2019 OK CR 9
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JESSE ALLEN JOHNSON, **Petitioner,** **v.** **THE HONORABLE RAY C. ELLIOTT, JUDGE OF THE DISTRICT COURT, THE STATE OF OKLAHOMA,** **Respondent.**	**FOR PUBLICATION** **No. PR 2018-1203**

ORDER GRANTING APPLICATION FOR EXTRAORDINARY RELIEF AND REMANDING MATTER TO DISTRICT COURT

(Filed May 24, 2019)

¶1 On November 29, 2018, Petitioner, by and through counsel Melissa A. French, filed an application for an extraordinary writ in this Court from Oklahoma County District Court Case No. CF-2005-5714. Petitioner seeks an extraordinary writ to prohibit the Honorable Ray C. Elliott, District Judge, from resentencing him without empaneling a jury pursuant to 22 O.S.2011, § 929. Petitioner submits the District Court cannot legally sentence him without first empaneling a jury pursuant to the Mandate issued in *Jesse Allen*

Johnson v. State of Oklahoma, Appeal No. PC 2017-755, issued May 22, 2018.

¶2 Petitioner, age seventeen, entered a blind plea of guilty on November 29, 2006, to First Degree Murder. He was sentenced to life imprisonment without the possibility of parole. Petitioner's certiorari appeal to this Court was affirmed in a Summary Opinion issued October 3, 2007, Appeal No. C-2007-83.

¶3 Citing *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and *Luna v. State*, 2016 OK CR 27, 387 P.3d 956, Petitioner filed a post-conviction application in the District Court on March 13, 2017, alleging that because he was a minor at the time he was sentenced, the imposition of a life without parole sentence was unconstitutional. The denial of Petitioner's post-conviction application was appealed to this Court. In an Order issued May 22, 2018, Appeal No. PC 2017-0755, Petitioner's sentence of life without parole was vacated and the matter was remanded to the District Court for resentencing.

¶4 On August 27, 2018, Petitioner filed in the District Court a request for a jury trial on resentencing to which the State objected. A hearing was held before Judge Elliott on October 18, 2018. Judge Elliott denied Petitioner's request for a jury resentencing as he found Petitioner waived his right to sentencing by a jury when Petitioner entered his blind plea of guilty in 2006. Petitioner is seeking extraordinary relief from

this Court to reverse the order denying jury resentencing.

¶5 For a writ of prohibition Petitioner must establish that (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App. (2019).

¶6 In *Stevens v. State*, 2018 OK CR 11, ¶¶ 31, 38-40, 422 P.3d 741, 749-751, the District Court's order denying post-conviction relief was reversed by this Court, the matter was remanded to the District Court for resentencing, and the procedures for conducting said resentencing were established. As in the present case where Petitioner entered a plea of guilty and was sentenced to life without the possibility of parole for First Degree Murder, Stevens was sentenced to life without the possibility of parole when he entered a negotiated plea of guilty in 1996 to First Degree Murder. *Stevens* directs that the trial court shall schedule the matter for resentencing in accordance with both Sections 812.1 and 929 of Title 22 and to conduct resentencing pursuant to Section 929 of Title 22.

¶7 Section 929(C) directs that if a written request for a jury trial is filed within twenty days of the date of the appellate court order, the trial court *shall* impanel a new jury for a new sentencing proceeding. This means there is no judicial discretion in whether

or not a judge proceeds with a jury for resentencing. If the State or defendant files a request, but is outside the twenty days, then the trial court must utilize Section 929(B).

¶8 Allowing for a discretionary decision, Section 929(B) directs that when a criminal case is remanded for vacation of a sentence, the trial court *may* (1) set the case for a nonjury sentencing proceeding; or (2) if the defendant or the prosecutor so requests in writing, impanel a new sentencing jury. In this case, a written request for a jury trial was not filed within twenty days from the date of this Court's Order granting post-conviction relief. Thus, Section 929(C)'s mandatory language is not at issue, and the judge correctly used Section 929(B) in making a decision.

¶9 Section 929(B) gives the trial judge the discretion to impanel a jury if requested or to set the case for nonjury sentencing. In making his decision, Judge Elliott denied Petitioner's request for jury trial resentencing based upon a finding that Petitioner waived his right to sentencing by a jury when he entered his blind plea in 2006.

