF-2005-5714, District Court of Oklahoma County, State of Oklahoma. Judgment entered Mar. 16, 2005.
- *J.A.J. v. State of Oklahoma*, No. J-2006-259, Oklahoma Court of Criminal Appeals. Judgment entered June 22, 2006.
- *State of Oklahoma v. Jesse Allen Johnson*, No. CF-2005-5714, District Court of Oklahoma County, State of Oklahoma. Judgment and Sentence entered Jan. 3, 2007.
- *Jesse Allen Johnson v. State of Oklahoma*, No. C-2007-83, Oklahoma Court of Criminal Appeals. Judgment entered Oct. 3, 2007.
- *Jesse Allen Johnson v. State of Oklahoma*, No. CF-2005-5714, District Court of Oklahoma County, State of Oklahoma. Judgment entered Sep. 12, 2013.
- *Jesse Allen Johnson v. State of Oklahoma*, No. CF-2005-5714, District Court of Oklahoma County, State of Oklahoma. Judgment entered Jun. 26, 2017.
- *Jesse Allen Johnson v. State of Oklahoma*, No. PC-2017-755, Oklahoma Court of Criminal Appeals. Judgment entered May 22, 2018.

RELATED PROCEEDINGS—Continued

- *State of Oklahoma v. Jesse Allen Johnson*, No. CF-2005-5714, District Court of Oklahoma County, State of Oklahoma. Judgment entered Oct. 18, 2018.
- *Jesse Allen Johnson v. Hon. Ray C. Elliott, Judge of the Dist. Ct., State of Oklahoma*, No. PR-2018-1203, Oklahoma Court of Criminal Appeals. Judgment entered May 24, 2019.

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PETITION FOR A WRIT OF CERTIORARI

The District Attorney of Oklahoma County, on behalf of the State of Oklahoma, respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Court of Criminal Appeals (App. 1) is reported at *Johnson v. Elliott*, 2019

OK CR 9, 2019 WL 2251707 (Okla. Crim. App. 2019). The order of the trial court (App. 13) is unreported.

JURISDICTIONAL STATEMENT

The Oklahoma Court of Criminal Appeals entered judgment on May 24, 2019. The State of Oklahoma invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). The decision of the Oklahoma Court of Criminal Appeals qualifies as a "[f]inal judgment or decree[]" within the meaning of the statute. *Id.*; *see Kansas v. Marsh*, 548 U.S. 163, 168 (2006) (granting review when state supreme court found state's capital sentencing statute facially unconstitutional and remanded for new trial); *see also Michigan v. Bryant*, 562 U.S. 344, 352 (2011); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "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."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution, Section 1, provides in relevant part: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Okla. Stat. tit. 21, § 701.9(A) provides in relevant part: "A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life. . . ."

INTRODUCTION

In the wake of this Court's decisions in *Miller* and *Montgomery*, states have grappled with devising procedures that are both constitutional and workable for sentencing offenders who, prior to their eighteenth birthdays, murder another human being. The fallout was to be expected and, perhaps to some extent, desirable. As stated in *Montgomery*, "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 136 S.Ct. at 735. Even so, the ensuing years since this Court decided *Miller* have shown that certain questions regarding implementation of this new Eighth Amendment

rule, such as the question presented here, can only be resolved by this Court.

This case arises from a direct conflict among state high courts over whether a confluence exists between the Eighth Amendment framework announced in *Miller* and *Montgomery* and the Sixth Amendment principles developed in *Apprendi v. New Jersey*, 520 U.S. 466 (2000) and its progeny. In the case below, the Oklahoma Court of Criminal Appeals (OCCA) held that juvenile homicide offenders possess a Sixth Amendment right to a jury trial on the issue of punishment before a sentence of life without parole may be imposed under *Miller*.

The OCCA reached this conclusion even after the supreme courts of Michigan, Pennsylvania, and Utah, as well as numerous intermediate appellate courts throughout the country, reached precisely the opposite conclusion—that *Apprendi* and its progeny have no application in this context. This clear state split has resulted in the recognition of a federal constitutional right for juvenile homicide offenders in one state that has been expressly denied to identically-situated offenders in its sister states.

