Case No. 19-121951-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas,
Appellee

v.

Ronald Johnson,
Appellant.

APPELLANT'S MOTION FOR REHEARING AND/OR MODIFICATION

Comes now, Ronald Johnson, by and through his counsel, Wendie C. Miller, and pursuant to Kansas Supreme Court Rule 7.06 respectfully requests that the Court grant rehearing in this case, or modify its opinion, on the grounds that the Court overlooked Johnson's claim in his motion to modify is statutory; this court previously found K.S.A. 21-4635 authorizes a hard 50 sentence; and the district court had jurisdiction to modify Mr. Johnson's sentence. Accordingly, the Court's decision was in error, and this case should be remanded to the district court for modification of Mr. Johnson's sentence in accord with K.S.A. 21-4639. This Court filed its opinion on April 30, 2021.

ARGUMENTS AND AUTHORITY

1. The Court overlooked K.S.A. 21-4639 requires the district court to sua sponte bring Mr. Johnson before the court and modify his sentence to include no mandatory term of imprisonment and no application by Mr. Johnson is necessary.

This Court found there must be a procedural vehicle for Mr. Johnson to bring his argument before the Court, but in so finding, overlooked the plain language of K.S.A. 21-

4639 mandates sentence modification and is prospective in that K.S.A. 21-4639 specifically applies to a person "previously sentenced," and includes the language, "in the event," the mandatory term of imprisonment or any provision authorizing such term is held to be unconstitutional. K.S.A. 21-4639 directs the court is to sua sponte bring the Defendant before the court and modify his sentence to include no mandatory term of imprisonment. Relief under the statute requires no application by Mr. Johnson.

2. The Court erred in determining that applying *State v. Coleman*, 312 Kan. 114, 472 P.3d 85 (2020) to the circumstances here, there is no procedural vehicle that allows a court to revisit a sentence that was final when *Alleyne* was decided because the sentence is not final according to K.S.A. 21-4639 if the provision authorizing such, K.S.A. 21-4635, is held to be unconstitutional.

The Court found while this appeal was pending it decided *Coleman*, at 121-124, holding K.S.A. 2020 Supp. 21-6628(c) does not create a new avenue or independent means by which a convicted person can challenge his or her underlying sentence. However, this court previously found the hard 50 sentence is authorized by K.S.A. 21-4635 which requires the court to weigh evidence of any mitigating circumstances against evidence of any aggravating circumstances. *State v. Baker*, 281 Kan. 997, 1018, 135 P.3d 1098 (2006). K.S.A. 21-4635 has been held unconstitutional and this statute authorized the hard 50 sentence imposed here. Thus, the sentence is subject to modification per K.S.A. 21-4639, as a "provision authorizing" the mandatory term was found unconstitutional. The sentence is not final according to K.S.A. 21-4639 if the "provision authorizing" the same is held to be unconstitutional. By overlooking *Baker*, the Court is circumventing K.S.A. 21-4639 and Johnson's distinguishing point by framing the issue as a constitutional issue.

3. The Court misconstrued Johnson's argument as one arguing he is entitled to resentencing under K.S.A. 21-4639 because the sentencing judge engaged in judicial fact-finding to determine that aggravating factors justified a minimum sentence of 50 years, rather than the statutory argument he claims.

Mr. Johnson does not argue for resentencing because of judicial fact-finding. Instead, Mr. Johnson argues modification of his sentence to no mandatory term of imprisonment was mandated where "in the event" a provision authorizing such sentence is held unconstitutional, which occurred here. Mr. Johnson's argument is statutory, and relies on K.S.A. 21-4639.

4. The Court erred in finding K.S.A. 2020 Supp. 21-6628(c) does not create independent means by which a convicted person can challenge his or her underlying sentence.

