IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CF-2022-2721**
	)	
JOSHUA AARON BROCK,	)	
DAVID LEE CHANEY,	)	
BENJAMIN SCOTT HARRIS,	)	
	)	
Defendants.	)	

STATE'S RESPONSE TO DEFENDANT DAVID LEE CHANEY'S RULE 15 MOTION FOR JUDICIAL DISQUALIFICATION

COMES NOW the State of Oklahoma, by and through Gentner F. Drummond, Attorney General of the State of Oklahoma, and respectfully requests this Honorable Court deny the motion of the defendant, David Lee Chaney, seeking this Court's disqualification in the above-styled cause.

STATEMENT OF THE CASE

The State of Oklahoma, through the Oklahoma County District Attorney's Office, first charged Defendant Chaney and his co-defendants, Joshua Aaron Brock and Benjamin Scott Harris, by information on June 23, 2022. The State, through the District Attorney and the Attorney General, later filed an amended information on October 4, 2023. The Office of the Attorney General (OAG), more specifically the Criminal Justice Division, has since assumed full prosecutorial responsibility in this matter.

Initially, this case was automatically assigned to the Honorable Cindy H. Truong, District Judge. On December 5, 2023, Judge Truong recused from the matter, and the then-Chief Judge of the District Court, the Honorable Sheila Stinson, District Judge, reassigned the case to the

Honorable K. Nikki Kirkpatrick, District Judge. Judge Kirkpatrick recused on December 7, 2023, and Judge Stinson reassigned the case to the Honorable Kathryn Savage, District Judge. Judge Savage recused on December 8, 2023, and Judge Stinson reassigned the case to the Honorable Amy Palumbo, District Judge. Judge Stinson reassigned the case to this Court on December 12, 2023, upon Judge Palumbo's recusal.

On March 11, 2024, Defendant Brock waived his right to a preliminary hearing and was bound over to stand trial. The preliminary hearing against Defendants Chaney and Harris commenced on March 25, 2024, and was conducted throughout that entire week. Defendant Brock testified as a witness for the State on Friday, March 29. After his direct examination, the magistrate recessed the hearing until May 7, 2024. On that date, Defendant Brock, through his counsel of record, Irven Box and Chris Box, filed a motion seeking to disqualify Gary Wood, as well as that of his law firm, Riggs Abney, as counsel for Defendant Chaney on the ground that Mr. Wood had also previously represented him in relation to this case and he (Defendant Brock) had not waived the conflict of interest created by the prior representation. The State joined Defendant Brock's motion to disqualify Mr. Wood and his law firm in a motion filed on June 10, 2024.

Due to the potential conflict issue raised by Defendant Brock, the magistrate placed the preliminary hearing on hold.[1] The Presiding Judge of the District Court, the Honorable Richard Ogden, District Judge, ultimately assigned the matter to this Court to adjudicate the attorney disqualification issue.[2] During the course of those proceedings, counsel for Defendant Harris sought this Court's disqualification. Following a hearing pursuant to District Court Rule 15, this Court denied Defendant Harris's request, and Presiding Judge Ogden affirmed following a Rule 15 re-hearing. Defendant Harris attempted to challenge Judge Ogden's decision through a petition

[1] The preliminary hearing against Defendants Chaney and Harris is still pending conclusion at this time.
[2] The attorney disqualification hearing is also still pending conclusion at this time.

for writ of mandamus, but the Oklahoma Court of Criminal Appeals (OCCA) declined jurisdiction and denied the petition as untimely. *Harris v. Hon. Susan Stallings*, No. MA-2024-893 (Okl. Cr. December 20, 2024).[3]

After the criminal proceedings before this Court resumed, Defendant Chaney unsuccessfully sought this Court's recusal at an *in camera* hearing held on April 4, 2025. Defendant Chaney filed the instant Rule 15 motion on April 21, 2025. In support of his motion, Defendant Chaney alleges this Court's disqualification is required due to an appearance of impropriety created by: (1) the legal representation of this Court by the OAG's Litigation Unit on a motion to quash a subpoena issued to this Court (as well as Judge Kirkpatrick) by counsel for Defendant Harris in relation to the previous Rule 15 re-hearing; and (2) this Court's designation of the OAG as representative to respond to Defendant Harris's mandamus petition to the OCCA. For the reasons discussed below, Defendant Chaney fails to demonstrate actual or apparent partiality of this Court requiring disqualification.

ARGUMENT AND AUTHORITY

The right to a fair and impartial tribunal is guaranteed by both the state and federal constitutions. *See* Okla. Const., art. II, § 6; *Fitzgerald v. State*, 1998 OK CR 68, 972 P.2d 1157; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

> Every person accused of crime is entitled to nothing less than the cold neutrality of an impartial judge, and where the circumstances are of such a nature as to cause doubts as to the impartiality of a judge, the error, if any, should be made in favor of the disqualification rather than against it. . . .

[3] Following the denial of his mandamus petition, Defendant Harris improperly sought a writ of mandamus from the Oklahoma Supreme Court against each of the judges of the Court of Criminal Appeals. The Oklahoma Supreme Court denied the application to assume original jurisdiction. *Harris v. Hon. Scott Rowland et al.*, No. MA-122760 (Okla. February 24, 2025).

Fort v. State, 2022 OK CR 12, ¶ 10, 516 P.3d 690 (quoting *State ex rel. Vahlberg v. Crismore*, 1949 OK CR 131, 213 P.2d 293, 295).

At the same time, courts must guard against "[c]aptious and unwarranted accusations of bias." *Crismore*, 1949 OK CR 131, 213 P.2d 293, 295. "[T]here is a general presumption of impartiality on the part of judges as to matters before them." *Frederick v. State*, 2001 OK CR 34, ¶ 175, 37 P.3d 908, 951 (quoting *Pittman v. State*, 1986 OK CR 59, ¶ 7, 718 P.2d 366, 369). As the OCCA has cautioned, "[t]he determination of the judge who will preside at the trial of one accused of crime should not depend upon the whim or trivial accusation of the accused." *Crismore*, 1949 OK CR 131, 213 P.2d at 295.

In order to "uphold and promote the independence, integrity, and impartiality of the judiciary," the Code of Judicial Conduct requires judges to "avoid impropriety and the appearance of impropriety." *Code of Judicial Conduct,* 5 O.S.2011, Ch.1, App. 4, Cannon 1. To this end, the Code directs that a judge "should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." *Code of Judicial Conduct,* 5 O.S.2011, Ch.1, App. 4, Rule 2.11(A). Correlatively, a judge has a duty to "hear and decide matters assigned to the judge" unless disqualification is required. *Code of Judicial Conduct,* 5 O.S.2011, Ch.1, App. 4, Rule 2.7. "Unwarranted disqualification may bring public disfavor to the court and to the judge personally." *Id.*, Comment 1. Here, neither of the grounds upon which the defendant relies warrants this Court's disqualification.

I. The limited legal representation by the OAG's Litigation Unit on a motion to quash subpoena does not necessitate disqualification.