¶10 This finding is contrary to our decision in *Stevens*. Petitioner did not waive his rights under *Miller* when he entered his guilty plea. *Stevens*, 2018 OK CR 11, ¶ 23, 422 P.3d at 748. The 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*, 2018 OK CR 11, ¶ 34, 422 P.3d at 750.

Petitioner'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*.

¶11 Therefore, we find this holding is an abuse of discretion as it is contrary to this Court's holding in *Stevens*. Petitioner has met his burden for an extraordinary writ. The trial court's denial of Petitioner's request for jury trial resentencing based upon waiver is **VACATED**, and the matter is **REMANDED** to the trial court for a decision using his discretion under the directives in *Stevens v. State*, 2018 OK CR 11, ¶¶ 38-39, 422 P.3d 741, 750-751, in determining which resentencing procedure pursuant to Section 929 of Title 22 is appropriate. Petitioner's pleas of guilty and convictions remain constitutionally valid.

¶12 The Clerk of this Court is directed to transmit a copy of this Order to the Honorable Ray C. Elliott, District Judge, as well as the parties.

¶13 **IT IS SO ORDERED.**

¶14 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 24th day of May, 2019.

/s/ David B. Lewis
DAVID B. LEWIS,
Presiding Judge

/s/ Dana Kuehn
DANA KUEHN,
Vice Presiding Judge

/s/ Gary L. Lumpkin
GARY L. LUMPKIN, Judge

Robert L. Hudson –
/s/ Dissent (Writing Attached)
ROBERT L. HUDSON, Judge

Scott Rowland – I dissent
/s/ by separate writing.
SCOTT ROWLAND, Judge

ATTEST:

/s/ John D. Hadden
Clerk

HUDSON, J., DISSENTING:

¶1 I join Judge Rowland in his dissenting opinion. I write separately to emphasize the need to clarify *Stevens v. State*, 2018 OK CR 11, ¶¶ 34-40, 422 P.3d 741, 750-51, to the extent it implies that the Sixth Amendment demands jury sentencing despite a prior, valid waiver of that right. The 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. As Judge Rowland observes, both *Montgomery* and *Miller* reference judge sentencing.

¶2 Moreover, the Majority misinterprets and applies 22 O.S.2011, § 929. The Majority overlooks pivotal language contained in Sections 929(B)(2) and 929(C), which each reference impaneling a new jury. Section 929(B)(2) provides the trial court may "impanel a ***new*** sentencing jury" if the defendant or the prosecutor so request in writing. (emphasis added). Section 929(C) states, "[i]f a written request for a jury trial is filed within twenty (20) days of the date of the appellate court order, the trial court shall impanel ***a new jury*** for the purpose of conducting a new sentencing proceeding." (emphasis added). To "impanel a new jury[,]" it is axiomatic that the original sentencing proceeding was a jury sentencing.[1] There can be no other interpretation. This language is clear and unambiguous. *See State v. Cooper*, 2018 OK CR 40, ¶ 11, 434 P.3d 951, 954 (rules outlining statutory interpretation, including construing statutes according to the plain and ordinary meaning of their language and giving effect to legislative intent). Therefore, if jury sentencing was validly waived during the original proceedings, § 929 does not entitle the defendant to jury sentencing upon remand from this Court. Judge Elliott's denial of Petitioner's request for jury trial resentencing on grounds that Petitioner waived his right to jury sentencing

[1] This interpretation is supported by and consistent with 21 O.S.2011, § 701.10a relating to resentencing in death penalty cases, which specifically provides that the prosecutor may only "move the trial court to impanel a ***new*** sentencing jury . . . provided[ ] the original sentencing proceeding was conducted before a jury[.]" 21 O.S.2011, § 701.10a(1)(b) (emphasis added).

when he entered his blind plea in 2006 was thus not an abuse of discretion.

¶3 For these reasons and those espoused from Judge Rowland's dissenting opinion, I dissent.