The Court indicated K.S.A. 2020 Supp. 21-6628(c) does not create an avenue by which a convicted person can challenge his or her underlying sentence. *Opinion*, p. 2. K.S.A. 21-4639 was enacted in 1994 for the singular purpose of requiring sentence modification in the event a provision authorizing a mandatory term was held unconstitutional. The statute does not create a change, and should apply in the circumstances here. K.S.A. 21-6628 provides the specific remedy in each subsection requiring the "new" sentence to be modified as follows: in subsection (a) life without the possibility of parole to the maximum term of imprisonment otherwise provided; in subsection (b) death to life without parole; and in subsection (c) a mandatory term to no mandatory term. The statute clearly provides the specific sentence to be imposed.

5. The Court erred in finding Johnson raises the same complaint as Coleman: A judge, not a jury, found aggravating factors that served as the basis for increasing the minimum term of their life sentences and Johnson contends his sentence should be vacated because the Sixth Amendment requires a jury determine these aggravating factors.

Mr. Johnson does not raise the same complaint as Mr. Coleman. Mr. Johnson does not contend his sentence should be vacated and he is not raising this issue via a motion to correct an illegal sentence. *Coleman* is distinguishable because Johnson brought his motion invoking sentence modification or a motion to modify his sentence. The *Coleman* court indicated in postconviction proceedings seeking sentence modification, "there must be a procedural vehicle for presenting the argument to the court," and a motion to correct an illegal sentence under K.S.A. 22-3504 is not a proper motion since a sentence imposed in violation of *Alleyne* does not fall within the definition of an "illegal sentence" that may be addressed by K.S.A. 22-3504. *Opinion*, p. 6, citing *Id.,* at 341. The concurring opinion here discusses this finding as well. *Opinion*, p. 13.

Because of the KSGA, this court specifically held, "a district court has no authority to modify a sentence unless plain statutory language provides such authority." *State v. Warren,* 307 Kan. 609, 612, 412 P.3d 993 (2018) citing *State v. Guder*, 293 Kan. 763, 267 P.3d 751 (2012) ("Statutory changes to the jurisdiction of district courts to modify sentences have superseded the *Woodbury* rationale. In *State v. Anthony*, 274 Kan. 998, 1001, 58 P.3d 742 (2002), this court framed the relevant question this way, "Does statutory authority exist for the modification of legal sentences after imposition?...a district court has no authority to modify a sentence unless plain statutory language

provides such authority. 274 Kan. at 1002."

In *Coleman* the Court found under *Kirtdoll v. State*, 306, Kan. 335, Syl. ¶ 1, 393 P.3d 1053 (2017), *Alleyne* cannot be retroactively applied to invalidate a sentence final when *Alleyne* was released, and the change in law effected by *Alleyne* cannot provide the exceptional circumstances required to permit a successive K.S.A. 60-1507 motion or demonstrate the manifest injustice necessary to permit an untimely motion. *Id.*, at 341. *Kirtdoll* is distinguishable because it was a collateral attack made in a K.S.A. 60-1507 motion raising a constitutional issue. The Kansas Legislature superseded or circumvented all judicially-conducted retroactivity analysis in 1994, when as part of the "hard 50" sentencing scheme - it passed K.S.A. 21-4639 (now renumbered as K.S.A. 21-6628©. The legislature had preempted retroactivity analysis by passing K.S.A. 21-4639/K.S.A. 21-6628. The claim here, unlike in *Kirtdoll*, is statutory. In *Coleman* the Court found K.S.A. 21-4635 did not authorize a hard 40 life sentence, whereas in *Baker*, at 1018, this Court found K.S.A. 21-4635 authorizes a hard 50 sentence. Despite any constitutional claim brought by Mr. Johnson in prior proceedings, here Mr. Johnson claims modification is required per statute.