The defendant first complains this Court's earlier representation by a civil attorney in the OAG's Litigation Unit on a motion to quash subpoena in relation to Defendant Harris's re-presented Rule 15 motion creates an appearance of impropriety because prosecutors in the OAG's

Criminal Justice Division represent the State in this criminal action. Defendant's argument ignores both the organizational structure of the OAG and the special, limited scope of civil counsel's legal representation.

The OAG is divided into a number of separate and distinct divisions, most with their own specialized sub-divisions or units. Relevant here, the Litigation Unit, which represents the State, its agencies, officials, and employees in civil matters, falls under the Civil & Public Advocacy Division; whereas the Multicounty Grand Jury Unit, whose attorneys serve as the prosecutors in this criminal action, falls under the Criminal Justice Division. These divisions operate independently of each other; serve separate functions; are staffed by different attorneys, agents, and support staff; office in separate buildings in different parts of the city; and do not share a case management system nor have access to one another's case files. Further, aside from falling generally under the umbrella of the OAG, each division runs under separate command chains. For all practical purposes, the two divisions are autonomous entities.

As stated above, this matter has been prosecuted by attorneys in the Criminal Justice Division since at least the end of 2023. In August 2024, counsel for Defendant Harris issued subpoenas to this Court, as well as Judge Kirkpatrick, to appear at the hearing on his re-presented Rule 15 motion before Presiding Judge Ogden. Upon receipt of the subpoenas, both judges sought the OAG's representation of them in their official capacities pursuant to 74 O.S. § 20f(A). On August 26, 2024, a civil lawyer in the OAG's Litigation Unit, Assistant Attorney General Stephanie Lawson, filed motions to quash the improperly issued subpoenas on behalf of both judges. During the August 30 hearing before Presiding Judge Ogden, AAG Lawson repeatedly stated that she was present "solely on the matter of the subpoenas to Judge Stallings and Judge Kirkpatrick." (8/30/24 Hr'g Tr. 4); *see also id.* at 10 ("I am here on behalf of Judges Stallings and

Kirkpatrick solely on the matter of the subpoenas and the motion to quash them.") and 25-26 ("I would just reiterate, Your Honor, that I'm here solely on the subpoenas.").[4]

Similarly, Deputy Attorney General Gayland Geiger, the senior prosecutor at the hearing, made the following clarification in response to an incorrect allegation by Defendant Harris's counsel that the OAG prosecutors were concurrently representing this Court:

> Right before [counsel] sat down, he said the very prosecution team that is prosecuting my client is also representing Judge Stallings. That is not an accurate factual statement. He then said Gentner Drummond, but while Gentner Drummond is the elected attorney general, Ms. Lawson has nothing to do with the prosecution. She is not in our division.

(8/30/24 Hr'g Tr. 26-27). Ultimately, the presiding judge overruled the objection to Ms. Lawson's representation of the subpoenaed judges and granted the motion to quash the subpoenas, the purpose of which he determined was outside the limited scope of review in a Rule 15 re-hearing. (8/30/24 Hr'g Tr. 29-31).

In addition to claiming AAG Lawson's limited representation of this Court on the motion to quash requires recusal, Defendant Chaney also argues that this Court cannot give fair and impartial consideration to the pending motion to disqualify Mr. Wood from representing Defendant Chaney because this Court is "represented by the attorney who is advancing that motion." (Br. at 2). Again, this is a patent misstatement of fact. The motion for Mr. Wood's disqualification was made by Defendant Brock, through his attorneys Messrs. Box, and later joined by the prosecution team.[5] AAG Lawson has never been a member of the prosecution team and has had no involvement whatsoever regarding the issue of Mr. Wood's disqualification. Therefore, this assertion is baseless.

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[4] This Court previously took judicial notice of the transcript of the August 30, 2024 proceedings at the prior *in camera* hearing in this matter.

[5] Contrary to insinuations made by Mr. Chaney's counsel during these proceedings, Defendant Brock has neither withdrawn nor abandoned his motion, which is predicated on his non-waiver of Mr. Wood's conflict of interest.

This Court's minimal, limited-scope representation by an OAG civil attorney on a matter wholly collateral to these criminal proceedings simply does not give rise to the appearance of impropriety, much less evince actual bias. Indeed, it is neither unusual nor uncommon for the OAG's Litigation Unit to represent judges in their official capacity throughout the state since such representation is specifically provided for by statute. *See* 74 O.S. § 20f(A), (G). Yet by the defendant's logic, every judge, including this Court, who has received statutorily authorized legal services from the civil arm of the OAG would be conflicted from ever presiding over a criminal prosecution brought by the OAG.

While there appears to be no controlling legal authority on this issue in this jurisdiction, the United States District Court for the Northern District of California addressed a fairly analogous situation in a case in which a federal criminal defendant sought a trial judge's recusal based, in part, on the fact that an Assistant United States Attorney (AUSA) represented the judge on a motion to quash a subpoena while a different AUSA was prosecuting the defendant's tax evasion case before that judge. *United States v. Zagari*, 419 F.Supp. 494 (N.D. Cal. 1976). In rejecting the defendant's claim that the roles of the two attorneys from the same United States Attorney's Office necessitated the judge's recusal, the federal court explained:

> This claim is ridiculous on its face. The United States Attorney customarily represents a federal judge in matters involving his judicial actions. The motion to quash was sustained on the basis that a sitting federal judge could not be deposed on matters connected with his official actions. The cases relied upon by the plaintiff are distinguishable on the ground that the judge in those cases had a personal rather than an official interest in the litigation in which the counsel in question had represented him. . . . If this argument of Zagari were valid, Judge Conti would be disqualified from presiding in any criminal case at least as long as [the AUSA who represented him on the motion to quash] is an Assistant.

Zagari, 419 F. Supp. at 505–06. *Cf. State v. Van Huizen*, 392 P.3d 933, 946 (Utah Ct. App. 2017) (distinguishing between a judge's connection to an attorney working in the civil division of a

county attorney's office as opposed to working in the same division prosecuting the case over which the judge presides), *reversed on other grounds*, 435 P.3d 202 (Utah 2019) .

The *Zagari* Court found the circumstances relating to the two government lawyers' roles to be distinguishable from the situation in *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965), in which a plaintiff's private attorney in a civil action also represented the judge presiding over the case in a separate damage action brought against the judge in his individual capacity. In that case, the Tenth Circuit, "[c]onfining [its] decision to the particular facts of [the] case," held that the judge's personal representation by the plaintiff's attorney was a sufficient connection to "a party or his attorney" to require disqualification under extant federal law, 28 U.S.C. § 455. *Id.* at 657;

As in *Zagari*, this case presents a clearly distinguishable situation than the impermissible connection between the judge and attorney in *Texaco, Inc.* AAG Lawson is not, and has never been, a member of the prosecution team in this case. She is assigned to a civil division of the OAG that is wholly separate and apart from the Criminal Justice Division. Moreover, the record irrefutably establishes her role in this case was strictly limited to challenging the lawfulness of the subpoenas issued to the judges. In fact, not only was AAG Lawson not involved in these criminal proceedings, she also expressly disclaimed involvement in the substantive issue of this Court's disqualification. *See* 8/30/24 Hr'g Tr. 25-26 ("MS. LAWSON: I would just reiterate, Your Honor, that I'm here solely on the subpoenas. I'm not going to get into any of the underlying issues on the recusal matter."). No person viewing all the facts and circumstances presented by this case could reasonably conclude that AAG Lawson's relatively *de minimis* role in moving to quash a subpoena issued to this Court draws into doubt this Court's ability to preside over the defendant's criminal proceedings with the cold neutrality and impartiality to which he is entitled. As such, his request for disqualification on this ground should be denied.

