CASE NO: 20-7825

IN THE SUPREME COURT OF THE UNTED STATES

CARLON D. MCGINN - PETITIONER

vs.

SHANNON MEYERS (WARDEN) - RESPONDENT

ON PETITIONER FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF KANSAS

Carlon D. McGinn #62252
C/O: Lansing Correctional Facility
P.O. Box 2
Lansing, Kansas
66043

QUESTION PRESENTED

Petitioner's 'OUT OF STATE' crime 'IS NOT' Defined under Kansas State Statutes and used to Enhance His Sentence based on the Determinations of a Judge not a Jury. Whether the subsection-specific definition of "PERSON FELONY" in Kansas Statutes Annotated 21-6810, and Kansas Statutes Annotated 21-6811 which applies in the limited context of a Prior criminal Conviction for Criminal History Determination is unconstitutionally vague.

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The opinion of Petitioners Supreme court of Kansas filed September 11, 2019

- is Unpublished - McGinn v. State, 2019 Kan. App. Unpub. LEXIS _____ (APPENDIX E)

STATEMENT OF JURISDICTION

The Kansas Supreme Court issued its order denying petitioners Petition for review on September 11, 2019 (APPENDIX E). The Court has Jurisdiction under 28 U.S.C. § 1257 (a).

NOTE - DUE TO COVID 19

issues, The Court failed notify the petition in a Timely manner to make corrections (AFTER) he resubmitted his petition, and the Clerk Issued a march 3rd, 2021 Letter providing Petitioner the opportunity to make Corrections. COVID 19 created the Confusion in the Resubmission of the Corrections. The Kansas Spreme Court Administrative Order 2020-PR-113 Extended Deadlines Due to Covid 19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." - U.S. Const. Amend. V

The Sixth Amendment to the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." - U.S. Const. Amend. VI

The Eighth Amendment to the Constitution provides in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor Cruel and unusual punishments inflicted." - U.S. Const. Amend. VIII

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." - U.S. Const. Amend. XIV

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STATEMENT OF ThE CASE

Carlon D. McGinn appeals the district court's decision to deny his motion to correct an illegal sentence. McGinn argues the sentencing court erred in classifying his prior Colorado conviction for menacing, as defined in Colo. Rev. Stat. § 18-3-206 (2000), as a person Felony in (KANSAS) for criminal history purposes. In 2003, Mr. McGinn pled Guilty to violation of K.S.A. § 21-3502 (2) and of violation of K.S.A. § 21-3506 (a) presentence investigation report revealed McGinn had a criminal history score of [E] based, in part, on a prior Colorado felony conviction for menacing. The district court enhanced Mcginn's sentenced to an underlying 554 months in prison, the mitigated presumptive sentence under the Kansas Sentencing Guidelines Act (KSGA), based on McGinn's criminal history score of B.

In 2013, McGinn file a pro se motion to correct an illegal sentence, challenging the sentencing court's decision to include his Colorado menacing conviction as a person felony in his criminal history. McGinn claimed the court should have classified it as a nonperson offense. The district court denied the motion, finding McGinn invited any error by stipulating to his criminal history score at sentencing. On appeal, we reversed the district court's ruling and remanded the case for a hearing on the merits of McGinn's motion. Relying on our Supreme Court's holding in State v. Dickey, 301 Kan. 1018, 1032, 350 P.3d 1054 (2015), we held a defendant's stipulation to criminal history at sentencing does not preclude a later claim that a prior conviction was improperly classified as a person or nonperson crime for criminal history purposes. State v. McGinn, 366 P.3d 666, 2016 Kan. App. Unpub. LEXIS 141, 2016 WL 758310, at *2-3 (Kan. App. 2016) (unpublished opinion). (APPENDIX C)

On remand, the district court appointed counsel for McGinn and held a hearing on his motion. McGinn argued that under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Dickey, the sentencing court should have classified his Colorado menacing conviction as a nonperson offense because there is no comparable offense in Kansas. The State disagreed, arguing that the Colorado crime of menacing was comparable to the Kansas crime of aggravated assault. Following oral argument from both counsel, the district court denied McGinn's motion. The court held the Colorado menacing statute was substantially similar and comparable to the Kansas aggravated assault statute. The district court later denied

McGinn's motion to reconsider.

On Appeal the Kansas Appeals Court denied relief, and the State Supreme Court denied review, The Petitioner comes before the United States Supreme Court, as the State of kansas has based discreationary decisions affecting sentencing, in the hands of Judges, not a Jury, Where the State Statute clearly States - Kan. Stat. Ann. § 21-6811 (e),(3) "If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state conviction shall be classified as a nonperson crime." - the Record of the State Appeals Court clearly noted the Specific subsection of the Out-of-State convictions was unknown, and the Court made it's own determination on ot's own accord as to Which subsections of the out-of-state statute, Petitioner was guilty of violating, making this determination with out subbitting the underllying 'facts' to a jury, and establishing the elements beyond a reasonable doubt.

The State appeals court noted - "Although McGinn admits that he committed the crime of felony menacing, it is unclear whether his conviction was under subsection (a) or (b)." (APPENDIX C at *7), and without jurisdictions over a out-of-State offence, the state appeals court made such determination of it's own accord, in violation of mcGinn's Constitutional rights.

Accordingly petitioner, comes to the United States Supreme Court, seeking consideration of an issue which has continued plague the Court on a recurring basis, only petitioner appear to be the First to actually question the 'mechanics' of the Kansas Sentencing Guidelines as applied and the affect of Apprendi in such Conatitutional Application.

Accordingly Petitioner preys this Court grant Review.

REASONS FOR GRANTING THE WRIT

Of Continues Constitutional Dispute among the lower State and Federal Courts, Involving Application of Apprendi v. New Jersey, 530 U.S, 466 (2000), this case involves the State of kansas as it applies It's Sentencing Guidelines in relation to application of the Principles Firmely Established in the Apprendi line of Cases. In Dispute are Kan. Stat. Ann.§ 21-6810 and Kan. Stat. Ann.§ 21-6811, which Specifically directs the State Court make "FINDINGS OF ADDITIOANL FACTS" which are then used to increase the underlying sentence, based on "Judicial Determination" that the prior crime "ELEMENTS" are a "CRIME OF VIOLENCE" or "PERSON FELONY". where Apprendi specifically Established that -"any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Kansas places discreation in the trial Judge to MAKE "FINDINGS OF ADDITIONAL FACTS", where the Due Process Clause of U.S.Const. amend. V and the notice and jury trial guarantees of U.S. Const. amend. VI.