6. The Court erred in interpreting Mr. Johnson's claim as a constitutional claim.

The Court began its discussion of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2002) and indicated the holding applied explicitly only to the determination of statutory maximum sentences and that same year, the Court declined to extend *Apprendi* to findings made by a district court judge before imposing a mandatory

minimum - the complaint Johnson makes. *Opinion*, p. 4-5, citing *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000). The Court addressed the decisions in *Harris v. U.S.*, 536 U.S. 545, 556, 122 S.Ct. 2406, 153 L.Ed. 2d 524 (2002) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002) and indicated *Alleyne* overruled *Harris*. This Court extended *Alleyne* to Kansas' hard 50 sentencing statutes in *State v. Soto*, 299 Kan. 102, 122-24, 322 P.3d 334 (2014) and later held *Alleyne* could not be applied retroactively to invalidate a sentence that was final before the date *Alleyne* was decided in *Kirtdoll*, at Syl. ¶1. *Opinion*, p. 5. However, this history does not explain the legal basis for Johnson's complaint. The Court relies on constitutional claims raised in other pro se filings under *Apprendi* and *Alleyne*, but overlooks the central claim here is statutory. The holding in *Baker*, *supra*, is omitted in *Coleman*, *supra*. K.S.A. 21-4635 authorizes a hard 50 sentence. See *Baker*, at 1018. K.S.A. 21-4635 was held unconstitutional in *Soto*, *supra*. This satisfies the requirement of K.S.A. 21-4639/K.S.A. 21-6628(c), which controls, and mandates modification. Mr. Johnson did not request vacatur or retroactive application of caselaw, and no application by the Defendant is required for modification per K.S.A. 21-4639/K.S.A. 21-6628(c).

7. The Court erred in concluding no court has jurisdiction to modify the sentence unless there is a jurisdictional basis for presenting the argument to the Court.

This Court found the finality of Johnson's sentence before its decision in *Soto*, at 122-124 and *Alleyne* means no court has jurisdiction to modify the sentence unless there is a jurisdictional basis for presenting the argument to the court. *Opinion*, p. 6, citing *Coleman*, at 119-120. The Court found it explored the potential ways a court could have

jurisdiction to hear the claim of someone like Johnson or Coleman seeking relief from the hard 40 or 50 minimum term of his or her life sentence, but no procedure, including via K.S.A. 21-6628(c) offers a path to jurisdiction. *Opinion*, p. 6, citing *Coleman*, at 121-24. The Court indicated while the history (constitutional case analysis) explains the basis for Johnson's complaint, it does not address the pivotal question - can he obtain relief from his sentence given it was final years before *Soto* and *Alleyne*? The Court found the finality of Johnson's sentence means no court has jurisdiction to modify the sentence unless there is a jurisdictional basis for presenting the argument to the Court. *Opinion*, p. 6. Mr. Johnson contends a plain reading of K.S.A. 21-4639/K.S.A. 21-6628(c) informs a defendant's sentence is not final if a provision authorizing a mandatory term is held unconstitutional (i.e. using the language "in the event.") Before Johnson's alleged crime, the legislature enacted K.S.A. 21-4639 which clearly mandates modification where a provision authorizing the sentence imposed here is found unconstitutional. Therefore, the district court, the only court that had jurisdiction to sentence Mr. Johnson under the provision found unconstitutional, is mandated by K.S.A. 21-4639 to modify his sentence accordingly. The sentence cannot be final if the statute requires an event based modification. K.S.A. 21-4639 addresses the jurisdictional basis for presenting the argument to the court and provides the specific relief upon modification. The Court appears to divide the statute creating a nonexistent bar. The Court overlooks Johnson's claim is modification of his sentence is mandated under K.S.A. 21-4639 as a provision authorizing his sentence has been held unconstitutional. K.S.A. 21-4639/K.S.A. 21-

6628(c) states: "The court having jurisdiction over a person previously sentenced...shall cause such person to be brought before the court." The district court is the only court having jurisdiction to modify Mr. Johnson's sentence, having previously sentenced him. In *State v. McGill*, 271 Kan. 150, 22 P.3d 597 (2001), the Court found the district court had jurisdiction to modify the Defendant's sentence pursuant to K.S.A. 22-3716(b). In a pre sentencing guidelines case, *State v. Rios*, 225 Kan. 613, 592 P.2d 467 (1979) a timely motion for modification was filed by the Defendant pursuant to K.S.A. 21-4603(2). While no jurisdiction is granted to modify a sentence in the Kansas Sentencing Guidelines Act, except to correct arithmetic or clerical errors, a district court has authority to modify a sentence if plain statutory language provides such authority, as K.S.A. 21-4639 does here. *Mcgill*, at 152; *Anthony*, at 274 Kan. at 1002.

