

19-7794
No. _____

Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

JEREMY SHANE FOGLEMAN - PETITIONER

VERSUS

STATE OF MISSISSIPPI - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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STATE OF MISSISSIPPI - RESPONDENT

ET AL.

ORIGINAL

QUESTIONS PRESENTED

- 1.) Does the SUPREME COURT of the STATE of MISSISSIPPI'S, 5-4 SPLIT DECISION REVERSING the COURT of APPEALS of the STATE of MISSISSIPPI'S, 9-0 UNANIMOUS DECISION in this case SQUARE with the DECISIONS of this, the SUPREME COURT of the UNITED STATES?
 - 2.) Can a judge aggravate a punishment or penalty based upon subjective judicial fact finding such as determining a non-violent crime to be a "crime of violence", or must it be submitted to a jury and each element be found beyond a reasonable doubt?
 - 3.) Does the SUPREME COURT of the STATE of MISSISSIPPI'S, 5-4 SPLIT DECISION VIOLATE the PETITIONERS rights under the SIXTH and FOURTEENTH AMENDMENTS of the UNITED STATES CONSTITUTION and also does it run afoul of ALLEYNE v. UNITED STATES, 570 U.S. 99, 103, 133 S.Ct. 2151, 186 L.Ed. 2d 314 (2013) among other UNITED STATES SUPREME COURT DECISIONS?
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CITATIONS OF OPINIONS

= Both lower court OPINIONS in this CASE have been PUBLISHED, their CITATIONS are as follows:

1.) The OPINION of the SUPREME COURT of the STATE of MISSISSIPPI on WRIT of CERTIORARI:

= FOGLEMAN V. STATE, 2019 MISS. LEVIS 303, 2019 WL 4071866, CASE # 2016-CT-01244-SCT, Decided on AUGUST 29, 2019. =

2.) The OPINION of the COURT of APPEALS of the STATE of MISSISSIPPI on APPEAL:

= FOGLEMAN V. STATE, 276 So. 3d 1213 (MISS. SEPTEMBER 18, 2018); CASE # 2016-CA-01244-COA. =

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JURISDICTION

— The JURISDICTION of this COURT is INVOKED under 28 U.S.C. § 1257(a). —

The SUPREME COURT of the STATE of MISSISSIPPI on AUGUST 29, 2019 REVERSED the SEPTEMBER 18, 2018 JUDGMENT of the MISSISSIPPI STATE COURT of APPEALS on WRIT of CERTIORARI.

A copy of aforesaid DECISION appears at APPENDIX E

A PETITION for REHEARING was not filed per MISSISSIPPI Rules of APPELLATE PROCEDURE. Nor has an application for EXTENSION of TIME to FILE been filed.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

= SIXTH AMENDMENT of the CONSTITUTION of the UNITED STATES, 12/15/1791 =

= In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense =

= FOURTEENTH AMENDMENT of the CONSTITUTION of the UNITED STATES, 7/9/1868 =

= (Subsection #1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. =

STATUTORY PROVISIONS

= MISSISSIPPI CODE ANNOTATED § 97-9-72(2), 7/1/2014 =

= Any person who is guilty of violating subsection (1) of

this section by operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or who so operates a motor vehicle in a manner manifesting extreme indifference to the value of human life, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by commitment to the custody of the Mississippi Department of Corrections for not more than five (5) years, or both. —

— MISSISSIPPI CODE ANNOTATED § 97-3-2 (2), 7/1/2014 —

— In any felony offense with a maximum sentence of no less than five (5) years, upon conviction, the judge may find and place in the sentencing order, on the record in open court, that the offense, while not listed in Subsection (1) of this section, shall be classified as a crime of violence if the facts show that the defendant used physical force, or made a credible attempt or threat of physical force against another person as part of the criminal act. No person convicted of a crime of violence listed in this section is eligible for parole or for early release of the Department of Corrections until the person has served at least fifty percent (50%) of the sentence imposed by the court. —