At issue are not the 'FACT' of the Prior Conviction but the 'ELEMENTS', in classifing that prior Crime as a 'Crime of Violence' or [PERSON FELONY], Where "Apprendi concluded that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. Id., at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (internal quotation marks omitted); id., at 483, n. 10, 120 S. Ct. 2348, 147 L. Ed. 2d 435 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"). We held that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. Id., at 484, 120 S. Ct. 2348, 147 L. Ed. 2d 435. While Harris limited Apprendi to facts

Where this becomes confused is the term (ELEMENTS) is referenced twice - first in relation to the 'Current Crime' of which the offender is charged, and Second involving (ELEMENTS) of 'a separate legal offense'. Focus in on second portion of the Statement where 'the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt.

"The dispositive question in determining whether a jury determination is necessary, is one not of form, but of effect. If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact, no matter how the state labels it, must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Ring v. Arizona, 536 U.S. 584 (2002)

The rule of Apprendi and Ring is that if a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the state labels it--must be found by a jury beyond a reasonable doubt. Apprendi explicitly limits its holding to sentence enhancements based on facts other than the fact of a prior conviction. It is within the jury's province to determine any fact, other than the existence of a prior conviction, that increases the maximum punishment authorized for a particular offense.

In the Current case, the record clearly reflects that the State specifically requested the State Superior court - Remand the Cases, and premit the State to 'go Fishing' - requesting remand so the state can go on a search of any means by which to classify the [OUT-OF-STATE] offense as a "PERSON' Felony, as a simple means to justify the increase in the Underlying sentence. (APPENDIX ___) (BRIEF OF APPELLEE, Page 10, L. 10 - 20)

Kansas first classified the Out of Sate Crime - as comparable the the Kansas Offense of (Criminal threat), then has sought look at the Out of State 'STATUTE' rather that the "Conduct involved", as justification to sustain the Sentencing enhancement. 'Findings of Additioanl facts', preformed by a Judge, not a Jury, and then has proceeded to attempt classify the 'Out of State' offense with any crime it can simply classify as being a 'PERSON' Felony. Including (Aggravated Assult, Simple Assult), and avoiding any consideration of 'Comparable' (MISDEAMENORS).

Such 'finding of additional facts' is strictly prohibited, and allows confusion, where in making such comparisons - the State looks not only at the 'Out of State Statute' but then also innermixes the alligations in it's fact finding search, with (The factual statements that are contained in those documents are often

"prone to error." Mathis v. United States, 579 U. S. ___, ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 615 (2016).

This involves Double jeopardy questions as, the State of Kansas seeks to focus on any means it can to justify use of 'ELEMENTS' of Prior Crimes, as means to justify the Increase in punishment for a new conviction, and under the kansas Sentencign Scheme, allows an increase of over 30 years, based on a 'out-of-State' crime which initially carried only a sentence of - (3 Years) - not as serious as the Prosecutor leads the State to Believe. the State appeals court noted the Same (APPENDIX D)

'Although McGinn admits that he committed the crime of felony menacing, it is unclear whether his conviction was under subsection (a) or (b).' State v. McGinn, 2018 Kan. App. Unpub. LEXIS 55, Court of Appeals of Kansas, July 20, 2018, Opinion Filed.

With this admission as to the specific portion, the Kansas Appeals Court simply 'affirmed' based on focus on the 'out of State' Statute - Specifically subsection (b), and avoid any discussion of any lessor possible alternative, where the Colorado Statute contains Subsections (a) and (b), and the Colorado chraging dockument is Silent.

As this involves Constitutional questions which continue to plague this court on a recurring basis ever sense it anounced its ruling in Apprendi in 2000, this involves nearly 1500 person directly affected in Kansas, but also other States as well as Federal Application. Kansas has simply capitalized on the difficulity to articulate the constitutional challenge clearly.

This court, in speaking of determinaton of prior Convictions has stated 'a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.' Jones v. United States, 526 U.S. 227 at 249 (1999), actually an Apprendi precurses case.

Kansas places the Establishment of these prior convictions directly in the discreation of the Court 'not a jury' in direct disreguard to the Sixth and Fourteenth amendment rights of the petitioner. where the State first faced challenge to it's sentencing guidelines on a poorly presented arguement in 2002.

Kansas first faced challenge to it's Sentencing guidelines in 2002, in STATE OF KANSAS v. DAVID L. IVORY, 273 Kan. 44 - Supreme Court of Kansas, March 8, 2002, Opinion Filed (APPENDIX ____) based on the underlying arguement presented by Ivory, who challenges only the horizontal axis on which the Kansas Sentencing Guidelines Act (KSGA) operates, Ivory failed to challenge the Mechanic's of that Axis, which has allowed kansas Operate on it's own determination.

The Kansas Sentencing Guidelines Act (KSGA) operates on (a letter designation along the horizontal axis of the KSGA grid; the vertical axis indicates the severity level of the crime). (a letter designation along the horizontal axis of the KSGA grid - esstablishes the prior crimes on which the sentence increases, these Axis operate on a Axis of [RIGHT] to [Left], [boxes I, through E] are not in dispute as these Boxes operate on the 'FACT' of prior Convictions Consistant with Apprendi, what are in dispute are the [boxes, D, through A], these boxes operate in violation of Apprendi, placing 'finding of Additional facts' in the Discreation of the Court, not a Jury, in Violation of The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435, (2000).

Petitioner, in his latest attempt addressed this failure on Ivory, and Made direct challenge seeking the State Court address the 'mechanics' of its sentencig guidelines, to which the court again stood firm on its own determination in Ivory, avoiding any determination of the Constitutional Challenge in this current case.

Kansas based determination of (out of State) crimes in the Discreation of a judge, not a jury, "In calculating a criminal history score for sentencing on the current crime of conviction, all felony convictions and adjudications and certain misdemeanor convictions and adjudications occurring prior to the current sentencing are considered, including those that occurred in other states. Kan. Stat. Ann. § 21-6810(a) (2011) [APPENDIX G] - ; Kan. Stat. Ann. § 21-6811(e) (2017). For out-of-state adjudications, Kansas accepts the foreign jurisdiction's designation of its crime as either a felony or misdemeanor, but this state will classify an out-of-state crime as either person or nonperson by referring

to comparable offenses under the Kansas criminal code in effect on the date the current crime was committed. If there is no such comparable Kansas offense, the out-of-state adjudication will be scored as a nonperson crime. § 21-6811 (e)." State v. Buell, 307 Kan. 604 (2018)

The Court just affirmed ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT - United States v. Davis, 903 F.3d 483, 2018 U.S. App. LEXIS 25486 (5th Cir. Tex., Sept. 7, 2018) - United States v. Davis, 139 S. Ct. 2319, Supreme Court of the United States, April 17, 2019, Argued; June 24, 2019, Decided the Lower Court striking down the 'residual clause, in - 18 U.S.C.S. § 924(c)(3)(B),' - Kan. Stat. Ann. § 21-6811(e) is simulular to this same determination, allowing the State in this current case look for any means by which to determine without factual support that the underlying [OUT OF STATE] crime involved subsection (b) rather than (a) of the Colorado offense.