Mr. Johnson further argues a void order or judgment is void even before reversal. *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 41 S.Ct. 116, 65 L.Ed. 297 (1920) (courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgment and orders are regarded as nullities. They are not voidable, but simply void, and this even before reversal.) In a district court, the court has limited jurisdiction, the court must proceed exactly according to the law or statute under which it operates. *Flake v. Pretzel*, 381 Ill. 498 (1943). The court must proceed under chapter 341 of the 1994 Session Laws of Kansas (1994) governing hard 50 cases. The legislature is presumed to have expressed its intent through the language of the statutory scheme it

enacted. When a statute is plain and unambiguous the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. *State v. Sedillos*, 33 Kan. App. 2d 141, 146, 98 P.3d 651 (2004).

8. The Court erred in finding a sentence imposed in violation of *Alleyne* does not fall within the definition of an illegal sentence because Johnson raised his claim as a motion to modify his sentence.

The Court concluded a sentence imposed in violation of *Alleyne* does not fall within the definition of an illegal sentence that may be addressed by K.S.A. 22-3504. *Opinion*, p. 7, citing *Coleman*, at 120. *Coleman* discussed and rejected relief through K.S.A. 60-1507 based on *Kirtdoll*, at 341, where the Court held "for 60-1507 motions to be considered hereafter, *Alleyne's* prospective-only change in the law cannot provide exceptional circumstances that would justify a successive 60-1507 motion or the manifest injustice necessary to excuse the untimeliness of a 60-1507 motion." *Opinion*, p. 7-8, citing *Kirtdoll*, at 341. Acknowledging Johnson did not seek relief through K.S.A. 60-1507, but filed his motion as one invoking modification of his sentence pursuant to K.S.A. 21-4639/K.S.A. 21-6628(c), the court found converting his motion to a 60-1507 motion would not benefit Johnson because he has no right to relief under K.S.A. 60-1507. *Opinion*, p. 6, 8.

The Court may have overlooked the plain language of K.S.A. 21-4639. K.S.A. 21-4639 is prospective and necessarily applies to persons "previously sentenced," and "in the event" a provision authorizing the sentence is held unconstitutional. While the Court later extended *Alleyne* to Kansas' hard 50 sentencing statutes in *Soto*, at 122-24, and later held

Alleyne cannot be applied retroactively to invalidate a sentence that was final before *Alleyne* in *Kirtdoll,* at Syl. ¶1, K.S.A. 21-4639 is the statutory provision at issue in this appeal and its prospective language mandates modification. The decisions in *State v. Brown*, 306 Kan. 330, Syl. ¶1, 393 P.3d 1049 (2017) and *State v. Moncla*, 301 Kan. 549, Syl. ¶4, 343 P.3d 1161 (2015) involve constitutional claim analysis applied to *Coleman*, who did not bring a motion invoking modification of his sentence. The court overlooks *Baker*, *supra*, which Johnson relies on, as well as his statutory argument pursuant to K.S.A. 21-4639, which distinguishes *Coleman*. Contrary to the Court's finding that Johnson offers no argument that counters *Coleman*, *Brown*, and *Moncla*, the distinctions in *Coleman* were presented in his response to the State's Rule 6.09 letter, and herein. Mr. Johnson's statutory argument does not require retroactive application of *Alleyne*. Mr. Johnson claims a provision authorizing his sentence, K.S.A. 21-4635 was held unconstitutional so his sentence should have been modified in accord with K.S.A. 21-4639. It is not determinative that *Apprendi* held the ceiling unconstitutional or *Alleyne* held the floor unconstitutional or that the Supreme Court overturned *Harris*, noting there is no basis in principle or logic to distinguish the two, or that Mr. Johnson made *Apprendi/Alleyne* based arguments in prior proceedings. The only way a mandatory term sentence may come about is by the district court's imposition of the same as authorized by K.S.A. 21-4635. K.S.A. 21-4635 was held unconstitutional. This court did not address *Baker, supra*, finding K.S.A. 21-4635 authorizes a hard 50 sentence, and under K.S.A. 21-4639 modification is required. This point separates Johnson from *Coleman* analysis.

