No. 19-8355

IN THE

Supreme Court of the United States

LANCEY DARNELL RAY,

Petitioner,

Vs.

KEVIN STITT, GOVERNOR

Respondent.

On Petition For En Banc Rehearing
To the Oklahoma Court of Civil Appeals
for the State of Oklahoma

PETITION FOR EN BANC REHEARING

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PETITION FOR *EN BANC* REHEARING

Lancey D. Ray respectfully submits this Petition for *en banc* Rehearing on Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals for the State of Oklahoma.

OPINIONS BELOW

The United States Supreme Court's Order Denying Certiorari is not published.

JURISDICTION

The United States Supreme Court entered its Order denying certiorari June 29, 2020. This Court has jurisdiction under 28 U.S.C. § 2403.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2403 provides, in pertinent part:

> (b) 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.

STATEMENT OF THE CASE

1. In 1996, by means of 34 U.S.C.A. § 12104 (Formerly cited as 42 USCA § 13704) the U.S. Congress afforded grants provided "[s]uch State has **implemented truth-in-sentencing laws** that require persons convicted of a **part 1 violent crime** to serve not less than 85 percent of the sentence imposed." Congress' focus was its prescribed 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. Per 34 U.S. C.A. § 12101 (Formerly cited as 42 USCA § 13701) "'part 1 violent crime' means murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault." Former Governor Mary Fallin's Justice Reform Task Force acknowledged as much in its February 2017 Report when it stated:

> [t]he '85 percent rule,' O.S. § 21-12.1 and 13.1 requires that individuals convicted of certain, serious felony offenses must be incarcerated until 85 percent of their sentences are served. **The original list of offenses has grown form a total of 11 in 1999 to 22 in 2016, with at least two other offenses listed in separate statutes.**[1]

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[1] 21 O.S. §13.1. Required service of minimum percentage of sentence -Offenses specified.

Persons convicted of:

1. First degree murder as defined in Section 701.7 of this title;
2. Second degree murder as defined by Section 701.8 of this title;
3. Manslaughter in the first degree as defined by Section 711of this title;
4. Poisoning with intent to kill as defined by Section 651 of this title;
5. Shooting with intent to kill, use of a vehicle to facilitate use of a firearm, crossbow or other weapon, assault, battery, or assault and battery with a deadly weapon or by other means likely to Oklahoma Statutes - Title 21. Crimes and Punishments Page 34 produce death or great bodily harm, as provided for in Section 652 of this title;
6. Assault with intent to kill as provided for in Section 653 of this title;
7. Conjoint robbery as defined by Section 800 of this title;
8. Robbery with a dangerous weapon as defined in Section 801 of this title;
9. First degree robbery as defined in Section 797 of this title;
10. First degree rape as provided for in Section 1115 of this title;
11. First degree arson as defined in Section 1401 of this title;
12. First degree burglary as provided for in Section 1436 of this title;
13. Bombing as defined in Section 1767.1 of this title;
14. Any crime against a child provided for in Section 843.5 of this title;
15. Forcible sodomy as defined in Section 888 of this title;
16. Child pornography as defined in Section 1021.2, 1021.3 or 1024.1 of this title;
17. Child prostitution as defined in Section 1030 of this title;
18. Lewd molestation of a child as defined in Section 1123 of this title;
19. Abuse of a vulnerable adult as defined in Section 10-103 of Title 43A of the Oklahoma Statutes who is a resident of a nursing facility;
20. Aggravated trafficking as provided for in subsection C of Section 2-415 of Title 63 of the Oklahoma Statutes;
21. Aggravated assault and battery upon any person defending another person from assault and battery; or
22. Human trafficking as provided for in Section 748 of this title, shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole.

Added by Laws 1999, 1st Ex. Sess., c. 4, § 30, eff. July 1, 1999.

