No. 19-250

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

THE STATE OF OKLAHOMA,

Petitioner,

vs.

JESSE ALLEN JOHNSON,

Respondent.

RESPONDENT'S APPENDIX TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 18, 2019

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
PLAINTIFF,)
) CF-05-5714
Vs.)
)
JESSE ALLEN JOHNSON,)
DEFENDANT

DEFENDANT'S REQUEST FOR JURY TRIAL PURSUANT TO 22 O.S.2011§929 AND BRIEF IN SUPPORT OF JURY TRIAL

COMES NOW, the Defendant, JESSE ALLEN JOHNSON, by and though his attorneys of record, Melissa A. French and Madison Melon, Assistant Public Defenders, and requests a Jury Trial pursuant to 22 O.S.2011 §929. In support of his request, the Defendant states the following:

On December 21, 2005, a preliminary hearing for Jesse Johnson was held before Judge Ryan. On March 3, 2006, a youthful offender hearing was held where the Court determined that the Defendant should be treated as an adult because of his age at the time of the hearing. The Court found that the Defendant was unable to complete Youthful Offender program in the time required by Statute. The denial of Youthful Offender status was appealed to the Oklahoma Court of Criminal Appeals and on June 23, 2006, the Oklahoma Court of Criminal Appeals denied Youthful Offender status based upon the Defendant's inability to complete youthful offender program under age requirements prescribed by law. Based upon the advice of his appointed attorney, George Miskovsky III, the Defendant entered a guilty plea on November 29, 2006. Blind plea sentencing was set for January 3, 2007 and a PSI was ordered by the Court.

On that date, Judge Elliott formally sentenced the Defendant to life without the possibility of parole on count one and ten years to do on court two. A Motion to Withdraw Guilty Plea was filed by the Defendant in a timely manner and a hearing was held on January 18, 2007. The Defendant raised ineffective assistance of counsel based on the fact that Mr. Johnson was not told he could present mitigation at the time of the blind plea sentencing. The Defendant also stated that a mitigation case was not presented that included all the mitigation that Mr. Johnson could produce. The issue was taken up on appeal and the sentence was affirmed. An Application for Post-Conviction Relief was filed March 13, 2017 and was subsequently denied by the Court on June 26, 2017. The Court of Criminal Appeals took the issue up on appeal and a mandate was issued where the Court of Criminal Appeals vacated and remanded Mr. Johnson's case for a resentencing before a jury.

Jesse Johnson was sentenced to life without the possibility of parole on January 3, 2007. Since that time, the United States Supreme Court and the Oklahoma Court of Criminal Appeals have ruled juvenile life without parole sentences violate the 8th Amendment unless certain finding and sentencing requirements are met. The line of cases began with *Graham v. Florida*, 560 US 48, 130 S.Ct. 2011, 176 L.Ed.2d. 825 (2010) in 2010. In *Graham*, the United States Supreme Court ruled that life without the possibility of parole sentences are in violate the 8th Amendment as being cruel and unusual for juveniles convicted of non-homicide offenses. The rationale for this decision is that juvenile offenders have lessened moral culpability when compared to adult offenders and are less deserving of the most severe punishment. *Graham v. Florida*, 560 U.S. @ 68. In 2012, the Supreme Court extended the *Graham* holding to homicide offenses in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d. 407 (2012). The Court in *Miller* ruled that life without the possibility of parole can never be mandatory for juveniles convicted of homicide under the 8th Amendment. "None of what *Graham* said about children -- about their distinct (and transitory) mental traits and environmental vulnerabilities -- is

crime-specific". *Miller v. Alabama*, 567 U.S.460, 473. "*Miller* placed no categorical prohibition against the imposition of life without the parole sentenced on juvenile homicide offenders, so long as the sentencing judge was vested with, and appropriately exercised, the discretion to consider factors such as the defendant's youth in imposing that sentence". *Luna v. State* 2016 OK CR 27 ¶ 9, 387 P.3d 956 Four years later, the Court ruled that *Miller* and *Graham* apply retroactively to those defendants who were sentenced to life without the possibility of parole prior to the ruing in *Miller* in 2012. *Montgomery v. Louisiana*, 577 U.S.,136 S.Ct. 718, 193 L.Ed.2d 599 (2016). The Court explicitly noted that it would be the "rare" juvenile offender who received a life without parole sentence. *Montgomery* 577 U.S.718 @73.

While *Miller*, *Graham*, and *Montgomery* did not specifically call for a jury trial, "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 v. State,* 2018 OK CR 11 citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000). *Apprendi* held that any sentence that was considered aggravated and the sentence was based on certain factors; those factors had to be found beyond a reasonable doubt by a jury under the Sixth Amendment. *Apprendi v. New Jersey*, 530 U.S. @___, Therefore, the protected class of juveniles described in *Miller,* with a judge or jury fully aware of the constitutional line between children whose crimes reflect transient immaturity and those *rare* children whose crimes reflect irreparable corruption, requires a sentencing trial procedure conducted before the imposition of the sentence. *Luna v. State*, 389 OK CR 956, ¶ 11, 387 P.3d. 956, __, *citing Montgomery v. Alabama* @ __, 134 S. Cr. @ 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 2953, 106 L.Ed. 256, 285 (1989))

In Oklahoma, the jury is vested with the authority to render punishment. 22 O.S. 2011 §926.1. The Judge must impose the sentence that is rendered by the jury unless the jury cannot agree on a sentence. *Luker v. State* 173 OK CR 135, ¶12, 552 P.2d 715, 719, *Redell v.*

State 175 OK CR 229, ¶31, 543 P.2d at 581-82 Therefore, when a defendant invokes his right to a jury trial, the jury is the sentencing body. *Stevens* held that the defendant's trial shall be bifurcated and the issue of the defendant's guilt shall be separately determined from the enhancement of his or her sentence. *Stevens v. State,* 2018 OK CR 11 citing *Mitchell v. State* 2011 OK CF 26, 119, 270 P.3d 160, 186 (contrasting sentencing procedure where State seeks to enhance sentence); 22 O.S. 2011, 860.1 (statutory procedure for sentencing).

Oklahoma has taken up the issue of juvenile life without parole in three pivotal cases *McGee v. State, Luna v. State* and *Stevens v. State*. The Court of Criminal Appeals first addressed this issue in *McGee v. State*, F-2015-393 (Okl.CR. 2016) (unpublished opinion) on December 2, 2016. In that case, the Court specifically stated that the defendant was to be resentenced by a jury and included a sample jury instruction to be used by the Court. The Court held that:

> We find that *Miller* requires a sentencing trial procedure conducted before the imposition of the sentence, with a judge or jury fully aware of the constitutional "line between children whose crimes reflect transient immaturity and the rare children whose crimes reflect irreparable corruption"

McGee v. State, F-2015-393, pg 42-43 (Okl. CR 2016)

During formal sentencing, the Court in *McGee* heard argument of counsel, which included evidence presented during the jury trial. The Court found that argument made to the Judge during formal sentencing and the evidence presented during the trial did not meet the standard set forth in *Montgomery*. Therefore, *McGee* was entitled to a new jury trial sentencing. The State of Oklahoma filed a Petition for Rehearing on December 22, 2016, requesting that the Court rehear argument regarding the issue of a jury trial resentencing. The Court denied the Petition for Rehearing.

The Court also decided *Luna v. State* 2016 OK CR 27 (2016), 387 P.3d 956 on December 2, 2017. The Court published an opinion that is substantially similar to *McGee v.*

State. The Court took notice of the same issues, including the right to a jury sentencing in Oklahoma and the standard as set forth in *Montgomery*. The Court determined that while *Miller* and *Montgomery* do not specifically state that the defendant is entitled to a jury resentencing, the State of Oklahoma is required to resentence *Luna* and all other like situated defendants by a jury trial due to the Oklahoma Statute that vests sentencing with the Jury. *Stevens v. State*, 2018 OK CR 11, ¶ 31, 422 P. 3d. 741, __.

While *Luna* and *McGee* were on direct appeal, there were several other similarly situated defendants across the State. Approximately 43 defendants have been sentenced to life without the possibility of parole, some by jury trial and many through a plea of guilty. The Court addressed the remedy for those defendants in *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741. The Court followed the opinions of *McGee* and *Luna* and ordered that *Stevens*, and all other like situated defendants, be remanded for a jury trial sentencing. *Stevens v. State*, 2018 OK CR 11, ¶ 31, 422 P3d. 741, __

The Court gave explicit instructions regarding the procedure that must be used to impose a sentence of Life without parole.