As Chief Justice Luckert acknowledged in the concurring opinion, "the Court erred in *Coleman*." Mr. Johnson's claim is not a constitutional claim but a statutory claim for modification of his sentence. Analysis of Coleman's pro se K.S.A. 60-1507 is inapposite. Unlike Johnson, Coleman and Kirtdoll filed successive pro se 1507 motions raising constitutional claims against their sentences.

9. Rehearing is sought because Johnson relies on prospective K.S.A. 21-4639 as a basis for relief, and contrary to the finding in *Coleman*, K.S.A. 21-4635 authorized Mr. Johnson's sentence in accord with *Baker, supra.*

The Court found as it concluded in *Coleman*, at 121-24, K.S.A. 2020 Supp. 21-6628(c) does not provide defendants in Johnson's position a mechanism for relief. *Opinion*, p. 8. The Court interpreted K.S.A. 2020 Supp. 21-6628 to be a "fail-safe provision" that "by its clear and unequivocal language...applies when the term of imprisonment or the statute authorizing the term of imprisonment are found to be unconstitutional." *Opinion*, p. 8, citing 312 Kan. at 124. The Court found in *Coleman* it held K.S.A. 21-4635 "was part of the procedural framework by which the enhanced sentence was determined" and the root authorization for Coleman's sentence was the statute that provided for a life sentence. *Opinion*, p. 8, citing *Coleman*, at 124. The Court found Johnson committed premeditated murder, and the Legislature has authorized a life sentence for someone convicted of that crime. *Opinion*, p. 8-9, citing K.S.A. 2001 Supp. 21-3439; K.S.A. 2001 Supp. 21-4706. The Court found a life sentence has never been determined to be categorically unconstitutional and such sentences continue to be imposed in Kansas. *Opinion*, p. 9. Thus, the Court found Johnson's sentence does not

trigger the fail-safe provision of K.S.A. 2020 Supp. 21-6628(c) and resentencing is not required. *Opinion*, p. 9. The Court concluded there is no procedural mechanism by which a Kansas court may reconsider Mr. Johnson's sentence; *Alleyne* and *Soto* do not operate retroactively to afford a remedy and K.S.A. 2020 Supp. 21-6628(c) does not apply. *Opinion*, p. 9.

In the concurring opinion, the Court found the district court had no authority to impose a hard 50 sentence without first walking through the weighing of circumstances provided in K.S.A. 2001 Supp. 21-4635. Thus, the Court found K.S.A. 2001 Supp. 21-4635 authorized Johnson's sentence. *Opinion*, p. 12. However, the Court indicated under K.S.A. 2020 Supp. 21-6628(c), Johnson must still show a court has jurisdiction over him. *Opinion*, p. 12. Mr. Johnson argues the district court has jurisdiction as he argues in Issue number 7 above.

The Court indicated if the U.S. Supreme Court held either the death penalty or the hard 50 sentencing statute was categorically unconstitutional - rather than an aspect of it, a time extension based on manifest injustice would likely apply and the "fail-safe" provisions of K.S.A. 2020 Supp. 21-6628 could be used to provide relief pursuant to K.S.A. 60-1507. However, the Court found Johnson did not present a situation that demanded an extension to prevent manifest injustice. The Court indicated after *Alleyne*, the Legislature signaled an intent that an *Alleyne* violation did not trigger the fail-safe of K.S.A. 2020 Supp. 21-6628 and the Governor called a special session to address the hard 50 sentencing statutes. *Opinion*, p. 14. The Court found Johnson failed to establish

