

No. 19-250

**In The
Supreme Court of the United States**

STATE OF OKLAHOMA,

Petitioner,

v.

JESSE ALLEN JOHNSON,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS*

REPLY BRIEF FOR THE PETITIONER

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In the decision below, the Oklahoma Court of Criminal Appeals (OCCA) held that, as a matter of federal constitutional law, “[t]he Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury. . . . Petitioner’s waiver of his right to jury trial in 2006 was not an affirmative waiver of his rights to a jury on sentencing that he now possesses under *Miller*.” Pet. App. 4-5.

The respondent does not dispute that the question presented is of extreme importance. Nor does he dispute that the OCCA made its ruling in this case even after the supreme courts of Michigan and Pennsylvania each held juvenile offenders do *not* possess a Sixth Amendment right to *Miller* findings by a jury. These are compelling reasons for granting certiorari. By contrast, the reasons that the respondent advances for denying certiorari do not withstand scrutiny.

In his Brief in Opposition, the respondent claims the decision below was based on state law (BIO 6), the Sixth Amendment issue was not presented to the OCCA (BIO 10), and no state split exists on this issue (BIO 12). All three contentions are groundless, and this Court should grant certiorari to resolve the conflict of federal constitutional law among the states.

ARGUMENT

I. The Sixth Amendment Issue Was Fully Presented In The State Courts.

Our position has always been clear: neither *Miller v. Alabama*, 567 U.S. 460 (2012), nor *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), created a Sixth Amendment right to jury factfinding before a juvenile convicted of murder may be sentenced to life without parole. That was the State’s sole argument before the district court (Resp. App. 9-27), the unmistakable basis for the district court’s ruling (Pet. App. 13),¹ and the only issue presented to and decided by the OCCA (Pet. App. 4-5).

And yet the respondent strangely asserts that the Sixth Amendment issue was not fairly presented in the state courts. He takes exception to the State’s non-filing of an answer brief to his petition to the OCCA for a writ of extraordinary relief, ignoring that there existed no legal authority for the State to do so. Unlike in ordinary appeals,² the OCCA’s rules do not authorize

¹ Far from the respondent’s claim that the district court’s ruling “merely state[d] that the State’s ‘position is accurate,’” (BIO 12), it was the explicit order of the district court that the respondent “waived his right to sentencing by a jury when he entered his blind plea of guilty in this matter and *he has no Sixth Amendment right to be re-sentenced by a jury.*” Pet. App. 13 (emphasis added).

² See Rule 3.4(C), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. (2018) (governing direct appeals: “Unless otherwise ordered by this Court, the appellee shall file an answer brief. . . .”); Rule 4.3(E), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App.

responsive pleadings to petitions for extraordinary writs unless, in its discretion, the court orders it.³ Because the state appellate court did not order a response in this case, the State was not at liberty to file one. The respondent also wrongly suggests that the State could have sought rehearing following the issuance of the court's decision, disregarding that the OCCA's rules expressly prohibit petitions for rehearing. Rule 10.6(D), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. (2018) ("Once this Court has rendered its decision on an extraordinary writ, that decision shall constitute a final order. A petition for rehearing is not allowed. The Clerk of this Court shall return to the movant any petitions for rehearing tendered for filing.").

The State of Oklahoma has raised the question presented in the petition before this Court at every opportunity afforded it in the state courts below. In fact, it has been the *only* issue litigated by the parties since the respondent's life without parole sentence was vacated. Though the State was precluded from filing an answer to the respondent's state court petition, the same responsive brief that the State filed in the district court was presented to the OCCA through

(2018) (governing certiorari appeals: "While not required to respond unless directed by the Court, the district attorney, municipal attorney or the Attorney General may file an answer brief to the petition and brief on their own motion. . . .").

³ See Rule 10.4(A), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. (2018) (governing extraordinary writs: "Oral argument and/or a response may be ordered by this Court.").

the record submitted by the respondent. Resp. App. 30. Indeed, one need look no further than the dissenting opinions for clear confirmation that the Sixth Amendment question was squarely before the court. Pet. App. 6, 9-12.

Regardless of how the respondent attempts to mischaracterize the decision below, the majority's ruling was decidedly rooted in its interpretation of this Court's Sixth Amendment jurisprudence. To be sure, as the sole authority for its unequivocal Sixth Amendment finding (Pet. App. 4), the majority cited to obiter dictum found at paragraph 34 of the court's earlier decision in *Stevens v. State*, 422 P.3d 741, 750 (Okla. Crim. App. 2018), wherein it made an identical determination:

The Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000).

That the majority also referenced a state procedural statute does not negate the federal law basis for its decision. Not only was the constitutional issue fairly presented to the state appellate court but, as discussed below, it was dispositive of the majority's decision.

II. The Decision Below Was Dictated Solely By Federal Constitutional Law.

The district court denied the respondent's request to be resentenced by a jury because he "waived his right to sentencing by a jury when he entered his blind plea of guilty in this matter and he has no Sixth Amendment right to be re-sentenced by a jury." Pet. App. 13. A majority of the OCCA reversed that decision, concluding:

The Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived. *Stevens*, 2018 OK CR 11, ¶ 34, 422 P.3d at 750. [Johnson]'s waiver of his right to jury trial in 2006 was not an affirmative waiver of his rights to a jury on sentencing that he now possesses under *Miller*.

Pet. App. 4-5.

Despite this clear mandate, the respondent curiously asserts that the lower court's decision was not based at all upon its interpretation of the Sixth Amendment rule announced in *Apprendi v. New Jersey*, 520 U.S. 466 (2000), but instead rested on Oklahoma's statutory right to jury sentencing. BIO 10. That is plainly incorrect. The conditions triggering Oklahoma's jury-sentencing statutes, Okla Stat. tit. 22, §§ 926.1, 929, are not present in this case.