Other than the fact of a prior conviction, criminal defendants enjoy a Sixth Amendment right to have "any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* . . . submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added). The "statutory maximum" for purposes of *Apprendi* "is the maximum

sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). In every state that has addressed the question presented, including Oklahoma, life without parole was the statutory maximum sentence for the proscribed manner of homicide when committed by a juvenile. *See* Okla. Stat. tit. 21, § 701.9(A). Yet the OCCA has curiously concluded that the Eighth Amendment limits announced by this Court in *Miller* somehow supplant the maximum sentence authorized by the state legislatures. Put another way, in the judgment of the OCCA, courts, not lawmakers, define what facts must be proven to a jury beyond a reasonable doubt. That conclusion cannot possibly be right.

This Court made clear in *Montgomery* that no formal findings of fact are required by *Miller* before a juvenile homicide offender may be sentenced to life without parole. 136 S.Ct. at 734-35. The jury trial and related due process rights underlying the *Apprendi* line of decisions have thus far never been extended to factual considerations relevant only to an Eighth Amendment inquiry. Such an extension is simply not "rooted in the historic jury function—determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon v. Ice*, 555 U.S. 160, 163 (2009). The State of Oklahoma respectfully requests that this Court grant the petition and determine whether a juvenile homicide offender possesses a Sixth Amendment right that requires jury findings of fact beyond those facts already reflected in

the jury's verdict or admitted by the offender before a sentence of life without parole may be imposed.

STATEMENT OF THE CASE

Respondent Jesse Allen Johnson shot Leroy Vigil three times in the head and left him to die in his own front yard in the late evening of September 27, 2005. Before firing the fatal shots, the respondent assisted two of his confederates, Antwyon Turner and Adam Peters, in chasing Mr. Vigil from his home and beating him with baseball bats. The vicious killing was all part of a murder-for-hire plot they had hatched earlier in the evening. Mr. Vigil's wife, Catherine Vigil, had solicited Turner, their daughter's boyfriend, to murder her husband. The respondent had never met Mr. Vigil but was recruited by Turner with the promise of money to help kill him. App. 28. For his part, the respondent received $200—taken from Mr. Vigil's wallet as he lay dying. He spent the proceeds on car speakers. *Id.* at 22, 28.

1. The State of Oklahoma charged the respondent, conjointly with four other codefendants, by information with Murder in the First Degree and Conspiracy to Commit Murder in the First Degree. *Id.* at 25. The trial court denied his motion to be certified as a youthful offender or juvenile, and the OCCA affirmed. *Id*. at 25-31. In 2006, the respondent entered a

"blind" plea of guilty to the crimes charged.[1] His guilty plea exposed him to punishment "by imprisonment for life without parole or by imprisonment for life."[2] Okla. Stat. tit. 21, § 701.9(A). After an extensive evidentiary hearing on punishment, the trial court sentenced the respondent to concurrent terms of life without parole for the murder and ten years imprisonment for the conspiracy.[3] App. 17, 21. The trial court denied the respondent's subsequent application to withdraw his guilty plea. The respondent appealed, arguing, among other things, that his sentence was excessive. *Id*. at 21. The OCCA denied his petition for writ of certiorari and affirmed his convictions and sentences. *Id.* at 20-24.

2. In 2013, the respondent filed an application for post-conviction relief in the trial court, arguing that his discretionary life-without-parole sentence for a murder he committed when he was seventeen years old violated the Eighth Amendment in light of this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). The trial court denied the application on September 12, 2013, and the respondent did not appeal. App. 16-17.

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[1] "A 'blind' plea of guilty is a plea in which there is no binding agreement on sentencing, and punishment is left to the judge's discretion." *Medlock v. State*, 887 P.2d 1333, 1337 n.2 (Okla. Crim. App. 1994).

[2] Okla. Stat. tit. 21, § 701.9(A) also provides for punishment by death, but the respondent was categorically ineligible for capital punishment due to his status as a juvenile at the time he committed the murder. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

[3] The respondent has already served and fully discharged his sentence for the conspiracy.

3. This Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) dramatically altered the jurisprudence of life-without-parole sentences for juvenile murderers in Oklahoma. In *Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016), the OCCA concluded "there is no genuine question that the rule in *Miller* as broadened in *Montgomery* rendered a life-without-parole sentence constitutionally impermissible, notwithstanding the sentencer's discretion to impose a lesser term, unless the sentencer 'take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id.* at 961 (quoting *Montgomery*, 136 S.Ct. at 733 (quoting *Miller*, 567 U.S. at 480)). Based on that interpretation of the "broadened" *Miller* rule, the OCCA held that as a matter of federal constitutional law a juvenile homicide offender cannot receive a discretionary life-without-parole sentence unless the sentencer finds "beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible." *Id.* at 963 n.11.