II. The Attorney General's Office did not act as this Court's legal counsel before the Oklahoma Court of Criminal Appeals.

Finally, the defendant contends the Court is required to disqualify from this case because the OAG "represented her as counsel" on the response to Defendant Harris's petition for writ of mandamus. That is incorrect.

Following Presiding Judge Ogden's denial of Defendant Harris's re-presented Rule 15 motion, Defendant Harris filed a petition for writ of mandamus in the OCCA. On November 14, 2024, the OCCA issued an order directing "Judge Stallings, *or her designated representative*. . . to file a response to the claims raised by [Defendant Harris]." *See* Def's Exh. A, Order Directing Response (emphasis added). On November 25, 2024, this Court designated "the Office of the Attorney General, *as the prosecutors in the underlying criminal prosecution*, to be the designated representative to respond to the Petition for Writ of Mandamus." *See* Def's Exh. B, Designation of the Oklahoma Attorney General as Respondent's Representative in Extraordinary Writ Proceedings (emphasis added). Accordingly, undersigned counsel, a prosecutor assigned to the Multicounty Grand Jury Unit within the OAG Criminal Justice Division, prepared and filed a written response to the mandamus petition on December 13, 2024.

Contrary to the defendant's assertion, no attorney-client relationship has ever existed between undersigned counsel or any other member of the prosecution team and this Court. Indeed, had the Court desired to engage the OAG as counsel in the mandamus action, then the procedure set forth in 74 O.S. § 20f(G)[6] must have been followed, and the request for representation would have been referred to the OAG's Litigation Unit. Of course, in that situation, the response could

[6] 74 O.S. § 20f(G) provides: "When an original action seeking either a writ of mandamus or prohibition against a district judge. . . of the district court is commenced, the Attorney General shall represent such judicial officer if, and only if, directed to do so, in writing, by the Chief Justice of the Oklahoma Supreme Court, upon the Chief Justice's finding that such representation is necessary to protect either the function or integrity of the judiciary."

not be characterized as being filed by the Court's "designated representative" but rather by the Court itself, through legal counsel. But that is not what happened here. Instead, this Court elected to follow the alternative option provided by the OCCA's order and designated the real party in interest, *i.e.* the prosecution, as the representative supporting this Court's (or more precisely, Presiding Judge Ogden's) ruling.[7]

The OCCA, like many appellate courts, has a well-established custom of authorizing respondent-judges to designate a representative to file a responsive brief in extraordinary writ proceedings. In fact, the language used in the OCCA's Order Directing Response in this case was the exact same language used in almost every such order the OCCA issues. When that course is followed, respondent-judges typically, though not always, designate counsel for the opposing party as representative to support the court's challenged ruling. To be sure, were the parties' positions in this case reversed, and it had been the State that had unsuccessfully sought this Court's recusal and pursued mandamus relief, it would have been entirely proper for this Court to designate defense counsel as its designated representative before the OCCA. And no attorney-client relationship or conflict of interest would thereby be created.

Examples of this practice abound. *See, e.g.*, *Hopkins v. LaFortune*, 2016 OK CR 25, ¶ 4, 392 P.3d 1283, 1285 (Tulsa County District Attorney's Office designated to respond to defendant's petition for writ of prohibition); *State v. District Court of Mayes County*, 2016 OK CR 19, ¶ 6, 387 P.3d 930, 932 (defense counsel designated to respond to Mayes County District Attorney's petition

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[7] Counsel for the defendant states in his brief that "the Attorney General and Judge Stallings maintained *in camera* that the entire process of having the Attorney General represent her in the Court of Criminal Appeals was 'statutory.'" (Br. At 8). Respectfully, without the benefit of a transcript, counsel either misunderstood or misremembers the State's position. The OCCA's longstanding practice of allowing a representative designated by a respondent-judge to respond to a petition for extraordinary relief is *not* statutorily based. The authority for such a designation is derived directly from the OCCA's order itself. In contrast, undersigned counsel did state during the *in camera* hearing that this Court's authority to request representation by the OAG on the motion to quash the subpoena, discussed *supra*, was statutory. *See* 74 O.S. § 20f(A).

for writ of prohibition); *State ex rel. Pruitt v. Steidley*, 2015 OK CR 6, ¶ 8, 349 P.3d 554, 556 (construing defense counsel's response to OAG's petition for writ of mandamus as a response of the respondent-judge's designated representative upon the judge's application); *Davison v. Truong*, No. MA-2017-1064 (Okla. Cr. November 21, 2017) (Oklahoma County District Attorney's Office designated to respond to capital defendant's petition for writ of mandamus) (State's Exh. 1);[8] *Fields v. Newby*, No. MA-2023-651, at 4 (Okl. Cr. September 27, 2023) (capital defense counsel designated to respond to Garfield County District Attorney's petition for writ of mandamus) (State's Exh. 2); *State v. McElwee*, No. PR-2018-364, at 3 (Okl. Cr. July 10, 2018) (defense counsel designated to respond to Oklahoma County District Attorney's petition for writ of prohibition) (State's Exh. 3); *Postelle v. Ryan*, No. MA-2006-189 (Okl. Cr. April 18, 2006) (Oklahoma County District Attorney's Office designated to respond to capital defendant's petition for writ of mandamus) (State's Exh. 4); *State v. McElwee,* No. PR-2018-1114, at 3 (Okl. Cr. May 24, 2019) (defense counsel designated to respond to Oklahoma County District Attorney's petition for writ of prohibition) (State's Exh. 5); *Stevens v. Palumbo*, No. MA-2022-478, at 3 (Okl. Cr. October 28, 2022) (Oklahoma County District Attorney's Office designated to respond to defense counsel's petition for writ of prohibition) (State's Exh. 6).