The sentencing court erred in classifying his prior Colorado conviction for menacing, as defined in Colo. Rev. Stat. § 18-3-206 (2000) {APPENDIX J }, as a person offense for criminal history purposes, the State Court in its 2018 ruling, admitted on the record "it is unclear whether his conviction was under subsection (a) or (b)." [APPENDIX D] at *7 - the Court itself stated "Because McGinn's Colorado conviction could have resulted from conduct exceeding Kansas' definition of aggravated assault, the district court erred in finding that the two crimes were comparable. {APPENDIX D] at *8.

the State Statute provides no reliable way to determine which offenses qualify as a Person Crime (CRIME OF VIOLENCE), and thus is unconstitutionally vague.

The State itself admitted [APPENDIX D] at *3 "The State counters that while the two offenses do not have identical elements, they are sufficiently similar to constitute comparable offenses. Alternatively, the State argues that Colo. Rev. Stat. § 18-3-206 is comparable to the Kansas crime of simple assault, K.S.A. 21-3408." (a Kansas misdeamenor). - and the Appeals court took it upon itself with no supporting record.

Kansas Appeals court violated Apprendi, when it Stated [Under the identical-or-narrower rule set forth in Wetrich, these Crimes are comparable because McGinn's Convictions under Colo. Rev. Stat. § 18-3-206(1)(b)].

With little material on the Subject of Apprendi and the Constitutional protection concerning Double Jeopardy, as applied to the Current Sentence - based on [ELEMENTS], OR [PRIOR CRIMINAL ACTS], for which Petitioner Carlon McGinn, has already been punished, and in order to sustain the increase in the underlying sentence, The State of Kansas has simply placed the determination of the "ADDITIONAL FACTS" in the Discreation of a Judge.

'The Double Jeopardy Clause of the Fifth Amendment provides that no person may be twice put in jeopardy for the same offence. U.S. Supreme Court double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular "offence" cannot be tried a second time for the same "offence".' Gamble v. United States, 139 S. Ct. 1960 (2018), in the Current Case, Petitioner has been subjected to being tried by a Kansas Trial Judge, as well as a Kansas Appeals Court judge, which made the determination that petitioner was guilty of (MENACING) under the Colorado Statute - Colo. Rev. Stat. § 18-3-206(1), specifically subsection (b), as a means to justify the increase in the Kansas Sentence from (221) months - to (554) Months, an increase of over 27 years (333) Months, in essence petitoner has been [Twice put in jeopardy for the same offense], once with the Colorado Court, and a Second time with the Kansas Court, simply as a means for Kansas to Justify a sentence increase, based on (Judicial Finding of Additional Facts), not a jury, as specifically Required "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999).[n. 6.]. This does not involve the (FACT) of the Prior Conviction,, but the Determination of the [ELEMENTS] of that prior Conviction, Based on the Kansas Sentencing Guideleins Act (KSGA), the State makes the Determination on the findings of a judge, not a Jury, - Kan. Stat. Ann. § 21-6811 (e).

The Eighth Amendment's ban on cruel and unusual punishments prohibits sentences that are disproportionate to the crime committed, and the constitutional principle of proportionality has been

recognized explicitly in the United States Supreme Court for almost a century. Three factors may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. Ewing v. California, 538 U.S. 11 (2003)

In the Current case, McGinn's underlying sentence 'absent' the finding of any additional facts, based on the Kansas Sentencing Guidelines, would be that of (three Plus) [unlabeled Felonies], or the (E) box of the Guidelines grid. [APPENDIX LL], only after the Finding of 'Addititonal Facts', preformed by a judge, not a jury, does the State then label those Prior Offenses as [PERSON] crimes.

The Tenth Circuit addressed this [June 17, 2019], Gordon v. Cline, 772 Fed. Appx. 712, Stating, However, it is clear from the record that the sentencing court did not look at the underlying facts of Petitioner's past criminal offenses. Certain prior offenses were classified as "person" offenses based on the statutory elements of those offenses, not based on any individualized factfinding about Petitioner's specific conduct in those cases. Petitioner has not shown that this constituted an unreasonable application of federal law; indeed, this approach appears to be consistent with the Supreme Court's categorical approach for federal courts to apply in determining whether a defendant's prior offense should be characterized as a "violent felony"—a characterization which, like Kansas's "person" characterization of prior offenses, may affect the length of the defendant's sentence. See Taylor v. United States, 495 U.S. 575, 600, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). Accordingly, Petitioner has not shown that reasonable jurists could debate the state court's resolution of this claim under the deferential standard required by § 2254(d).

This Finding was incorrect and avoids the Central requirement, that such finding (MUST) be made by a Jury, not a Judge - accordingly, reasonable jurists could debate the state court's resolution of this claim under the deferential standard required by § 2254(d).

It is not simply disputed whether the State may use the [Elements] or Prior Crimes, but in order to

properly do so, Such Elements [a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.] Jones v. United States, 526 U.S. 227, at 249 (1999) in the Current case - ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"). Alleyne v. United States, 570 U.S. 99 at 111 (2013), in it's review the Tenth Circuit simply avoided the central requirement that these findings (MUST) be made by a jury, not a Judge.

'the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case.", United States v. Davis, 139 S.Ct. 2319 (2019), where clearly in the Current case the Trial Courtjudge himself first - absent any support in the record, made the Determination that Petitioners (OUT-OF-STATE) conviction involved subsection (b) of the Colorado Statute, as noted earlier, the kansas Court of Appeals also noted the Record was Silent to this Fact, and again the Appeals Court in order to Sustain the Additional sentence of over 27 Additional Year, took it upon itself and again made a Determination petitioner violated Subsection (b) of the Colorado Statute.

In fact the State Statute itself, Kan. Stat. Ann. § 21-6811, directs State Judges to make his own determination of the [ELEMENTS] involved, in comparing the Out-of-State Crimes.