> In all future trials where the State intends to seek a sentence of life without the possibility of parole for an offender who committed his or her offense under the age of eighteen (18) years of age the State shall give notice of this fact by stating at the bottom of the Information in bold type: "**The State is seeking the punishment of life without the possibility of parole for the offense of Murder in the First Degree, as Defendant (state last name here) is irreparably corrupt and permanently incorrigible.**" *See Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986 (adopting notice pleading). Both parties shall be afforded full discovery on this issue in accordance with established discovery law. 22 O.S.2011, § 2001 *et seq.* The assigned trial judge has the authority under our Discovery Code to issue any orders necessary to accomplish this task.
>
> 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. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000). The defendant's trial shall be bifurcated and the issue of the defendant's guilt shall be separately determined from the enhancement of his or her sentence. *Cf. Mitchell v. State*,

> 2011 OK CR 26, ¶ 119, 270 P.3d 160, 186 (contrasting sentencing procedure where State seeks to enhance sentence); 22 O.S.2011, § 860.1 (statutory procedure for sentencing). The prohibition against the introduction of evidence in either aggravation or mitigation set forth in *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, shall not be applicable to the sentencing proceeding in this type of case. Therefore, each party shall be afforded the opportunity to present evidence in support of its position as to punishment in the second stage of the trial. The trial court shall submit a special issue to the jury as to whether the defendant is irreparably corrupt and permanently incorrigible. *Cf.* 21 O.S.2011, § 701.10b(F). Pending Legislative action the District Courts of the State are directed, in addition to the instruction set out in *Luna*, to use the instruction and verdict form attached as "Appendix A" at the conclusion of this Opinion.
>
> It is the State's burden to prove, beyond a reasonable doubt, that the defendant is irreparably corrupt and permanently incorrigible. *Luna*, 2016 OK CR 27, ¶ 21 n. 11, 387 P.3d at 963 n. 11; *see also Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding facts increasing punishment beyond the maximum authorized by a guilty verdict must be proven beyond a reasonable doubt). The State shall have the opportunity to present any evidence tending to establish this fact subject to the limitations of 12 O.S.2011, § 2403. Generally, this will include, but not be limited to, evidence concerning the defendant's: (1) sophistication and maturity; (2) capability of distinguishing right from wrong; (3) family and home environments; (4) emotional attitude; (5) pattern of living; (6) record and past history, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and (7) the likelihood of the defendant's rehabilitation during adulthood. *See Luna*, 2016 OK CR 27, ¶ 20, 387 P.3d at 962; *Cf.* 10A O.S.2011, § 2-5-205(E).
>
> Similarly, the defendant must be permitted to introduce relevant evidence concerning the defendant's youth and its attendant characteristics. *Miller*, 567 U.S. at 489, 132 S.Ct. at 2475 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for a juveniles."). Generally, this will include, but not be limited to, evidence concerning the defendant's: "(1) chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; and (3) whether the circumstances suggest possibility of rehabilitation." *Luna*, 2016 OK CR 27, ¶ 20, 387 P.3d at 962 (quotations and citation omitted).

Stevens v. State, 2018 CR 11, ¶33-35, 422 P.3d. 741, ___.

Like Mr. Johnson, the defendant in *Stevens* entered a guilty plea and was sentenced by the Court. The Court of Criminal Appeals ruled that a sentencing hearing at that time and that the youthful offender hearing held did not constitute sufficient procedure to comply with the

Eighth Amendment. *Stevens v. State* 2018 CR 11, ¶30, 422 P.3d 741, __ *citing Miller v. Alabama* 567 U.S. at 489, 132 S. Ct. at 2475. The Court in *Stevens* explicitly ruled that the defendant's prior waiver of jury trial did not constitute a waiver of a resentencing before a jury because a defendant could not waive rights he did not previously know he was entitled to. Petitioner could not have been aware that he had the right an individualized sentencing hearing because this right was not recognized until the Supreme Court held it in M*iller. Stevens v. State,* 2018 CR @ ¶23, 422 P.3d. 741, __.

WHEREFORE, Defendant prays that this Court grant this request for jury trial.

Respectfully submitted,

MELISSA A. FRENCH (OBA #18376)
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was hand-delivered to the District Attorney's office, 5th floor, County Office Building, Oklahoma City, Oklahoma, 73102, on the date of filing.

MELISSA A. FRENCH

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CF-2005-5714**
	)	
JESSE ALLEN JOHNSON,	)	
	)	
Defendant.	)	

STATE'S RESPONSE & OBJECTION TO DEFENDANT'S REQUEST FOR JURY TRIAL PURSUANT TO 22 O.S. § 929

The State of Oklahoma respectfully requests that this Court deny the Defendant's demand for jury re-sentencing and set this matter for re-sentencing by the Court consistent with *Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407 (2012) and *Montgomery v. Louisiana*, 577 U.S. __, __, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016).

STATEMENT OF THE CASE

On November 29, 2006, the Defendant, represented by counsel, waived his right to a jury trial and entered a blind plea of guilty to Murder in the First Degree (Count 1) and Conspiracy to Commit a Felony (Count 2). This Court accepted the plea and set off sentencing for completion of a pre-sentence investigation (PSI) by the Oklahoma Department of Corrections.

On January 3, 2007, the Court, after considering evidence and argument presented by both the State and Defendant, as well as the PSI, sentenced Defendant to life without parole (LWOP) for Count 1 and ten (10) years imprisonment for Count 2 and ordered those sentences to be served concurrently.[1] Defendant timely moved to withdraw his guilty plea. That request was denied, and

[1] Defendant has since discharged his sentence in Count 2.

the Oklahoma Court of Criminal Appeals (OCCA) denied his petition for *certiorari*. *Johnson v. State*, C-2007-83 (Okl. Cr. Oct. 3, 2007) (not for pub.).

On May 22, 2018, the OCCA granted Defendant's subsequent application for post-conviction relief, vacated his LWOP sentence in Count 1, and remanded the matter to this Court for re-sentencing in accordance with *Stevens v. State*, 2018 OK CR 11. *Johnson v. State*, PC-2017-755 (Okl. Cr. May 22, 2018). An initial status conference was held before this Court on June 25, 2018. At that time, counsel for both the Defendant and the State advised the Court that Defendant was entitled to a jury re-sentencing, unless waived, in light of the Court of Criminal Appeals' opinion in *Stevens*.

On August 27, 2018, Defendant, through his attorneys, filed the instant request for jury re-sentencing. After undertaking additional research, the State has changed its position on the issue and, for the reasons discussed below, submits Defendant has no Sixth Amendment right to re-sentencing by a jury.

ARGUMENT & AUTHORITY

Whether the Defendant—after pleading guilty, waiving his right to a jury trial, and requesting to be sentenced by the Court rather than a jury—is now (eleven years later) entitled to a jury trial on sentencing turns on whether the Sixth Amendment demands that a jury determine whether his sentence violates the Eight Amendment. It does not.

I. Eighth Amendment Limits on LWOP for Juvenile Homicide Offenders

Before turning to a Sixth Amendment discussion, it is instructive to review the Eighth Amendment line of cases that brought Defendant back before this Court for re-sentencing.

In 2012, the United States Supreme Court concluded that the Eighth Amendment prohibits a sentencing scheme that mandates an LWOP sentence for individuals who commit murder before

their eighteenth birthday. *Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407 (2012). Instead, *Miller* requires an individualized sentencing proceeding at which "***a judge or a jury*** must have the opportunity to consider *mitigating circumstances* before imposing the harshest possible penalty for juveniles." *Id.*, 567 U.S. at 489, 132 S.Ct. at 2475 (emphasis added).

Four years later, the Supreme Court held that *Miller* announced a new, substantive rule of constitutional law with retroactive effect. *Montgomery*, 136 S.Ct. at 734. The *Montgomery* Court explained *Miller's* holding by concluding "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.*, 136 S.Ct. at 734 (*citing Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). In light of *Montgomery*, the OCCA has determined those federal constitutional principles apply to Oklahoma's discretionary LWOP sentencing scheme for Murder in the First Degree. *Luna v. State*, 2016 OK CR 27, ¶ 14, 387 P.3d 956, 961.

