19-8355
No.

IN THE

Supreme Court of the United States

LANCEY DARNELL RAY,

Petitioner,

Vs.

KEVIN STITT, GOVERNOR

Respondent.

On Petition For a Writ Of Certiorari
To the Oklahoma Court of Civil Appeals
for the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

LANCEY D. RAY
NFCC
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Pro se Litigant

QUESTIONS PRESENTED

PREFACE TO QUESTIONS PRESENTED: Prisoners, by the very nature of their circumstances, are more than merely similarly situated; they are exactly situated. A prisoner's first opportunity for a parole consideration should therefore occur with some semblance of equal incidence. In Oklahoma, that would mean eligibility for a consideration for parole at one-third (1/3) or one-fourth (1/4) of the sentence imposed for all persons within the custody of the Department of Corrections as it had been before the adoption of 42 U.S.C.A. § 13704's 85% Rule.

QUESTIONS:

1. Whether 34 U.S.C.A. § 12104's (Formerly cited as 42 U.S.C.A. § 13704) 85% requirement mean to disturb States' settled parole statutes regarding eligibility for consideration for parole.

2. Has Petitioner presented a justiciable question of fact concerning whether Okla. Stat. tit 21 § 12.1's 85% Rule-adopted from 34 U.S.C.A. § 12104 (Formerly cited as 42 U.S.C.A. § 13704)-applied to eligibility for a consideration for parole, serve a legitimate state purpose.

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PETITION FOR WRIT OF CERTIORARI

Lancey D. Ray respectfully submits this petition for a writ of certiorari to the Oklahoma Supreme Court for the State of Oklahoma.

OPINIONS BELOW

The Oklahoma Court of Civil Appeals Order (Pet. App. A. 1a) affirming the District Court's Order is not published. The Oklahoma Court of Civil Appeals Order (Pet. App. B. 13a) To Respond to Petition for Rehearing is not published. The Oklahoma Court of Civil Appeals Order (Pet. App. C. 15a) Denying Petition for Rehearing is not published. The Oklahoma Court of Civil Appeals Order (Pet. App. D. 16a) Denying Plaintiff's Motion to Add Speaker of The House of Representatives and President Pro Tempore of The Senate for the Oklahoma State Legislature is not published. The District Court's Order (Pet. App. E. 17a) Sustaining Defendant's Motion To Dismiss is not published. The District Court's Order (Pet. App. F 20a) Denying Ray's Motion To Reconsider is not published. The Oklahoma Supreme Court's Order (Pet. App. G. 22a) Denying Certiorari is not published.

JURISDICTION

The Oklahoma Supreme Court entered its Order denying review on certiorari January 6, 2020. This Court has jurisdiction under 28 U.S.C.A. § 1257 (a). 28 U.S.C.A. § 2403 (b) may apply and this document shall be served on the Attorney General for the State of Oklahoma. As to whether the Oklahoma Court of Civil Appeals certified to the State Attorney General the fact that the constitutionality of the *parole clause* in 21 O.S. § 12.1 was drawn into question, the Petitioner can only offer that that court formulated Plaintiffs' *pro se* complaint, challenging the

constitutionality of said *parole clause* into a question and presented it to the state attorney who represented the Defendant Kevin Stitt. The federal questions perfected are now presented to this Court.

STATUTORY PROVISION INVOLVED

1. 28 U.S.C.A. § 1257 (a) which provides:

> 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.

2. 28 U.S.C. A. § 2403 (b) which provides:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

STATEMENT OF THE CASE

Petitioner Lancey D. Ray hailed from Atlanta, Georgia, U.S. Army First Lieutenant (RES.), Veteran of the War in Iraq and Veteran of 13 years 9 months and active duty service member when carried off, and introduced to the State of Oklahoma's criminal justice system. Ray is now a first-time convicted felon and one

of many inmates forced to serve 85% of the sentence imposed before becoming eligible for a parole consideration.

Petitioner has sought diligently to have the state courts recognize and acknowledge the facts presented in support of his claim that Oklahoma's Truth-in-Sentencing Act, specifically the *parole clause* in Okla. Stat. tit. 21 Section 12.1: ***one*** violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and ***two*** does so without achieving a legitimate state purpose and ***three*** is a detriment *fiscally* to the state in that it facilitates the warehousing of persons in both state and private prison facilities.

In 1999, adopted from 34 U.S.C.A. § 12104 (Formerly cited as 42 U.S.C.A. § 13704) under Chapter 136 Violent Crime Control and Law Enforcement, Oklahoma implemented a rather unique version of the 85% Rule. Per § 12104 however "To be eligible to receive a grant award under this section . . . such State has implemented truth-in-sentencing laws that . . . require persons convicted of a part 1 violent crime[1] to serve not less than 85 percent of the sentence imposed (without counting time not actually served, such as administrative or statutory incentives for good behavior)." *id.* The focus being the would-be truth-in-sentencing laws *i.e.* uniform "matrices and sentencing ranges" in which persons were to serve not less than 85% of the sentence imposed.

As to parole, States maintained their own individualized parole systems. Oklahoma has provided parole for state prisoners since 1947. Inmates, whether

[1] Per 34 U.S.C.A. § 12101 (Formerly cited as 42 USCA § 13701), "the term 'part 1 violent crime' means murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault."

convicted of a violent crime or of a nonviolent crime, with the exception of inmates sentenced to life without the possibility of parole, were all considered for parole at the completion of one-third (1/3) of the sentence imposed. On March 1, 2000, pursuant to Okla. Stat. tit 21 Sec. 12.1, the privilege of eligibility for consideration for parole for persons convicted of a violent crime was essentially abridged thereby.

1. Ray in 2017 petitioned to the Oklahoma Supreme Court for writ of prohibition concerning Okla. Stat. tit 21 Sec. 12.1's (85% Rule) *parole clause.* The court treated the application as one to assume original jurisdiction and petition for writ of prohibition. In its order filed November 6, 2017 the court explained "Petitioners do not show urgency or a pressing need for an early determination for the Court to exercise its concurrent jurisdiction" and "Petitioners must first bring their claim in the district court." All justices concurred.
2. Ray's "Complaint for Declaratory and Injunctive Relief..." was filed December 7, 2017 in the District Court of Oklahoma County for the State of Oklahoma. Petitioners asserted their rights to "equal protection of the laws" under the Fourteenth Amendment to the U.S. Constitution. 57 O.S. § 332.7 B is the law that persons convicted of a part 1 violent crime are denied the equal protection of. The longstanding statute dates back to 1947. Petitioner argued, that pursuant to Sec. 332.7 B, with the exception of persons serving a life sentence without the possibility for parole, all persons had been considered for parole at the completion of one-third (1/3) of the sentence imposed.

Ray argued "the specific clause in Section 12.1 of title 21 reading '**Such persons shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed**'" on no rational basis, treated similarly situated persons, *i.e.* prisoners, differently and violated the Fourteenth Amendment to the U.S. Constitution. In pertinent part, petitioner argued:

> 1. This is an action for Declaratory Relief pursuant to Okla. Stat. tit 12 § 1652 [(D) (2)]:
> A determination of rights, status, or other legal relations may be obtained by means of a pleading seeking that relief alone or as incident to or part of a petition, counterclaim, or other pleading seeking other relief, and, when a party seeks other relief, a court may grant declaratory relief where appropriate.
>
> 2. Petitioners are inmates in the custody of the Oklahoma Department of Corrections (ODOC) confined at the North Fork Correctional Center in Sayre, Oklahoma.
>
> 3. This action involves a challenge to the constitutionality of the specific clause in Section 12.1 of Title 21 reading **"Such person shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed"** where the statutory class of inmates in the custody of ODOC is treated differently in violation of the *Equal Protection* clause of the 14th Amendment to the United States Constitution. The statutory class of inmates, via the challenged clause, does not become eligible for consideration for parole at the completion of one-third (1/3) of the sentence imposed, whereas inmates not of the statutory class become eligible for consideration for parole at the completion of one-third (1/3) of the sentence imposed - pursuant to Okla. Stat. tit 57 Section 332.7 *Subsection B* –the law which actually governs consideration for parole in the State of Oklahoma.
>
> 4. There is no rational basis for the distinction drawn to justify continued enforcement of the challenged clause; the difference in treatment does not achieve a conceivable legitimate state purpose. Oklahoma State Bureau of Investigation (Uniform Crime Reporting Department) reports that violent crimes totaled 17,177 in year 2000 –the year the 85% requirement was first applied. Between the years 2000 and 2015, an average of 17,681.38 violent

crimes occurred. That is an increase by 502.38 of violent crimes. Those numbers represent on average a 2.9% increase in violent crimes in Oklahoma since implementation of the challenged clause. See graphical representation of data gathered by OSBI Uniform Crime Reporting Department for type 1 violent crime attached hereto.