Final Report (2017) p. 6

2. In 1997, by means of the Oklahoma Truth in Sentencing Act the State Legislature and Governor passed into law OK ST T. 21 § 15 "relating to application of matrices and sentencing ranges, levels and fields." Section 15, in pertinent part, provided:

> A. On and after July 1, 1998, criminal offenses shall be punished as provided by the sentencing matrices and in accordance with the application of any sentencing enhancers authorized by the Oklahoma Truth in Sentencing Act.
>
> B. For purposes of sentencing:
>
> , 1. The main matrix shall be applied in felony cases for crimes that are classified pursuant to Section 6 of this act as a Schedule A, Schedule B, Schedule C, Schedule D, Schedule D-1 ,Schedule D-2, Schedule E, Schedule F, Schedule G, or Schedule H crime committed on or after July 1, 1998;
>
> C. The ranges of punishment for each level in the schedules shall be established as provided in Section 6 of this act. Provided, however, Schedule A shall be subject to the criminal provisions of Sections 701.7 through 701 .16 of Title 21 of the Oklahoma Statutes.
>
> D. A sentencing matrix is a crime severity and criminal history classification tool. The sentencing matrix determines crime severity of the current offense of conviction according to sentencing level. The sentencing level classifies the severity of the circumstances of the offense and the criminal history of the offender.
>
> E. A sentencing matrix, except for Schedule A, defines the possible terms of confinement or community punishment.

See Pet. Exh. B

3. In 1999, the State Legislature nonetheless repealed truth-in-sentencing laws Sections 12, 13, 14, 15, 16, 17, and 18. With respect to the occurrences of

"unconstitutional disproportionate sentences" that result, Judge Chapel described the event as such "The legislature attempted to address this problem with Truth in Sentencing legislation but was beaten down." *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. *See* Pet. Exh. C.

Nonetheless Sections 12.1(the 85% Rule) and 13.1(the list of offenses) stood. Moreover the *parole clause* in Section 12.1 was erected. The Clause reads "Such person shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed..." So the double whammy or unusually severe punishment lies in (1) repeal of the prescribed matrices and sentencing ranges and yet the requirement to serve eighty-five percent of the resulting disproportionate sentence imposed and (2) the added requirement to serve eighty-five percent of the sentence imposed before a consideration for parole.[2]

4. Petitioner had 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

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[2] 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"; however, in his dissent Judge Lumpkin reasoned "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).

purpose, and ***three*** is a detriment *fiscally* to the state in that it facilitates the warehousing of its citizens in both state and private prison facilities.

5. In April 2020, in this Court, Petitioner timely filed a Petition for a writ of certiorari to the Oklahoma Court of Civil Appeals for the State of Oklahoma- drawing in question the constitutionality of Okla. Stat. tit 21 Section 12.1. Petitioner made the following claims:

> 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;
>
> 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 SENTENCE IMPOSED DOES NOT INVOLVE PAROLE;
>
> III. OKLAHOMA'S COURTS HAVE YET TO 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 denied certiorari June 29, 2020.

Nonetheless Oklahoma has "the second highest imprisonment rate in the country and the highest for incarcerated women, the latter being a distinction the state has held since 1991. While prison populations across the country have stabilized or declined, Oklahoma's has risen." *See* Final Report (2017), *Key Findings in Oklahoma's Correctional System,* Oklahoma Justice Reform Task Force.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court, oftentimes, is called upon to settle disputes over Acts of Congress *i.e.* treaties, federal statutes, *etc.* Recently this Court settled a dispute over territory in Oklahoma established by Congress in Art. III, June 14, 1866, 14 Stat. 786. 1866, in *McGIRT v. OKLAHOMA*, 591 U. S. ____ (2020) and TOMMY SHARP, INTERIM WARDEN, PETITIONER *v.* PATRICK DWAYNE MURPHY 591 U. S. ____ (2020).

Today the Court is presented with yet another dispute in Oklahoma-which is over the State's "unusually severe" application of federal law. That is, Oklahoma's application of the 85% Rule apart from Congress' prescribed truth-in-sentencing laws.

The U.S. Congress did mean to provide some degree of severity in the implementation of truth-in-sentencing laws as Congress required:

> [t]he State has implemented, or will implement, correctional policies and programs, **including truth-in-sentencing laws** that ensure that violent offenders serve a substantial portion of the sentences imposed, **that are designed to provide sufficiently severe punishment for violent offenders**," including violent juvenile offenders, and that the prison time served is appropriately related to the determination that the inmate is a violent offender and for a period of time deemed necessary to protect the public.