In the Dissent, in United States v. Davis, 139 S. Ct. 2319, the Justices described the very nature of the problem which plague the State of Kansas on a continued basis stating 'FIRST', in the prior-conviction cases, the Court emphasized that the categorical approach avoids the difficulties and inequities of relitigating "past convictions in minitrials conducted long after the fact. Monerieffe v. Holder, 569 U.S. 184, 200-201 (2013), a problem which plagues Kansas with the Greatest Number of Apprendi Appeals based on State population compared to any other State. and in the present Case, the Following Statements apply as well, (The factual statements that are contained in those documents are often "prone to error." Mathis v. United States, 579 U. S. ___, ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 615 (2016). The categorical approach avoids the unfairness of allowing inaccuracies to "come back to haunt the defendant many years down the road." Id., at ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 615-

616). The Court has echoed that reasoning time and again. See, e.g., Sessions v. Dimaya, 138 S. Ct. 1204, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (plurality opinion), 200 L. Ed. 2d 549, Johnson v. United States, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (slip op., at 13); Descamps v. United States, 570 U. S. 254, 270, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); Chambers v. United States, 555 U. S. 122, 125, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009).

Existing law principles dating back to 1970 - In re Winship, 397 U.S. 358, and Kansas, in order to sustain, sentencing which violated the Principles 'given Force or Effenct' in the Rulings of this Court have Clouded the Issue.

[Existing law] - providing protection to all person already sentenced, {Apprendi v. New Jersey, 530 U.S. 466 (2000), Alleyne v. United States, 570 U.S. 99 (2013), Ring v. Arizona, 536 U.S. 584 (2002), Blakely v. Washington, 542 U.S. 296 (2004).} and this line of Cases all simply applied Existing law, protections to which those already Sentenced, and who's State cases already final on direct review, are fully entitled. JUSTICE STEVENS, concurring, in Jones v. United States, 526 U.S. 227(1999) Listed The following cases - [In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), and Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).], it is these Existing legal principles which provid Existing protections, and through Misleading and Misrepresenting the underlying Rule of law, Kasnas has been able to maintain Illegal Sentencing on Persons like (ROBERT L. VERGE v. STATE OF KANSAS, 50 Kan. App. 2d 591 (2014), who's hard 50 Sentence is entitled to Existing law protections, as applied by Apprendi, and Allenye, Respectively.

The Kansas Supreme Court has correctly stated 'Alleyne is an extension of Apprendi. The United States Supreme Court has decided that other rules based on Apprendi do not apply retroactively on collateral review. See Schriro v. Summerlin, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (finding that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 [2002], which held Arizona's death penalty sentencing scheme unconstitutional in light of Apprendi, did not apply retroactively to cases already final on direct review). This implies that the United States Supreme Court

will not declare Alleyne to be retroactive to cases that are already final on Direct Review. Likewise, our Supreme Court has found that Apprendi does not Apply Retroactively to Cases on collateral review. We can find nothing that Distinguishes this case from Apprendi and the analysis in Whisler when it comes to Retroactivity. SEE: Verge v. Satte, 50 ka. App. 2d 591, 598 (2014)

The State Court holding 'our Supreme Court has found that Apprendi does not Apply Retroactively to Cases on collateral review.' is Written with the intent to mislead that the Apprendi Line of of cases only [APPLIED EXISTING LAW], and the Discussion concerning retroactivity is written with the intent to mislead the untrained reader.

Existing Law protections, which include the underlying fact - those cases already final on direct Review - are already entitled to the protections of these Existing Laws. Which this court has Stated when Sentencing is involved - 'By the traditional understanding of habeas corpus, a "fundamental miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a federal constitutional right. See 28 U. S. C. § 2254(a) (federal courts "shall entertain" habeas petitions from state prisoners who allege that they are "in custody in violation of the Constitution or laws or treaties of the United States"); Smith v. Murray, 477 U.S. 527, at 543-544 (1986).

In essence, those Cases remain increased based on a "Fundamental Miscarrage of justice" based on the Fact the Underlying sentence is secured in violation of a federal constitutional right. See 28 U. S. C. § 2254(a).

This includes Petitioner, who's Sentence is secured in violation of the Constitutional Rights, as the U.S. Const. amend. XIV provides for the proscription of any deprivation of liberty without due process of law, and U.S. Const. amend. VI guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. Taken together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

As in Apprendi directly - the State trial Judge - 'based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate"

his victim on the basis of a particular characteristic the victim possessed. In light of the constitutional rule explained above, and all of the cases supporting it, this practice cannot stand.' Apprendi, at 491 - 492.

The Kansas Judge had to Determine - without the Right to Jury, that Petitioner Violated -

> (1) A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a class 3 misdemeanor, but, it is a class 5 felony if committed:

'and

> (b) By the person representing verbally or otherwise that he or she is armed with a deadly weapon.

Petitioner [WAS NOT] afforded the Right that a jury make these findings, and the Court should make the Following determination - that the Kansas procedures challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system. Accordingly, the judgment of the Court of Appeals of Kansas Should be reversed, and the case is remanded for further proceedings not inconsistent with the opinion in Apprendi.

As the dissenting Justinces outlines in United States v. Davis, 139 S. Ct. 2319, at 2344, , Kansas court are plagued - "courts would have to determine the underlying conduct from years-old or even decades-old documents with varying levels of factual detail. Taylor v. United States, 495 U. S. 575, Compared to State v. Dwerlkotte, 2018 Kan. App. Unpub. LEXIS 685, Court of Appeals of Kansas, August 31, 2018, Opinion Filed - Who has faced Not one, Not Two, Not Three, But Resentencing Six Times on the State Fishing at any means to [LABEL] or Classify the Prior Convictions as Person Crimes as means to Justify the Enhanced Sentence - So All Six Appeals Should be Considered in this Courts revies of the Unconstitutional Nature of the Kansas Sentencing Statute, Each of the justices Following Statments all Apply - "The factual statements that are contained in those documents are often "prone to error." Mathis v. United States, 579 U. S. ___, ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 615 (2016). The categorical approach avoids the unfairness of allowing inaccuracies to "come back to haunt the defendant many years down the road." Id., at ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 615-616). The

Court has echoed that reasoning time and again. See, e.g., Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (plurality opinion) 138 S. Ct. 1204, 200 L. Ed. 2d 549 (slip op., at 15); Johnson, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (slip op., at 13); Descamps v. United States, 570 U. S. 254, 270, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); Chambers v. United States, 555 U. S. 122, 125, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009).

Yet these very problems plague Petitioner, as well as others affected by this Sentencing Structure maintained by the State of Kansas - Petitioner would stress - it is not the issue that Kansas can use the 'Elements' of those prior convictions, the Issue is the Procedure in which this is being undertaken by the Judge rather than a jury.