II. The Sixth Amendment Right to Jury Trial

The issue of whether the Defendant has a right to be resentenced by a jury arises from the intersection of the Eighth Amendment principals discussed above and the Sixth Amendment right to jury trial. This Section first discusses *Stevens v, State*, 2018 OK CR 11, wherein the OCCA for the first time briefly addressed the issue, and then turns to the United States Supreme Court cases dealing with the Sixth Amendment jury trial right in regards to sentencing considerations. It then applies those federal constitutional rules to Oklahoma's sentencing scheme.

a. *Stevens v. State*

Earlier this year, the OCCA granted post-conviction relief to a defendant who was sentenced pursuant to plea agreement to LWOP for a murder he committed when he was seventeen

years old. *Stevens*, 2018 OK CR 11. The trial court had summarily denied the defendant's application for post-conviction relief upon incorrectly finding *Miller* and *Montgomery* did not apply to him. *Id.* at ¶ 11. The *only* issues before the *Stevens* Court were (1) whether the defendant's claim was viable for post-conviction review, and (2) whether the holdings of *Miller* and *Montgomery* applied to him under the circumstances, *i.e.* where he pleaded guilty and his LWOP sentence was imposed pursuant to a negotiated plea agreement. *Id.* at ¶ 19. After resolving those two questions that were properly before the Court, however, the OCCA hastily continued to establish procedures it believed would best provide "guidance" for trial courts and practitioners in both future criminal trials and post-conviction proceedings until the Legislature could address the matter. *Id.* at ¶¶ 32-40.

Contrary to Defendant's assertion, the Court in *Stevens* did not "explicitly rule[ ] that the defendant's prior waiver of jury trial did not constitute a waiver of a resentencing before a jury . . . ." What the OCCA actually concluded was the defendant's guilty plea did not waive his "right to an *individualized sentencing hearing* because this right was not recognized until the Supreme Court announced it in *Miller*." *Id.* at ¶ 23 (emphasis added). The *Stevens* Court also found "[the defendant] could not have known what evidence to put on to fall within the protection of *Miller* and *Montgomery*. Further, *the sentencing judge* could not have determined that [the defendant] was irreparably corrupt and permanently incorrigible since he did not know that *he* was required to make such a finding." *Id.* at ¶ 30 (emphasis added).

Defendant's claim to a jury re-sentencing arises from a single sentence in the advisory portion of the *Stevens* opinion discussing the procedure to be followed "[i]n all future trials" where the State seeks an LWOP sentence for a juvenile offender:

> 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. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000).

Stevens, 2018 OK CR 11, ¶ 34.

With nothing more than the lone citation to *Apprendi*, the court offers no explanation for why a Sixth Amendment jury trial right attaches to LWOP sentencing or how *Apprendi* applies to these situations at all. The issue was not briefed or argued by either party. To be sure, none of the appellate briefs filed in that case made any reference to the Sixth Amendment or *Apprendi*. Simply put, that statement is pure *dicta*. *See Brown v. State*, 2018 OK CR 3, ¶ 47, 422 P.3d 155, 167 ("*Dicta*, or more precisely *obiter dictum*, are words of an opinion which are entirely unnecessary for the decision of the case, and, therefore, not precedential. In other words *dicta* is an expression in a court's opinion which goes beyond the facts before the court and therefore is an individual view of the author and is not binding in subsequent cases.") (Citations and quotation marks omitted). And, unfortunately, it also misses the constitutional mark.

Nothing in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), or related Sixth Amendment cases mandates that sentencing a juvenile murderer to LWOP under Oklahoma law after *Miller* and *Montgomery* must be by a jury.

b. *Apprendi* and Its Progeny

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the defendant pleaded guilty to second-degree possession of a firearm for an unlawful purpose (among other charges), which under state law was punishable by 5 to 10 years imprisonment. *Apprendi*, 530 U.S. at 470, 120 S.Ct. at 2352. However, that range of punishment could be enhanced under New Jersey's hate crime statute to 10 to 20 years imprisonment if the offense was committed for an improperly biased purpose. *Id.* The State sought enhancement in that case alleging the defendant

had fired his gun into the home of an African American family for the purpose of intimidation, motivated by racial bias.

After an evidentiary hearing on the issue of "purpose," the sentencing court found by a preponderance of the evidence that the defendant's actions fell within the hate crime statute and sentenced him to 12 years imprisonment. *Id.*, 530 U.S. at 471, 120 S.Ct. at 2352. The United States Supreme Court found this sentencing scheme violated the defendant's Sixth Amendment jury trial right on the facts necessary to enhance the maximum sentence. The Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* 530 U.S. at 490, 120 S.Ct. at 2362-63 (emphasis added).

Two years later, the Supreme Court invalidated on the same grounds Arizona's capital sentencing procedure, which allowed a judge sitting alone to determine the presence or absence of aggravating factors required by state statute for imposition of the death penalty. *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002). The Court concluded "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which *the legislature* conditions an increase in their maximum punishment." *Id.*, 536 U.S. at 589, 120 S.Ct. at 2432 (emphasis added).[2]

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[2] *See also Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) (Florida's capital sentencing scheme allowing judge to independently evaluate aggravating circumstances and impose death penalty after recommendation from an advisory jury violated Sixth Amendment right to jury trial where maximum sentence without finding aggravating circumstance(s) was life imprisonment under Florida law); *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (California's determinate sentencing law allowing judge to find facts exposing defendant to an elevated "upper term" sentence not supported by the guilty plea alone violated Sixth Amendment right to jury trial on those facts); *Blakeley v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (Washington's sentencing scheme allowing judge to impose an "exceptional sentence" greater than the "standard range" if substantial and compelling reasons other than those used to compute the standard range were found violated Sixth Amendment right to jury trial on those facts); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 783, 160 L.Ed.2d 621 (2005) (invalidating on Sixth Amendment grounds provisions of Sentencing Reform Act that made federal sentencing guidelines mandatory and required judge to impose sentence greater than statutory "base" sentence upon finding additional facts by a preponderance of the evidence).

In the context of sentencing considerations, the Supreme Court has only found the Sixth Amendment right to jury trial to apply to factual findings necessary to either impose a punishment that exceeds the statutory maximum or raise the statutory minimum prescribed by the legislature.[3] *See Alleyne v. United States,* 570 U.S. 99, 116, 133 S. Ct. 2151, 2163, 186 L. Ed. 2d 314 (2013). The Court has explained "the 'statutory maximum' for *Apprendi* purposes 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, 124 S.Ct. 2531, 2537 (emphasis by the Court).

c. Oklahoma's Statutory Maximum for Murder I

Unlike the sentencing schemes at issue in the Sixth Amendment cases above, a sentence of LWOP in this state is within the statutory range of punishment for First Degree Murder. The Oklahoma Statutes require no additional factual findings beyond those encompassed by a verdict or plea of guilty to First Degree Murder for imposition of an LWOP sentence. As applicable to this Defendant:

> 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. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree, as described in subsection E of Section 701.7 of this title, shall not be entitled to or afforded the benefit of deferment of the sentence.

21 O.S.2001, § 701.9(A). In capital murder cases, the death penalty may not be imposed unless at least one statutory aggravating circumstance is found and is not outweighed by one or more mitigating circumstances. 21 O.S.2001, § 701.11. But Oklahoma law places no preconditions

[3] Or sentencing guideline set by sentencing commission, as in *Booker.* 543 U.S. 220, 125 S.Ct. 783.

whatsoever on imposition of an LWOP sentence for First Degree Murder *simpliciter*; LWOP *is* the statutory maximum.