5. As a result of the challenged clause forcing the statutory class of inmates to serve eighty-five (85%) of the sentence imposed before eligibility for consideration for parole, Oklahoma's Department of Corrections' population exceeds 100% capacity. While prison receptions by ODOC for violent offenses increased, the number of paroled inmates decreased by 74%: E.g. In the year 2004 2,210 inmates convicted of violent offenses were processed into ODOC. In 2004 2,238 inmates were paroled. In year 2013, 2,539 persons convicted of a violent crime processed into ODOC, but only 576 inmates paroled that year. See graphical representation of data extracted from the Offender Management System attached hereto.

6. That due to the fact that no conceivable legitimate state purpose is achieved, -in terms of "rational basis" *i.e.* Crimes deterrent and public safety, - the statute unjustifiably denies the statutory class of inmates of the right to equal protection of the law *i.e.* Okla. Stat. tit 57 § 332.7 *Subsection B.*

7. That due to the fact that the challenged statute unjustifiably denies the statutory class of inmates equal protection of the law, the petitioners request of the Court an Order providing declaratory relief with corresponding injunctive relief in regard to the class as a whole, by injunction to prohibit enforcement of the challenged clause i.e. Section 12.1 requiring that "**Such person shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed**".

8. Petitioners acknowledge that the State Legislature has the authority to prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole; however, **the challenged statute must be rationally related to a legitimate state objective** and the difference in treatment of persons must not be completely disparately arbitrary.

> Petitioners are prepared to show in brief that: (1) by forcing the statutory class of inmates to serve 85% of the sentence imposed prior to eligibility for parole consideration violates the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution; and (2) in terms of a rational basis *i.e.* crime deterrent and public safety, the challenged clause fails to achieve a conceivable legitimate state purpose; therefore, there is no justification for the continued enforcement of the challenged clause.

See Pet. Compl. 2a-4a

Relying on the Oklahoma Supreme Court case *Thayer v. Phillips Petroleum Co., Okla.*,[2] Ray argued Sec. 12.1's parole clause denies persons of the created class a reasonable opportunity for equal incidence clearly seen in the amount of time to be confined before eligible to be considered for parole while other persons confined are eligible at one-third of the sentence imposed.

The state attorney, in a motion to dismiss, focused on the "strict scrutiny" standard of review pertaining to race, alienage or ancestry and ignored the "rational basis" test which generally applies to the facts in the instant case. Moreover the state attorney argued "Plaintiffs have failed to state a claim upon which relief can be granted." In error the attorney further argued "Plaintiffs here challenge the constitutionality of 21 O.S. § 13.1 [*sic*]...." In response Petitioners argued the state attorney's motion was frivolous in violation of Okla. Stat. tit 12 § 2011 E,[3] and should be overruled. Petitioners explained "the state attorney erred in his understanding of Plaintiffs' complaint for relief" and "for the sake of the state

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[2] 613 P. 2d 1041 (1980)

[3] As used in this section, "frivolous" means the action or pleading was knowingly asserted in bad faith or **without any rational argument based in law or facts to support the position of the litigant** or to change existing law.

attorney, Plaintiffs recite and clarify" that of course the complaint involves Section 13.1, however Section 12.1 (85% Rule) with its *parole clause* is the provision complained of that denies equal protection to persons convicted of a crime enumerated in Section 13.1. *See* Pet. Resp. to Def. Mot. 12a-20a.

The court's order sustaining the motion to dismiss was filed May 7, 2018, but not on the ground Plaintiffs did not state a claim. The court in its order conceded "To date, no appellate decision in Oklahoma has addressed the specific issues raised by Plaintiff". *See* Pet. App. E 18a. That court however declined to adjudicate Plaintiffs' claims for injunctive relief based on the facts presented.

Furthermore the court explained: "[t]he Legislature has the authority to establish the appropriate sentences for different crimes" and "Thus, an equal production [*sic*] challenge against a particular scheme for the punishment of crimes must fail." In that instance the court erred in its understanding of Plaintiffs' complaint, which draws into question the constitutionality of said parole clause in Section 12.1.

The plaintiff's complaint was "dismissed without prejudice". *See* Pet. App. E 18a.

In a "Motion to Reconsider Judgment" filed May 18, 2018, Plaintiffs asserted their claims had neither been adjudicated (1) on the facts nor (2) on the merits.

In response the state attorney conceded "this case was determined on the pleadings, the Court did not weigh any evidence". And though the attorney acknowledged Plaintiffs' motion was timely filed, he attempted to raise concerns as

to its timeliness. That attorney wrote "It appears that the Plaintiffs-by waiting 11 days to file their motion-missed this deadline."

In reply the Plaintiffs, relying on Okla. Stat. tit 12 Sec. 1031 Para 3.,[4] argued and showed proof though the court's order was filed May 7, 2018: (1) the "certificate of mailing" dated and signed the next day on May 8, 2018 by the court clerk. *See* Pet. App. E 19a. Thus May 18, 2018, was the tenth day or the deadline from the time the court's order to dismiss without prejudice was mailed to Plaintiff and (2) the court clerk did not certify the "order sustaining defendant's motion to dismiss" until the following day on May 9, 2018. *See* Pet. App. E 18a.

In the court's order denying Plaintiff's motion to reconsider its judgment, it explained "Having determined that the Defendant's motion may be considered without a hearing, pursuant to District Court Rule 4(h), and for good cause shown..." ... "[N]o just cause has been shown by Plaintiff Ray for reconsideration of the Court's order of May 7, 2018. It is unclear however from the order why for the second time the court declined to address the issues raised and adjudicate on the merits or facts presented. *See* Pet. App. F 20a.

3. On appeal in the Oklahoma Court of Civil Appeals, Petitioner Ray presented two points of law alleged as error with his complaint that Okla. Stat. tit 21 Sec. 12.1: (1) violates his right to equal protection of the law, and (2) "there is no rational basis for the distinction drawn to justify continued enforcement of the challenged clause; the difference in treatment does not achieve a conceivable

[4] Per Sec. 1031 Para 3 "The district court shall have power to vacate or modify its own judgments or orders within the times prescribed here after: ... 3. For mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order."

legitimate state purpose." *See* Pet. Err 33a-36a. With respect to the two points of law alleged as error, Petitioner raised two claims asserting rights under Okla. Stat. tit 12 Sections 683, 1652, and 2024.

Section 683 provides "In all other cases, upon the trial of the action, the decision must be upon the merits." Petitioner argued "the district court failed to adjudicate his claims for declaratory relief on the merits." Petitioner further asserted his rights under the state provision Section 1652[5].

The State had not presented any evidence. Relying on the state provision Section 2024[6], Petitioner argued, "The court did not adjudicate plaintiffs' claims for injunctive relief based on the facts."

In response the state attorney focused on Section 13.1 (the enumerated list of offenses that if convicted of, Section 12.1's "85% Rule" parole clause applies).

Citing *F.C.C. v. Beach Communications, Inc.*, the state attorney acknowledged "A statutory classification is constitutional under rational basis scrutiny so long as 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *id.* The attorney argued "[t]his legislation survives rational basis review" and that the claim fails and must be denied. The attorney however (1)

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[5] Per § 1652 "A determination of rights, status, or other legal relations may be obtained by means of a pleading seeking that relief alone or as incident to or part of a petition, counterclaim, or other pleading seeking other relief, and, when a party seeks other relief, a court may grant declaratory relief where appropriate...."