To illistrate the History of how the State has continued to manivure the Unconstitutional acts through both the State Courts, as well as the State Legislature, Petitioner will attempt to provide some history, While this began with State v. Ivory, 273 Kan. 44 (2002), this was followed by State v. Murdock, 299 Kan. 312, 323 P.3d 846 (2014) (SPECIAL NOTE) - (Defendant's two prior out-of-state convictions must be scored as nonperson offenses under Kan. Stat. Ann. § 21-4710(d)(8) following the Williams precedent, because in the absence of a statutory directive a comparable offense should be determined as of the date the prior crime was committed, when using the date the prior out-of-state crime was committed to calculate a defendant's criminal history score was consistent with the fundamental rule of sentencing for a current in-state crime; the Kansas Supreme Court recognized this rule resulted in the classification of all pre-1993 crimes as nonperson felonies, an outcome the State characterized as unreasonable.)

Followed by - State v. Dickey, 301 Kan. 1018 (2015) (Sentencing court violated Apprendi by going beyond the fact that defendant had an unclassified prior adjudication for burglary to consider other facts in deciding that his prior burglary adjudication involved a dwelling and was a person felony, which in turn increased the penalty for his current crime beyond the prescribed statutory Maximum.).

Followed by - State v. Keel, 302 Kan. 560 (The evidence was sufficient to show that defendant had constructive possession of drugs and paraphernalia found in the residence he shared with his girlfriend because a glass pipe containing methamphetamine residue was in close proximity to defendant, a baggie of methamphetamine was in plain view, and defendant tried to avoid discovery by burrowing away in a hidden room containing surveillance equipment; [2]-Consistent with recent amendments to Kan. Stat. Ann. §§ 21-6810, 21-6811, defendant's 1993 Kansas convictions for 'attempted aggravated robbery and aggravated robbery were properly classified as person felonies (resulting in a criminal history score of B), based on the classification in effect for those crimes when the current crime's were committed (overruling State v. Williams, 291 Kan. 554, 244 P.3d 667 (2010) and State v. Murdock, 299 Kan. 312, 323 P.3d 846 (2014)).).

Followed by - State v. Murdock, 309 Kan. 585 (2019) (SPECIAL NOTE) (This is the Same Murdock as Above) (Kan. Stat. Ann. § 21-6810(d)(2) provides that prior adult felony convictions for offenses that were committed before July 1, 1993, shall be scored as a person or nonperson crime using a comparable offense under the Kansas criminal code in effect on the date the current crime of conviction was committed. Kan. Stat. Ann. § 21-6811(e)(3) provides that the state of Kansas shall classify the out-of-state crime as person or nonperson. In designating a crime as person or nonperson, comparable offenses under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state conviction shall be classified as a nonperson crime. To avoid retroactivity concerns, the State claimed State v. Keel and H.B. 2053 did not change the law; instead, they merely recognize or clarify the Kansas Sentencing Guidelines Act's existing requirements.).

Kansas has made every attempt to legislate it's way to sustain every means to use those prior Convictions, As noted State v. Murdock, 309 Kan. 585 (2019) - the State had went so far as attempt to manipulate the Change in the Statute as a means to 'Classify' the Prior Convictions as a "PERSON" Crime, as a means to increase from the [C] box to the [A] box where the [C] Box has a base

Sentence of 102 months, to the (A) box with a base of 223 Months - the Increase of close to 10 Years.

Just this year Kansas passed - 2019 Bill Text KS S.B. 18 - Modifing yet again - Out-of-State Crimes - Subsection (B) [If a crime is a misdemeanor in the convicting jurisdiction, the state of Kansas shall refer to the comparable offense under the Kansas criminal code in effect on the date the current crime of conviction was committed to classify the out-of-state crime as a class A, B or C misdemeanor. If the comparable offense in the state of Kansas is a felony, the out-of-state crime shall be classified as a class A misdemeanor. If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall not be used in classifying the offender's criminal history.].

Twist, turn, manipulate, and rewrite the statute, reguardless, the Unconstitutional act is still being placed in the Discreation of the judge - Not a jury as Constitutionally required, based on the Sixth and Fourteenth Amendment Protections - Given Force of Effect in Apprendi.

This Now involves Fourteeth Amendment issue, that K.S.A. 2019 Supp. 21-6810 violates the Equal Protection Clause of the United States Constitution because (1) it differentiates between individuals who are convicted in another state and person Convicted in Kansas, and (2) it places Discreation in the hands of a Judge, not a Jury as requird by the Sixth and Fourteenth Amendment. Also - K.S.A. 2019 Supp. 21-6811 violates the Equal Protection Clause of the United States Constitution because (1) it differentiates between individuals who are convicted in another state and person Convicted in Kansas, and (2) it places Discreation if the hands of a Judge, not a Jury as required by the Sixth and Fourteenth Amendment.

reguardless, looking at the continued course of Statutory changes, Kansas continues to avoid any change that would meet the requirements of Apprendi. the Kansas sentencing scheme should be held unconstitutional because, under the Scheme, a trial Judge, not a jury, makes findings necessary to impose the increased penalty. Specifically, Kansas sentencing scheme violates the Sixth Amendment right to a trial by Jury because a Judge, not a jury, found the existance or the aggraviting circumstance that made the Defendant eligible for the

increased Sentence.The Sixth Amendment requires that the Specific findings authorizing an increased sentence, must be made by a jury. The ("[F]acts that exposed a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a seprate legal offense"). This Court has Clearly stated that the Sixth Amendment provides defendants with the Right to have a jury find those facts beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, at 484, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Alleyne v. United States, 570 U.S. 99 at 111 - 112, 133 S.Ct. 2151, 186 l.Ed.2d 314 (3013)

Further, in Robert L. Verge v. State of Kansas, 50 Kan. App. 2d 591 (2014) persons faced with a (HARD 50) sentence, the State of Kansas, has deliberatly mislead those under this Sentencing Scheme. While the State Court is Correct that the Ruling stating (The United States Supreme Court has decided that other rules based on Apprendi do not apply retroactively on collateral review. See Schriro v. Summerlin, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (finding that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 [2002], which held Arizona's death penalty sentencing scheme unconstitutional in light of Apprendi, did not apply retroactively to cases already final on direct review).

This discussion is misleading, as those persons who's cases were not under [collateral review] are still in fact entitled to the protections of Apprendi, Alleyne, respectively, as both Apprendi, as well as Alleyne, only gave Force or Affect - or Applied Existing law.

These Cases, gave effect to, 'In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970) - the historical foundation for these principles extends down centuries into common law. While Judges in this Country have long exercised discreation in sentencing, such discreation is bound by the range of sentencing options prescribed by the legislature. SEE, e.g., United States v. Tucker, 404 U.S. 443, 447, 30 l.Ed.2d 592, 92 S.Ct. 589. The historic inseparability of verdict and judgement and the consistent limitation on judges' diecreation highlight the novelty of a Scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone. Others simularly denied the 'protections of Existing law' based on the misdirection in the discussion on retroactivity - where these person 'ARE' entitled to the protection of 'EXISTING LAW'. - Including person such as - State v. Vasquez, 52 Kan. App. 2d 708 (2014), and State v. Thomas, 307 Kan. 733 (2014) - both were

denied based on the misleading discussion concerning "RETROACTIVITY" as opposed to 'EXISTING LAW'.