"The mere fact that counsel for the real party in interest responds to a petition for a writ of mandamus directed to the trial judge is not of itself enough to show bias requiring his disqualification." *Century Cas. Co. v. Sec. Mut. Cas. Co.*, 606 F.2d 301, 302 (10th Cir. 1979). Indeed, in the federal courts, it is not only common practice for an opposing party's counsel to respond to a writ petition filed against a judge, it is expressly contemplated by the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 21 ("All parties to the proceeding in the trial court

[8] Although not indicated in the OCCA's order, undersigned counsel drafted the response on behalf of Judge Truong, which is available at: file:///C:/Users/221215/Downloads/1037806141-20171023-143919-%20(1).pdf .

other than the petitioner are respondents for all purposes."). As the United States District Court for the District of Columbia aptly explained in rejecting a claim for judicial disqualification in the Watergate case:

> Representation by [the United States Attorney] and the Special Prosecutor in mandamus proceedings was in reality on behalf of the government. The Court was a nominal respondent. It is common practice that when the Court of Appeals seeks an answer from respondents in a mandamus case pursuant to Rule 21, Federal Rules of Appellate Procedure, the party which prevailed below files a brief supporting the judge's position. Such a practice does, not, for example, disqualify any judge so represented from hearing all further cases brought by the United States while the then incumbent United States Attorney remains in office.

United States v. Mitchell, 377 F. Supp. 1312, 1324 (D.D.C. 1974), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976). On appeal, the Court of Appeals agreed:

> The petition seeking a writ of mandamus or prohibition to control a ruling of a District Judge is a relatively frequent occurrence in this circuit. Active defense of the ruling by counsel for the litigant favored is commonplace, and we have discerned no reason to discourage the practice.
>
> * * * *
>
> We do not find the relationship normally existent between judges and counsel in those instances any need for recusal upon resumption of the litigation in the District Court. So far as we are aware, it has never been suggested that a judge participating in a case prior to a contested appeal should step out of post-appeal proceedings simply because counsel include one or more who endeavored to rescue the judge in this court.

Haldeman, 559 F.2d at 138–39 (footnotes omitted), *cert. denied* 431 U.S. 933, 97 S. Ct. 2641 (Mem.) (1977).

Here, too, the prosecution's response in opposition to Defendant Harris's petition for writ of mandamus was entirely proper. Despite Defendant Chaney's attempt to miscast the prosecutors in this matter as this Court's attorneys before the OCCA, at all times the prosecution team, including undersigned counsel, has represented only the State of Oklahoma as the plaintiff in this criminal action and never this Court. As in any appellate proceeding, the State's role before the

OCCA was merely that of a party in support of the lower court's *ruling*, not as counsel for Your Honor. Indeed, this Court's November 24, 2025 designation explicitly stated the OAG's role as representative in the mandamus proceedings was "as the prosecutors in the underlying criminal prosecution."

On this record, no reasonable person could view the State's filing of a response to a petition for a writ of mandamus as creating an attorney-client relationship between the State and this Court. The defendant's attempt to mischaracterize the prosecution team as acting in any capacity other than as the prosecutors in this case is both factually and legally meritless. Therefore, the defendant's request for this Court's recusal on this ground should also be rejected.

CONCLUSION

As shown, the defendant has not demonstrated this Court suffers from an actual, disqualifying conflict nor any appearance of partiality relating to the OAG's roles in this matter. Because he has failed to establish receiving anything less than the cold neutrality of an impartial judge, the defendant's request for this Court's disqualification is without merit.

WHEREFORE, the State respectfully requests the defendant's motion for disqualification pursuant to Rule 15 be denied.

Respectfully Submitted,

GENTNER F. DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA

By: _____

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CERTIFICATE OF MAILING

On this 28th day of April, 2025, the undersigned mailed and/or emailed a true and correct copy of the foregoing *State's Response to Defendant David Lee Chaney's Rule 15 Motion for Judicial Disqualification* to:

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Index of Exhibits

Exh. 1, Order Denying Extraordinary Relief, *Davison v. Truong*, No. MA-2017-1064 (Okla. Cr. November 21, 2017)

Exh. 2, Order Denying Extraordinary Relief and Lifting Stay, *Fields v. Newby*, No. MA-2023-651 (Okl. Cr. September 27, 2023)

Exh. 3, Order Granting Exrtaordinary Relief and Lifting Stay, *State v. McElwee*, No. PR-2018-364 (Okl. Cr. July 10, 2018)

Exh. 4, Order Denying Petitioner's Request for Writ of Mandamus and/or Prohibition and Denying Request for Oral Argument and Lifting Stay of Proceedings, *Postelle v. Ryan*, No. MA-2006-189 (Okl. Cr. April 18, 2006)

Exh. 5, Order Denying Application for Extraordinary Relief, *State v. McElwee,* No. PR-2018-1114 (Okl. Cr. May 24, 2019)

Exh. 6, Order Denying Extraordinary Relief, *Stevens v. Palumbo*, No. MA-2022-478 (Okl. Cr. October 28, 2022)

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DUSTIN MELVIN DAVISON, Petitioner, v. THE HONORABLE CINDY H. TRUONG, DISTRICT COURT JUDGE OF OKLAHOMA COUNTY, 7TH JUDICIAL DISTRICT, Respondent.	)	No. MA-2017-1064

ORDER DENYING EXTRAORDINARY RELIEF

On October 16, 2017, Petitioner, by and through counsel Melanie Freeman-Johnson and James T. Rowan, filed both a petition for extraordinary relief challenging an October 13, 2017 order issued by the Respondent, the Honorable Cindy H. Truong, District Judge, in Oklahoma County District Court Case No. CF-2015-3992; and an application to stay trial court proceedings. Petitioner requests extraordinary relief reversing the trial court's order denying his trial counsel's Motion to Withdraw and denying an ex parte hearing on the merits of his motion.

The facts recited in this order are taken from Petitioner's brief filed with this Court. On May 27, 2015, Petitioner was charged with Murder in the First Degree in Case No. CF-2015-3992. This case was set for jury trial on October 23, 2017. On October 6, 2017, Petitioner's trial counsel filed a Motion to Withdraw. A hearing on the motion was held October 13, 2017. Petitioner's trial counsel argued "that either the Court accept counsel's statement that professional considerations require termination and grant it or, if the Court wants mo

explanation of the conflict for the withdrawal, which is based upon confidential communications, that it must be done in an ex parte proceeding pursuant to Rules 3.3, 1.16, and 1.2." Judge Truong denied the motion to withdraw and the request for an ex parte hearing in an order entered October 13, 2017.

On October 19, 2017, this Court issued an order staying trial court proceedings and directing Judge Truong to file a response to the issues raised in Petitioner's pleadings filed with this Court. In her response, filed with this Court on October 20, 2017, Judge Truong acknowledged it was a mistake to deny Petitioner an ex parte hearing regarding the reasons requiring withdrawal that Petitioner's counsel claimed could not be stated in open court. On October 24, 2017, this Court issued an order temporarily lifting the stay in this case for the limited purpose of the trial court holding an ex parte hearing regarding Petitioner's counsel's motion to withdraw. Following this ex parte hearing the trial court entered an October 31, 2017 order denying the motion to withdraw.