— A copy of the complete STATUTE appears at APPENDIX A.
Note that in the copy of the STATUTE on page 2 under CONSTITUTIONALITY the case at hand in this PETITION is listed FOLEMAN V. STATE 276 So.3d 1613 (Miss. Ct. App. Sept. 18, 2018) —

— MISSISSIPPI CODE ANNOTATED § 47-7-3(1)(a)(i), 7/1/2014 —

— No person who, on or after July 1, 2014, is convicted of a crime of violence pursuant to Section 97-3-2, a sex crime or an

offense that specifically prohibits parole release, shall be eligible for parole. —

— Note that LexisNexis includes the case at hand in this PETITION under MS CODE 97-7-3 in its MISCELLANEOUS subsection. FOGLMAN v. STATE 876 So. 3d 613 (Miss. Ct. App. Sept. 18, 2018) —

— MISSISSIPPI CODE ANNOTATED § 99-19-83, 7/1/2014 —

— Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, as defined by Section 97-3-2, shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections. —

— 18 U.S.C.A. § 924(c)(1)(A) —

— Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the

United States, uses or carries a firearm, or who in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.—

—28 U.S.C.A. § 1257(a)—

—Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.—

STATEMENT OF THE CASE

¶ 1.) The Petitioner, following a jury trial in the Circuit Court of Harrison County, Mississippi, was convicted of failing to stop a motor vehicle pursuant to MISS. CODE ANN. § 97-9-72(2), on August 10, 2016.

The jury was then dismissed. At a deferred sentencing hearing that took place on August 18, 2016, the Petitioner was sentenced to the maximum term of (5) five years in the Mississippi Department of Corrections. Additionally the State moved *Ore Tenus* to declare said offense a "crime of violence" under MISS. CODE ANN. § 97-3-2(2).

The Circuit Court judge sided with the State and classified the Petitioner's offense as a "crime of violence" based upon judicial fact finding, not upon facts submitted to a jury. This "crime of violence" enhancement in turn increased the punishment and penalty for the crime.

¶ 2.) The Petitioner then appealed and the case was assigned to the Court of Appeals for the State of Mississippi, CASE # 2016-KA-01299-COA, on August 30, 2016. On September 18, 2016 the Court of Appeals

REVERSED and RENDERED the Circuit Courts "crime of violence" enhancement under 97-3-2(2) stating that section 97-3-2(2) VIOLATES the SIXTH AMENDMENT of the UNITED STATES CONSTITUTION by increasing the penalty for the crime based on facts not submitted to the jury and found by the judge alone. A copy of the Court of Appeals OPINION is attached as APPENDIX B, it includes NOTICE.

97 3) The State Filed for REHEARING. The Petitioner was never served with the motion. The State's motion was DENIED on January 23, 2019. A copy of the Court of Appeals NOTICE of DENIAL is attached as APPENDIX C.

97 4.) On January 24, 2019 the State Filed a PETITION FOR WRIT OF CERTIORARI with the Supreme Court of the State of Mississippi. The Petitioner was not served or notified of the States PETITION. On April 4, 2019 the State's PETITION was GRANTED. A copy of the ORDER is attached as APPENDIX D.

¶ 5.) On August 29, 2019 the Supreme Court of the State of Mississippi REVERSED the Court of Appeals, September 18, 2018 decision, and REINSTATED and AFFIRMED the judgment of the Circuit Court of Harrison County, Mississippi. A copy of the Supreme Courts NOTICE and

OPINION are attached as APPENDIX E.

¶ 6.) On September 18, 2019 the Petitioner filed a Motion to Stay the Issuance of the Mandate Pending the Petition of Writ of Certiorari to this HONORABLE

COURT. On October 24, 2019 the Supreme Court of the State of Mississippi DENIED said motion. A copy of the ORDER of DENIAL is attached as

APPENDIX F.

¶ 7.) On October 31, 2019 the Supreme Court of the State of Mississippi ISSUED the MANDATE, REINSTATING and AFFIRMING the Circuit Court of Harrison County, Mississippi's judgment, via the Supreme Courts 5-4 Split Decision. A copy of the MANDATE is attached as

APPENDIX G. Which now brings us to this point in which the Petitioner

is petitioning this the Supreme Court of the United States for writ

of CERTIORARI.