exceptional circumstances or manifest injustice as necessary to allow a court to have jurisdiction to grant him relief under K.S.A. 2020 Supp. 21-6628 based on *Alleyne*. *Opinion*, p. 15. The decision overlooks Johnson sought relief pursuant to prospective K.S.A. 21-4639 via a motion invoking K.S.A. 21-4639/K.S.A. 21-6628(c) for modification of his sentence. The legislature authorized sentence modification in K.S.A. 21-4639 applicable to mandatory term sentences where a provision authorizing the same is held unconstitutional, as here. This court's decision in *Baker*, *supra*, finding K.S.A. 21-4635 authorizes a hard 50 sentence which meets the fail-safe language in K.S.A. 21-4639 where a provision authorizing the sentence here was held unconstitutional. A declaration that the hard 50 is categorically unconstitutional is not the only path to relief under K.S.A. 21-4639. K.S.A. 21-4639/K.S.A. 21-6628(c) contain no case specific retroactive application and place no timeline for application. Instead, K.S.A. 21-4639 applies prospectively. The concurring opinion finding the Court erred in *Coleman* when it held K.S.A. 21-4635 was not a statute authorizing a hard 50 life sentence conflicts with *Coleman*, *supra*, so rehearing is requested because relief under K.S.A. 21-4639 is dependent on whether K.S.A. 21-4635 authorized the sentence.

In the concurring opinion, the Court indicated Johnson's request for relief is based on *Apprendi*, not *Alleyne*, requires a conclusion that *Alleyne* was a mere extension of *Apprendi*, but it was not. *Opinion*, p. 15. After *Apprendi*, the Court found *Harris v. U.S.*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed 2d 524 (2002) affirmed a sentence that imposed a mandatory minimum based on judicial fact-finding and changed the law. *Opinion*, p. 15.

The Court concluded K.S.A. 2020 Supp. 21-6628 (c) did not require the district court to vacate Johnson's hard 50 life sentence. *Opinion*, p. 16. The Court's decision overlooks the plain language of prospective K.S.A. 21-4639 which mandates modification "in the event," a provision authorizing Johnson's hard 50 life sentence is found to be unconstitutional. This court has already found *Soto* triggered K.S.A. 21-6628(c) and K.S.A. 21-6435 authorizes a hard 50 sentence (*Baker, supra*). The question of whether *Alleyne* is retroactive is not determinative here where K.S.A. 21-4639 is prospective. K.S.A. 21-4639 does not require vacatur of Johnson's sentence before application, nor does K.S.A. 21-6628. The new statutes were enacted to address vacated hard 50 sentences. The legislature did not change the language and K.S.A. 21-6628(c) is still noted as an exception.

10. Mr. Johnson had a due process right to modification of his sentence under K.S.A. 21-4639.

The court found Mr. Johnson's argument he had a due process right to have his sentence modified pursuant to K.S.A. 21-4639/K.S.A. 21-6628(c)turns on the Court's agreement with him that K.S.A. 21-6628(c) requires him to be resentenced, but the Court rejected his arguments and he was not owed any process under the statute that he had not received. Mr. Johnson contends when he was originally sentenced, deprivation of his liberty by adjudication was required to be preceded by notice and opportunity for hearing appropriate to the nature of the case. At sentencing he was entitled to have a jury find any factors to enhance his mandatory minimum sentence beyond a reasonable doubt, which did not occur. At the time he was sentenced, K.S.A. 21-4639 applied to provide if any

provision authorizing the Hard 50 sentence was found unconstitutional, he was to be brought before the Court and his sentence modified to include no mandatory term of imprisonment. See *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") Appellant asserts he has a liberty interest in being free from mandatory imprisonment by the State of Kansas where a provision authorizing such imprisonment was found to be unconstitutional and the process due is found in K.S.A. 21-4639/K.S.A. 21-6628(c). See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed. 2d 578 (2004) ("The most elemental of liberty interests in being free from physical detention by one's own government.")

CONCLUSION

The Court should grant rehearing on the grounds that the Court overlooked Johnson's claim is statutory; this court previously found K.S.A. 21-4635 authorizes a hard 50 sentence; and the district court has jurisdiction to modify Mr. Johnson's sentence. The Court's decision was in error, should be withdrawn, and this case should be remanded to the district court for modification of Johnson's sentence in accord with K.S.A. 21-4639.

Respectfully submitted,

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