[6] Per § 2024 D. Para 1 "In any action, suit, or proceeding to which the State of Oklahoma or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of this state affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the State of Oklahoma to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality."

ignored the facts in this case that show the opposite and (2) contrary to state law, failed to present any evidence for argument on the question of constitutionality. *See* Okla. Stat. tit 12 Sec. 2024 D. 1., requiring the court to "permit the state of Oklahoma to intervene for presentation of evidence...and for argument on the question of constitutionality." *id.* at n. 6

In affirming the district court's decision the court of civil appeals erred in its understanding of Appellant's equal protection claim. The court stated, in reference to the appellant, "He alleges that he, as an offender required to serve a minimum of eighty-five percent of his imposed sentence without [*sic*] the possibility of parole under Section 13.1, is treated differently than those similarly situated, namely those offender convicted of crimes not enumerated in Section 13.1." In *State v. Ray* (CF-2010-571), the court imposed sentence with the possibility of parole.

Furthermore the appellate court acknowledged (1) "The Legislature has provided in Section 13.1 in an attempt to protect the population...and to deter criminal activity" but without any consideration for the facts presented by the Appellants, that show otherwise, the court stated (2) "there is a rational basis for disparate treatment of Section 13.1 and that the challenged provision does not violate the Equal Protection Clause". *See* Pet. App. A 11a.

Although the appellate court cited (1) the Tenth Circuit case *Barney v. Pulsipher,*[7] wherein the court held "In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated

[7] 143 F. 3d 1299, 1312 (10th Cir. 1998)

differently from others who were similarly situated to them" the occurrence of which in the instant case the state appeals court acknowledged, and (2) the Tenth Circuit case *Riddle v. Mondragon,*[8] when the court held "a statutory distinction will not be set aside under a rational basis review if 'any state of facts reasonably may be conceived to justify it.'" The state attorney however did not present any facts neither did he present any evidence for the court to determine whether continued enforcement of the challenged parole clause is justified.

Finally the appellate court stated "Plaintiff doesn't argue that he is treated differently than those inmates convicted of the same crime he was convicted of or a different crime enumerated in Section 13.1" and "nor has he shown that he is being treated differently than those inmates convicted of the crime he was convicted of or a different crime set forth in Section 13.1" *See* Pet. App. A 10a-11a. The court added "Plaintiff has not established that he was treated differently from other similarly-situated persons and, therefore, failed to state an Equal Protection claim" *id* at p. 11a. The court missed the point. Persons convicted of crimes enumerated in Section 13.1 ***are*** treated differently per Section 12.1 from persons convicted of crimes not enumerated in 13.1 in that Section 12.1 requires the created class to serve 85 percent of the sentence imposed before eligibility for a parole consideration. Nonetheless, fact is Ray and other inmates are treated differently-within the class-than those inmates convicted of the same crime he was convicted of or a different crime enumerated in Section 13.1.

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[8] 83 F. 3d 1197, 1207 (10th Cir. 1996)

4. Aggrieved by the Court of Civil Appeals decision, Ray petitioned for rehearing. Additionally, in the event any one of the sitting justices were stockholders in the private prison industry or of its subsidiaries, Ray motioned for judges to disqualify themselves where applicable. In his petition Ray expounded upon the fact that (1) the 85% Rule contributes significantly to prison overcrowding in Oklahoma and (2) the correlation to private prisons. Ray cited the 2005 annual report for the Corrections Corporation of America (Core Civic) where it explained in a filing with the Securities and Exchange Commission:

> Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and **sentencing patterns** in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, **leniency in conviction and sentencing practices** or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, **any changes** with respect to drugs and controlled substances or illegal immigration **could affect the number of persons arrested, convicted and sentenced, thereby potentially reducing demand for correctional facilities to house them**.

In its May 6, 2019 order, the court formulated the question, prefaced with specific directions to the Appellee which read:

> [t]he Appellee is directed to respond to the petition for rehearing. In addition to any other content, the Appellee's response shall address Appellant's argument to the effect that the rationale for the subject 85% sentencing provision is to provide an inmate population for the benefit of private prisons. In this regard, Appellee is directed to the petition for rehearing, starting with the last paragraph page 6, beginning "The 2006 annual report" ending on page 8, line 3. The response shall state

> the views of Appellee on the question: **Has Appellant presented a justiciable question of fact concerning whether there is a legitimate state purpose for the 85% provision?**

See Pet. App. B 13a-14a.

In response the state attorney presented four propositions. In his third proposition the attorney argued "This Court should therefore decline Appellants request to redefine the terms of incarceration set forth at 21 O.S. § 13.1 [*sic*], as the criminalization and consequent punishment for behaviors is squarely delegated to the wisdom of the people through the Legislature" and "the Court should deny Plaintiff's request to scrutinize the State of Oklahoma's policy of using private prison contracts because the Oklahoma Legislature vested the Oklahoma Department of Corrections with the discretion and authority to provide for the incarceration of inmates at private prison when necessary. Okla. Stat. tit 51[*sic*], § 561."[9]

The attorney didn't mention however the fact that in May 2002, two years after the parole clause was implemented, Section 561 (B) was amended to accommodate for private prison contractors. *See* Section 561 (B) "Amended by Laws 2002, c. 350, § 1, emerg. eff. May 30, 2002; Laws 2012, c. 304, § 255" the provision authorizing "The Department of Corrections. . .to lease existing facilities or portions thereof from private prison contractors. . .and operate such facilities or portions thereof in the same manner as other state owned and operated prison facilities." Nonetheless,

[9] Okla. Stat. tit 57 § 561 et seq. Incarceration, supervision and treatment at other than department facilities - Services offered - Standards - Private prison contractors.

Okla. Stat. tit 57 Section 561 (B) was created to specifically "provide for the operation of Correctional Institutions of the Department of Private Prison Contractors".

Additionally the attorney ignored the fact that obviously more prisons become necessary as the 85% Rule stands, especially when so applied (1) towards eligibility for a consideration for parole and (2) applied without the truth-in-sentencing laws i.e. prescribed uniformed "matrices and sentencing ranges".[10]

Although no liberty interest created in parole in Oklahoma, surely enforcing eligibility for parole at 85 percent of the sentence imposed without implementation of truth-in-sentencing laws i.e. "matrices and sentencing ranges" exacerbates the demand for bed space.

The state attorney (1) ignored the court's directive regarding a response to "Has Appellant presented a justiciable question of fact concerning whether there is a legitimate state purpose for the 85% provision?" and (2) failed to seek intervention from the Speaker of the House of Representatives and the President Pro Tempore of the Senate as provided by law (Okla. Stat tit 12 § 2024 D Para 2)[11], which provides for "intervene [tion] on behalf of their respective house of the Legislature" and who "shall be entitled to be heard." *id.* Relying on Okla. Stat. tit 12 Sec. 2021, Ray

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[10] Per 34 U.S.C.A. § 12104 B (Formerly cited as 42 U.S.C.A. § 13704 B), the states who had enacted truth-in-sentencing laws i.e. "matrices and sentencing ranges", but not yet implemented them, were given three (3) years to implement said laws from the date "such State submits an application to the Attorney General" *Id.*

[11] Per 12 O.S. § 2024 D Para 2, "upon receipt of notice pursuant to paragraph 1 of this subsection or other actual notice that the constitutionality of any statute of this state affecting the public interest is drawn into question, the Attorney General shall immediately deliver a copy of the proceeding to the Speaker of the House of Representatives and President Pro Tempore of the Senate who may intervene on behalf of their respective house of the Legislature...".

sought to add Speaker of the Oklahoma House of Representatives and President Pro Tempore of the Senate as defendants in his suit.

Nonetheless, both the Petition for Rehearing and motion to add respective house leaders were denied. The motion requesting judges to disqualify themselves, if applicable, was also denied.