In his brief filed with this Court Petitioner's first argument is that the trial court erred when it denied him an ex parte hearing. He objects to "[t]he denial of an ex parte hearing and subsequent denial of the withdrawal motion without conducting a sufficient inquiry...". Based on the October 27, 2017 ex parte hearing and October 31, 2017 trial court order, the District Court fully adjudicated Petitioner's complaints regarding the denial of an ex parte hearing in this case. Therefore, as it pertains to an ex parte hearing, Petitioner's request for a Writ of Mandamus is **MOOT**.

In the alternative, Petitioner's application filed with this Court requests this

Court reverse Judge Truong's denial of his counsel's motion to withdraw. The record does not support this claim and Petitioner has cited no legal authority establishing that based on the record in this case his counsel should be allowed to withdraw. Regarding withdrawal of counsel this Court held the following:

> *Faretta* say that all defendants, including indigents, in criminal proceedings have a constitutional right, almost unlimited, to elect to proceed Pro se provided the election is made in a voluntary, knowing and intelligent manner. This does not mean that an indigent defendant can demand a choice of appointed counsel. See, e.g., Jones v. Johnson, Okl.Cr., 404 P.2d 686 (1965). Once counsel has been appointed for an indigent, valid reasons for discharge and appointment of a new attorney include demonstrable prejudice against the defendant on the part of counsel, incompetence of counsel, and conflict of interest. See, e.g., Day v. Page, Okl.Cr., 436 P.2d 59 (1968). A personality conflict or disagreement over the conduct of the defense is not sufficient to allow a defendant to discharge his attorney, to permit this would allow him to delay his trial indefinitely by demanding a new attorney every time the trial is set. This Court views a demand for another counsel, based on the latter reasons, as nothing more than an impermissible delaying tactic.

Johnson v. State, 1976 OK CR 292, ¶ 33, 556 P.2d 1285, 1294 .

For a writ of mandamus, Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. See, *Woolen v. Coffman*, 1984 OK CR 53, ¶ 6, 676 P.2d 1375, 1377; Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). Petitioner's claims fail to

establish that, in denying the motion to withdraw, the Respondent refused "to perform a plain legal duty not involving the exercise of discretion." *Id.* Further, Petitioner's counsel has not cited any authority which holds he has a clear legal right to withdraw in this case. *Id.*

For a writ of prohibition, Petitioner must establish: (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). Petitioner's counsel has not shown that the District Court's denial of the motion to withdraw was unauthorized by law. *Id.*

Petitioner has not established that he is entitled to the relief sought in Oklahoma County District Court Case No. CF-2015-3992. Petitioner's request for extraordinary relief is **DENIED**. The stay of proceedings imposed by this Court in an Order issued October 19, 2017, is hereby **LIFTED**.

IT IS SO ORDERED.

WITNESS MY HAND AND THE SEAL OF THIS COURT this 21st day of November, 2017.

GARY L. LUMPKIN, Presiding Judge

DAVID B. LEWIS, Vice Presiding Judge

ROBERT L. HUDSON, Judge

DANA KUEHN, Judge

ATTEST:

Clerk
N/F

RIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. MICHAEL J. FIELDS, DISTRICT ATTORNEY,	
Petitioner,	
v.	**No. MA-2023-651**
THE HONORABLE TOM NEWBY, DISTRICT JUDGE,	
Respondent.	

ORDER DENYING EXTRAORDINARY RELIEF AND LIFTING STAY

The State of Oklahoma, through District Attorney Michael J. Fields and Assistant District Attorney Sean K. Hill, seeks extraordinary relief from an order denying its request to allow a qualified forensic expert of its own choosing conduct a competency examination of the defendant below, Michael Scott Geiger, in preparation for a post-evaluation competency hearing in Garfield County District Court Case No. CF-2022-138.

Geiger presently faces charges of Murder in the First Degree, Rape in the First Degree, and Kidnapping.[1] The issue of his

[1] The State has filed a Special Bill of Particulars alleging certain statutory aggravating factors warranting imposition of the death penalty.

competency was first raised by the district court on August 10, 2022, when the Honorable Brian Lovell, Special Judge, entered a *sua sponte* Order for Determination of Competency. However, Judge Lovell vacated that order the next day at the request of defense counsel, who advised the court they "ha[d] no question as to the adjudicative competence of their client" at that time.

On April 27, 2023, prompted by an apparent change in circumstances, defense counsel filed an Application for Determination of Competency. Attached to the application was a written report by a forensic psychiatrist retained by the defense, Dr. Regan Gill, detailing her evaluation of Geiger and concluding he was not competent to stand trial and should be admitted to the Oklahoma Forensic Center (OFC) for treatment in order to restore him to adjudicative competence. On May 26, 2023, Respondent, the Honorable Tom Newby, District Judge, entered an order directing Geiger be committed to the OFC for an inpatient competency examination by the Department of Mental Health and Substance Abuse Services. Pursuant to the court's order, Dr. Scott Orth of the OFC submitted to the district court a written report of his examination, which found Geiger was not currently competent to stand trial.

On July 11, 2023, the State filed a Motion to Compel Evaluation by Mental Health Professional on Behalf of the State, which it later supplemented through a discovery motion filed on July 14, 2023. Defense counsel filed a written response opposing the State's request. A hearing on the issue was held on July 17, 2023. At the conclusion of the hearing, Judge Newby orally denied the State's motion upon finding "the State's request . . . to have the Defendant examined by an examiner of the State's choice is not allowed by statute. . . ." In his written order filed with the district court clerk on August 2, 2023, Judge Newby specifically found the district court lacked discretion to grant the State's request where an additional compulsory examination of the defendant was not authorized by Oklahoma's statutes governing competency determinations, 22 O.S. §§ 1175.1-1175.8. The district court tentatively set the matter for a post-examination competency hearing on August 14, 2023. *See* 22 O.S.2011, § 1175.4.

On August 4, 2023, the State filed its petition for a writ of mandamus with the Clerk of this Court challenging Judge Newby's determination that the district court had no discretion to grant its request for an additional competency examination by its own qualified expert. The State acknowledges that the district court's ultimate

decision whether to grant its request for an independent examination is discretionary. Nevertheless, the State contends the district court's failure to consider exercising that discretion warrants extraordinary relief. *See Hamill v. Powers*, 2007 OK CR 26, ¶ 5, 164 P.3d 1083, 1085 (recognizing that although "writs of mandamus and prohibition are not appropriate to interfere in matters wholly within a district court's discretion," extraordinary writs may be appropriate when a district court "acts under a mistaken belief that it has no discretion as to a particular matter.").

In an order issued on August 11, 2023, we granted the State's motion to stay the district court proceedings and directed Judge Newby, or his designated representative, to file a response to the issues raised in the State's petition. The response, by Gretchen Mosley of the Oklahoma Indigent Defense System, as the designated representative for Judge Newby, was filed in this Court on September 11, 2023.