III. Sixth Amendment Inapplicability to Eighth Amendment Rights

Miller and *Montgomery* present a fundamentally different issue than factual findings necessary to exceed a statutory maximum — they create an Eighth Amendment protection from an otherwise legislatively authorized sentence. *See Apprendi*, 530 U.S. at 519, 120 S.Ct. at 2378 (Thomas, J., concurring) ("[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things."). Any prerequisite finding of "permanent incorrigibility" for juvenile offenders sentenced to LWOP[4] is a product not of Oklahoma's statutory punishment range or procedural sentencing scheme, but of a protection afforded exclusively to juvenile offenders by the Eight Amendment as announced by *Miller* and *Montgomery*, *supra*. While that distinction may at first seem insignificant, it is critical to the Sixth Amendment analysis.

a. Interplay of Sixth and Eighth Amendment Rights in the Capital Sentencing Context

Although this issue has yet to be squarely addressed by the Supreme Court or OCCA in the context of juvenile homicide offenders sentenced to LWOP, the courts have consistently rejected arguments that the Sixth Amendment right to jury trial applies to Eighth Amendment restrictions on imposition of the death penalty. It should be noted that before *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (holding Eighth Amendment prohibits LWOP sentence for juvenile non-homicide offenders), which laid the foundation for *Miller*, the Supreme Court had not applied categorical Eighth Amendment restrictions to non-capital sentences. *Graham*, 560 U.S.

[4] As will be discussed *infra*, States are split on whether such a finding of "permanent incorrigibility" is even required as *Montgomery* expressly stated that it is not. *See Montgomery*, 136 S.Ct. at 735.

at 60-61, 120 S.Ct. at 2022. Therefore, the only comparable cases to that presented here are those relating to Eighth Amendment restrictions on capital sentences. Analogizing to capital cases is also appropriate in light of the Supreme Court's "likening life-without-parole sentences imposed on juveniles to the death penalty itself." *Miller*, 567 U.S. at 474, 132 S.Ct. 2466 (*citing Graham*, 560 U.S. at 69, 130 S.Ct. at 2027).

In the context of capital sentencing, the Sixth Amendment has not been found to require jury fact finding for protections afforded by the Eight Amendment. For example, in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the Supreme Court held the death penalty is disproportionate for a defendant convicted of felony murder if "he did not kill, attempt to kill, and he did not intend to kill." The Supreme Court later rejected a felony-murderer's argument that the Sixth Amendment requires the factual finds necessary under *Enmund* be made by a jury. *Cabana v. Bullock*, 474 U.S. 376, 386, 106 S.Ct. 689, 697, 88 L.Ed.2d 704 (1986) (death sentence may stand provided "requisite findings are made in an adequate proceeding before some appropriate tribunal-be it an appellate court, a trial judge, or a jury").[5]

Similarly, after the Supreme Court declared the death penalty disproportionate for those who are mentally retarded,[6] the OCCA rejected a capital defendant's contention that *Apprendi* and *Ring* require the State to prove, and the jury to find, the absence of mental retardation beyond a reasonable doubt. *Howell v. State*, 2006 OK CR 28, ¶¶ 37-38, 138 P.3d 549, 561-62. Citing to other states that had reached the same conclusion, the OCCA reasoned:

> The Oklahoma legislature has not conditioned an increase in a defendant's maximum punishment on the fact that he is not mentally retarded; the fact a

[5] *See also Hopkins v. Reeves*, 524 U.S. 88, 100, 118 S.Ct. 1895, 1902-03, 141 L.Ed. 2d 76 (1998) ("*Tison* [*v. Arizona,* 481 U.S. 137 (1987)] and *Enmund* do not affect the showing that a State must make at a defendant's *trial* for felony murder, so long as their requirement is satisfied at some point thereafter."); *Brown v. State*, 2003 OK CR 7, ¶ 12, 67 P.3d 917, 920 ("If the *Enmumd/Tison* test is not met, the death penalty is not appropriate. The determination is a limiting factor, not an enhancing factor. Thus, once a defendant is found to be eligible for the death penalty, *any tribunal may make the requisite* Enmund/Tison *findings*.") (Emphasis added);

[6] *See Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

> defendant is not mentally retarded is not an aggravating circumstance which the State must prove beyond a reasonable doubt. 21 O.S.2001, § 701.12. Eligibility for the death penalty is a different issue than proof of an aggravating circumstance.

Id. at ¶ 37, 138 P.3d at 561; *see also Howell v. Trammel*, 728 F.3d 1202, 1225 (10th Cir. 2013) (rejecting same argument and citing to numerous other jurisdictions reaching the same conclusion).

"The procedure *Miller* prescribes is no different." *Montgomery*, 136 S.Ct. at 735. The determination of whether a juvenile offender's homicide offense reflects "only transient immaturity" or "permanent incorrigibility" under *Miller* is procedurally indistinguishable from the Eighth Amendment limitations announced in *Enmund* and *Atkins*. As such, jury findings beyond a reasonable doubt are unnecessary for an Eighth Amendment proportionality analysis of an LWOP sentence.

b. Inapplicability to Mitigation Considerations

Furthermore, far from imputing to the State the burden of proving a juvenile defendant is "irreparably corrupt and permanently incorrigible" through evidence of some sort of judicially-created aggravating circumstance, *Miller* and *Montgomery* discuss only the "mitigating qualities of youth" and how the differences in children contrasted with adults "counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 476, 480, 132 S.Ct. at 2468, 2469; *Montgomery*, 136 S.Ct. at 733. The Court identified such sentencing considerations to include:

> [the defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. . . . the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. . . . the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. . . . his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Miller, 567 U.S. at 477–78, 132 S. Ct. at 2468. Conspicuously absent from *Miller* or *Montgomery* is any discussion or examples of evidence the State would be required to present to support an

LWOP sentence. *See Cook v. State*, 242 So.3d 865 (Miss. Ct. App. 2017) ("We also note that the United States Supreme Court has never defined 'irreparable corruption,' a term that sounds more like a theological concept than a rule of law to be applied by an earthly judge."). The Supreme Court's silence in that regard makes sense where these opinions establish only a juvenile offender's right to present *mitigating evidence* at an individualized sentencing hearing to demonstrate he is within the class of defendants for whom LWOP is a disproportionate sentence. *Apprendi*'s bright-line rule does not apply to mitigating circumstances that may *reduce* punishment.

c. Decisions of Other State and Federal Courts

Aside from the OCCA's previously quoted one line of *dicta* in *Stevens* citing *Apprendi*, every other State that has considered the issue has uniformly concluded that no Sixth Amendment right to a jury trial exists for a *Miller/Montgomery* sentencing proceeding.

1. Michigan

In response to *Miller* and *Montgomery*, the Michigan Legislature passed a statute, MCL 769.25, which mandated that a judge, rather than a jury, make the decision whether to impose a sentence of LWOP. *Id.* at *4. Different panels of the Michigan Court of Appeals, Michigan's intermediate appellate court, were split on whether there exists a Sixth Amendment right to have the *Miller* factors considered by a jury. *See People v. Skinner*, 877 N.W.2d 482, 504 (Mich.Ct.App. 2015), (declaring MCL 769.25 unconstitutional to the extent it mandated judicial sentencing); *People v. Hyatt*, 885 N.W.2d 900, 924-25 (Mich.Ct.App. 2016) (concluding no Sixth Amendment right to a jury exists for sentencing pursuant to *Miller* and declaring a conflict with the *Skinner* panel). A seven-judge conflict panel of the Court of Appeals was consequently convened. The conflict panel disagreed with the *Skinner* panel and held that a judge may decide whether to impose

a non-parolable life sentence on a juvenile. *People v. Hyatt*, 891 N.W.2d 549, 572 (Mich.Ct.App. 2016).

Ultimately, the Michigan Supreme Court retained appeals on the issue in both cases and consolidated them for appellate purposes. *People v. Skinner, et al.*, ___N.W.2d ___, 2018 WL 3059768, *4 (Mich. June 20, 2018). After conducting a thorough analysis of United States Supreme Court precedence in *Miller*, *Montgomery*, *Apprendi*, *Cunningham*, and *Ring*, the Michigan Supreme Court concluded that:

> The Sixth Amendment does not prohibit trial courts from considering mitigating circumstances in choosing an appropriate sentence because the consideration of mitigating circumstances does not expose a defendant to a sentence that exceeds the sentence that is authorized by the jury's verdict. In other words, 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. Therefore, the requirement in MCL 769.25(6) that the court consider the *Miller* factors does not violate the Sixth Amendment.

Skinner at *12 (citations omitted) (emphasis by the court).

The Michigan Supreme Court was also persuaded by appellate courts in its sister states finding that, "This conclusion is further supported by the fact that all the courts that have considered this issue have likewise concluded that the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole." *Skinner* at *16 *citing* *State v. Lovette*, 233 N.C. App. 706; *State v. Fletcher*, 149 So.3d 934 (La.App., 2014); *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017); *People v. Blackwell*, 3 Cal.App.5th 166 (2016); and *State v. Ramos*, 387 P.3d 650 (Wash. 2017).[7]

[7] The Michigan Supreme Court did not reference the *dicta* from OCCA's *Stevens* opinion which had been decided one month earlier.