5. Ray timely filed a Petition for Certiorari to the Oklahoma Supreme Court. Ray argued "The Court of Civil Appeals decided the question of constitutionality of the 85% provision, which has not heretofore been determined by the Oklahoma Supreme Court" or any appellate court for that matter and "The Court of Civil Appeals sanction of the district court's departure from the accepted and usual course of judicial proceedings-in this instance, disregard for the facts and law relating to the question of constitutionality of the 85% provision-calls for the exercise of the Oklahoma Supreme Court's power of supervision." In support of his arguments Ray presented the facts in dispute. The Oklahoma Supreme Court denied Ray's Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

Ray has presented a justiciable question of fact concerning whether the Okla. Stat. tit 21 § 12.1's 85% Rule applied to eligibility for a consideration for parole serve a legitimate state purpose. As opposed to a political question which involves (1) a political matter that is not justiciable without infringing on the powers of the executive or legislative branch or (2) is not accompanied by guiding policy or (3) discoverable and manageable standards for resolving it: The questions

presented involve the encroaching of a specific "Crimes and Punishments"[12] provision on a "prison and reformatory"[13] provision whereby the created class is denied equal protection of the "prison and reformatory" parole provision for no rational basis.

Understood, the powers of states in dealing with crime within their borders are not limited by the Fourteenth Amendment to the Federal Constitution, except for the important qualification that no state can deprive classes of persons-even statutory classifications-of equal protection under the law. And though the equal protection clause gives states a wide scope of discretion in enacting criminal laws, which affect some groups differently from others, the Fourteenth Amendment does exist to forbid arbitrary discrimination by the states against classes. This Court in *McGowen v. Maryland,*[14] held that constitutional safeguard is offended if classification rests on grounds wholly irrelevant to achievement of state's objective.

I. OKLAHOMA APPELLATE JUDGES HAVE DISSENTING OPINIONS ABOUT OKLAHOMA'S UNIQUE APPLICATION OF THE OKLAHOMA TRUTH-IN-SENTENCING ACT REGARDING DISPROPORTIONATE SENTENCING AND PAROLE ELIGIBILITY.

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[12] Okla. Stat. tit 21. Crimes and Punishments

[13] Okla. Stat. tit 57. Prisons and Reformatories, Consideration for Parole, Section 332.7 Subsection B

[14] 366 U.S. 420, 81 S Ct. 11016, L Ed. 2d 393; *See also, Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) where this Court held "Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. (*Citation omitted*) It implies that the decision maker...selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of', its adverse effects upon an identifiable group."

Reasonable jurists would agree with the following sentiment. In her marvelous wisdom and foresight Judge Chapel[15] of the Oklahoma Court of Criminal Appeals, twenty years ago, wrote:

> Disproportionate sentencing does nothing to advance the goals of punishment. Indeed, disproportionate sentences undermine the public's confidence in our system. A sentence of forty years to one defendant and four years to another for similar crimes cannot be justified except perhaps in some third world dictatorship.

Judge Chapel explained:

> Oklahoma now incarcerates more of its citizens for longer sentences than any other state in the nation. What most citizens do not know, however, is that the real explosion in the costs of incarceration is yet to come...Our prison population is not only getting larger it will inevitably get older.

Judge Chapel further reasoned:

> In the next 20 years as these prisoners reach old age they will begin to require huge outlays of state resources for their medical expenses and incarceration. The legislature attempted to address this problem with truth in sentencing legislation but was beaten down. I have attempted to address this problem in a modest way by suggesting that this Court's review of sentences is inadequate and results in unconstitutional disproportionate sentences...But there will be change. There will have to be. Otherwise, this state will bankrupt itself by ridiculous sentences which serve no legitimate purpose.

Now twenty years later, in 2020, not having implemented truth-in-sentencing laws i.e. uniformed "matrices and sentencing ranges", no significant changes in sentencing practices have been made.

The issue however before this Court concerns the *parole clause* inserted in Okla. Stat. tit 21 § 12.1 where the 85 percent requirement is applied to eligibility for a

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[15] *See, Harley Satterfield v. State,* 2000 OK CR 346, n. 1, (Chapel, J. concurring in part and dissenting in part) (May 15, 2001) not for publication. Attached hereto.

consideration for parole. Pertaining to that very same issue, six years after 12.1's parole clause was implemented, the Court in *Anderson v. State,*[16] wrote: "On March 1, 2000, legislation enacting Oklahoma's 85% Rule went into effect. This legislation was part of a 'truth in sentencing' movement nationwide" and "The legislature has acted again, creating a specialized area of law regarding parole eligibility for specific serious felonies" and "application of the 85% Rule is determined by statute, before a defendant is convicted, sentenced, or imprisoned."

The court further held "The Oklahoma Pardon and Parole Board currently, and for the past several years, has provided that parole for any sentence over 45 years, including a life sentence, is calculated based upon a sentence of 45"[17] and "In determining the application of the 85% Rule to a life sentence, we take into account the Oklahoma Pardon and Parole Board provision that parole for any sentence over 45 years, including a life sentence, is calculated based upon a sentence of 45 years" *Anderson* Supra at ¶ 24.

Judge Lumpkin of the Oklahoma Court of Criminal Appeals acknowledged that "21 O.S. 2001, § 12.1, the so-called 85% Rule, mandates that a defendant who is convicted of certain crimes must serve 'not less than eighty-five percent (85%) of the sentence of imprisonment imposed' before becoming eligible for parole consideration." *Anderson v. State,* 2006 OK CR 6, n.1, 130 P. 3d 273, (Lumpkin, V.P.J.: concurring in part/dissenting in part).

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[16] 2006 OK CR 6, ¶ 11, 130 P. 3d 273

[17] Oklahoma Pardon and Parole Board Policy 004 I.A.3. a.

In his keen insight in this regard, Judge Lumpkin explained "85% of a life sentence is not discernable with any mathematical certainty....It would be more accurate on an individual basis to use the actuarial mortality tables used by insurance companies to say when an inmate can be considered for parole rather than the one size fits all approach here, and even that would tend to change over time" and "what constitutes service of 85% of a life sentence is anybody's guess . . . For these reasons, I dissent to the methodology adopted to apply the provisions of 21 O.S. 2001, § 12.1, to life sentences." *Anderson v. State,* 2006 OK CR 6, ¶¶ 4-5, 130 P. 3d 273 (Lumpkin, V.P.J.: concurring in part/dissenting in part).

Judge Lewis added "I concur with the Court's opinion that the Legislature's enactment of 21 O.S. 2001 § 12.1, the 85% Rule, changed the traditional understanding of parole." *Anderson v. State,* 2006 OK CR 6, ¶1, 130 P. 3d 273, (Lewis, J., specially concurring)

A. Before Sec. 12.1, under Oklahoma's "Forgotten Man Act", every person became eligible for a parole consideration on or before the completion of one-third of the sentence imposed.

Before Oklahoma implemented Sec. 12.1's 85% Rule there was no question as to equal incidence of parole consideration because every inmate was eligible for a parole consideration at the completion of the one-third of the sentence imposed. The Tenth Circuit Court of Appeals acknowledged as much in *Shirley v. Chestnut,*[18] where the court stated "Pursuant to the Forgotten Man Act, 57 Okl. Stat. Ann. § 332.7 (1971), every inmate must be considered for parole on or before the expiration

[18] 603 F. 2d 805 (10th Cir. 1979)

of one-third of his maximum sentence. In addition, any inmate serving 45 years or more, including a life sentence, shall be considered for parole or clemency after serving 15 years. *See* Rules of the Board, 57 Okl. Stat. Ann., Chap. 7, App. (Supp. 1977)." *id.*

II. THIS COURT SHOULD CLARIFY THAT 34 U.S.C.A. § 12104 (Formerly cited as 42 U.S.C.A. § 13704) MANDATES THAT STATES RECEIVING GRANTS IMPLEMENT TRUTH-IN-SENTENCING LAWS THAT REQUIRE PERSONS CONVICTED OF A PART 1 VIOLENT CRIME TO SERVE NOT LESS THAN 85 PERCENT OF THE SENTECE IMPOSED DOES *NOT* CONCERN PAROLE.