The Legislature has enacted at Sections 1175.1 through 1175.8 of Title 22 "a detailed and comprehensive statutory system" of mandatory procedures for trial courts to follow when a doubt arises as to a criminal defendant's competency to stand trial. *Scott v. State*, 1986 OK CR 179, ¶ 2, 730 P.2d 7, 7. Under the statutes, whenever

the district court finds a doubt as to the defendant's competency exists, it "shall order the person to be examined by the Department of Mental Health and Substance Abuse Services or by a qualified forensic examiner designated by the Department to perform competency examinations." 22 O.S.Supp.2019, § 1175.3(D)(1)(a). Once the examination is completed, "the Department of Mental Health and Substance Abuse Services or qualified forensic examiner designated by the Department to perform competency examinations shall notify the court of its findings." 22 O.S.Supp.2019, § 1175.3(F). A post-examination competency hearing must then be held "within thirty (30) days after the qualified forensic examiner(s) have made the determination required in Section 1175.3 of [Title 22]." 22 O.S.2011, § 1175.4(A).

In its petition for writ of mandamus, the State acknowledges the governing competency statutes do not expressly authorize a court-ordered competency examination other than the examination required by Section 1175.3. But the State observes the statutes also do not expressly *prohibit* an additional competency examination. For this reason, the State claims, the district court has the discretion to grant its request for an additional competency examination of the

defendant by a qualified expert of its choosing. However, in Section 1175.3(D)(1)(b), the Legislature has specifically provided for the involvement of other examiners by the Department of Human Services, upon notice from the District Attorney, in cases where developmental or intellectual disability may be involved. If this process is to be extended to all competency cases, it must be done by the Legislature and not by judicial pronouncement of this Court.

"Mandamus is not a writ to be taken lightly. By its very nature, mandamus is an extraordinary writ. . . ." *Canady v. Reynolds*, 1994 OK CR 54, ¶ 26, 880 P.2d 391, 396. A writ of mandamus will not issue unless the petitioner can show: (1) a clear legal right; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. *Id.*; Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023).

Based upon the record provided to this Court in this matter, the State has failed to show it is entitled to the relief requested. The State has not cited any authority which holds it has a clear legal right to relief. Accordingly, the State's petition for writ of mandamus is

DENIED. The stay of proceedings imposed by this Court is hereby **LIFTED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 27th day of September, 2023.

SCOTT ROWLAND, Presiding Judge

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

WILLIAM J. MUSSEMAN, Judge

ATTEST:

Clerk

ORIGINAL

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 10 2018

STATE OF OKLAHOMA,

Petitioner,

v.

THE HONORABLE MICHELE MCELWEE,

Respondent.

No. PR 2018-0364

ORDER GRANTING EXTRAORDINARY RELIEF AND LIFTING STAY

On April 11, 2018, Petitioner, by and through David W. Prater, Oklahoma County District Attorney, Lori McConnell, Assistant District Attorney and John McKenzie McMahan, Assistant District Attorney, filed a petition for extraordinary relief in Oklahoma County District Court Case No. CF-2015-4476. Petitioner seeks an extraordinary writ directing the Honorable Michele McElwee, District Judge, to withdraw her order disallowing the testimony of Todrick Cooper based on a finding that Mr. Cooper has a Fifth Amendment privilege against self-incrimination. The State asserts that Judge McElwee's ruling is contrary to law and an unauthorized exercise of power.

The record reflects Quinton Davila was charged with seven

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STATE'S EXHIBIT 3

counts, including Murder in the First Degree, and co-defendant Todrick Cooper was charged with three counts, including Murder in the First Degree. Following preliminary hearing, both defendants were bound over for trial. A motion to sever the defendants was granted. Cooper's trial was held in October 2017. During the defense's case-in-chief, Cooper took the stand in his own defense and testified about the involvement of Davila in the charged crimes. Cooper was found not guilty of Murder in the First Degree and Pointing a Firearm at Another. He was found guilty of Kidnapping and Robbery with a Firearm. Cooper was sentenced to two years for Kidnapping and five years for Robbery with a Firearm, with credit for time served. Cooper announced at the time of sentencing that he did not intend to appeal his conviction. He has not filed a notice of intent to appeal his conviction, nor sought an appeal out of time.

The State endorsed Cooper as a witness in the trial against Davila. Davila's trial was set for March 12, 2018, at which time Cooper announced his intent to invoke his Fifth Amendment privilege against self-incrimination and not testify in the trial against Davila. Following a hearing on this issue on March 13, 2018, Judge McElwee found Cooper's Judgment and Sentence is final and not on appeal. Because

she could not find that Cooper would have no adverse consequences of testifying in this matter, she also found that Cooper could invoke his Fifth Amendment privilege against self-incrimination and she would not allow the State to call Cooper as a witness.

The State argues that Cooper no longer retains a Fifth Amendment privilege against self-incrimination because he has been tried on this matter, a Judgment and Sentence imposed, and that he has waived his right to appeal. The State also argues that because Cooper has already been tried for the offenses that are the subject of his testimony and the Double Jeopardy Clause prohibits him from being prosecuted again for the same offenses, contrary to the trial court's ruling, Cooper will suffer no adverse consequences of testifying in this matter. The State asserts that its case will suffer an injury in the wake of the trial court's ruling because the State would be prohibited from calling a witness who has already testified to his own presence and involvement in the crimes with which Davila is charged.

In an Order issued April 19, 2018, Respondent, or her designated representative, was directed to file a response to Petitioner's application. The Response was filed in this Court on May 3, 2018, by Bill Foster, Assistant Public Defender.

Respondent states that Mr. Cooper faces adverse consequences in State and Federal court if compelled to testify. Citing *Ashton v. State*, 2017 OK CR 15, ¶ 21, 400 P.3d 887, Respondent argues that a defendant maintains a Fifth Amendment privilege if there are any adverse consequences that could result from his testimony in any proceeding. Respondent states that Mr. Cooper has not been given immunity from Federal prosecution, nor has the State given him immunity from a perjury prosecution in this matter.

For a writ of prohibition Petitioner must establish: (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App. (2018). For a writ of mandamus, Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. Rule 10.6(B).

The United States Constitution's Fifth Amendment privilege

against self-incrimination provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Likewise, the Oklahoma Constitution provides that "No person shall be compelled to give evidence which will tend to incriminate him." Article II, § 21. Judge McElwee reasoned the Fifth Amendment privilege remained available to Cooper because there are "other avenues" in which she believed Cooper could "still have the opportunity if he wished" to "attack or to appeal his convictions" namely post-conviction review. Judge McElwee's ruling is contrary to established law.

In order for the Fifth Amendment privilege against self-incrimination to apply, "an individual must face some *authentic danger* of self-incrimination." *United States v. Rivas-Macias*, 537 F.3d 1271, 1277 (10th Cir. 2008) (internal quotation marks omitted) (emphasis added). "When no further danger of incrimination is present, the privilege ceases to apply." *Id.* Accordingly, "the privilege generally remains available ... *until* an individual's sentence has been fixed and the judgment of conviction has become *final*." *Id.* (emphasis added). Cooper's criminal liability as a co-defendant in this case has been established, his sentences have been imposed and he has waived his

right to appeal. His convictions and sentences are thus final. *Kern v. State*, 1974 OK CR 54, 521 P.2d 412, 415 (a final judgment and sentence is "one unappealed from within the time prescribed for direct appeal or final disposition made and entered by the appellate court if direct appeal has been perfected.") That Cooper could potentially seek relief through post-conviction review is of no consequence to the resolution of this issue. Moreover, the reasons proffered by Cooper are too remote and speculative given the finality of his convictions.