=====

REASONS FOR GRANTING THE PETITION

I.) PETITIONERS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED

¶ 8.) In the case at hand here the Court is posed with the

Following questions. Number one, can a judge aggravate a

punishment or penalty based upon subjective judicial fact

finding, such as determining a non-violent crime to be a

"crime of violence", or must it be submitted to a jury and each

element found beyond a reasonable doubt? Secondly, does

the Supreme Court of the State of Mississippi's, 5-4 split decision,

reversing the Court of Appeals of the State of Mississippi's, 9-0

unanimous decision violate the Petitioners rights under the

SIXTH and FOURTEENTH AMENDMENTS of the UNITED STATES

CONSTITUTION? Furthermore, does it run afoul of ALLEYNE v.

UNITED STATES, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d

314 (2013) among other UNITED STATES SUPREME COURT holdings?

¶ 9.) The Harrison County Circuit Court has taken a leap by arbitrarily

declaring a non-violent crime a "crime of violence" under MISS. CODE

ANN. § 97-3-2(2). The Circuit Court's declaration was purely

Subjective, and should've required a jury's consideration, to determine whether or not the Petitioners reckless action crossed the line necessary to deem the offense a "crime of violence", and in turn enhancing not only the punishment and penalty for the offense, but also enhancing any future punishment and penalty for any additional offense. The State of Mississippi has a habitual offender statute Miss. Code Ann. § 99-19-83 that calls for a sentence of life without the possibility of parole if a person has (2) two prior felonies, with at least (1) one of them being a "crime of violence". Therefore the ambiguous subsection (2) of 97-3-2 opens the door for a judge to "rubber stamp" a potential life sentence upon a person, which can be subject to abuse. For instance if a person had (2) two pending indictments against them arising from (2) two separate events, and say the person was guilty of one and innocent of the other and chose to fight for his innocence on the second case when the State wanted the person to plea out to both cases, but the person would not, the State would try and

convict the person on the first indictment, then out of left field at sentencing have the judge "rubber stamp" a non-violent crime a "crime of violence" with the intent to sentence the person to life without the possibility of parole because because the person would not play ball and plea to something that they did not do. The State would then in a court where no one is calling balls or strikes, deny the accused due process, fundamental fairness, and access to the courts at the least and then channel them into a vile trial with a biased judge in which the state shopped for, removing the person's case from a just judge and transferring the ball into the court of the State's go to judge who plays ball, as is Harrison County, Mississippi's longstanding custom and practice, and is the case here.

II.) MISSISSIPPI CODE ANNOTATED § 97-3-2, 47-7-3 AND THEIR EFFECTS

10.) The "crime of violence" designation of 97-3-2(2) not only effects future punishments and penalties, it effects the instant sentence. A person who is convicted of Miss. Code Ann. § 97-9-72(2)

would be eligible for parole after serving (25%) twenty five percent of their sentence. They would also qualify for "early release" prior to their parole date. They would be able to participate in education, re-entry, religious, and other programs available to inmates. They would be able to work. They would be able to earn additional time off of their sentence. They would be classified with and housed with other non-violent, low level offenders, i.e. a safer and more secure environment. Among other things.

¶ 11.) By being deemed "violent" by a judge not a jury under 97-3-2(2) eliminates a person to be eligible for parole altogether. How, you may ask? 97-3-2(2) states that "No person convicted of a crime of violence listed in this section is eligible for parole or for early release of the Department of Corrections until the person has served at least fifty percent (50%) of the sentence imposed by the court."