In 1984, the U.S. Congress abolished parole for federal prisoners and moved to a system of fixed prison terms i.e. definite terms. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98. Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559).

See 34 U.S.C.A. § 12104 (Formerly cited as 42 U.S.C.A. § 13704) provides-in pertinent part:

> **(a) Eligibility**
> To be eligible to receive a grant award under this section, a State shall submit an application to the Attorney General that demonstrates that-
>
> **(1)(A)** such State has implemented truth-in-sentencing laws that--
> **(i)** require persons convicted of a part 1 violent crime to serve not less than 85 percent of the sentence imposed (without counting time not actually served, such as administrative or statutory incentives for good behavior); or
> **(ii)** result in persons convicted of a part 1 violent crime serving on average not less than 85 percent of the sentence imposed (without counting time not actually served, such as administrative or statutory incentives for good behavior);

> **(B)** such State has truth-in-sentencing laws that have been enacted, but not yet implemented, that require such State, not later than 3 years after such State submits an application to the Attorney General, to provide that persons convicted of a part 1 violent crime serve not less than 85 percent of the sentence imposed (without counting time not actually served, such as administrative or statutory incentives for good behavior); or
> **(C)** in the case of a State that on April 26, 1996, practices indeterminate sentencing with regard to any part 1 violent crime--
> **(i)** persons convicted of a part 1 violent crime on average serve not less than 85 percent of the prison term established under the State's sentencing and release guidelines; or
> **(ii)** persons convicted of a part 1 violent crime on average serve not less than 85 percent of the maximum prison term allowed under the sentence imposed by the court (not counting time not actually served such as administrative or statutory incentives for good behavior)

Thus no parole provision was created in 34 U.S.C.A. § 12104 (Formerly cited as 42 U.S.C.A. § 13704).

A. 34 U.S.C.A. § 12104 (Formerly cited as 42 U.S.C.A. § 13704) does not apply to a state's parole statute regarding eligibility for consideration for parole of part 1 violent crimes.

The point on the issue of no parole provision in § 12104 is unmistakable. Naturally, parole is the release of a prisoner from imprisonment before the full sentence has been served (Black's Law Dictionary (8th ed. 2004)). "The essence of parole is release from prison, before completion of the sentence, on condition that the prisoner abide by certain rules during the balance of the sentence. Parole is not freedom." 59 Am. Jur. 2d Pardon and Parole § 6 (1987). Nonetheless, the only system discussed in § 12104 remotely close to a parole system is an individual

state's practice of "indeterminate sentencing". Supra at (C) (i) (ii). *See* 34 U.S.C.A. § 12101[19] (Formerly cited as 42 USCA § 13701).

Oklahoma practices only one indeterminate sentence, which is the life sentence with the possibility of parole. Following the 34 U.S.C.A. § 12104 (C) (i) (ii) mandate that persons serve "not less than 85 percent of the prison term established under the State's sentencing and release guidelines; or . . . not less than 85 percent of the maximum prison term allowed under the sentence imposed by the court" the 85% Rule in Oklahoma generally forces persons convicted of a part of a part 1 violent crime to serve 38.25 years flat before eligible for a consideration for parole on a life sentence.

In the instant case, contrary to the Oklahoma Court of Civil Appeals holding that: "Plaintiff doesn't argue that he is treated differently than those inmates convicted of the same crime he was convicted of or a different crime enumerated in Section 13.1" and "nor has he shown that he is being treated differently than those inmates convicted of the crime he was convicted of or a different crime set forth in Section 13.1" Pet. App. A10a-11a: the disparate treatment among the class is evident. That specific disparate treatment is a result of not implementing the truth-in-sentencing laws' uniform "matrices and sentencing ranges".

Moreover the Okla. Stat. tit 21 Sec. 12.1 parole clause is preceded by 22 O.S. § 991a. Section 991a directs district courts to suspend any sentence, including a life

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[19] Per 34 U.S.C.A. § 12101: (1)the term 'indeterminate sentencing' means a system by which (A) the court may impose a sentence of a range defined by statute; and (B) an administrative agency, generally the parole board, or the court, controls release within the statutory range.

sentence, "in whole or in part".[20] However whether the sentence is suspended "in whole or in part" is left to the court's discretion. E.g.: John W. Powell, prior felony convictions, was convicted of one count of Murder and one count of Attempted Robbery with a Firearm and was sentenced to two life sentences "with all but the first 32 years and 6 months suspended" ran concurrent (Case no. CF-2012-3786). At 85 percent of the sentences imposed, Powell becomes eligible for a consideration for parole after serving 27.62 years. And Morgan Cline, first time conviction, was convicted of Murder and was sentenced to a life sentence "with all but the first 35 years suspended" (Case no. CF-2009-2556). At 85 percent of the sentences imposed, Cline becomes eligible for a consideration for parole after serving 29.75 years. The State's otherwise indeterminate life sentences imposed on Powell and Cline become determinate as these men will inevitably be released from prison-Powell after he's served 32 years and 6 months and Cline after he's served 35 years-despite a parole board's unfavorable recommendation.

Contrary to principles of equal protection, in Oklahoma not every defendant convicted of a crime listed in Section 13.1 is afforded a suspended sentence. E.g.: Lancey D. Ray, first time conviction, was convicted of Murder and sentenced to the general term of life with the possibility of parole. At 85 percent of the sentence imposed, Ray becomes eligible for a consideration for parole after serving 38.25 years.

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[20] 21 O.S. § 991a. Sentencing powers of court - - A. Except as otherwise provided in the Elderly and Incapacitated Victim's Protection Program, when a defendant is convicted of a crime and no death sentence is imposed, the court shall either:

1. Suspend the execution of sentence in whole or in part, with or without probation.

As long as the 85% Rule applies to eligibility for a parole consideration, other than the actual granting of parole, there is no release date per se for other persons sentenced to a general term of life imprisonment like Ray. Judge Lewis acknowledged as much when he stated "Defendants sentenced to life imprisonment in this way remain under that sentence all of their days, and obtain their liberty only after a recommendation from the Pardon and Parole Board, and then only conditionally, under terms dictated by the Governor, if ever." *Anderson v. State,* 2006 OK CR 6, ¶2, 130 P. 3d 273, (Lewis, J., specially concurring).

As to "the State's sentencing and release guidelines" discussed in (C) (i), again Oklahoma did not implement the uniformed sentencing guidelines of its truth-in-sentencing act, rather it repealed the section relating to uniform "matrices and sentencing ranges". *See* Pet. Exh. B. Completely at the discretion of the court, it selects from very broad sentencing ranges the sentence to impose-which more often than not results in unequal treatment. E.g. under 21 O.S. § 800 for a first time conviction for the crime of conjoint robbery, the penalty is a sentence of not less than 5 years in the penitentiary or for not more than 50 years. Thus where persons are similarly circumstanced i.e. convicted of the same crime, but sentenced differently equal protection is prohibited.

And because the federal law i.e. 34 U.S.C.A. § 12104 provided:

> [t]o be eligible to receive a grant award under this section . . . such State has truth-in-sentencing laws that have been enacted, but not yet implemented, that require such State, not later than 3 years . . . to provide that persons convicted of a part 1 violent crime serve not less than 85 percent of the sentence imposed . . . .

This Court, has authority to order Oklahoma to implement truth-in-sentencing laws-retroactively and progressively-for persons presently confined, convicted of the crimes targeted by Section 12.1 of Oklahoma's truth-in-sentencing act.[21]

As to the application of the 85% Rule to eligibility for consideration for parole for the created class, it furthers no legitimate state purpose. Under the rational basis test, a classification is constitutional if there is a legitimate state purpose which is furthered by the classification. As rational basis requires that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.

B. 34 U.S.C.A. § 12104 (Formerly cites as 42 U.S.C.A. § 13704) neither its progenitor did not mean to disturb Oklahoma's nor any state's settled parole statute regarding eligibility for consideration for parole.