2. California

Much like the Michigan Supreme Court in *Skinner*, *supra*, the California Court of Appeals also conducted a thorough analysis of whether the Sixth Amendment requires the *Miller* factors be considered by a jury and reached the same result. *People v. Blackwell*, 3 Cal.App.5th 166 (Cal.App. 2016) *as modified on denial of reh'g* (Sept. 29, 2016), *cert. denied*, 138 S. Ct. 60, 199 L. Ed. 2d 44 (2017). In *Blackwell*, the California Court of Appeals found the defendant's arguments that a judge-imposed sentence of LWOP for a juvenile offender, even after consideration of the *Miller* factors, violated the Sixth Amendment were "without merit as they are premised on fundamental misconceptions about the application of *Miller*, *Graham* ... as well as *Apprendi* and its progeny." *Id.* at 183.

The California court conducted an extensive review of the text of both the Sixth and Eighth Amendments, as well as the United States Supreme Court opinions interpreting those amendments, and concluded, "The trial court's consideration of the *Miller/Gutierrez*[8] factors relating to the offense and the offender in exercising its discretion to impose sentence within a prescribed range did not violate *Apprendi*." *Id.* at 460 (*citing Alleyne*, 570 U.S. at ___, 133 S.Ct. at 2163; *Cunningham*, 549 U.S. at 294, 127 S.Ct. 856, and *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63).

Subsequently, a different division of the California Court of Appeals, while disagreeing with *Blackwell* on whether a factual finding of "permanent incorrigibility" is required at all before LWOP may be imposed, took no issue with consideration of the *Miller* factors and the sentencing determination being made by a judge as opposed to a jury. *People v. Padilla*, 4 Cal.App.5th 656

[8] *People v. Gutierrez*, 324 P.3d 245 (Calif. 2014) was a California Supreme Court case that held, in light of *Miller*, there could be no presumption in favor of LWOP for juvenile offenders.

(Cal.App. 2016). In fact, the *Padilla* court remanded that case for resentencing before a judge to consider the *Miller* factors in light of *Montgomery*. *Id.* at 221.[9]

3. North Carolina

Like Michigan, the North Carolina General Assembly enacted a statute directing trial courts to consider the *Miller* factors and granting them the discretion to impose a sentence of LWOP, both prospectively and in re-sentencing proceedings. N.C. Gen.Stat. § 15A-1340.19A, *et seq.* In *State v. James*, 786 S.E.2d 73 (N.C.App. 2016), that provision came under attack by a defendant who claimed it violated his right to a trial by jury. The North Carolina Court of Appeals, the state's intermediate appellate court, rejected his challenge to the statute given the absence of any provision requiring the State to prove beyond a reasonable doubt the existence of any aggravating factors as a prerequisite for the imposition of an LWOP sentence. The court determined, "The sentencing guidelines only require the sentencing court to consider the mitigating circumstances of defendant's youth to determine whether a lesser punishment of life without parole is appropriate. Thus, no jury determination was required and defendant's argument is without merit." *Id.* at 82.

The North Carolina Supreme Court modified and remanded the case on other grounds but upheld the intermediate court's finding that their statute, which provides for judicial sentencing, is constitutional. *State v. James*, 813 S.E.2d 195 (N.C. May 11, 2018).

> Although defendant has not questioned the correctness of the Court of Appeals' rejection of his challenge to the relevant statutory provisions as violative of his Sixth Amendment right to a jury trial, he did argue before this Court that the failure of N.C.G.S. § 15A-1340.19B and N.C.G.S. § 15A-1340.19C to require a narrowing finding violates the principles enunciated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), by failing to require that a jury find the

[9] These issue later became moot in California with the enactment of Senate Bill No. 394, which retroactively abolished LWOP sentences for all juvenile offenders. *See People v. Padilla*, 419 P.3d 535 (Calif. June 13, 2018).

> aggravating circumstances that he believes to be necessary in order to avoid a finding of arbitrariness. However, we need not address this argument given our conclusion that a valid statutory scheme for the sentencing of juveniles convicted of first-degree murder does not require the sentencing authority to find the existence of aggravating circumstances before imposing a sentence of life imprisonment without the possibility of parole.

Id. at 209, n.7.

4. Pennsylvania

In *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017), the Pennsylvania Supreme Court considered and rejected a defendant's contention that he had a Sixth Amendment right to have a jury make a determination of "permanent incorrigibility" before he could be sentenced to LWOP. In so holding, the Court explained:

> We further disagree with Batts that a jury must make the finding regarding a juvenile's eligibility to be sentenced to life without parole ... [T]he central principle of *Alleyne* and the decision upon which it was based, *Apprendi v. New Jersey*, is that a factual finding that increases an individual's punishment is an element of a different, aggravated offense other than the charged crime. "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." ... A finding of 'permanent incorrigibility' cannot be said to be an element of the crime committed; it is instead an immutable characteristic of the juvenile offender. To render these characteristics crime-specific would contradict the entire premise of the Supreme Court's decisions, which prohibit a sentencer from finding that a juvenile offender is unable to be rehabilitated based upon the crime itself.

Id. at 478-479 (citations omitted).

The Pennsylvania Supreme Court also noted that the United States Supreme Court in *Montgomery* "stated directly that the decision of whether to sentence a juvenile to life without parole could be made by a judge. Thus, the High Court itself did not recognize life imprisonment cases to be governed by *Alleyne*." *Id.* at 456-57 (internal citations omitted).

5. Louisiana

In *State v. Fletcher*, 149 So.3d 934 (La.App. 2014), the Louisiana Court of Appeals rejected the juvenile defendant's contention that the federal and Louisiana constitutions "require that the determination of whether his sentence should be served without the possibility of parole must be made by a jury." *Id.* at 942. The appellate court agreed with the state's argument that "the maximum sentence is life without parole and the minimum sentence is life with parole, so there is no additional element required in order to impose a life sentence without parole. Therefore, *Apprendi* and its progeny do not apply." *Id.* at 943. The court went on to state, "We have reviewed the *Apprendi*, *Ring*, and *Blakely* cases, and find them inapplicable to the instant situation." *Id.*

Montgomery v. Louisiana, supra, was also, of course, a case arising out of Louisiana. On remand from the United States Supreme Court the Louisiana Supreme Court remanded Montgomery's case to the district court for judicial resentencing and consideration of the *Miller* factors rather than a jury trial on resentencing. *State v. Montgomery*, 194 So.3d 606, 609 (La. 2016).

6. Mississippi

The Supreme Court of Mississippi places the burden on the offender to persuade the sentencing judge he is entitled to parole eligibility under *Miller*. *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013). With this backdrop, the Appellate Court of Mississippi rejected a defendant's contention that he was entitled to a jury determination of the issue under *Apprendi*. *Cook v. State*, 242 So.3d 865, 876 (Miss. Ct. App. 2017), *petition for cert. denied*, 237 So.3d. 1269 (Miss. 2018), *petition for cert. docketed*, No. 18-98 (U.S. May 31, 2018).[10] The appellate court noted that *Miller*

[10] The defendant has petitioned the United States Supreme Court for *certiorari* review of the following two issues: "1. Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently

held "*a judge* or a jury must have the opportunity to consider mitigating circumstances" before imposing LWOP on a juvenile offender and that *Montgomery* specifically stated that *Miller* did not impose any formal factfinding regarding an offender's incorrigibility. *Id.* at 876 (*citing Miller*, 567 U.S. at 489, 132 S.Ct. at 2475 (emphasis added by Mississippi Court of Appeals), and *Montgomery*, 136 S.Ct. at 2475. As the court aptly opined:

> It may be that "irreparable corruption" is not considered an objective, provable "fact" for purposes of *Apprendi*. Or it may be that *Apprendi* does not apply because "irreparable corruption" is something that a defendant must disprove in order to mitigate his punishment, rather than something the State must prove in order to increase the penalty. Whatever the reason, unless the United States Supreme Court's opinions in *Miller* and *Montgomery* do not mean what they specifically say—that a judge may sentence the offender to LWOP—[the defendant] does not have a constitutional right to be resentenced by a jury.