On March 14, 2017, the respondent filed an application for post-conviction relief in the trial court, again challenging the constitutionality of his life-without-parole sentence in light of the OCCA's interpretation of *Miller* and *Montgomery* in *Luna*. App. 16. The trial court found the respondent's claims were waived under state post-conviction procedures and summarily denied the application. *Id.* at 17. The respondent appealed.

While the respondent's post-conviction appeal was pending, the OCCA decided *Stevens v. State*, 422 P.3d 741 (Okla. Crim. App. 2018). In *Stevens*, the court granted post-conviction relief to a juvenile homicide offender who was sentenced to life without parole pursuant to a plea agreement sixteen years before *Miller* was decided. *Id.* at 748. After vacating the offender's sentence and remanding the matter to the trial court for resentencing, the OCCA then *sua sponte* set forth in *dicta* the procedure to be followed in all similar cases. *Id.* at 749-51. Included within that procedure, the OCCA declared, without further elaboration, that "[t]he Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived." *Id.* at 750 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

On May 22, 2018, the OCCA granted the respondent post-conviction relief, vacated his life-without-parole sentence, and remanded the matter to the trial court for resentencing as set forth in the *Stevens* opinion. App. 15-19.

4. On remand, the respondent filed a written request for jury trial resentencing on August 27, 2018. *Id.* at 2. The State of Oklahoma filed a written objection, arguing that the respondent has no statutory or constitutional right to a jury trial on the issue of punishment. *Id.* at 13. After a hearing on the issue, the trial court agreed with the State's analysis, concluding the respondent "waived his right to sentencing by a jury when he entered his blind plea of guilty in this

matter and he has no Sixth Amendment right to be resentenced by a jury." *Id.* at 13.

In a sharply divided 3-2 decision, the OCCA granted the respondent's application for an extraordinary writ to prohibit the trial court from resentencing him without empaneling a jury. *Id.* at 1-12. The majority based their resolution of the issue on federal constitutional grounds, finding that "[t]he Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury unless a jury is affirmatively waived. Johnson's waiver of his right to jury trial in 2006 was not an affirmative waiver of his rights to a jury on sentencing that he now possesses under *Miller*." *Id.* at 4 (citation omitted). The majority then remanded the matter to the district court with incongruous instructions for the trial judge to make a decision "using his discretion" which resentencing procedure is appropriate.[4] App. 5. This Hobson's choice in the guise of judicial discretion requires the trial court either to blatantly disregard the OCCA's binding determination that the respondent possesses an unwaived Sixth Amendment right to jury trial resentencing or to grant the respondent's request to be resentenced by a jury—a decision from which the State of Oklahoma will have no right of appeal. *See* Okla. Stat. tit. 22, § 1053.

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[4] The respondent has not been resentenced, and the trial court entered an order staying any proceedings regarding resentencing until after this Court completes its review.

Two judges dissented upon finding "[t]he advent of *Miller* and *Montgomery* did not create any new constitutional right to jury sentencing under the Sixth Amendment that necessitates the restoration of that right once affirmatively waived." App. 6; *see also id.* at 9. The dissenters observed that this Court specifically referenced judge sentencing in both *Miller* and *Montgomery*. *Id.* at 6, 10. The dissenting judges concluded:

> The cases dealing with juvenile homicide offenders sentenced to [life without parole] simply do not create, as the majority finds, any new constitutional right to jury trial which has yet to be waived. And, although Johnson is undoubtedly entitled to a new individualized sentencing hearing before he can be sentenced to [life without parole], he is not entitled to a new sentencing entity, namely a jury.

Id. at 12.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Solidifies A Direct Conflict Among The State Courts Of Last Resort Over Whether A Juvenile Homicide Offender Has A Sixth Amendment Right To Jury Factfinding Before A Life-Without-Parole Sentence May Be Imposed.

Prior to the OCCA's dictum in *Stevens*, 422 P.3d at 750, and its decision in this case, "all the courts that have considered this issue have . . . concluded that the

Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole." *People v. Skinner, et al.*, 917 N.W.2d 292, 311 (Mich. 2018), *cert. denied*, 139 S.Ct. 1544 (2019). The court below has created an entrenched conflict among the state appellate courts of last resort to decide this important federal constitutional issue.