Taking it a step further in the same legislative session as 97-3-2 was passed, in the same bill H.B. 585 (effective July 1, 2014) Legislature

passed Miss Code Ann § 47-7-3. 47-7-3(1)(g)(i) adds insult to injury, it states in pertinent part "no person who, on or after July 1, 2014, is convicted of a crime of violence pursuant to 97-3-2... shall be eligible for parole." So therefore it becomes a mandatory, day for day sentence, without the possibility of early release of any sort. With that an inmate is also eliminated in participating in many of the aforesaid programs. An inmate is not allowed to work. Then as if that is not enough to add injury to insult an average, mildmannered, non-violent, God fearing person is classified and housed with true violent offenders, convicted of heinous crimes, the vilest of the vile. By the State putting a "square" peg in a different shape hole, opens the door for the non-violent offender to be preyed upon. For instance if he refuses to "give up" his food or any property of value to the vile, he could be stabbed, as was the case here. Or if he refuses to be extorted or pay protection money he could be beaten, kicked, stomped, and more within an inch of his life by a gang of the slime from the bottom of the barrel, then spend a month in the hospital,

and suffer permanent disabling, disfiguring, life span reducing injuries, as is also the case here, among other things.

¶ 12.) If all of the foregoing isn't considered an increased punishment and penalty, then what is? With that being said the judge should not be allowed through judicial fact finding to deem a non-violent offense a "crime of violence" under 97-3-2(2), instead it is a matter that requires a jury's consideration, and is violative of the SIXTH AMENDMENT and furthermore it does not square with other decisions of this the UNITED STATES SUPREME COURT as I will show in the forthcoming.

¶ 13.) Not only is it violative of the SIXTH AMENDMENT but it is also violative of the FOURTEENTH AMENDMENT of the UNITED STATES CONSTITUTION. The result of a trial court making a judgment on an abstract notion can give rise to a variety of conclusions. With no standard, no clear definition, requiring the court to make a

judgment on an undefined abstraction, it would violate the requirements of the Due Process Clause.

¶ 14.) As applied to the States through the FOURTEENTH AMENDMENT, the SIXTH AMENDMENT guarantees the right to trial by jury in all serious criminal cases. See generally DUNCAN v. LOUISIANA, 391 U.S. 145 (1968).

¶ 15.) Additionally, the Due Process Clause of the FOURTEENTH AMENDMENT "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re WINSHIP, 397 U.S. 358, 364 (1970). That is, "all the essential elements" of the crime must be proven beyond a reasonable doubt. *Id.* at 361.

¶ 16.) Applying the SIXTH AMENDMENT in conjunction with the FOURTEENTH AMENDMENT, the UNITED STATES SUPREME COURT has held that "any facts that increase the prescribed range of penalties

to which a criminal defendant is exposed 'are elements of the crime' that must be submitted to the jury and proven beyond a reasonable doubt.

ALLEYNE v. UNITED STATES, 570 U.S. 99, 111 (2013) (quoting APPENDI v. NEW JERSEY, 530 U.S. 466, 490 (2000)).

III.) STANDING PRECEDENCE AND THEIR APPLICATIONS

¶ 17.) In ALLEYNE, the Court held that this constitutional rule applies not only to facts that increase the maximum sentence but also to any fact that triggers a mandatory minimum sentence. See *id.* at 102, 111-116.

The Court reasoned that "it is an indisputable fact that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed." *Id.* at 112. "And because the legally prescribed range is the penalty affixed to the crime, ... it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense," *Id.* According to the Supreme Court, it is "obvious... that the floor of a mandatory range is as relevant to wrongdoers as the ceiling. A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense."

Id. at 113. "Moreover," the Court continued, "it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment."

Id. "The essential point of the Court's decision was that any fact that 'produces a higher range... is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt.'" Id. at 115-116.

¶ 18) Post-ALLEYNE, other state courts have held that facts that require the court to impose or extend a period of ineligibility for parole must be submitted to the jury and proven beyond a reasonable doubt. The New Jersey Supreme Court held that a statute was unconstitutional under ALLEYNE because it required the court to impose a period of parole ineligibility if the judge found that the defendant was involved in organized crime. See STATE v. GRATE, 106 A.3d 466, 475-476 (N.J. 2015). Likewise, the Michigan Supreme Court held that the state's sentencing guidelines were unconstitutional under ALLEYNE to the extent that they required the court to extend a defendant's parole eligibility date based on facts

found by the judge but not the jury. See PEOPLE v. LOCKHART, 870 N.W. 2d 502, 516-517 (Mich 2015).