34 U.S.C.A. Section 12104, via Section 12102, meant only to ensure that the State has *one* implemented truth-in-sentencing laws and *two* that require persons convicted of a part 1 violent crime to serve not less than 85 percent of the sentence imposed. Section 12104 Supra at (1) (A). Section. 12102 provided:

> **(a) In general**
> The Attorney General shall provide Violent Offender Incarceration grants under section 12103 of this title and **Truth-in-Sentencing Incentive grants under section 12104** of this title to eligible States--
> **(1)** to build or expand correctional facilities to increase the bed capacity for the confinement of persons convicted of a part 1 violent

[21] Per 34 U.S.C.A. § 12108 - - Authorization of appropriations (Formerly cited as 42 USCA § 13708): "There are authorized to be appropriated to carry out this part - -
(A) $997,500,000 for fiscal year 1996;
(B) $1,330,000,000 for fiscal year 1997;
(C) $2,527,000,000 for fiscal year 1998;
(D) $2,660,000,000 for fiscal year 1999; and
(E) $2,753,100,000 for fiscal year 2000.

crime or adjudicated delinquent for an act which if committed by an adult, would be a part 1 violent crime;

(2) to build or expand temporary or permanent correctional facilities, including facilities on military bases, prison barges, and boot camps, for the confinement of convicted nonviolent offenders and criminal aliens, for the purpose of freeing suitable existing prison space for the confinement of persons convicted of a part 1 violent crime;

(3) to build or expand jails; and

(4) to carry out any activity referred to in section 3797w(b) of this title.

(b) Regional compacts

(1) In general

Subject to paragraph (2), States may enter into regional compacts to carry out this part. Such compacts shall be treated as States under this part.

(2) Requirement

To be recognized as a regional compact for eligibility for a grant under section 12103 or 12104 of this title, each member State must be eligible individually.

(3) Limitation on receipt of funds

No State may receive a grant under this part both individually and as part of a compact.

(c) Applicability

Notwithstanding the eligibility requirements of section 12104 of this title, a State that certifies to the Attorney General that, as of April 26, 1996, such State has enacted legislation in reliance on this part, as enacted on September 13, 1994, and would in fact qualify under those provisions, shall be eligible to receive a grant for fiscal year 1996 as though such State qualifies under section 12104 of this title.

Furthermore the U.S. Supreme Court recognized the value of legitimate parole systems created by a republic on principles of democracy. The Court in *Morrissey v. Brewer,*[22] explained "Parole is an established variation of imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the

[22] 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)

sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.'

III. OKLAHOMA'S COURTS HAVE YET TO (1) REACH THE MERITS AND (2) ANALYZE THE FACTS THAT TEND TO SHOW NO LEGITIMATE STATE PURPOSE ACHIEVED, HENCE NO RATIONAL BASIS FOR § 12.1'S (85% RULE) APPLIED TOWARDS ELIGIBILITY FOR A CONSIDERATION FOR PAROLE.

This Court in *Armour v. City of Indianapolis, Ind.*,[23] held "we are not to 'pronounc[e]' . . . classification 'unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators'". Ray, herein below, makes known the facts that are of such a character that reasonably preclude the assumption that Oklahoma Stat. tit 21 Section 12.1's (85% Rule) *parole clause*, applied to persons convicted of crimes enumerated in Section 13.1, rests upon some rational basis. In other words the facts show that the eighty-five percent requirement before parole eligibility does not rest upon a rational basis within the knowledge and experience of the Oklahoma State Legislature. *See, Harley Satterfield v. State,* 2000 OK CR 346, n. 1, (Chapel, J. concurring in part and dissenting in part) (May 15, 2001) not for publication. Supra. *See* Sup. Ct. R. 10 (c).

A. This Court should analyze the facts presented to determine whether the 85% Rule applied towards parole eligibility is rationally based.

[23] 566 U.S. 673, 132 S. Ct. 2073, 182 L. E. 2d 988 (2012)

This Court should conduct the necessary rational basis test regarding the question whether the 85% Rule applied to eligibility for a consideration for parole serve a legitimate state purpose-in light of the following verifiable facts:

1. The (OSBI) Oklahoma State Bureau of Investigation-Uniform Crime Reporting Department (UCR) reports that violent crimes totaled 17,177 in year 2000 –the year the 85% provision was initiated. Between years 2000 and 2015, an average of 17,681.38 violent crimes occurred. Those numbers represent an increase by 502.38 of violent crimes. These numbers represent on average a 2.9% increase in violent crimes in Oklahoma since implementation of the 85% Rule.
2. Murders reported in 2017 were the highest for the ten-year period (2008-2017). The number of murders increased 16.0% from 2008 to 2017. The number of rapes increased 53.9% from 2011 to 2017. The number of robberies decreased 18.8% from 2008 to 2017. After reaching a ten year low in 2014, the number of aggravated assaults continued to increase in 2017; however, the number of aggravated assaults decreased 9.7% from 2008 to 2017". *See* Pet. Exh. A #1. Per OSBI's Uniformed Crime Prevention Program, violent crime "Consists of the index crimes of murder, rape, robbery, and aggravated assault". "Manslaughters...are excluded" from the report. Pet. Exh. A #2.
3. In Oklahoma: In 2017 MURDERS accounted for 1.4% of all violent crimes. LEA reported 246 murders, but cleared 167, representing a 67.9% clearance rate. Of the 160 persons arrested for murder, 46.3% were white, 46.9% were

black, 6.3% were American Indian, and 0.6% were Asian. *See* Pet. Exh. A #2. RAPE accounted for 12.5% of all violent crimes. LEA reported 2,246 forcible and attempted rapes, but cleared 586, resulting in a 26.1% clearance rate. Of the 181 persons arrested, 69.6% were white, 24.3% were black, 5.0% were American Indian, and 1.1% were Asian. *See* Pet. Exh. A #3. ROBBERY accounted for 16.6% of all violent crimes. LEA reported 2,978 robberies, but cleared 776, resulting in a 26.1% clearance rate. Of the 728 persons arrested, 42.6% were white, 51.0% were black, 6.3% were American Indian, and 0.1% were Asian. *See* Pet. Exh. A #6. AGGRAVATED ASSAULTS accounted for 69.5% of all violent crimes. LEA reported 12,461 aggravated assaults, but cleared 5,532, resulting in a 44.4% clearance rate. Of the 3,880 persons arrested for aggravated assault, 61.3% were white, 30.2% were black, 7.8% were American Indian, and 0.7% was Asian. *See* Pet. Exh. A #4.

4. Data Source: U.S. Census 2010: Oklahoma Incarceration Rates by Race/Ethnicity (number of people incarcerated per 100,000 people in that racial/ethnic group.) -767 White; -1,059 American Indian/Alaska Native; -1,876 Hispanic; -3,796 Black. Black and brown people are the principal targets of the 85% provision. The numbers show blacks represent the majority of inmates, and shows blacks in number surpass the numbers combined for the other races/ethnic groups. 3,796 of blacks incarcerated compared to a combined number of 3,702 persons from the other groups.

B. This Court should analyze the merits of the claim that persons are unjustifiably denied equal protection of Oklahoma's governing parole statute (Okla. Stat. tit 57 Sec. 332.7 B) when no state purpose is achieved through § 12.1's parole clause.

1. In 1998 the state legislature proposed to enact Oklahoma Truth-in-Sentencing laws. However in 1999 essential elements of the Act were eviscerated; sections 12, 13, 14, 15, 16, 17, and 18 of Title 21 were repealed.[24] The 85% requirement (Section 12.1) was left intact. Congress' 85% Rule consisted of 2 parts, whereas Oklahoma's introduction of the 85% Rule via 21 O.S. § 12.1 consists of 3 parts. The insertion of the challenged parole clause is referred to below as "PART 2":

> PART 1
>
> A person committing a felony offense listed in Section 30 of this act [FN 1] on or after March 1, 2000, and convicted of the offense shall serve not less than eighty-five percent (85%) of the sentence of imprisonment imposed within the Department of Corrections.
>
> PART 2
>
> **Such person shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed**
>
> PART 3
>
> and such person shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of the sentence to less than eighty-five percent (85%) of the sentence imposed.
>
> CREDIT(S)
>
> Laws 1999, 1st Ex.Sess., c. 4, § 29, eff. July 1, 1999.