ROWLAND, JUDGE, DISSENTING:

¶1 I respectfully dissent from today's Order. The majority finds Judge Elliott abused his discretion by entering an order he clearly had the authority and discretion to enter. In my view, Judge Elliott got it right. In *Stevens v. State*, 2018 OK CR 11, ¶¶ 33-40, 422 P.3d 741, 749-51, we established procedures for conducting the individualized sentencing hearing required by the United States Supreme Court before a juvenile homicide offender may be sentenced to life imprisonment without the possibility of parole (LWOP). *See Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). When this Court ordered resentencing for Stevens, who is not only a juvenile homicide offender previously sentenced to LWOP but also Johnson's co-defendant, we directed the district court to follow the dictates in 22 O.S.2011, § 929. *Stevens*, 2018 OK CR 11, ¶ 38, 422 P.3d at 751. The trial judge, under Section 929, has discretion whether to impanel a jury, unless a written request for jury sentencing is filed within twenty days of the appellate court's remand order, in which case jury sentencing is mandatory. 22 O.S.2011, § 929 (B) & (C).

Johnson filed his request for jury sentencing sixty-five days after this Court issued its remand order, and Judge Elliott denied his request upon finding that Johnson had waived his right to jury sentencing, along with other trial rights, when he entered his knowing and voluntary blind plea of guilty.

¶2 Therein lies the rub: Judge Elliott exercised his discretion based upon his sound belief that Johnson's 2006 guilty plea, including his waiver of jury trial, remained intact. While the majority correctly holds that Johnson did not waive his rights under *Miller/Montgomery* to an individualized sentencing proceeding because that case had yet to be decided, it misapprehends the constitutional requirements for such a proceeding. Neither *Miller* nor *Montgomery* created any new constitutional right to jury sentencing under the Sixth Amendment or provided for restoration of that right once waived. The right to be free from cruel and unusual punishments is as old as the Bill of Rights itself. U.S. Const., amend. VIII; Okla. Const., art. 2, § 9. *Miller* and *Montgomery* merely extended the age-old protections of the Eighth Amendment to forbid the imposition of a sentence of LWOP on juvenile homicide offenders unless certain factors are proved beyond a reasonable doubt.

¶3 Even were Johnson's right to jury sentencing somehow restored despite his 2006 waiver, the fact remains that he did not act to enforce this right by timely filing his written request as required by Section 929(C). Thus, even after the issuance of this writ, Judge Elliott retains discretion to once again deny

Johnson's request for jury sentencing so long as he does not base his denial upon his opinion that Johnson's earlier waiver remains valid.

¶4 It is undisputed Johnson knowingly and voluntarily waived his right to jury trial and sentencing twelve years ago when he pled guilty to First Degree Murder and received his LWOP sentence. This Court rejected his attempt to withdraw that plea in a certiorari appeal, noting that "[t]his was an extensive guilty plea hearing and sentencing with many witnesses. The trial judge was especially thorough, explained the process to Petitioner, and ensured Petitioner was thoroughly advised as to all facets of the plea." *Johnson v. State*, Case No. C-2007-0083 (unpublished) (Okla. Crim. App., Oct. 3, 2007).

¶5 Nothing in the Supreme Court's or this Court's Eighth Amendment jurisprudence concerning juveniles sentenced to LWOP (*Montgomery, Miller, Luna or Stevens*) suggests these cases operate to revive an otherwise validly waived right to jury sentencing. Nor do these cases require the constitutionally-mandated individualized sentencing proceeding be held before a jury, and in fact both Supreme Court cases specifically refer to a sentencing judge. *Montgomery*, 136 S.Ct. at 733 ("*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different. . . ."); *Miller*, 567 U.S. at 489, 132 S.Ct. at 2475 ("*Graham, Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances

before imposing the harshest possible penalty for juveniles.")

¶6 In *Stevens*, we set forth guidelines for a broad category of cases, without specifically addressing whether a previous, valid waiver of jury trial and sentencing was restored by *Miller, Montgomery, Luna*, and/or *Stevens.* I believe we should clarify our opinion in *Stevens* and hold that if jury sentencing was validly waived during the original plea, the defendant is not entitled to jury sentencing upon remand from this Court.