1. The highest court in three states—Michigan, Pennsylvania, and Utah—have expressly rejected the argument that a juvenile homicide offender has a right under the Sixth Amendment for a jury to make any particular factual findings before a sentence of life without parole may be imposed. *See Skinner*, 917 N.W.2d at 305-06 (statute requiring the sentencing court to consider the *Miller* factors does not violate the Sixth Amendment because "the Sixth Amendment only prohibits fact-finding that *increases* a defendant's sentence; it does not prohibit fact-finding that *reduces* a defendant's sentence"); *Commonwealth v. Batts*, 163 A.3d 410, 478-79 (Pa. 2017) (finding "permanent incorrigibility" is not an element of a crime and further noting that this Court "itself did not recognize juvenile life imprisonment cases to be governed by *Alleyne* [*v. United States*, 570 U.S. 99 (2013)]."); *State v. Houston*, 353 P.3d 55, 68 (Utah 2015), *cert. denied*, 136 S.Ct. 2005 (2016) ("Under Utah's sentencing statute, a juvenile defendant guilty of aggravated murder can be sentenced to either life with the possibility of parole or [life without parole]. . . . Because the sentencing statute did not permit the jury to impose a sentence

'beyond the prescribed statutory maximum,' the *Apprendi* rule did not apply, and there is no violation.").[5]

Similarly, the Supreme Court of North Carolina concluded that a valid sentencing scheme under *Miller* does not require that the sentencing authority find the existence of aggravating circumstances before sentencing a juvenile murderer to life without parole. Based on that determination, it found no need to even address the Sixth Amendment question. *State v. James*, 813 S.E.2d 195, 209 n.7 (N.C. 2018). In the proceeding below, the North Carolina Court of Appeals expressly rejected the juvenile offender's argument that the state's sentencing guidelines, enacted in response to *Miller*, violated his constitutional right to a trial by jury. *State v. James*, 786 S.E.2d 73, 82 (N.C. Ct. App. 2016) (reasoning that the sentencing guidelines only require the sentencing court to consider mitigating circumstances of the defendant's youth to determine whether a lesser punishment is appropriate).

Intermediate appellate courts in four other states —California, Florida, Louisiana, and Mississippi—have likewise held that the Sixth Amendment is not violated when a juvenile offender is sentenced to life without parole after judicial, rather than jury, consideration of the factors set forth in *Miller*. *See*, *e.g.*, *People v. Blackwell*, 207 Cal.Rptr.3d 444, 465 (Cal. Ct. App. 2016) *as modified on denial of reh'g* (Sept. 29, 2016),

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[5] Subsequent to *Houston*, the Utah Legislature amended its Code to prohibit sentencing an individual under 18 years old to life without parole. 2016 Utah Laws, Ch. 277 (H.B. 405) (West).

cert. denied, 138 S.Ct. 60 (2017) ("[the defendant's] arguments are without merit as they are premised on fundamental misconceptions about the application of *Miller* . . . as well as *Apprendi* and its progeny");[6] *Beckman v. Florida*, 230 So.3d 77, 94-97 (Fla. Dist. Ct. App. 2017), *cert. denied*, 139 S.Ct. 1166 (2019) ("Florida's juvenile sentencing procedure . . . as contemplated by *Miller* does not violate the Sixth Amendment under *Apprendi* and its progeny."); *State v. Fletcher*, 149 So.3d 934, 943 (La. App. 2014), *cert. denied*, 136 S.Ct. 254 (2015) ("We have reviewed the *Apprendi, Ring*, and *Blakely* cases, and find them inapplicable to the instant situation. *Miller* does not require proof of an additional element of 'irretrievable depravity' or 'irrevocable corruption.'"); *Cook v. State*, 242 So.3d 865, 876 (Miss. Ct. App. 2017), *cert. denied*, 139 S.Ct. 787 (2019) (whether because "'irreparable corruption' is not considered an objective, provable 'fact' for purposes of *Apprendi*" or because "'irreparable corruption' is something that a defendant must disprove in order to mitigate his punishment," *Miller* and *Montgomery* specifically say a judge may sentence a juvenile offender to life without parole).