¶ 19.) The United States Supreme Court has not, narrowly limited the application of the SIXTH AMENDMENT to facts that increase the sentence for the crime, as the 5-4 majority of the Mississippi Supreme Court indicates in this case currently in front of this HONORABLE COURT.

¶ 20.) Rather this HONORABLE COURT has more broadly held that the SIXTH AMENDMENT requires a jury finding beyond a reasonable doubt, for any fact that increases the punishment or penalty. See BLAKELY v. WASHINGTON, 542 U.S. 296, 301-302, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004).

¶ 21.) Postponing the date of an offenders eligibility for parole or early release increases the punishment or penalty for the crime. Therefore, a fact that requires a result that postpones the date of such eligibility must be charged in the indictment and found by a jury.

beyond a reasonable doubt before the enhanced sentence may be imposed.

¶ 23.) In Apprendi, the Supreme Court held that, under the SIXTH AMENDMENT, "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.* at 490. The Honorable Court held that labeling a fact finding as a sentencing does not end the SIXTH AMENDMENT analysis: "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494 (footnote omitted). Because the effect of the judicial fact finding was to increase the maximum sentence beyond what was authorized by the jury's verdict, the defendant's constitutional right to a jury trial was violated. *Id.* at 497.

23.) In subsequent cases, this HONORABLE COURT has applied the rule from APPENDI in various sentencing contexts. In RIN v. ARIZONA, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002), the Court held that the SIXTH AMENDMENT forbids a sentencing judge, sitting without a jury, from finding an aggravating fact that triggers the imposition of the death penalty. In BLAKELY it was held that mandatory state sentencing guidelines are subject to APPENDI. Id. at 303. In that case, the maximum penalty for the crime was fifty-three months, but the state court had imposed an exceptional sentence of ninety months on a judicial finding that the defendant had acted with deliberate cruelty; the Supreme Court held that, because the jury's verdict alone had not authorized the enhanced sentence, the SIXTH AMENDMENT had been violated. Id. at 303-304. In UNITED STATES v. BOOKER, 543 U.S. 220, 226-227, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005), the Court held that federal sentencing guidelines are subject to APPENDI. And in CUNNINGHAM v. CALIFORNIA, 549 U.S. 270, 274, 127 S.Ct.

856, 166 L.Ed. 2d 856 (2007), the Court found that California's determinate sentencing law, which empowered the trial judge to find facts that enabled imposition of a longer sentence, violated the jury trial right.

91 24.) In SOUTHERN UNION CO. V. UNITED STATES, 567 U.S. 343, 346, 132 S.Ct. 2344, 183 L.Ed. 2d 318 (2012), the Court examined whether the Apprendi rule applies to a different kind of punishment: a criminal fine. In answering that question affirmatively, the Court "saw no principled basis under Apprendi for treating criminal fines differently" than other punishments. *Id.* at 349. This is because "Apprendi's 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense'" *Id.* (quoting OREGON V. ICE, 555 U.S. 160, 170, 129 S.Ct. 711, 172 L.Ed. 2d 517 (2009)). The Court held that this concern is present "whether the sentence is a criminal fine or imprisonment or death." *Id.* In a pronouncement vital to this case, the Court said that "in stating Apprendi's rule, we have never

distinguished one form of punishment from another, Instead, our decisions broadly prohibit judicial fact finding that increases maximum criminal 'sentence(s)', 'penalties', or 'punishment(s)'. "Id. at 350 (citing BLAKELY, 542 U.S. at 304; APPENDI, 530 U.S. at 490; RING, 536 U.S. at 589).