¶7 Although Oklahoma's statutory right to jury sentencing creates a federal liberty interest under the Fourteenth Amendment, *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), there is no federal constitutional right to jury sentencing under the Sixth Amendment. *Clemons v. Mississippi*, 494 U.S. 738, 746, 110 S.Ct. 1441, 1447, 108 L.Ed.2d 725 (1990). Notably, the Supreme Court said in *Clemons* that there would be no violation of the Sixth Amendment right to jury trial where an appellate court invalidated one of two aggravating circumstances sustaining a death sentence at trial and affirmed the death sentence on appeal after reweighing the aggravating and mitigating circumstances itself instead of remanding the case for jury sentencing. *Id.* at 745, 110 S.Ct. at 1446. Given that the United States Constitution does not mandate a capital sentencing proceeding be held before a jury for the reweighing of sentencing factors, I find it likewise does

not require jury sentencing in a *Stevens/Luna* hearing if that right has been previously waived.

¶8 Nor do I find jury resentencing mandated by the applicable Oklahoma statute. Section 929 controls when "the appellate court" finds prejudicial error only with respect to the sentencing proceeding and remands the case to the district court for vacation of the imposed sentence and resentencing. Johnson knowingly and voluntarily pled guilty to First Degree Murder to avoid a jury trial. A defendant who enters a voluntary guilty plea waives his constitutional rights, including the right to jury trial and all non-jurisdictional defects. *See Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142; *Huddleston v. State*, 1985 OK CR 12, ¶ 12, 695 P.2d 8, 10; *Dobbs v. State*, 1970 OK CR 124, ¶ 6, 473 P.2d 260, 262. The cases dealing with juvenile homicide offenders sentenced to LWOP 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 LWOP, he is not entitled to a new sentencing entity, namely a jury. For these reasons, I dissent.

¶9 I am authorized to state that Judge Hudson joins in this dissent.

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Plaintiff,	)	
	)	**Case No.**
v.	)	**CF-2005-5714**
JESSE ALLEN JOHNSON,	)	
Defendant.	)	

ORDER

NOW this 18th day of October, 2018, this matter comes on for consideration of the *Defendant's Request for Jury Trial Pursuant to 22 O.S.2011, § 929* and the *State's Response & Objection to Defendant's Request for Jury Trial Pursuant to 22 O.S. § 929.* Defendant appears with his attorney, Melissa French, and the State appears by assistant district attorneys Jimmy Harmon and Jennifer Hinsperger. The parties have thoroughly briefed the issues. The Court, having considered the briefs and the arguments of counsel at hearing, finds the Defendant 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 re-sentenced by a jury.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's request for jury trial re-sentencing is **DENIED**.

Dated this 18th day of October, 2018.

/s/ Ray C. Elliott
RAY C. ELLIOTT
DISTRICT JUDGE

Approved as to form:

/s/ Jennifer M. Hinsperger
Jennifer M. Hinsperger
Assistant District Attorney

/s/ Melissa French
Melissa French
Attorney for Defendant

[Certificate Of Service Omitted]

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JESSE ALLEN JOHNSON,	)	
Petitioner,	)	
v.	)	**No. PC-2017-755**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER GRANTING POST-CONVICTION RELIEF, VACATING SENTENCE OF LIFE WITHOUT PAROLE AND REMANDING FOR RESENTENCING

(Filed May 22, 2018)

On July 20, 2017, Petitioner Johnson, *pro se*, appealed to this Court from the denial of Johnson's Application for Post-Conviction Relief in Oklahoma County District Court Case No. CF-2005-5714. Johnson's request for relief is **GRANTED**.

On November 29, 2006, Johnson, represented by counsel, entered a blind plea to Count 1, First Degree Murder and Count 2, Conspiracy to Commit a Felony in Oklahoma County Case No. CF-2005-5714. At the conclusion of a sentencing hearing conducted January 3, 2007, Johnson was sentenced to life without parole for Count 1 and ten (10) years for Count 2, the sentences to be served concurrently. Johnson was seventeen (17) years old at the time the offense was committed, and eighteen (18) years old at the time he was

sentenced. Johnson's conviction was affirmed by this Court in an unpublished opinion issued October 3, 2007. *See*, *Johnson v. State of Oklahoma*, C-2007-83 (Not for Publication). This is Johnson's first application for post-conviction relief filed with this Court in Case No. CF-2005-5714.[1]

Johnson's current application for post-conviction relief filed with the district court alleges that because he was a minor at the time he was sentenced, the imposition of a life without parole sentence was unconstitutional, citing *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)[2], *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and this Court's decision in *Luna v. State*, 2016 OK CR 27, 387 P.3d 956. In his application filed with this Court, Johnson argues that Judge Elliott abused his discretion by denying his request for resentencing.