With Currently between 1,000 and 1,500 person directly Affected by by the Sentencing Scheme of Kansas, where as petitioner faces an increase of over 27 years, others could face an increase of up to or more than (653) months - compared to (246) if sentenced without the [ELEMENTS] of other crimes being imposed for a Second time, this case is of significant Constitutional concern and the Court should Accordingly grant the Writ.

In Fair Consideration, a review of the Colorado Statute should be considered, where Kansas in order to sustain the Disproportiate sentence - in Violation of the Eight amendment - which states - U.S. Const. amend. VIII provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Colorado has it's own assault statutes - Colo. Rev. Stat. § 18-3-203(1)(b) (1986) [second degree assault] - the Colorado Court has Compared 'Felony menacing to it's own Assult Statute, and Clearly asserted that felony menicing is not a 'Lessor Included Offence' - SEE: People v. Truesdale, 804 P.2d 287, Further, the Office of the Colorado public Defender was Contacted, and they responded, stating that, "Your letter ask if the menacing charge you pleaded guilty to is a "Crime against person." In Colorado, crimes are not declared by the legislature as a Crime against or not against a person. It is likely this is an internal DOC designation that the Colorado court have no control over. Colorado does however, designate crimes as being "extradorinary risk" or "Crimes of Violence (COV)." Menacing in Colorado (IS NOT) designated as either an extradorinary risk crime, or COV. - (APPENDIX M).

Where the Tenth Circuit, in it's diccussion of the Manner in Which Kansas Applies it's Statutes, Stated - "Certain prior offenses were classified as "person" offenses based on the statutory elements of those offenses, not based on any individualized factfinding about Petitioner's specific conduct in those cases. Petitioner has not shown that this constituted an unreasonable application of federal law; indeed, this approach appears to be consistent with the Supreme Court's categorical approach for federal courts to apply in determining whether a defendant's prior offense should be characterized as a "violent felony"—a characterization which, like Kansas's "person" characterization of prior offenses, may affect the length of the defendant's sentence. See Taylor v. United States, 495 U.S. 575, 600, 110 S. Ct. 2143,

109 L. Ed. 2d 607 (1990)."- See: Gordon v. Cline, 772 Fed. Appx. 712 (June 17, 2019) (United States Court of Appeals for the Tenth Circuit).

Where as applied, this finding by the United States Court of Appeals for the Tenth Circuit, is an unreasonable application of how Kansas Applies it's own Statutes, in making it's determination, the Kansas Courts violate the Following - "not based on any individualized factfinding about Petitioner's specific conduct in those cases", where in the Current case, the State of kansas did exactly what the tenth Circuit States they do not do - "Individualized factfinding about petitioenr's specific conduct", Comparing the Kansas "Person" Felony" classification to a "violent felony" - where Colorado - does not make this Classification.

'In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under the Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again. United States v. Davis, 139 S. Ct. 2319 (2019) - further the Court states - 'Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. See Dimaya, 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 570 (plurality opinion); id., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (Gorsuch, J., concurring in part and concurring in judgment) 138 S. Ct. 1204, 200 L. Ed. 2d 549 (slip op., at 2-9). Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. Connally v. General Constr. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926); see Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510 (1914). Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected

representatives in the legislature are authorized to "make an act a crime." United States v. Hudson, 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812). Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide. See Kolender v. Lawson, 461 U. S. 352, 357-358, 103 S. Ct. 1855, 75 L. Ed. 2d 903, and n. 7 (1983); United States v. L. Cohen Grocery Co., 255 U. S. 81, 89-91, 41 S. Ct. 298, 65 L. Ed. 516 (1921); United States v. Reese, 92 U. S. 214, 221, 23 L. Ed. 563 (1876). - See: United States v. Davis, 139 S. Ct. 2319 at 2325.

In the current case, petitioner made specific arguements as to 'why' the State was able to affirm it's statute in State v. Ivory, 273 Kan. 44 (2002), in fact, petitioner made specific arguements as to the actual Mechanics of the Kansas Sentencing Guidelines (KSG) grid, and the Court again simply upheld the States Sentencing Structure, Refusing any Reconsideration of State v. Ivory, Supra.

As illistrated, the Kansas Statute clearly 'hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide. - all with the central effort to punish a second time for criminal acts for which the offender has already been punished - 'Double jeopardy protection extends to punishments that are not positively covered by the language of the Fifth Amendment. It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.', Yeager v. United States, 557 U.S. 110, 117 (2009) - in the Current case, petitioner had already been punished in Colorado, and kansas, has punished him a Second time based on the 'STATE OF KANSAS' finding petitiner had violated subsection (b) of he Colorado Statute, although the State Appeals Court clearly Noted that the Records from Colorado, [DID NOT] make specific note of Eitehr Subsection (a) or (b).

The contention that "placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision." Id., at 465; see also Walton v. Arizona, 497 U.S. 639, 648, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990); Clemons

v. Mississippi, 494 U.S. 738, 745, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990). and this court has clearly stated that simply because a case is (Capital) in nature or not - The Court has Stated it has - "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." Murray v. Giarratano, 492 U.S. 1, 9, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (plurality opinion). Herrera v. Collins, 506 U.S. 390 at 405 (1992) - Such differential treatment would violate the equal protection clause of the Fourteenth Amendment.

Kansas has remanded cases over 6 times - allowing the trial court repeated means to 'fish' or 'Justify' by any means the manner of making this increase. SEE: State v. Dwerlkotte, 425 P.3d 372 - Remanded Repeated times for Resentecing - and then the State in order to sustain an Increased sentence - resorted to 'Vindictive Sentecing Violations'. - "However, in Dwerlkotte's original sentencing his sentences for his two convictions were ordered to run concurrent to each other—at resentencing his sentences for his convictions were ordered to run consecutive to each other."