Id. at 876.

7. Other State Courts

Other states have delegated re-sentencing and consideration of the *Miller* factors to judges rather than to juries without challenge. *See Chandler v. State*, 242 So.3d 65 (Miss. 2018), *petition for cert. docketed*, No. 18-203 (U.S. Aug 15, 2018)[11] (affirming a ruling by the trial judge sentencing juvenile defendant to life after consideration of *Miller* factors); *State v. Ramos*, 387 P.3d 650 (Wash. 2017) (Supreme Court of Washington affirmed a judge's aggregate sentences of eighty-five years for a juvenile offender); *Davis v. State*, 415 P.3d 666 (Wyo. 2018) (Supreme Court of Wyoming remanded for resentencing by the trial judge, rather than a jury, after juvenile

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incorrigible in order to impose a sentence of life in prison without the possibility of parole. 2. Whether the Eighth Amendment prohibits a life without parole sentence for a crime committed by a juvenile."

[11] The defendant has petitioned the United States Supreme Court for *certiorari* review on the following two issues: "1. Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. 2. Whether Joey Chandler's life without parole sentence violates the Eighth Amendment because the sentencing judge failed to consider substantial, unrebutted evidence of his rehabilitation.".

offender had previously received a "de facto life without parole" sentence). The State has been unable to find a single state court appellate opinion, other than the *dicta* in *Stevens*, that finds the Sixth Amendment right to a jury trial applicable to a *Miller* hearing.

8. Federal Courts

The United States Supreme Court, in both *Miller* and *Montgomery*, refers to the determination of LWOP for juvenile offenders being made by a judge. *Miller*, 567 U.S. at 489, 132 S.Ct. at 2475 ("*a judge* or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles") (emphasis added); *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, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'") (Emphasis added and citations omitted).

One federal district court even went so far as to suggest that the *Miller* hearing and determination must be done by a judge rather than a jury.

> [T]he jury's decision to convict Petitioner for death-penalty-eligible offenses provides no evidence that the jury made any finding regarding 'future danger' or 'vileness.' Moreover, even if there were indicia that the jury had made a finding about either of these two aggravating factors, this Court is not convinced that such a finding would satisfy the requirements of *Miller* and *Montgomery*. Indeed, *Miller* and *Montgomery* require the sentencing judge to consider certain factors before sentencing a juvenile to life imprisonment without parole. Any findings made by the jury, notwithstanding their possible impact on the jury's penalty recommendation, cannot supplant the judge's duty to consider the factors expressed in *Miller* and *Montgomery*.

Malvo v. Mathena, 254 F.Supp.3d 820 (E.D.Va. 2017), *aff'd* 893 F.3d 265 (4th Cir. 2018), *petition for cert. docketed* No. 18-217 (U.S. Aug 20, 2018).[12]

[12] The Warden has petitioned the United States Supreme Court for *certiorari* review on the following issue: "Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*)

CONCLUSION

As one state high court has observed, *Miller* and *Montgomery* "are not models of clarity[.]" *People v. Skinner,* __ N.W.2d __, 2018 WL 3059768, *10 (Mich. 2018). But what can be understood from those opinions is that LWOP is now deemed to be disproportionate under the Eighth Amendment for a juvenile offender "whose crime reflects transient immaturity." *Miller*, 567 U.S. at 479-80, 132 S.Ct. at 2469; *Montgomery*, 136 S.Ct. at 735.

"[T]he decision of whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make." *Bullock*, 474 U.S. at 386, 106 S.Ct. at 697. Indeed, the Supreme Court has expressly recognized "*Miller* did not impose a formal factfinding requirement" regarding a child's incorrigibility. *Montgomery*, 136 S.Ct. at 735.[13]

The Supreme Court has "long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Alleyne v. United States,* 570 U.S. 99, 116, 133 S. Ct. 2151, 2163, 186 L. Ed. 2d 314 (2013); *see also Booker*, 543 U.S. at 233, 125 S.Ct. at 750 ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *Cunningham*, 549 U.S. at 294, 127 S.Ct. at 871 (noting that in the wake of *Apprendi* and *Blakely* some "States have chosen to permit judges genuinely to

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applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?"

[13] *See also Luna*, 2016 OK CR 27, ¶ 2, 387 P.3d at 963-64 (Lumpkin, V.P.J., concurring in part dissenting in part) (recognizing *Miller* "did not impose a formal factfinding requirement" as to whether the offender's "crimes reflect transient immaturity" or "irreparable corruption."); *Id.* at ¶ 3, 387 P.3d at 965 (Hudson, J., concurring in part/dissenting in part) ("[T]he majority opinion wrongly expands the requirements of *Miller* and *Montgomery* by mandating that the jury on remand find beyond a reasonable doubt that Appellant is irreparably corrupt and permanently incorrigible. The Supreme Court has not adopted a formal fact-finding requirement nor mandated any formal framework for sentencing.").

exercise broad discretion ... within a statutory range, which, everyone agrees, encounters no Sixth Amendment shoal." (Internal quotation marks and footnote omitted)). Even in *Apprendi* itself, the Court recognized "nothing in this history [of the Sixth Amendment jury trial right] suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to the offense and the offender—in imposing a judgment *within the range* prescribed by statute." 530 U.S. at 481, 120 S.Ct. at 2348 (emphasis in original). Because *Miller* and *Montgomery* do nothing more than impose Eighth Amendment limitations on what sentence may be imposed within Oklahoma's statutory range of punishment, the Defendant does not have a Sixth Amendment right to jury re-sentencing.

In this matter, the Defendant affirmatively waived his statutory right to jury sentencing when he entered a blind plea of guilty to this Court. He understood at that time he could be sentenced to either life or life without parole. Under *Miller* and *Montgomery*, life without parole is a disproportionate sentence for him if his crimes reflect only transient immaturity. But as discussed above, there is no Sixth Amendment right to a jury determination of that Eighth Amendment consideration. In other words, this is not a case where the Defendant waived a jury trial right he did not know he had because he does not actually have that right at all. *Miller* and *Montgomery* afford him nothing more than an individualized sentencing hearing at which this Court must consider his "youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S.Ct. at 735.

WHEREFORE, the State of Oklahoma respectfully prays that this Honorable Court will deny Defendant's Request for Jury Trial Pursuant to 22 O.S. § 929 in all respects and set this matter for a judicial re-sentencing hearing.

Respectfully Submitted,

DAVID W. PRATER
DISTRICT ATTORNEY

BY: _____

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing response was hand-delivered on the date of filing to Melissa French, Counsel for Defendant, by leaving a file-stamped copy at the front window of the Oklahoma County Public Defender's Office.

_____
Jennifer M. Hinsperger, ADA

IN THE COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA

JESSE ALLEN JOHNSON, Petitioner, vs. THE HONORABLE RAY C. ELLIOTT , Judge of the District Court, THE STATE OF OKLAHOMA, Respondent.	Court of Criminal Appeals Case No. PR-2018- Oklahoma County Case No. CF-05-5714

APPLICATION FOR COURT TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS TO PROHIBIT RESPONDENT FROM SENTENCING THE PETITIONER WITHOUT ENPANELING A JURY PURSUANT TO 22 O.S. 2011 §929 AND *STEVENS V. STATE*

COME NOW, Jesse Allen Johnson, Petitioner, by and through the Office of the Oklahoma County Public Defender, and submit this Petition for Writ of Prohibition and/or Writ of Mandamus, along with the accompanying brief in support, asking the Court to prohibit Respondent from RE-sentencing the Petitioner without empaneling a jury pursuant to 22 O.S. 2011 §929. This action is brought pursuant to Rule 10.1 of the *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. Tit. 22, Ch. 18, App. (Supp.1996). Petitioner respectfully submits that for the reasons stated the district court cannot legally sentence the Petitioner, without first empaneling a jury pursuant to the Mandate issued in Jesse Allen Johnson v. State of Oklahoma, PC-2017-755.