9125.] In ALLEYNE, the Court overruled its decision in HARRIS v. UNITED STATES "that judicial fact finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment" and found that HARRIS was irreconcilable with APPENDI. ALLEYNE, 570 U.S. at 102 (citing HARRIS v. UNITED STATES, 536 U.S. 545, 122 S.Ct. 2906, 153 L.Ed. 2d 524 (2002)). The Court set forth the APPENDI rule that "any fact that increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Id. (citing APPENDI, 530 U.S. at 483 n. 10, 490). Then, the Court held that the APPENDI rule applies to mandatory minimum sentences because "mandatory minimum

sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to a jury. Accordingly, HARRIS is overruled, *Id.* Thus, although ALLEYNE applied APPENDI to mandatory minimum sentences, it did not, as the Mississippi Supreme Court's majority posits, limit the application of the APPENDI rule to judicial fact findings that increase maximum or minimum sentences. Rather, as has been the case from the inception of the APPENDI rule, after ALLEYNE, the SIXTH AMENDMENT continues to require a jury trial for any fact that increases the sentence, penalty, or punishment for the crime, including fines, imprisonment, or death. S. LUNN, 587 U.S. at 349-350.

¶ 26) Furthermore, the ALLEYNE Court considered a federal sentencing statute 18 U.S.C. § 924(c)(1)(A). This statute applied to crimes of violence or drug trafficking, in which firearms are involved. In ALLEYNE, the jury's verdict supported a sentencing range from five

years in prison to life. *Id.* at 117. But under Section 924(c)(1)(A)(ii), if the defendant brandished a firearm during the crime, rather than simply possessing it, the mandatory minimum sentence increased from five years to seven years. *Id.* at 104. In ALLEYNE, the district judge made a factual finding that ALLEYNE had brandished a firearm and, thus, the mandatory minimum sentence increased from five to seven years. *Id.* The Supreme Court found that this violated ALLEYNE'S SIXTH AMENDMENT rights.

9127.) Most recently, in UNITED STATES v. HAYMOND, 139 S.Ct., 2368, 2378, 204 L.Ed. 2d 897 (2019), the Court applied the Apprendice rule to invalidate a federal statute providing that, upon revocation of supervised release, a judge must impose an additional prison term from five years to life upon the judge's finding of new facts by a preponderance of the evidence. To date, the Court has recognized only "two narrow exceptions" to the Apprendice rule: a judge may find the fact of a defendant's prior conviction, and a judge may find

facts that dictate whether the defendant's sentences will run consecutively or concurrently. HAYMOND, 139 S.Ct. at 2377 n.3 (citing ALMENDAREZ-TORRES v. UNITED STATES, 523 U.S. 284, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); ICE, 555 U.S. 160).

IV) Discussion

¶ 28.) Section 97-3-2(2) prescribes a fact-finding role for the judge identical to what is found in the statutes condemned in APPENDIX and it's progeny. If the judge finds by a preponderance of the evidence that the defendant has committed a crime of violence, then the defendant's parole or early release eligibility date must be postponed until he has served fifty percent (50%) of the sentence. Then on top of that as discussed earlier 47-7-3(1)(g)(i) despite 97-3-2(2) eliminating parole eligibility or early release altogether, so therefore the defendant must serve one-hundred percent (100%) of the sentence. The sentencing judge has no discretion in determining whether or not the date will be postponed because when the judge takes the leap to arbitrarily find a crime to be

a crime of violence postponement is automatic. Therefore the postponement is an additional feature of the sentence beyond what was permitted by the jury's verdict.

¶ 29.) The Mississippi Supreme Court's 5-4 majority attempts to distinguish this case from APPENDI and ALLEYNE on the ground that, even if the defendant's parole or early release is postponed, the defendant remains eligible for the same sentence length, in this case, from zero to five years. But this reasoning is erroneous. The APPENDI rule is not limited to facts that increase the sentence for the crime, but applies more broadly to the facts that increase the penalty or punishment for the crime, but applies more broadly to facts that postpone parole or early release also. The postponement of the date on which a convict will be eligible for parole or early release is punitive. Whatever other penological goals exist that maybe furthered by such postponement, such as deterrence or incapacitation, postponing the date on which a convict is eligible for parole or early release.

unquestionably serves as an additional punishment for the convict, who must serve that time until that date, "day for day" in prison with no possibility of early release or parole, and furthermore in the secondary vile conditions mentioned in the genesis of this petition, that an inmate classified as "violent" must suffer, endure, and persevere through-

¶ 30.) The reasoning of the United States Supreme Court regarding mandatory minimum sentences is equally applicable in the context of postponing the date of parole or early release eligibility: "Why else would Congress link an increased mandatory minimum to a particular or aggravating fact other than to heighten the consequences for that behavior?" ALLEYNE, 570 U.S. at 113.