Unlike the circumstances presented in *Ashton v. State*, 2017 OK CR 15, ¶ 22, 400 P.3d 887, 894, Cooper has not presented a "substantial and real hazard of incriminating" himself. Thus, to the extent the State seeks to ask Cooper questions related to the crimes for which he has been both acquitted and convicted, no Fifth Amendment right against self-incrimination is implicated. Thus, the trial court's grant of privilege was an abuse of discretion. In addition, it is well within the trial judge's ability in the management of the trial to ensure Cooper's testimony does not stray from the testimony he has previously given in his own trial.

Accordingly, Petitioner's application for extraordinary relief is **GRANTED**. The matter is **REMANDED** to the District Court for further

proceedings consistent with this Order. The Stay imposed in this Court's April 19, 2018, Order is **LIFTED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day of July, 2018.

GARY L. LUMPKIN, Presiding Judge

DAVID B. LEWIS, Vice Presiding Judge

ROBERT L. HUDSON, Judge

DANA KUEHN, Judge

RECUSED
SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden
Clerk

OA

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Operation Summary

Query: `"gilbert postelle" and mandamus`

Matching Record Count: 1
Total Retrieved: 1
Interpreted Query: "gilbert postelle" "and" "mandamus"
Total Database Records: 29456
Query Time: 3 seconds

Filename: 48615.html
Match Number: 1 of 1
Score: 100
ENTRY_DATE: 050507
APPELLANT: Gilbert Postelle
APPELLEE: District Court of Oklahoma County / Honorable gregory Ryan, Associate District Judge
JURISDICTION: Court of Criminal Appeals of Oklahoma
HEARING_DATE: April 18, 2006

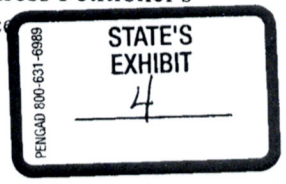
TEXT_OF_RULE:

Not Published

ORDER DENYING PETITIONERS REQUEST FOR WRIT OF MANDAMUS AND/OR PROHBITION DENYING REQUEST FOR ORAL ARGUMENT AND LIFTING STAY OF PROCEEDINGS

On February 23, 2006, Petitioner, by and through counsel Catherine C. Hammarsten, filed a petition for a writ of mandamus and/or prohibition. Petitioner seeks relief from the February 23, 2003, order of the District Court of Oklahoma County, Case No. CF-2005-4759, granting the City of Oklahoma City's Motion to Quash Subpoena Duces Tecum and Defendant's Motion to Compel State to Comply With Discovery. Petitioner states he "is in the midst of a mufti-defendant, four count murder in the first degree preliminary hearing" and requested a stay of the preliminary hearing while discovery issues are resolved. Petitioner requested oral argument in this case and asked this Court to "determine that police taped statements of witnesses are part of the discovery mandated by LaFortune1 and Constitutional protections".

On February 24, 2006, this Court issued an order staying proceedings in Petitioner's preliminary hearing, and directed a response from Respondent, the District Court of Oklahoma County, the Honorable Gregory Ryan, Associate District Judge, or his designated representative. The Respondent was directed to address Petitioner's claim that interviews consisting of video and audio taped statements recorded constitute "police
are to be provided to Petitioner as part of preliminary hearing discovery.



Judge Ryan designated the Oklahoma County District Attorney's office to respond on his behalf. On March 1, 2006, Travis White, Assistant Municipal Counselor for the City of Oklahoma City entered an appearance on behalf of the City of Oklahoma City and filed with this Court a Motion to Dismiss Petitioner's Petition for Writ of Prohibition and/or Mandamus. On March 3, 2006, Fern Smith, Assistant District Attorney for Oklahoma County, filed a response to Petitioner's application on behalf of Judge Ryan. On March 8, 2006, Petitioner filed a Motion to Strike the brief filed by the City of Oklahoma City and a Response to Judge Ryan's response, along with a Renewed Request for Oral Argument. On March 10, 2006, the City of Oklahoma City filed a Response to Petitioner's Motion to Strike the brief filed by the City. We now address Petitioner's request for relief.

In order to properly address Petitioner's application, it is necessary to establish a time line of events and to outline the proceedings which have taken place thus far in Petitioner's case.2 On August 24, 2005, Petitioner and his co-defendants were each charged with four (4) counts of First Degree Murder and one (1) count of Conspiracy to Commit First Degree Murder in Case No. CF 2005-4759 in the District Court of Oklahoma County. Petitioner was arraigned on August 30, 2005, and his first preliminary hearing conference was set. On September 22, 2005, Petitioner's first preliminary hearing conference was held. That conference was continued until October 20, 2005, to allow Petitioner time to obtain discovery.

On October 20, 2005, Petitioner's preliminary hearing date was set for February 22 and 24, 2006. On February 13, 2006, Petitioner caused subpoenas to issue to the City of Oklahoma City commanding Detectives Jeral Dupy and William Lord of the Oklahoma City Police Department to appear at Petitioner's preliminary hearing, and directing the officers to bring with them "all video tapes depicting interviews taken" in the investigation of Petitioner's case. On February 16, 2006, the City of Oklahoma City Filed a Motion to Quash the subpoenas. On February 21, 2006, Petitioner filed his Motion to Compel Discovery and Response to City's Motion to Quash. On February 22, 2006, the Motion to Quash was granted.

Petitioner filed his writ with this Court on February 23, 2006. Petitioner's application filed with this Court does not dispute that he has been provided with police reports. Rather, he complains that video and audio taped statements of witnesses recorded by detectives conducting witness interviews have not been provided to him by the State. Petitioner argues these video and audio taped witness interviews constitute "police reports" as specified by this Court in LaFortune.

For a writ of mandamus, Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. Rule 10.6(B), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2006). For a writ of prohibition Petitioner must establish: (1) a court, officer or person has or is about to exercise judicial or quasi judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2006). We find that Petitioner has not established that he has a clear legal right to the relief sought, nor has he established that Judge Ryan's actions were unauthorized by law. Therefore Petitioner's requests for a Writ of Prohibition and/or Mandamus are DENIED.