In support of this petition, Petitioner states the following:

1. Petitioner has entered a guilty plea to murder in the first degree on November 29, 2006 and was sentenced on January 3, 2007, by the Honorable Ray C. Elliott, to life without the possibility of parole. At the time of the commission of the offense, the Petitioner was 17 years old.
2. On March 13, 2017, Mr. Johnson filed an Application for Post-Conviction Relief stating that the holdings by the Supreme Court in *Graham v. Florida*, 560 US 48, 130 S.Ct. 2011, 176 L.Ed.2d. 825 (2010) in 2010, *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d. 407 (2012), and *Montgomery v. Louisiana*, 577 U.S.,136 S.Ct. 718, 193 L.Ed.2d 599 (2016) prohibited a sentence of life without the possibility of parole without a sentencing hearing they complied with the rules as set out by the Court. The district court denied post-conviction relief but the Court of Criminal Appeals reversed the decision. A Mandate was issued by the Court of Criminal Appeals that vacated and remanded the Petitioner case for resentencing (Attachment B).
3. On August 27, 2018, the Petitioner filed the Defendant's Request for Jury Trial Pursuant to 22 O.S.2011 §929 and Brief in Support of Jury Trial (Attachment C). The State of Oklahoma filed a response objecting to a request for jury trial on September 22, 2108 (Attachment D). A hearing was held before the Honorable Ray C. Elliott on October 18, 2018.[1] At that time, the Court ruled in

[1] An original copy of the October 18, 2018 hearing transcript has been provided to the Court.

favor of the State of Oklahoma based on their brief and argument. An Order was filed in November 1, 2018 (Attachment A).

4. In Oklahoma, the jury is vested with the authority to render punishment. 22 O.S. 2011 §926.1. The court must impose the sentence that is rendered by the jury unless the jury cannot agree on a sentence. *Luker v. State* 173 OK CR 135, ¶12, 552 P.2d 715, 719, *Redell v. State* 175 OK CR 229, ¶31, 543 P.2d at 581-82 Therefore, when a defendant invokes his right to a jury trial, the jury is the sentencing body. *Stevens v. State* held that the defendant's trial shall be bifurcated and the issue of the defendant's guilt shall be separately determined from the enhancement of his or her sentence. *Stevens v. State,* 2018 OK CR 11 citing *Mitchell v. State* 2011 OK CF 26, 119, 270 P.3d 160, 186 (contrasting sentencing procedure where State seeks to enhance sentence); 22 O.S. 2011, 860.1 (statutory procedure for sentencing).

5. In *Luna v. State* 2016 OK CR 27 (2016), Court determined that while *Miller* and *Montgomery* do not specifically state that the defendant is entitled to a jury resentencing, the State of Oklahoma is required to resentence *Luna* and all other similarly situated defendants by a jury trial due to the Oklahoma Statute that vests sentencing with the Jury. *Stevens* @ ¶ 31

6. The Court addressed the remedy for the defendants who pled guilty and

were sentencing by a judge to life without the possibility of parole in *Stevens*. The Court followed the opinions of *McGee* and *Luna* and ordered that *Stevens*, and all other like situated defendants, be remanded for a jury trial sentencing. *Stevens*.

7. The Court gave explicit instructions regarding the procedure that must be used to impose a sentence of Life without parole.
8. Like Petitioner, the defendant in *Stevens* entered a guilty plea and was sentenced by the Court. The Court of Criminal Appeals ruled that a sentencing hearing at that time and that the youthful offender hearing held did not constitute sufficient procedure to comply with the Eighth Amendment. *Stevens v. State* 2018 CR 11, ¶30 *citing Miller v. Alabama* 567 U.S. at 489, 132 S. Ct. at 2475. The Court in *Stevens* explicitly ruled that the defendant's prior waiver of jury trial did not constitute a waiver of a resentencing before a jury because a defendant could not waive rights he did not previously know he was entitled to. Petitioner could not have been aware that he had the right an individualized sentencing hearing because this right was not recognized until the Supreme Court held it in M*iller*. *Stevens v. State,* 2018 OK CR @ ¶23.
9. The Petitioner, according to the ruling in *Stevens,* should be sentenced by a jury pursuant to 22 O.S. 2011 §929.

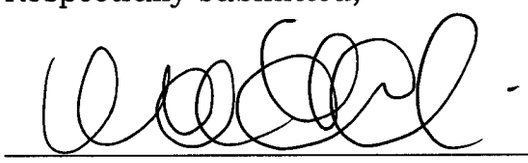
COMPLIANCE WITH THE TEN-DAY RULE

As required by Rule 10.2 of the *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. (Supp.1996), this Petition for Writ of Prohibition has been filed with no pending hearing dates and therefore, in compliance with the ten-day rule.

PRAYER FOR EXTRADINARY RELIEF

WHEREFORE, Petitioners respectfully requests that this Court issue a Writ of Prohibition and/or Mandamus and grant any and all other appropriate relief, to prohibit and bar Respondent sentencing the Petitioner without empaneling a jury pursuant to 22 O.S.2011 §929

Respectfully submitted,



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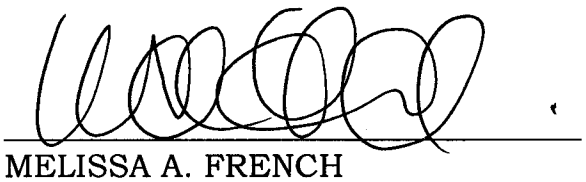
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This certifies that on the date of filing a true and correct copy of the foregoing document was delivered to the Honorable Ray C. Elliott and the office of the Oklahoma County District Attorney.



MELISSA A. FRENCH

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA

JESSE ALLEN JOHNSON, Petitioner, vs. THE HONORABLE RAY C. ELLIOTT , Judge of the District Court, THE STATE OF OKLAHOMA, Respondent.	Court of Criminal Appeals Case No. PR-2018- Oklahoma County Case No. CF-05-5714

P R 2018 1203

BRIEF IN SUPPORT OF APPLICATION FOR COURT TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS TO PROHIBIT RESPONDENT FROM SENTENCING THE PETITIONER WITHOUT ENPANELING A JURY PURSUANT TO 22 O.S. 2011 §929 AND *STEVENS V. STATE*

COME NOW, Petitioner Jesse Allen Johnson, and submits this brief in support of the Petition for Writ of Prohibition and/or Mandamus filed contemporaneously herewith asking this Court to prohibit the district court from sentencing the Petitioner without empaneling a jury in accordance with 22 O.S.2011 §929 and *Stevens v. State*, pursuant to Rule 10.1 of the *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. Tit. 22, Ch. 18, App. (Supp.1996).

STATEMENT OF THE CASE

The Petitioner entered a guilty plea on November 29, 2006 to murder in the first degree in violation of 21 OS §701.7. Blind plea sentencing was set for January 3, 2007 and a PSI was ordered by the Court. On January 2, 2007, Judge Elliott formally sentenced Mr. Johnson to life without the possibility of parole on count one. A Motion to Withdraw Guilty Plea was filed by Defendant

in a timely manner and a hearing was held on January 18, 2007. The Defendant raised ineffective assistance of counsel based on the fact that Mr. Johnson was not told he could present witness testimony at the time of the blind plea sentencing. Defendant also stated that a mitigation case was not presented that included all the mitigation that Mr. Johnson could produce. The issue was taken up on certiorari in Oklahoma Court of Criminal Appeals case number C-2007-83 and the sentence was affirmed. An Application for Post-Conviction Relief was filed March 13, 2017 and was subsequently denied by the Court on June 26, 2017. The Court of Criminal Appeals vacated and remanded Mr. Johnson's case for a resentencing before a jury in Court of Criminal Appeals case number PC-17-755 (Attachment B).[1] The Petitioner filed a Request for Jury Trial in accordance with 22 O.S.2011 §929 on August 27, 2018 (Attachment C). The State of Oklahoma filed a Response and Objection on September 11, 2018 (Attachment D). A hearing was held before the Honorable Ray C. Elliott on October 18, 2018.[2] The parties stood on their briefs and made additional argument. On November 1, 2018, the Court ruled in favor of the State of Oklahoma (Attachment A). Petitioner has filed An Application to Assume Original Jurisdiction and Petition for Writ of Prohibition and/or Writ of Mandamus and, this brief in support of that petition is in response to the court's unauthorized action.

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[1] The attachments referred to herein are attached to Petitioner's application for writ of prohibition and/or mandamus filed contemporaneously herewith.

[2] An original copy of the October 18, 2018 hearing transcript has been provided to the Court.