Additionally, although the issue was not directly presented as a Sixth Amendment challenge, the Court of Criminal Appeals of Alabama recently adopted the Michigan Supreme Court's holding in *Skinner* and

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[6] Subsequent to *Blackwell*, the California Legislature amended the state penal code to provide parole eligibility to juvenile offenders sentenced to life without parole. Act of Oct. 11, 2017, Cal. Legis. Serv. Ch. 684 (S.B. 394) (West).

rejected the argument that the state bears the burden of proving beyond a reasonable doubt that a juvenile offender is "the rare irreparably depraved or corrupt offender warranting a life-without-parole sentence." *Wilkerson v. State*, No. CR-17-0082, 2018 WL 6010590 * 14 (Ala. Crim. App. Nov. 16, 2018).

2. Not long after this Court handed down *Miller*, the Supreme Court of Missouri, sitting *en banc*, recognized that "no consensus has emerged in the wake of *Miller* regarding: (a) whether the state or the defendant should bear the risk of non-persuasion on the determination that *Miller* requires the sentencer to make, and (b) the burden of proof applicable to that determination." *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013). Citing to one of this Court's Sixth Amendment cases, *Cunningham v. California*, 549 U.S. 270 (2007), that court directed that "[u]ntil further guidance is received," a juvenile offender convicted of first degree murder could not be sentenced to life without parole "unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances." *Id.* Given the language of its opinion, the court seemed to take that position out of an abundance of caution rather than as a matter of federal constitutional law. The state supreme court has not had the occasion to revisit the issue, however, because only six months after this Court did provide further guidance in *Montgomery*, the Missouri Legislature provided parole eligibility to juvenile offenders already serving life without parole, *see*

Mo. Rev. Stat. § 558.047 (2016), and no juvenile offender has yet to receive that sentence since.

Oklahoma is the only state to take the immovable stance that *Miller*, as expounded by *Montgomery*, requires fact finding that triggers Sixth Amendment protections. The OCCA began paving the path to this issue in 2016 when it held that *Montgomery* "broadened" *Miller's* rule to apply not only to mandatory life-without-parole sentences but also to those imposed under discretionary sentencing schemes, such as Oklahoma's.[7] *Luna*, 387 P.3d at 961.

In 2018, although the issue was raised by neither party, the OCCA stated for the first time that "[t]he Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived." *Stevens*, 422 P.3d at 750. The OCCA gave no explanation for this conclusion but simply cited *Apprendi*. *Id.* The issue was squarely raised before the OCCA for the first time in this case. Again, the court below, citing solely to its statement in *Stevens*, held that the respondent "now possesses under *Miller*" a Sixth Amendment right to a jury on sentencing. App. 5.

3. This issue need percolate no further in the state courts. Its maturity and importance are amply

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[7] This Court is presently reviewing a judgment of the Fourth Circuit reaching that same conclusion. *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 139 S.Ct. 1317 (2019) (No. 18-217).

demonstrated by the fact that no less than eleven appellate courts in states authorizing life-without-parole sentences for juvenile offenders have been forced to address the issue in the seven years that have elapsed since the *Miller* ruling. Moreover, a delay in determining this issue risks frustrating the administration of justice in those states, not only as it relates to the prosecution of young murderers in future cases but also to those whose sentences are retroactively impacted by *Miller*. Courts, prosecutors, and offenders, as well as the loved ones of the victims of these killers, have a strong interest in the expedient resolution of this important constitutional issue so that finality of judgment may be achieved without needless relitigation.

II. This Case Presents A Clean Vehicle For The Question Presented.

This case squarely presents a clear Sixth Amendment issue and is an excellent vehicle for resolving the question presented. There are no factual disputes in this case. The proceedings in both the trial court and the OCCA centered solely upon the question of whether the respondent holds a right to *Miller*-sentencing by a jury, and a full record thereon is available for this Court's review. The court below, which is the state court of last resort, decided the issue in a published and, therefore, binding precedential order.

The ultimate outcome of the OCCA's decision is not based upon adequate and independent state grounds but instead rests firmly upon that court's interpretation of

the Sixth Amendment to the United States Constitution. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1990). Indeed, although the OCCA remanded the matter with instructions to the trial judge to "us[e] his discretion" in determining "which sentencing procedure pursuant to Section 929 of Title 22 [of the Oklahoma Statutes] is appropriate," the OCCA simultaneously divested the trial court of its statutory discretion by finding the respondent possesses a Sixth Amendment jury trial right on the issue of punishment. App. 4-5.