In an order entered and filed June 26, 2017, the District Court of Oklahoma County, the Honorable Ray C. Elliott, District Judge, summarily denied Johnson's request for post-conviction relief. The court determined that Johnson had previously filed an application for post-conviction relief which the court had denied in an

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[1] This is Johnson's second application for post-conviction relief filed with the District Court. The first application was filed June 21, 2013, by and through counsel, and was denied in an order issued September 12, 2013. Although Johnson filed a Notice of Appeal, no appeal of that denial was filed with this Court.

[2] This claim was presented and rejected in Johnson's first application for post-conviction relief filed June 21, 2013.

order entered September 12, 2013. Judge Elliott found that Johnson presented no good and sufficient reason for the court to consider his most recent application for post-conviction relief, and found all claims not previously addressed or asserted in the prior post-conviction application were waived. Judge Elliott determined Johnson was not entitled to relief and denied his request for the same.

The State's response to Johnson's application for post-conviction relief, made part of the appeal record in this matter, included a copy of the transcript of the sentencing hearing conducted in Johnson's case. Judge Elliott presided over that hearing. Witnesses testified, arguments were made and Judge Elliott announced his decision at the conclusion of the hearing. We have reviewed that hearing and determined that Johnson has met the criteria established by this Court in *Stevens v. State*, 2018 OK CR 11, ¶ 26, ___ P.3d ___, ___ sufficient to warrant relief.

Although Judge Elliott conducted a sentencing hearing in Johnson's case, that hearing did not comport with the directives set forth in this Court's decision in *Stevens, id.*, governing resentencing of juveniles sentenced to life without parole. As this Court noted in *Stevens*, because he was sentenced prior to the Supreme Court's pronouncement in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), Stevens could not have known what evidence to present at his sentencing hearing to fall within the protection of *Miller, id.* and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

Likewise the sentencing judge in *Stevens* could not have determined that Stevens was irreparably corrupt and permanently incorrigible since he did not know that he was required to make such a finding. *Stevens* at ¶ 30.

Similarly, Johnson was unaware of the evidence needed at the sentencing hearing to meet the protections established by the Supreme Court's decisions in *Miller* and *Montgomery*, and Judge Elliott did not determine that Johnson was irreparably corrupt and permanently incorrigible since he did not know he was required to make such a finding.

Pursuant to this Court's opinion issued in *Stevens*, Johnson's sentence of life without parole is **VACATED** and this matter is **REMANDED** for resentencing, as set forth at ¶¶ 31, 38-40 of the *Stevens* opinion.

Johnson's pleas and convictions remain constitutionally valid.

The Clerk of this Court is directed to transmit a copy of this order to the District Court of Oklahoma County, the Honorable Ray C. Elliott, District Judge; the Court Clerk of Oklahoma County; Petitioner and counsel of record.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of May, 2018.

/s/ Gary L. Lumpkin
GARY L. LUMPKIN,
Presiding Judge

/s/ David B. Lewis
DAVID B. LEWIS,
Vice Presiding Judge

/s/ Robert L. Hudson
ROBERT L. HUDSON,
Judge

/s/ Dana Kuehn
DANA KUEHN,
Judge

/s/ Scott Rowland
SCOTT ROWLAND,
Judge

ATTEST:

/s/ John D. Hadden
Clerk

PA/F

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JESSE ALLEN JOHNSON,	)	
Petitioner,	)	**NOT FOR PUBLICATION**
v.	)	
THE STATE OF OKLAHOMA,	)	**Case No. C-2007-83**
Respondent.	)	

SUMMARY OPINION DENYING CERTIORARI

(Filed Oct. 3, 2007)

LUMPKIN, PRESIDING JUDGE:

Petitioner, Jesse Allen Johnson, entered a blind guilty plea in the District Court of Oklahoma County, Case Number CF-2005-5714, and was convicted of First Degree Murder, Count I, in violation of 21 O.S.2001, § 701.7, and Conspiracy to Commit a Felony (First Degree Murder), Count II, in violation of 21 OS.2001, § 421. Petitioner was sentenced to life imprisonment without the possibility of parole on Count I and ten (10) years imprisonment on Count II, with both counts to run concurrently. Petitioner moved to withdraw his plea, but that request was denied following a hearing. Petitioner now appeals his conviction and the denial of his motion to withdraw plea.