See 34 U.S.C.A. § 12103 (Formerly cited as 42 USCA § 13703).

Moreover the federal law stipulated "[s]uch State has implemented truth-in-sentencing laws that require [ed] persons convicted of a part 1 violent crime to serve not less than 85 percent of the sentence imposed" *See* 34 U.S.C.A. § 12104 (Formerly cited as 42 USCA § 13704). Therefore the claim that the 85% Rule as

applied by Oklahoma is "unusually severe", is founded on the basis that the very truth-in-laws prescribed to coincide with the Rule's purpose, were repealed rather than implemented by the State.

I. PURSUANT TO THE GENERAL PRINCIPLES ESTABLISHED IN *FURMAN*, THIS COURT SHOULD ANALYZE OKLA. STAT. TIT 21 SECTION 12.1 TO DETERMINE WHETHER OR NOT THE APPLICATION OF THE 85% RULE-UNIQUE IN NATURE-IS CRUEL AND UNUSUAL.

This Court in *Furman* explained "Even though '[t]here may be involved no physical mistreatment, no primitive torture,' severe mental pain may be inherent in the infliction of a particular punishment." (Internal citations omitted). *Id* at 272, 273. Moreover this Court in *Rhodes v. Chapman*,[3] held "no static 'test' can exist by which courts determine whether punishment is cruel and unusual. Meaning is drawn from the evolving standards of decency that mark the progress of a maturing society." And this Court in *Harmelin v. Michigan*,[4] held "the clearest and most reliable [standard] of which is the legislation enacted by the country's legislatures."

The instant case actually calls for deference to 34 U.S.C.A. § 12104 (Formerly cited as 42 USCA § 13704) enacted by Congress in April 1996-requiring participating States to implement truth-in-sentencing laws.

Nonetheless, pursuant *Furman's* principles, this Court is suited to determine (1) whether Oklahoma's unique application of the 85% Rule towards parole eligibility, requiring a proportionality review, is unusually severe (2) whether there is a strong

[3] 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59, 21 O.O. 3d 382
[4] 501 U.S. 957, 1000, 111 S. Ct. 2680, 115 L. Ed. 2d 836

probability that it is inflicted arbitrarily (3) whether it is substantially rejected by contemporary society and (4) whether Okla. Stat. tit 57 Section 332.7 et seq., the longstanding parole statute which affords parole eligibility at one-third (⅓) or .33% of the sentence imposed since 1947, is a significantly less severe punishment adequate to achieve the purposes for which the 85% Rule is inflicted.

When considering whether a punishment comports with the Eight Amendment's prohibition to "cruel and unusual" punishment, the U.S. Supreme Court in *Furman v. Georgia,*[5] held "There are, then four principles by which we may determine whether a particular punishment is 'cruel and unusual'" and a determination would involve a "cumulative" analysis of the implication of each of the four principles. Those four principles are:

- Whether the punishment is unusually severe;
- Whether there is a probability that it is inflicted arbitrarily;
- Whether the severe punishment is substantially rejected by contemporary society; and
- Whether there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, if so the punishment inflicted is unnecessary and therefore excessive.

The focus here is on Oklahoma's unusually severe application of its 85% Rule (1) applied to the service of the sentence before a consideration for parole (2) applied to disproportionate sentences (45 year or more sentences to include life sentences) and (3) applied in the absence of the prescribed matrices and sentencing ranges-inflicted

[5] 408 U.S. 238 (1972)

arbitrarily substantially rejected by contemporaries, and significantly less severe punishment exists to achieve state purposes.

A. Principle #1: This Court should assess whether Oklahoma's unusual application of 21 O.S. § 12.1 (the 85% Rule)-in the absence of truth-in-sentencing laws-is "unusually severe".

Okla. Stat. tit 21 Section 12.1 (the 85% Rule) applied to the sentencing ranges for the crimes listed in § 13.1 in contrast are unusually severe in light of the sentences prescribed in the Oklahoma truth-in-sentencing matrix. Citing *Weems v. United States*, 217 U.S., at 377, 30 S. Ct. and at 553, the *Furman* Court explained "the physical and mental suffering inherent in the punishment of *cadena temporal*." That is, the court acknowledged the physical and mental suffering inherent in imprisonment even for a term less than a life sentence. The court noted "It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character."