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[24] Oklahoma Statutes Annotated Currentness
Title 21. Crimes and Punishments
Part I. General
Chapter 1. Preliminary Provision (Refs & Annos)
§§ 14 to 18. Repealed by Laws 1999, 1st Ex. Sess., c. 5, § 452, eff. July 1, 1999
HISTORICAL AND STATUTORY NOTES
http://correctional.westlaw.com/result/documenttext.aspx?rs=COOR15.07&ss=CNT&cnt

[FN 1] Title 21, § 13.1.

2. To date the state's prison system population exceeds 100% capacity. While prison receptions by the Oklahoma Department of Corrections (ODOC) for violent offenses increased, the number of paroled inmates decreased by 74%- due to the 85% Rule towards eligibility for parole consideration: E.g. In the year 2004 2,210 persons convicted of violent offenses were processed into ODOC. That same year 2,238 inmates were paroled. In year 2013, 2,539 persons convicted of a violent crime processed into ODOC, only 576 inmates paroled (*Offender Management System*).

C. This Court should analyze-per 34 U.S.C.A. § 12102 (a) (1), (a) (2); and § 12105 (2) (d)-whether Oklahoma's usage of private prisons to confine persons convicted of part 1 violent crimes, subject to the 85% Rule, is in compliance with the federal laws provisions i.e. Special Rules.

Under 34 U.S.C.A. § 12105 (2) (d) (Formerly cited as 42 USCA § 13705), use of private facilities was to carry out the purposes of section 12102. Section 12102 (a) (1) (2), via Section 12104 Truth-in-Sentencing Incentive grants, provided "build[ing] or expand[ing] correctional facilities to increase the bed capacity for the confinement of persons convicted of a part 1 violent crime" *Id.* at (a) (1); and "build[ing] or expand[ing] temporary or permanent correctional facilities . . . for the confinement of persons convicted of a part 1 violent crime" *Id.* at (a) (2).

Oklahoma, following its truth-in-sentencing enactment, contrary to (a) (1) did not build or expand any correctional facilities for confinement exclusive to persons convicted of a part 1 violent crime; and contrary to (a) (2) did not build or expand

any of its correctional facilities exclusive to persons convicted of a nonviolent crime. Although the state law (57 O.S. § 561 B) generally "provide[s] for the operation of correctional institutions of the Department of Private Prison Contractors," the federal laws (34 U.S.C.A. § 12105 (2) (d) and 34 U.S.C.A. § 12102 (a) (2)) specifically provides for the confinement of convicted NON-violent offenders in private facilities.

In 2005 Corrections Corporation of America (Core Civic) explained in a filing with the Securities and Exchange Commission:

> Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted and sentenced, thereby potentially reducing demand for correctional facilities to house them.

U.S. Securities and Exchange Commission (2005). *Corrections Corporation of America* (Form 10K).[25]

In sum a person convicted of a part 1 violent crime, subject to the 85% Rule, was to be confined in a "suitable existing [State] prison". Nonetheless, in Oklahoma, private prison facilities house persons convicted of part 1 violent crimes in four different locations: Cushing, Holdenville, Lawton, and Sayre, Oklahoma.

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[25] Alexander, M. (2012). *The New Jim Crow*. The New Press

This warrants a discussion about the microeconomics of government policy. Byrns and Stone (1987) explained "Exchanges occur only when all parties *directly* involved in transactions expect to gain" (p. 625). Byrns and Stone (1987) further explained "Externalities occur when private calculations of benefits or cost differ from the benefits or cost to society because third parties gain or lose from a transaction" (p. 625).

Where State prison facilities exceed 100 % capacity, Oklahoma taxpayers lose from the State's reliance on private prisons, a loss sustained by laws such as 12 O.S. § 12.1's (85% Rule) which is: ***one*** implemented without truth-in-sentencing laws *i.e.* uniform "matrices and sentencing ranges" and ***two*** the application of the 85% Rule as a requirement before eligible for consideration for parole.

The Court in *Anderson v. State*, 2006 OK CR 6, ¶24, 130 P. 3d 273, recognized the Pardon and Parole Board as an executive agency, and its policy "parole for any sentence over 45 years , including a life sentence, is calculated based upon a sentence of 45 years"; moreover, the Court concluded "if a defendant is sentenced to a term of imprisonment and required to serve at least eighty-five percent (85%) of the sentence within the Department of Corrections, he is not eligible to be considered for parole until he has actually served at least eighty-five percent (85%) of the sentence imposed" *Id.*

The private prison industry, however, is not an extension of the executive branch, but serves as a pure public good. Prisons housing dangerous criminals serve as protection and are examples of nonrival goods. Nonetheless it has become

unnecessarily prohibitively expensive for taxpayers to confine State inmates in private prisons when the "85% Rule" prohibits parole prior to serving 85% of the sentence imposed. Thus "the 85% Rule" and its application towards parole is (1) not only expensive to Oklahomans, it is (2) counterproductive to the Oklahoma Department of Corrections mission i.e. promoting successful reentry and rehabilitation.

IV. THIS CASE IS RIPE FOR CERTIORARI TO RESOLVE THE QUESTION PRESENTED BEFORE THE U.S. SUPREME COURT.

The issues presented herein are ripe for review by this Court to resolve whether 21 O.S. § 12.1's 85% Rule, applied as a criteria for eligibility for a parole consideration for persons convicted of crimes enumerated in § 13.1, serve a legitimate state purpose. Ray preserved the federal claim, and argued to the court below that the district court (1) failed to adjudicate his claims for declaratory relief on the merits and (2) failed to adjudicate his claims for injunctive relief based on the facts presented. Furthermore the Oklahoma Court of Civil Appeals failed to address the facts presented in support of Ray's argument for "no rational basis". In not addressing the facts that tend to show the contrary, that court erroneously held "there is a rational basis related to a legitimate governmental interest for the distinction established in Section 13.1 [*sic*]" and "offenders . . .required to serve more of their sentence in an attempt to protect the population. . .and to deter criminal activity." This case clearly presents the federal question pertaining to equal protection for the statutory created class and magnifies the extent to which the class is treated differently by Sec. 12.1's parole clause.

A. Ray Clearly and Concededly Presented His Federal Claim To The Oklahoma Court of Civil Appeals, And That Court Plainly Failed To Address It.

No doubt Ray presented the class' federal claim to "equal protection" of the law *i.e.* Oklahoma's parole statute under Okla. Stat. tit 57 § 332.7 B, throughout the state proceedings and properly presented it to the Oklahoma Supreme Court on Petition in Error. *See* Pet. Err 34a. The appeal was assigned to the Oklahoma Court of Civil Appeals. Ray made clear "that the specific clause of 21 O.S. § 12.1 which reads 'Such person shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed'" violates the class' right to equal protection. Ray presented facts *i.e.* Oklahoma State Bureau of Investigations Crime Reports for violent crime, which indicate the targeted crime not deterred and public safety not enhanced-thus no legitimate state purpose achieved. Additionally Ray presented facts *i.e.* Oklahoma's Offender Management System statistical data, to show Oklahoma's prison system population exceeds 95% capacity.

The state attorney ignored Ray's argument regarding Sec. 12.1's parole clause-the source of the equal protection violation-and chose rather to redirect the court's attention to Sec. 13.1-which is merely the enumerated list of crimes affected by the challenged clause. Neither was any evidence presented by the state attorney, to show any legitimacy of a state purpose achieved by Sec. 12.1's parole clause. The state attorney altogether ignored the facts presented by Ray.

It is also true that, though Ray asserted the class' Fourteenth Amendment right to equal protection and cited relevant Oklahoma Appellate Court authority and

Oklahoma statutes, the assigned court (1) failed to adequately address the federal claim for a declaratory judgment and (2) failed to address the federal claim for injunctive relief-in spite of the facts presented. Instead, following the state attorney's suit-which focused on the enumerated list of crimes and ignored the facts presented-the court focused on the Legislature's role in law making and explained "it is not the role of this Court, or Plaintiff, to second guess the Legislature" *See* Pet. App. A 11a. Further the court added "the trial court [*sic*] did not err in granting Defendant's Motion to Dismiss and therefore, did not abuse its discretion in denying Plaintiff's Motion to Reconsider" *id.* at 12a.