Also - See: State v. Murdock, 309 Kan. 585 (2019) - "This is Jimmy Lee Murdock's second appeal to this court. In his first appeal, Murdock argued the district court miscalculated his criminal history score when it classified his two out-of-state offenses as person crimes, resulting in a criminal history score of A. State v. Murdock, 299 Kan. 312, 313, 323 P.3d 846 (2014), modified by Supreme Court order September 19, 2014, overruled by State v. Keel, 302 Kan. 560, 357 P.3d 251 (2015). We agreed, holding Murdock's prior out-of-state convictions must be scored as nonperson offenses. Murdock, 299 Kan. at 319. At resentencing, the Shawnee County District Court followed our mandate in Murdock, scored Murdock's prior out-of-state convictions as nonperson felonies, and found he had a criminal history score of C. Shortly after, Keel overruled Murdock, and the State moved to correct Murdock's sentence. The district court granted the motion and sentenced Murdock a third time, finding a criminal history score of A. - On appeal, Murdock argues his second sentence was legally imposed under Murdock, and it did not become illegal after Keel changed the law. We agree and hold the legality of a sentence under K.S.A. 2018 Supp. 22-3504 is controlled by the law in effect at the time the sentence was pronounced. Accordingly, we reverse and remand." - again the State attempting find any means to Punish for Prior

Crimes for which a person had already been punished.

Further this court has States, Also in Davis, at 2333 'Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.' - Here, Kansas has acted to circumvent Apprendi, based on the First Challenge, where David Ivory, presented a Poorly argued claim, where Ivory challenged the 'horizantal Axis', and based on his failure to additionally argue the mechanics of the axis, kansas has maintained it's sentencing Scheme for nearly 20 year.

"It is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." Jones, 526 U.S. at 253 (emphasis added). Thus, the Court appears to hold that any fact that increases or alters the range of penalties to which a defendant is exposed – which, by definition, must include increases or alterations to either the minimum or maximum penalties – must be proved to a jury beyond a reasonable doubt.", Apprendi v. New Jersey, 530 U.S. 466 at 533 (2000)

Kansas Statutes directtly remove the 'assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed' - Kansas simply 'LABELS' the additional facts as "PERSON CRIMES", while removing the necessary finding that these [ADDITIONAL FACTS] - must be proved to a jury beyond a reasonable doubt - this would give effect to the courts statement 'The dispositive question in determining whether a jury determination is necessary, is one not of form, but of effect. If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact, no matter how the state labels it, must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.' Ring v. Arizona, 536 U.S. 584 at 602 (2002) - Kansas as Stated has simply attached the label (PERSON FELONY) to the Additional facts, which kansas has placed in the Unconstitutional Discreation of the Judge. - Stated by this Court as Follows - 'For Apprendi purposes, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any

additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.' Blakely v. Washington, 542 U.S. 296, 303 - 304 (2004), - in essence, the Stateute of the State of Kansas, specifically direct the Judge to Deliberitely 'exceeds his proper authority.'.

Kansas can not even adhear to it's own Case's on the Subject, in 2018, Kansas, again dealing with Out-of-State Crimes, and this (PERSON) and (NONPERSON) classification, Stated -"the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced." SEE: State v. Wetrich, 307 Kan. 552 (2018) - "That changed in 2018 when our Supreme Court decided Wetrich and held that "constitutional constraints would require that, to be a comparable offense, a prior out-of-state crime must have identical or narrower elements than the Kansas offense to which it is being compared." 307 Kan. at 557. - only in consideration of the 'identical or narrower elements' rule - this Allows the state to elevate the Out of State crime, into a more Serious Crime, as a means to increase the Penality for the Current Crime.

Where a Wyoming statute fails define 'Age', in order to sustain the Increased penalty, Kansas compared [Wyo. Stat. Ann. § 14-3-105 (1978)] to Kansas [K.S.A. 21-3503.], where the Kansas Statute does contain a Specific Element of Age, and the Wyoming statute does not. SEE: State v. Dubry, 309 Kan. 1229 (2019) - "Under the law at the time of Weber's sentencing, as he concedes, "[f]or purposes of determining criminal history, the offenses need only be comparable, not identical." Vandervort, 276 Kan. at 179. In Murdock II's wake, he cannot argue Wetrich makes his sentence, which was legal when it was imposed, illegal. See State v. Newton, 309 Kan. , , 442 P.3d 489 , 2019 Kan. LEXIS 97 at *7 (No. 116,098, filed June 7, 2019). SEE: State v. Weber, 442 P.3d 1044 (2019) - where Weber is entitled to Existing law protections under Apprendi.

While it is not in Dispute that "A state is justified in punishing a recidivist more severely than it punishes a first offender. The defendant's status, however, cannot be considered in the abstract." - Solem v. Helm, 463 U.S. 277, and as in Helms, McGinn's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person. simularly - the records reviewed by the State of Kansas 'DID NOT' state whether McGinn had been convicted under Subsection (a) or Subsection (b) of the Colorado Statute.

The Trial judge took this determination upun himself to make this determination, clearly with Bias intent. How else can the Trial Judge justify the increaded Sentence from the (C) box of the Guidelines grid, to the (B) box - As in Helm's though the Same Reasoning applies - 'An inmate's recidivist sentence was disproportionate because the underlying crime was minor. He could have received the same sentence for a much worse crime and in comparison to other states' sentencing laws, the sentence was extremely severe.' - [Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, Sources of Our Liberties 236 (1959); see 4 W. Blackstone, Commentaries *16-*19 (1769) (hereafter Blackstone); see also id., at *16-*17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive).]

Kansas in order to justify the increase in the underlying Sentence, made findings with no support in the record, when comparing the underlying Colorado Offense

While the Court has Stated 'An inmate's sentence did not violate the constitutional prohibition against cruel and unusual punishment because it was within the parameters of a state felony sentencing statute; thus, the inmate's habeas corpus petition was dismissed.' - Hutto v. Davis, 454 U.S. 370 , in such cases, the state statues itself was constitutional, where in the present case, the Kansas Statute, removes the requirements of Apprendi from the Jury, and leaves them in the discreation of the judge.

Therefore the State of Kansas, imposing the sentence, has violated the - due-process right of the

Petitioner in removing the right that a jury make the necessary findings to increase the underlying sentence, futher violating the Sixth Amendment which provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. The Apprendi rule holds that any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an element that must be submitted to a jury. In the years since adoption of the Apprendi rule, it has been applied to instances involving plea bargains, sentencing guidelines, criminal fines, mandatory minimums, and capital punishment.

In the Current case, Kansas [DID NOT] 'requires that each element of a crime be proved to a jury beyond a reasonable doubt', as the Record clearly reflects, these Findings as to the 'ELEMENTS' of the 'OUT OF STATE' - COLORADO - crime of menicing were made by a judge from KANSAS, and were not submitted to a jury.