III. The OCCA's Decision Is Wrong.

1. The divided decision below conflicts with this Court's application of the Sixth Amendment jury trial right in the context of factual findings necessary to support a sentencing determination. The Sixth Amendment guarantees the right to a trial by jury in all criminal prosecutions. U.S. Const. Amend. VI. In a series of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has clarified the scope of that right, in conjunction with the right to due process, to require that each element of a crime be proved to a jury beyond a reasonable doubt. *Id.* at 478; *Alleyne v. United States*, 570 U.S. 99 (2013); *United States v. Booker*, 543 U.S. 220 (2005). In *Apprendi*, this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," or admitted by the defendant, is an "element" that must be submitted to the jury. 530 U.S. at 494.

Under those precedents, this Court has determined that facts increasing a statutory maximum penalty, a statutory minimum penalty, a mandatory sentencing guidelines range, or a mandatory minimum revocation of post-imprisonment supervision must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490 (statutory maximum); *Alleyne*, 570 U.S. at 116 (statutory minimum); *Booker*, 543 U.S. at 230-44 (sentencing guidelines); *United States v. Haymond*, 139 S.Ct. 2369, 2382 (2019) (plurality opinion) (revocation of post-imprisonment supervision). The scope of that right, however, has never been extended to findings of fact *decreasing* the punishment to which a defendant is exposed. Nor has this Court ever found that any factor or consideration relevant to analyzing whether a sentence is cruel or unusual in violation of the Eighth Amendment must be proven to a jury beyond a reasonable doubt.

2. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne*, 570 U.S. at 107. *Miller* did not touch on the elements of homicide offenses at all. Instead, the decision rendered life without parole an unconstitutional penalty for "*a class of defendants* because of their *status*—that is, those whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S.Ct. at 734 (emphasis added; internal quotation marks omitted). To be sure, nothing in *Miller* requires any particular finding of fact before a court may sentence a juvenile offender to life without

parole. *Montgomery*, 136 S.Ct. at 735. On the contrary, the decision requires only that "the sentencing judge . . . take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 733; *Miller*, 567 U.S. at 480.

In Oklahoma, as in many states, the legislature has authorized a sentence of life without parole for any offender, regardless of his or her status, based on the essential elements of the homicide offense alone. *See* Okla. Stat. tit. 21, § 701.9(A). However, under the new rule announced in *Miller*, life without parole may not be the *only* available sentencing option for murderers under the age of 18 because a mandatory sentencing scheme poses too great a risk of disproportionate punishment. *Miller*, 567 U.S. at 479. Thus, before such an offender may receive that sentence, "a judge or a jury must have the opportunity to consider *mitigating circumstances*" attendant to the offender's youth. *Id*. at 489 (emphasis added). A mandatory sentence of life without parole for a juvenile murderer offends the Constitution not because prosecutors must prove any facts to establish the sentence's proportionality but because it deprives the offender the opportunity to present mitigating evidence to justify a less severe sentence. *See Montgomery*, 136 S.Ct. at 718.

"[W]hen the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class. * * * The procedure *Miller* prescribes is no different." *Id.* at 735.

The determination of whether any sentence is disproportionate in violation of the Eighth Amendment does not fall within the historical role of the jury. On the contrary, such inquiries are traditionally undertaken by the courts. *Cabana v. Bullock*, 474 U.S. 376, 385-86 (1986), *overruled in part on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987). While a juvenile offender has a right under *Miller* to an individualized sentencing proceeding to show he or she falls within the protected class, and while a sentencing court must be mindful of *Miller's* important Eighth Amendment limits on imposition of the harshest penalty for that class, nothing in the Constitution requires jury findings beyond a reasonable doubt before a court may impose the otherwise statutorily authorized sentence of life without parole.

3. Without analysis or explanation, the court below reached the opposite conclusion that the individualized sentencing proceeding required by *Miller* must be a trial by jury under the Sixth Amendment. Unfortunately, given the line of cases leading up to that decision, it appears unlikely the OCCA will self-correct its error. Indeed, the entire argument in the case below centered on the improvidence of the OCCA's earlier dictum in *Stevens*, which relied on *Apprendi* for the proposition that "[t]the Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury." *Stevens*, 422 P.3d at 750. When directly faced with the issue in this case, rather than abandon or clarify its previous erroneous statement, the majority below

doubled down and reversed the trial court's rejection of respondent's right to a trial by jury. App. 4. As such, absent resolution by this Court, the OCCA's misplaced recognition of a Sixth Amendment right in this context will likely remain binding law in Oklahoma, and the state split on this issue will persist.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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