Petitioner raises the following propositions of error in this appeal:

I. Petitioner's plea was entered as a result of a misunderstanding of the legal process;

II. Petitioner was denied his right to effective assistance of counsel at his plea hearing;

III. Petitioner's sentence is excessive and should be modified;

IV. Reversible error occurred when the trial court accepted Petitioner's pleas without informing him of the elements of each offense charged; and

V. Petitioner is entitled to relief based upon cumulative error.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal or modification is not required.

With respect to proposition one, we find Petitioner's plea was entered voluntarily and intelligently. *Hagar v. State*, 1999 OK CR 35, ¶ 4, 990 P.2d 894, 896. This was an extensive guilty plea hearing and sentencing with many witnesses. The trial judge was especially thorough, explained the process to Petitioner, and ensured Petitioner was thoroughly advised as to all facets of the plea. The trial court did not abuse its discretion in rejecting Petitioner's request to withdraw

his plea. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244.

With respect to proposition two, we find Petitioner has failed to show errors by counsel that were so serious as to deprive him of a fair trial, one with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Defense counsel effectively represented Petitioner throughout the plea and sentencing proceedings.

With respect to proposition three, we find Petitioner's sentence is not excessive. *Rea v. State*, 2001 OK CR 28, ¶5, 34 P.3d 148, 149. While Petitioner's age and borderline intelligence are pertinent to this discussion, he was a chief component of a very vicious horrific crime. His participation for the promise of what proved to be a paltry sum, $200.00, is incredible.

With respect to proposition four, we find the record does not support the claim that Petitioner was not informed of the elements of any of the charged offenses. His case does not parallel *Zakszewski v. State*, 1987 OK CR 152, 739 P.2d 544.

With respect to proposition five, we find no errors have been shown and thus the cumulative error claim is without merit. *Myers v. State*, 2006 OK CR 12, ¶103, 133 P.3d 312, 336.

DECISION

The Petition for Writ of Certiorari is hereby **DENIED**; the judgment and sentences are hereby

AFFIRMED. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY
THE HONORABLE, RAY C. ELLIOTT
DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: LUMPKIN, P.J.

C. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

J.A.J., Appellant,	)	
v.	)	No. J-2006-259
THE STATE OF OKLAHOMA, Appellee.	)	

ACCELERATED DOCKET ORDER

(Filed Jun. 22, 2006)

On October 7, 2005, Appellant was charged as an adult with First Degree Murder and Conspiracy to Commit First Degree Murder in Case No. CF-2005-5714 in the District Court of Oklahoma County.[1] Appellant was seventeen (17) years and four (4) months old at that time, and was charged as an adult.[2] On December 20, 2005, Appellant filed a motion to be certified to stand trial as either a Youthful Offender or a Juvenile. A preliminary hearing was conducted December 21, 2005. Appellant's certification hearing was conducted on March 3, 2006. On March 16, 2005, the District Court of Oklahoma County, the Honorable Gregory J. Ryan, Special Judge, entered an order denying Appellant's request for certification as either a

[1] Appellant is charged along with four (4) other co-defendants in the death of Leroy Vigil.

[2] Appellant's date of birth is May 29, 1988. At the time of Appellant's hearing before this Court he was 18 years and 2 weeks old.

juvenile or youthful offender, and Appellant was bound over for trial as an adult. From this Judgment, Appellant appeals.

On appeal Appellant raised two propositions of error:

1. The trial court abused its discretion in denying Appellant's Motion or Certification as a Youthful Offender by finding Appellant would not complete the plan of rehabilitation and that the public would not be adequately protected if he were sentenced as a Youthful Offender; and

2. Delay in the proceedings unduly prejudiced Appellant in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the Rules of the Court of Criminal Appeals governing juvenile proceedings.

Pursuant to Rule 11.2(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006) this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument June 8, 2006, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court.

The District Court's order denying Appellant's request to be certified to stand trial as a Youthful Offender is **AFFIRMED**.