The *Furman* court further explained "[t]he infliction of an extremely severe punishment, then, like the one before the Court in *Weems v. United States*, from which '[n]o circumstance of degradation [was] omitted,' may reflect the attitude that the person punished is not entitled to recognition as a fellow human being." (Internal citations omitted) and "That the punishment is not severe, 'in the abstract,' is irrelevant." And "Finally, of course, a punishment may be degrading simply by reason of its enormity." *Id.*

The Petitioner has now exposed the evisceration of Oklahoma's so-called Truth-in-Sentencing Act in the State's repeal of Sections 14 through 18's uniformed sentencing ranges, while Section 12.1 (the 85% Rule) is left intact. Additionally the 85% Rule is applied to parole.[6]

See below actual answers in years for felony crimes in the truth-in-sentencing matrix in contrast with Oklahoma's present sentencing scheme; the sentences represent penalties for a first offense-absent "prior record enhancers" and "offense enhancers".[7] For purposes of this petition, only sentencing ranges for part 1 violent crime are listed in the right column-where no uniform sentencing exists.

Okla. Truth in Sentencing laws	vs.	Okla. Stat. tit 21 Crimes and Pun
- Schedule A ~ life (33.2 year), lwop, death		life (38.25 years), lwop, death
- *****		1st degree Manslaughter ~ 4 years not to exceed life
- Schedule B ~ 13.8 years		shooting/intent kill ~ punishment not to exceed life
- Schedule D ~ 3 years		1st degree Robbery ~ 10 years not to exceed life
- Schedule D-1 ~ 1½ years		*aggravated* assault ~ 1 year not to exceed 5
- Schedule S-1 ~ 17½ years		1st degree Rape ~ 5 years, life, lwop, death

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[6] Per 21 O.S. § 12.1, A person committing a felony offense listed in Section 30 [§ 13.1] of this act 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. **Such person shall not be eligible for parole consideration prior to serving eighty-five percent (85%) of the sentence imposed** 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.

[7] Per Oklahoma Truth-in-Sentencing Matrix, the actual sentence for crimes is calculated by "take[ing] the average of months in Level 1 on the matrix. (To do that, add the two numbers and divide by two. For instance, Schedule B is 30-300 months = 330 divided by 2 = 165 months. Divide 165 by 12 to find the number of years (165 months divided by 12 equals 13.8 years)."

Per Section 6, Chapter 133, O.S.L. 1997 of Oklahoma's Truth in Sentencing Act:

> A. There is hereby established a classification system for all felony criminal offenses provided for in the Oklahoma Statutes that places the offenses into schedules on the basis of the severity of the offense and other factors of the commission of the crime. The Oklahoma Truth in Sentencing Policy Advisory Commission may recommend changes for the schedules to the Legislature. All felonies provided for by the Oklahoma Statutes shall be classified in the following schedules:
>
> 1. "Schedule A" is reserved for the crime of murder in the first degree as defined by Section 701.7 of Title 21 of the Oklahoma Statutes; and is not subject to the application of the sentencing matrices of the Oklahoma Truth in Sentencing Act;[8]
>
> 2. "Schedule B" means a violent offense which is committed with intent to kill or with reckless disregard for human life;
>
> 3. "Schedule D" means a violent offense which creates a significant risk of death or serious bodily injury to a person;
>
> 4. "Schedule D-1" means a violent offense which creates a risk of death or bodily injury to a person;
>
> 5. "Schedule S-1" means a Schedule S-2 sexual offense the commission of which involved the presence of aggravating circumstances established by the state by clear and convincing evidence.

Furthermore the double whammy, as it is described here, also makes for an "unusually severe" punishment, in that in addition to serving 85% of a disproportionate sentence imposed, the 85% Rule is applied to parole eligibility. Which means when other prisoners become eligible for parole at the completion of one-third of a disproportionate sentence imposed, prisoners convicted of part 1 violent crimes do not benefit from the privilege. Hence the 85% Rule, although

[8] Schedule A (Murder) did not fit under the Act, except that life equals 18-60 years. According to specific calculations explained in the Act, for most, that means a person would have to serve 33.2 years flat.