ARGUMENT AND AUTHORITY

RESPONDANT'S ORDER DENYING MR. JOHNSON A RE-SENTENCING TRIAL BEFORE A JURY VIOLATES THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 2, §§ 19 AND 20 OF THE OKLAHOMA CONSTITUTION IN LIGHT OF *STEVENS V. STATE* AND THE COURT'S ORDER IN PETITIONER'S POST-CONVICTION APPEAL.

Oklahoma has taken up the issue of juvenile life without parole in three pivotal cases; *McGee v. State, Luna v. State* and *Stevens v. State.* The Court of Criminal Appeals first addressed this issue in *McGee v. State*, F-2015-393 (Okl.CR. 2016) (unpublished opinion) on December 2, 2016. In that case, the Court specifically stated that the defendant was to be resentenced by a jury and included a sample jury instruction to be used by the Court. The Court held that:

> We find that *Miller* requires a sentencing trial procedure conducted before the imposition of the sentence, with a judge or jury fully aware of the constitutional "line between children whose crimes reflect transient immaturity and the rare children whose crimes reflect irreparable corruption.

McGee v. State, F-2015-393, pg 42-43 (Okl. CR 2016)

During formal sentencing, the Court in *McGee* heard argument of counsel, which included evidence presented during the jury trial. The Court found that argument made to the Judge during formal sentencing and the evidence presented during the trial did not meet the standard set forth in *Miller*

McGee v. State, Oklahoma Court of Criminal Appeals Case No. F-15-393, Slip

Op. at 41(Attachment E).[3] Therefore, *McGee* was entitled to a new jury trial sentencing. The State of Oklahoma filed a Petition for Rehearing on December 22, 2016, requesting that the Court rehear argument regarding the issue of a jury trial resentencing. The Court denied the Petition for Rehearing.

The Court also decided *Luna v. State* 2016 OK CR 27 (2016) on December 2, 2017. The Court published an opinion that is similar to *McGee v. State*. The Court took notice of the same issues, including the right to a jury sentencing in Oklahoma and the standard as set forth in *Montgomery*. The Court determined that while *Miller* and *Montgomery* do not specifically state that the defendant is entitled to a jury resentencing, the State of Oklahoma is required to resentence *Luna* and all other like situated defendants by a jury trial due to the Oklahoma Statute that vests sentencing with the jury. *Stevens v. State*, 2018 OK CR 11, ¶ 31,

While *Luna* and *McGee* were on direct appeal, there were several other similarly situated defendants across the State. Approximately 43 defendants have been sentenced to life without the possibility of parole, some by jury trial and many through a plea of guilty. The Court addressed the remedy for those defendants in *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741. The Court followed the opinions of *McGee* and *Luna* and ordered that *Stevens*, and all other like situated defendants, be remanded for a jury trial sentencing. *Stevens v. State*, 2018 OK CR 11, ¶ 31

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[3] Pursuant to Rule 3.5 (C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App., Petitioner has attached a copy of the *McGee* unpublished slip opinion because no published opinion would serve as well the purpose for which counsel cites it.

The Court gave explicit instructions regarding the procedure that must be used to impose a sentence of Life without parole.

> In all future trials where the State intends to seek a sentence of life without the possibility of parole for an offender who committed his or her offense under the age of eighteen (18) years of age the State shall give notice of this fact by stating at the bottom of the Information in bold type: "**The State is seeking the punishment of life without the possibility of parole for the offense of Murder in the First Degree, as Defendant (state last name here) is irreparably corrupt and permanently incorrigible.**" *See Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986 (adopting notice pleading). Both parties shall be afforded full discovery on this issue in accordance with established discovery law. 22 O.S.2011, § 2001 *et seq.* The assigned trial judge has the authority under our Discovery Code to issue any orders necessary to accomplish this task.
>
> 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. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000). The defendant's trial shall be bifurcated and the issue of the defendant's guilt shall be separately determined from the enhancement of his or her sentence. *Cf. Mitchell v. State*, 2011 OK CR 26, ¶ 119, 270 P.3d 160, 186 (contrasting sentencing procedure where State seeks to enhance sentence); 22 O.S.2011, § 860.1 (statutory procedure for sentencing). The prohibition against the introduction of evidence in either aggravation or mitigation set forth in *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, shall not be applicable to the sentencing proceeding in this type of case. Therefore, each party shall be afforded the opportunity to present evidence in support of its position as to punishment in the second stage of the trial. The trial court shall submit a special issue to the jury as to whether the defendant is irreparably corrupt and permanently incorrigible. *Cf.* 21 O.S.2011, § 701.10b(F). Pending Legislative action the District Courts of the State are directed, in addition to the instruction set out in *Luna*, to use the instruction and verdict form attached as "Appendix A" at the conclusion of this Opinion.
>
> It is the State's burden to prove, beyond a reasonable doubt, that the defendant is irreparably corrupt and permanently incorrigible. *Luna*, 2016 OK CR 27, ¶ 21 n. 11, 387 P.3d at 963 n. 11; *see also Ring v.*

> *Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding facts increasing punishment beyond the maximum authorized by a guilty verdict must be proven beyond a reasonable doubt). The State shall have the opportunity to present any evidence tending to establish this fact subject to the limitations of 12 O.S.2011, § 2403. Generally, this will include, but not be limited to, evidence concerning the defendant's: (1) sophistication and maturity; (2) capability of distinguishing right from wrong; (3) family and home environments; (4) emotional attitude; (5) pattern of living; (6) record and past history, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and (7) the likelihood of the defendant's rehabilitation during adulthood. *See Luna*, 2016 OK CR 27, ¶ 20, 387 P.3d at 962; *Cf.* 10A O.S.2011, § 2-5-205(E).
>
> Similarly, the defendant must be permitted to introduce relevant evidence concerning the defendant's youth and its attendant characteristics. *Miller*, 567 U.S. at 489, 132 S.Ct. at 2475 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for a juveniles."). Generally, this will include, but not be limited to, evidence concerning the defendant's: "(1) chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; and (3) whether the circumstances suggest possibility of rehabilitation." *Luna*, 2016 OK CR 27, ¶ 20, 387 P.3d at 962 (quotations and citation omitted).

Stevens v. State, 2018 CR 11, ¶33-35

Like Mr. Johnson, the defendant in *Stevens* entered a guilty plea and was sentenced by the Court. The Court of Criminal Appeals ruled that a sentencing hearing at that time and that the youthful offender hearing held did not constitute sufficient procedure to comply with the Eighth Amendment. *Stevens v. State* 2018 CR 11, ¶30 *citing Miller v. Alabama* 567 U.S. at 489, 132 S. Ct. at 2475. The Court in *Stevens* explicitly ruled that the defendant's prior

waiver of jury trial did not constitute a waiver of a resentencing before a jury because a defendant could not waive rights he did not previously know he was entitled to *Johnson v. Zerbst*, 304 U.S. 458 (1979). Petitioner could not have been aware that he had the right an individualized sentencing hearing because this right was not recognized until the Supreme Court held it in M*iller. Stevens v. State,* 2018 CR @ ¶23.

A Writ of Prohibition is appropriate where: 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, Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. tit. 22, Ch. 18, App.; Maynard v. Layden, 830 P.2d 581, 583 (Okl.Cr.1992). Petitioners submit all three requirements have been met and hence, this Court should issue the writ.

In the alternative Petitioners ask the Court to issue a Writ of Mandamus, mandating their return. A Writ of Mandamus is appropriate where: 1) Petitioner has a clear legal right to the relief sought; 2) the Respondent refuses to perform a plain legal duty not involving the exercise of discretion; and 3) the adequacy of mandamus and the inadequacy of other relief. Rule 10.6 (B), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App; Woolen v. Coffman, 676 P.2d 1375, 1377 (Okl.Cr.1984). Petitioner respectfully requests that this Court assume original jurisdiction, issue the appropriate extraordinary writ, and order the Respondent to empanel a Jury to conduct the

resentencing of the Petitioner.

CONCLUSION

Based on the above and foregoing arguments and authority, Petitioners request that the Court issue a writ of Prohibition and/or Writ of Mandamus, and any other relief the Court deems necessary to meet the ends of justice.

Respectfully Submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing a copy of the same was delivered to the Honorable Ray C. Elliot, and the Oklahoma County District Attorney's Office.

MELISSA A. FRENCH