¶ 31.) Although parole ultimately may be denied to any parole eligible prisoner, a meaningful difference exists between a sentence that includes parole eligibility and a sentence in which the possibility of parole is entirely foreclosed. The United States Supreme Court has

recognized that time served without parole eligibility is a harsher "penalty" or "punishment" than time served with parole eligibility in its landmark decision that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without parole for juvenile offenders." MILLER v. ALABAMA, 567 U.S. 460, 479, 132 S.Ct. 2455, 183 L.Ed. 2d 907 (2012).

¶ 32.) In STATE v. LOUIS, 73 N.E. 3d 917, 935-936 (Ohio Ct. App. 2016), the Court of Appeals of Ohio, Fourth District, held that the trial court had erred by sentencing the defendant to life without parole rather than life imprisonment because the jury had not made the fact findings required for a life without parole sentence. Further, after ALLEYNE, the Kansas Legislature amended its sentencing scheme that had provided for an increased mandatory minimum sentence of fifty years before parole eligibility if a judge found certain facts. STATE v. BERNHARDT, 372 P.3d 1161, 1163 (Kan. 2016). After the amendment, any fact findings that could increase the amount of time served before parole eligibility must be made by a jury. *Id.*

33.) Section 97-3-2(2) runs afoul of ALLEYNE's holding. The judge's finding that the defendant used, attempted to use, or threatened to use "physical force" increases the minimum sentence that the defendant must serve in prison and indisputably "alters the prescribed range of sentences to which the defendant is exposed." ALLEYNE, 570 U.S. at 112. Contrary to ALLEYNE, section 97-3-2(2) "approv[es] the punishment" based on judicial fact finding, *Id.* at 113. Under ALLEYNE, section 97-3-2(2) violates a defendant's rights under the SIXTH and FOURTEENTH AMENDMENTS to the extent that it permits the circuit judge to find that an unlisted felony is a "crime of violence". The elevation in punishment, based upon judicial fact finding also violates the APPENDIX rule.

V) THE BOTTOM LINE

A 34.) Section 97-3-2(2) is hopelessly indeterminate. Lack of precision is what we have here, and it is not just the facts in this case, but in every such case. Such decision cannot be left to the subjective interpretation of the trial court, which is the very error

decided in Apprendo. The Petitioner should have had the right to have each and every element of the charge against him presented to, and decided upon, by a jury, and he wasn't afforded that opportunity. Thus the Petitioner's SIXTH and FOURTEENTH AMENDMENT rights were violated. Therefore the Mississippi Supreme Court's, 5-4 split decision does not square with the decisions of this the United States Supreme Court.

¶ 35.) The bottom line here is that the Mississippi Supreme Court in concert with the Harrison County Circuit Court are attempting to badly set a new precedent with its unconstitutional, 97-3-262 statutes, sentencing scheme. The 5-4 majority of the Mississippi Supreme Court is attempting to unravel United States Supreme Court holdings, and pervert justice with their false weights and measures interpretations of standing precedents. We must together preserve liberty and prevent unjust, and unconstitutional mass incarcerations in a Department of Corrections that is near a state of emergency already, by tearing the scales of justice, thus ending a further Langbeil at Harvard effect.

CONCLUSION

— For the foregoing reasons in the sake of justice, this petition,
the Petitioner prays, for a WRIT OF CERTIORARI should be GRANTED. —

RESPECTFULLY SUBMITTED,

On this the 19th day of November 2019



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