Section 926.1 of Title 22 of the Oklahoma Statutes authorizes and, if requested by the defendant, requires

that the jury assess and declare punishment “[i]n all cases of *a verdict* of conviction.” Okla. Stat. tit. 22, § 926.1 (emphasis added). “There is no entitlement to jury sentencing on a first degree murder charge once a guilty plea has been entered.” *Fields v. State*, 923 P.2d 624, 630 (Okla. Crim. App. 1996). Indeed, the Oklahoma Statutes expressly direct that if the defendant enters a plea of guilty or nolo contendere to murder in the first degree, “the sentencing proceeding shall be conducted before the court.” Okla. Stat. tit. 21, §§ 701.10(B) (state seeking death penalty), 701.10-1(B) (state not seeking death penalty). The OCCA made no reference to Section 926.1 in its decision. And the respondent does not contend, nor could he, that the statute is applicable here.

Rather, the respondent relies on Section 929 of Title 22, which provides for resentencing by either a judge or a jury following the vacation of a sentence on appeal, claiming it served as adequate and independent state grounds for the lower court’s decision. In so arguing, he misconstrues the role the statute played in the decision below by confusing the substantive federal right inaptly recognized by the court and the state procedural rule it used to enforce that right.

It should come as no surprise that the OCCA referenced provisions of the state resentencing statute upon finding that *Miller* created a new constitutional jury trial right. Absent that Sixth Amendment determination, though, it could not have reached the provisions of Section 929, which contemplate only a “*new* sentencing jury.” See Okla. Stat. tit. 22, § 929(B)

(emphasis added). Assuredly, if the court's decision were based on state procedural grounds alone, it would have had no reason to reverse the district court's ruling – the district court had already denied the respondent's request for jury sentencing, as would fall within its discretion under Section 929(B). But even were that not so, the fact that the respondent *might* have been permitted a sentencing jury as a matter of discretion under state law does not bar this Court from reaching the dispositive Sixth Amendment question. *See Oregon v. Guzek*, 546 U.S. 517, 522-23 (2006).

Thus, respondent's reliance on the ancillary state procedural rules is misplaced. Irrespective of the district court's discretion under Section 929 to resentence the respondent either itself or through a jury, the lower court's ruling is governed by its misguided recognition of a new Sixth Amendment right to jury finding of particular facts under *Miller*.

[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory.

Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

Certainly, as the respondent suggests, the states are free to implement greater protections on resentencing than *Miller* or *Montgomery* require. *See*

California v. Ramos, 463 U.S. 992, 1013-14 (1983). But Oklahoma has not done so. The OCCA did not purport to base its decision on a state constitutional or statutory right that exceeded that afforded by the federal constitution. Its recognition of the respondent's Sixth Amendment right to a jury trial on the issue of punishment under *Miller* fully controls the outcome of this case. Therefore, this Court has jurisdiction to review this important federal question.

III. There Is A Direct Split.

"*Miller* did not impose a formal factfinding requirement. . . ." *Montgomery*, 136 S.Ct. at 735. Pennsylvania and Michigan have taken this Court at its word, rejecting any claim to a Sixth Amendment right to jury factfinding under *Miller*.⁴ *Commonwealth v. Batts*, 163 A.3d 410, 478-79 (Pa. 2017); *People v. Skinner, et al.*, 917 N.W.2d 292, 305-06 (Mich. 2018), *cert. denied*, 139 S.Ct. 1544 (2019). Oklahoma has not.

The respondent tries to minimize this direct split by (1) suggesting the OCCA did not rule on the Sixth Amendment issue below, and (2) attempting to distinguish Oklahoma, which provides for jury assessment of punishment, from the conflicting states, which do not. The fallacy of the former argument has been fully

⁴ The Utah Supreme Court has reached the same conclusion. *State v. Houston*, 353 P.3d 55, 68 (Utah 2015), *cert. denied*, 136 S.Ct. 2005 (2016). However, as previously acknowledged (Pet. 13 n.5), the Utah Legislature subsequently eliminated life without parole as a sentencing option for juvenile offenders. As such, this discussion here is limited to Michigan and Pennsylvania.

exposed above. The OCCA categorically found the respondent possesses a Sixth Amendment jury-trial right under *Miller*.

As to his latter challenge, the respondent does not deny that the Michigan Supreme Court and Pennsylvania Supreme Court have reached precisely the opposite conclusion. Nevertheless, he claims no direct conflict exists because Michigan and Pennsylvania have “judge sentencing” rather than “jury sentencing.” BIO 13, 14. This argument conflates two separate and distinct concepts: the constitutional right to jury fact-finding beyond a reasonable doubt of all elements essential to imposition of a life-without-parole sentence à la *Apprendi*, and the varying state procedures for assessment of punishment.

This case perfectly illustrates that critical distinction. The respondent has no statutory guarantee to jury sentencing. Even under the provisions of Section 929, the district court has full discretion to deny the respondent a sentencing jury and proceed to sentencing itself, as it had previously ruled it would. *See Okla. Stat. tit. 22, § 929(B)*. But if a Sixth Amendment right truly exists, as a majority of the OCCA has found, the district court cannot deny the respondent’s demand for a trial by jury to determine whether he is, beyond a reasonable doubt, “irreparably corrupt and permanently incorrigible.” *See Stevens*, 422 P.3d at 750. Therefore, Oklahoma, Pennsylvania, and Michigan are in all material respects identically situated. Only this

Court can resolve their disparate application of the Sixth Amendment right to a trial by jury.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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