In affirming the district court's orders (1) without addressing the facts presented and (2) without reaching the merits of the federal claim regarding § 12.1's challenged parole clause: the court's decision was in conflict with its own holding in *Olson v. Continental Resources, Inc.*,[26] regarding the determination of an issue. The facts were presented in this case but not "necessarily decided".

Since it is clear from the record or lack thereof, that the state courts (1) did not reach the merits of Ray's federal claim specifically regarding § 12.1's parole clause and (2) did not address the issues *i.e.* the facts presented in support thereof: Clearly the issues Ray presented were not 'necessarily determined' thus 117, 250-*Lancey D. Ray v. Kevin Stitt, is* ripe for review by this Court. [27]

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[26] 2007 OK CIV APP 90, 169 P. 3d 410 ("For purposes of issue preclusion, an issue is 'actually litigated' if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined, and the issue is 'necessarily determined' if the judgment would not have been rendered but for the determination of that issue.")

[27] *See, U.S. v. Howe,* 590 F. 3d 552, 556 (8th Cir. 2009) "To determine what was 'necessarily decided', we look to the record of the prior proceeding." *Id.*

Furthermore on a Petition to Rehear Ray argued "This Court did not decide all of the properly preserved and briefed issues" and "It remains, as the district court explained, 'To date, no appellate decision in Oklahoma has addressed the specific issues raised by Plaintiff.'" *See* Pet.Reh.40a.

Additionally, Ray expounded upon Oklahoma's demand for private prisons is an issue directly related to § 12.1's 85% Rule as applied to (1) the sentences imposed without the applicable truth-in-sentencing laws *i.e.* uniform "matrices and sentencing ranges" and (2) parole eligibility-an artfully crafted "double whammy". *See* Pet.Reh. 41a. 42a.

That court mainly focused on the 12.1's (85% Rule) relation to private prisons in Oklahoma, and ordered:

> In addition to any other content, the Appellee's response shall address Appellant's argument to the effect that the rationale for the subject 85% sentencing provision is to provide an inmate population for the benefit of private prisons. In this regard, Appellee is directed to the petition for rehearing, starting with the last paragraph page 6, beginning "the 2006 [*sic*] annual report" ending on page 8, line 3. The response shall state the views of Appellee on the question: Has Appellant presented a justiciable question of fact concerning whether there is a legitimate state purpose for the 85% provision?

See Pet. App. B-13a, 14a.

Still Ray's federal claim, specifically regarding the application of 12.1's 85% Rule with parole eligibility actually achieving a legitimate state purpose such as deterring crime and enhancing public safety, was not addressed. And as to the 85% Rule's relation to the demand for private prisons in Oklahoma the state attorney argued "Such challenges present nonjusticiable political questions, [*sic*]"

B. Ray Preserved The Issues and the State District Court Conceded "To Date, No Appellate Decision In Oklahoma Has Addressed The Specific Issues Raised By Plaintiff".

Ray clearly presented the issues whereby the constitutionality of the *parole clause* in 12 O.S. § 12.1 were drawn in question. As to the merits of his claim to Equal Protection, Ray argued "the specific clause . . . 'Such person shall not be eligible for parole consideration prior to serving the eighty-five percent (85%) of the sentence imposed' where the statutory class of inmates in the custody of ODOC is treated differently" violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because prisoners not of the created class become eligible for consideration for parole at the completion of one-third (1/3) of the sentence imposed. *See* Pet. Compl. 3a.

Relying on the Oklahoma Supreme Court's holding in *Thayer v. Phillips Petroleum Co., Okla.*,[28] Ray argued the parole clause denies persons of the created class a reasonable opportunity for equal incidence, obvious from the amount of time to be confined before eligible for a consideration for a parole.

As to the clearly presented facts that show the difference in treatment not rationally based, citing data from OSBI crime reports, Ray argued "the difference in treatment does not achieve a conceivable legitimate state purpose." *See* Pet. Exh. A #1; *See also* Pet. Compl. 3a. Ray further argued "As a result of the challenged clause . . . Oklahoma's Department of Corrections' population exceeds 100% capacity." *id.*

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[28] 613 P. 2d 1041 (1980) ("Under the basic and conventional standard for reviewing discrimination or differentiation of treatment between classes in individuals, the classification is constitutional if there is a reasonable opportunity for uniform or equal incidence on the class created.")

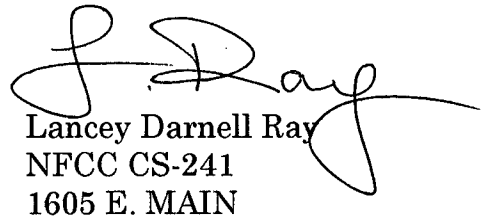
The district court, focusing on the argument presented by the state attorney-who side-stepped Ray's argument concerning the parole clause in § 12.1, and countered with an argument which highlighted the enumerated list of crimes in § 13.1-merely recited the enumerated list of crimes without analyzing the merits of Ray's claim to equal protection.

The court stated "To date, no appellate decision in Oklahoma has addressed the specific issues raised by Plaintiff", but declined to adjudicate based on the clearly presented facts. Citing *State v. Young,*[29] the court held "the Legislature has the authority to establish the appropriate sentences for different crimes" which had nothing to do with Ray's argument concerning the denial of equal incidence in eligibility for a consideration for parole not rationally based. *See* Pet. App. E-18a

CONCLUSION

For the reasons stated hereinabove, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 31, 2020

PRO SE LITIGANT

[29] 1999 OK CR 14, 989 P. 2d 949 955

21 Okl.St.Ann. § 15

Pet. Exh. B

Oklahoma Statutes Annotated Currentness
Title 21. Crimes and Punishments
Part I. In General
Chapter 1. Preliminary Provisions (Refs & Annos)
§§ 14 to 18. Repealed by Laws 1999, 1st Ex.Sess., c. 5, § 452, eff. July 1, 1999

HISTORICAL AND STATUTORY NOTES

Repealed § 14, relating to definitions applicable to the Oklahoma Truth in Sentencing Act, was derived from Laws 1997, c. 133, § 4.
Repealed § 15, relating to application of matrices and sentencing ranges, levels and fields, was derived from Laws 1997, c. 133, § 5; Laws 1998, 1st Ex.Sess., c. 2, § 4.
Repealed § 16, providing for felony classification schedules, was derived from Laws 1997, c. 133, § 6.
Repealed § 17, providing sentence enhancers, was derived from:
Comp.Laws Dak.1887, §§ 6946, 6948.
St.1890, §§ 2570, 2572.
St.1893, §§ 2564, 2566.
St.1903, §§ 2671, 2673.
Comp.Laws 1909, §§ 2814, 2816.
R.L.1910, §§ 2805, 2806.
Comp.St.1921, §§ 2299, 2300.
St.1931, §§ 1817, 1818.
Laws 1963, c. 283, § 1.
Laws 1968, c. 179, § 1.
Laws 1975, c. 64, § 1.
Laws 1976, c. 94, § 1.
Laws 1978, c. 281, § 1.
Laws 1985, c. 112, § 3
Laws 1989, c. 197, § 9.
Laws 1989, c. 259, § 5.
21 O.S.1991, §§ 51 to 52.
63 O.S.1991, § 2-419.
Laws 1997, c. 133, § 7.
Laws 1997, c. 333, § 1, eff. July 1, 1999.
See Title 21, § 51.1.
Repealed § 18, providing that second and subsequent offenses for certain misdemeanors remain misdemeanors, was derived from Laws 1997, c. 133, § 22; Laws 1998, 1st Ex.Sess., c. 2, § 5.

21 Okl. St. Ann. § 15, OK ST T. 21 § 15

Current through Chapter 399 (End) of the First Session of the 55th Legislature (2015)

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