Further the State of Kansas, has violated petitioners Fifth Amendment Rights - This Court has Stated 'The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, "requires that each element of a crime" be either admitted by the defendant, or "proved to the jury beyond a reasonable doubt." Alleyne v. United States, 570 U. S. 99, 104, 570 U.S. 99, 133 S. Ct. 2151, 2154, 186 L. Ed. 2d 314, 320 (2013). Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, Apprendi v. New Jersey, 530 U. S. 466, 483, n. 10, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and "must be found by a jury, not a judge," Cunningham v. California, 549 U. S. 270, 281, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). We have held that a substantively unreasonable penalty is illegal and must be set aside. Gall v. United States, 552 U. S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge.'

The Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. - in the Case

Presented, the 'aggravating factor determination' was preformed by a Judge, not a jury. - the State appeals Court clearly Stated - "Although McGinn admits that he committed the crime of felony menacing - Colo. Rev. Stat. § 18-3-206 -, it is unclear whether his conviction was under subsection (a) or (b)." The Judge not a Jury made the Determination McGinn violated Subsection (b), Clearly this Determination required Finding of an 'aggravating factor' - Colorado defines menacing as Follows:

18-3-206. Menacing

(1) A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury.

Menacing is a class 3 misdemeanor, but, it is a class 5 felony if committed:

(a) By the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or

(b) By the person representing verbally or otherwise that he or she is armed with a deadly weapon.

Attached (APPENDIX JJ)

This Court has held 'federal courts "shall entertain" habeas petitions from state prisoners who allege that they are "in custody in violation of the Constitution or laws or treaties of the United States"); Smith, 477 U.S. at 543 - 544 (1986) - See 28 U. S. C. § 2254(a).

This all falls directly from the language of the Statute of the State of Kansas, Which specifically directs the State court judge to violate the Protections of Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and its progeny - Specifically Kan. Stst. Ann. 21-6811 (APPENDIX I) - Which directs the State trial judge make these 'Findings of Additional Facts' - which Kansas then 'LABELS' as [PERSON] crimes, and then based on this Judicial finding of Additional Facts, the Judge, then pronounced an Increased Sentence. - accrodingly Petitioner is - "in custody in violation of the Constitution or laws or treaties of the United States" and the Petitioner is accordingly entitled to Relief.

It is these type of cases where a sentence has been imposed in violation of the Constitution or laws

or treaties of the United States which contribute to the overcrowding of the prison system, and where because of these types of Constitutional violations the lower federal courts would benifit from this court Granting relief in this case.

Accordingly the Court should make a determination that the Statute of the State of kansas is Unconstitutionally vague, and remand that Petitioner be properly sentenced 'without' the [PERSON] felony classification's used to enhance his sentence, where the Factual 'ELEMENTS; of the prior Crimes 'were not' properly determined by a jury, and Established beyond a reasonable doubt.

The Kansas Courts have clearly Stated "So a nonperson classification doesn't implicate Apprendi because the classification doesn't increase a defendant's sentence—it only shows the fact of a prior conviction, as expressly permitted under Apprendi. 530 U.S. at 490. But changing the classification to "person" will increase a defendant's sentence because crimes that cause physical or emotional harm to another person are weighted more heavily in the sentencing guidelines. Buell, 2016 Kan. App. LEXIS 40, slip op. at 7; Keel, 302 Kan. at 574-75; see K.S.A. 2015 Supp. 21-6804(a); K.S.A. 2015 Supp. 21-6809.

This also involves the state use of the 'PRIOR' in State Crimes, and Scoring thse crimes as "PERSON" crimes, where a review of the State cases, will reveal that kansas is plagued with cases, where the Appeals Court, and Kansas Supreme Court, have attempted review, decades old cases, and where the Record is 'UNCLEAR' it simply looks at the Statute, and then 'LABELS' the Offence, as a [PERSON] crime in order to sustain the classification, and subsequently enhance the Offenders sentence.

Where again, these 'FINDINGS OF ADDITIONAL FACTS' as also placed in the Determination of a Judge, not a Judge, also violating the Constitutional Protections outlined above.

Accordingly, the State Statute should be also deemed unconstitutional, as applied to 'IN STATE' prior Crimes, and this ruling would involve the Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws.", Simply because a 'PRIOR CRIME' - was committed in another State, and not kansas, to allows such comparisions based on these factors would violate the Equal Protection Clause of the Fourteenth

amendment.

Respectfully the Court should grant the writ, remand for proper resentencing, and rule that kansas Statute, is Unconstitutional according to Apprendi principles outlined herein.

CONCLUSION

Since 1796, American legislatures have enacted statutes enhancing punishment for repeat offenders. As the 1980 case of Rummel v. Estelle, 445 U.S. 263 (1980), indicates, harsh penalties for recidivists are not necessarily a thing of Europe's pre-Enlightenment past. In Rummel, the United States Supreme Court upheld a life sentence imposed on an offender who, in three felonies committed over a period of nine years, had enriched himself by a total of $ 229.11.

This type of punishment while legal, must be based on meeting the necessary Constitutional and/or Statutory requirements, in the Current case, the increase is based 'NOT' on the 'FACT' that McGinn had a prior offense, but and Additional increase through the Kansas Statute through the 'LABEL' of the offense as a 'PERSON CRIME' or as the tenth Circuit Stated - Characterized as a "violend Felony' - a characterization which, like kansas 'person' characterization of prior offenses, may affect the length of Defendant's Sentence. SEE: Taylor v. United Sattes, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

thirteen years after Apprendi, in Alleyne v. United States, the Court was clear, when dealing with these 'ELEMENTS' of 'Seperate legal Offenses', The same Apprendi principles apply, Those "ELEMENTS', the Court States - "Wh held that the Sixth Amendment provides the defendant with the right to have a jury find those facts beyond a reasonable doubt." Id., at 484, 120 S.Ct. 2348, 147 L.Ed.2d 435 - See: Alleyne V. United States, 570 U.S. 99 at 111 (2013).

Kansas Stat. Ann. § 21-6811 directly places the Determination of thse 'Prior offense [ELEMENTS] directly in the determination of the Judge, not the Jury, Clearly in violation of the Fourteenth Amendmet's Due process Clause and the Sixth Amendments's Jury trial guarantee (as incorporated by the Fourteenth Amendment) required the Satte to prove to the jury Beyond a reasonable Doubt.

Both involved prior (In State) Offenses, as well as (Out-Of-State) Offenses, and as in the Current case,

this determination is preformed based on an incomplete record, "It is unclear whether his conviction was under Subsection (a) or (b)." State v. McGin, 2018 Kan. App. Unpub. LEXIS 551 (APPENDIX D)

Accordingly the Court Should grant the Writ.

Respectfully Submitted this 4 day of: APRIL 2019.

Carlon D. Mcginn
C/O: Lansing Corr. Facility
P.O. Box 2
Lansing, Kansas
66043