We note first that, by operation of law, Appellant was charged as an adult. 10 O.S.2001 §7306-2.5(D). Pursuant to 10 O.S.2001 §§ 7306-2.5(A) Appellant filed a motion to be certified to be treated either as a juvenile or youthful offender. The burden to sustain the motion to be certified as a juvenile or youthful offender falls upon the accused. *J.D.P. v. State*, 1999 OK CR 5, ¶ 6, 989 P.2d 948, 949; 10 O.S. § 7306-2.6(A)(6). It is not the State's responsibility to show that Appellant is *not* amenable to treatment as a juvenile or youthful offender. It is Appellant's burden to overcome the presumption that he should be tried as an adult by showing that he is amenable to treatment as a juvenile or youthful offender and should be certified as such.

The question before this Court is whether or not the trial court abused its discretion in denying Appellant's motion for certification as a juvenile or youthful offender. "[A]buse of discretion" is defined by this Court as:

> . . . a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application. . . . The trial court's decision must be determined by the evidence presented on the record, just as our review is limited to the record presented.

(citations omitted.) W.C.P. v. State, 1990 OK CR 24, ¶ 9, 791 P.2d 97, 100. *See also*, *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 70 OBJ 946, 946 (Okl.Cr. 1999). After reviewing the appeal record in this matter, including the psychological evaluation and certification study, the

preliminary hearing and certification hearing transcripts, we find that the District Court did not abuse its discretion in denying Appellant's motion to be certified as a juvenile or youthful offender.

A recital of the relevant facts is necessary to properly evaluate the claims presented in Appellant's appeal. Appellant was contacted by co-defendant Antwoyn Turner who offered to pay him a sum of money in exchange for Appellant's assistance in killing Turner's girlfriend's father, Leroy Vigil. Appellant advised Turner that he would have to consider the request and would call Turner with his answer. Appellant agreed to assist Turner in the murder, and met with Turner, and three other individuals that same evening to discuss how to commit the crime. The five devised a plan to kill Vigil, and subsequently executed it, killing Vigil in the process. Although Appellant did not know Vigil, he agreed to assist in beating Vigil with a baseball bat, and eventually shot Vigil in the head three times. The day after the murder, Turner paid Appellant $200, which he spent on speakers for his car.

Appellant's psychological evaluation, which was introduced into evidence at Appellant's certification hearing, was conducted by Dr. Herman Jones, Ph.D.[3] Dr. Jones concluded that Appellant was amenable to treatment as a Youthful Offender. Dr. Jones opined that because of the nature and seriousness of the

[3] Dr. Jones did not testify at Appellant's certification hearing.

charged offense, Appellant would require extensive monitoring, a "heightened intensity of services" and treatment would take at least 15 to 18 months, requiring extension of custody over Appellant past his nineteenth (19) birthday. Appellant has no prior contacts with the justice system.

Jay Giezentanner, a Juvenile Justice Specialist, employed by O.J.A. also interviewed Appellant. He testified at the certification hearing and his report was introduced into evidence. Because of the nature of the offense, and the assessment determining that Appellant was in need of extensive treatment, Mr. Giezentanner determined that Appellant was not amenable to treatment in the time remaining before he reached his 19th birthday.

We find nothing in the record presented to this Court indicating the trial court abused its discretion in denying Appellant's request for certification as a Youthful Offender. Despite Appellant's age, and his lack of prior contacts with the juvenile system, there was sufficient evidence for the District Court to determine that Appellant was not amenable to the extensive treatment deemed necessary to facilitate his rehabilitation.

With regard to Appellant's claims of delay, as noted at Appellant's hearing, all parties involved in Appellant's case contributed to the delay in proceedings. Moreover, because of the number of defendants involved in this matter, and the nature of the charges,

we find no support for Appellant's claim that the delay in this instance was unreasonable.

IT IS THEREFORE THE ORDER OF THIS COURT by a vote of three (3) to two (2) that the order of the District Court of Oklahoma County denying Appellant's request for Certification as a Youthful Offender in Case No. CF-2005-5714 is **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of June, 2006.

/s/ Charles S. Chapel – Dissents
CHARLES S. CHAPEL,
Presiding Judge

/s/ Gary L. Lumpkin
GARY L. LUMPKIN,
Vice Presiding Judge

/s/ Charles A. Johnson – Dissent
CHARLES A. JOHNSON,
Judge

/s/ Arlene Johnson
ARLENE JOHNSON, Judge

/s/ David Lewis
DAVID LEWIS, Judge

ATTEST:

/s/ Michael S. Richie
Clerk

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