First, we note that Petitioner has failed to establish that he has standing to seek relief for this alleged error through use of an extraordinary writ. As this Court has clearly stated on numerous occasions, and as the Legislature has made abundantly clear, the purpose of a preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime. See, 22 O.S. 258 (2001) 22 O.S. 258 (8) (eighth); Thacker v. State, 2004 OK CR 32, 21, 100 P. 3d 1052; Bland v. State, 2000 OK CR 11, 70, 4 P.3d 702; Martin v. State, 1998 OK CR 35, 4, 959 P.2d 982. The Legislature specifically limited the purpose of the preliminary hearing, eliminating its use as a discovery forum. 22 O.S. 2002 (D) (2001) (the time for discovery is after arraignment); 22 O.S. 258 (2001) 22 O.S. 258 (6) (sixth) (the preliminary hearing magistrate shall have authority to limit the evidence presented to that which is relevant to the issues of whether a crime was committed and whether there is probable cause to believe the defendant committed the crime); LaFortune v. District Court of Tulsa County, 1998 OK CR 65, 10; 972 P.2d 868; McLaughlin v. District Court of Delaware County, 1996 OK CR 11, 8, 915 P.2d 919 (magistrate is required to terminate preliminary hearing once showing of probable cause is made). And, while this Court has found that use of an extraordinary writ is proper for

compelling a district court rule upon a pending discovery motion which is ripe for decision, we have determined that orders by the District Court resolving discovery issues are not immediate appealable orders. Rather, these matters are subject to review on direct appeal. See, Webber v. District Court of Tulsa County, 1995 OK CR 23, 6, 895 P.2d 728.

In Petitioner's case we find that Judge Ryan's ruling on the City's Motion to Quash is not properly presented for review via the use of an application for extraordinary writ, and is in fact premature. There are numerous opportunities and avenues available for Petitioner to seek resolution of this alleged discovery issue that do not involve use of an extraordinary writ. The matter can be reviewed on direct appeal, as noted above. Secondly, Petitioner argues that the witness statements (audio and video) are police reports, but we find nothing in the record presented to this Court indicating that Petitioner filed a Motion to Compel the State to produce these alleged police reports prior to preliminary hearing.3 A review of hearing transcript of the proceedings in Petitioner's case conducted February 22, 2006 reveal that all of the charged defendants agreed that they had been provided with police/law enforcement reports as specified in 22 O.S. 258 (6) (sixth).

Furthermore, 22 O.S. 258 (6) (sixth) provides that preliminary hearing may be terminated by the magistrate only if the state made available to the defendant for inspection law enforcement reports as specified in the statute five (5) days prior to the preliminary hearing. If and when the preliminary hearing is terminated after the State presents its evidence, Petitioner, at that time, has the opportunity to object on the basis that these witness statements constitute police/law enforcement reports within the meaning of 22 O.S. 258 .

Assuming Petitioner is bound over for trial, pursuant to 22 O.S. 2002 , he can seek production of these witness statements pursuant to the Oklahoma Criminal Discovery Code. In short, Petitioner is unable to show that he has a clear legal right to the relief sought (in that preliminary hearing is not a discovery forum); nor has he shown that he has no other relief available.

As for Petitioner's request for a writ of prohibition, we again find that Petitioner is unable to show that Judge Ryan has or is about to exercise judicial or quasi judicial power which is unauthorized by law, and which will result in injury for which there is no other adequate remedy. As noted above, Petitioner's 6 Y complaint is an alleged discovery issue, which is not proper for consideration as an extraordinary writ and which can be addressed on direct appeal. However, even if Petitioner clears this first hurdle, he is unable to meet the remaining criteria for a writ of prohibition. Specifically, Petitioner must be able to show this Court that the requested video and audio taped witness statements constitute police/law enforcement reports as contemplated by the Legislature in 22 O.S. 258 , and that these reports should have been produced by the State. Petitioner asks this Court to find that audio and video taped witness statements constitute police reports as "mandated by LaForlune and Constitutional protections." In doing so, Petitioner asks this Court to expand the term "police/law enforcement report", and thereby expand the scope of the discovery allowed in a preliminary hearing. We will not. As noted in the response filed in this matter, while the term police/law enforcement report is not defined in 22 O.S. 258 , the term is defined, after a fashion, in the relevant portion of the Oklahoma Discovery Code. See, 22 O.S. 2002 (A)(1)(b), Disclosure of Evidence by the State. Subsection A of the statute references those items which are to be disclosed by the State at the request of the defendant. Law enforcement (police) reports made in connection with a particular case are listed at 22 O.S. 2002 (A)(1)(b). The name and addresses of witnesses the State intends to call together with their relevant, written or recorded statement, if any is specified in 22 O.S. 2002 (A)(1)(a). Had the Legislature intended for recorded witness statements to be considered police/law enforcement reports, it could have so specified. It did not, and we refuse to construe the definition of police/law enforcement reports to include recorded audio and/or video witness statements. Likewise, had the Legislature intended for the State to disclose and/or produce audio, video or otherwise recorded witness statements as part of the preliminary hearing process, it could have required the State to make those statements available for inspection by the defendant in 22 O.S. 258 . It did not, and we will not construe the statute to require disclosure of these items at preliminary hearing.

Petitioner's request for oral argument is MOOT as we have resolved Petitioner's claims, and the request is therefore DENIED. The Stay of Proceedings granted in this Court's February 24, 2006 order is hereby LIFTED. Petitioner's request for extraordinary relief is DENIED.

The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Oklahoma County, the Honorable Greg Ryan, Associate District Judge, Petitioner and counsel of record.

IT IS SO ORDERED.

(FOOTNOTES):

1 LaFortune v. District Court of Tulsa County, 1998 OK CR 65, 972 P.2d 868.

2 Petitioner filed his application for extraordinary relief individually, but notes that his co defendants are aware of Petitioner's request for relief filed with this Court and "consent to the relief Postelle requests." (Petitioner's Petition and Brief in Support of Application for Extraordinary Relief, filed February 23, 2006, pg. 2.)

3 Petitioner's response to the City's Motion to Quash is titled "Motion to Compel Discovery Pursuant to LaFortune (Response to Motion to Quash Subpoena Duces Tecum)", however, this "Motion" was filed only because the City moved to quash the subpoena. The record does not contain any independent Motion to Compel Discovery filed by the Petitioner alleging the State failed to produce police/law enforcement reports pursuant to 22 O.S. 258 .

CITATIONS: Court of Criminal Appeals - MA-2006-0189 (2006)
DISPOSITION: ** Executed: February 17, 2022 - at 10:14 am **
PUBLISHED: 0

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 24 2019
JOHN D. HADDEN
CLERK

THE STATE OF OKLAHOMA,

Petitioner,

v.

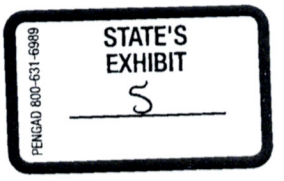
THE HONORABLE MICHELE, MCELWEE, DISTRICT JUDGE, OKLAHOMA COUNTY, 7TH JUDICIAL DISTRICT,

Respondent.

No. PR 2018-1114

ORDER DENYING APPLICATION FOR EXTRAORDINARY RELIEF

On November 1, 2018, Petitioner, by and through David W. Prater, District Attorney of Oklahoma County, and Jennifer M. Hinsperger and Jimmy R. Harmon, Assistant District Attorneys, filed an application for an extraordinary writ in Oklahoma County District Court Case No. CF-1994-5960. The State seeks an extraordinary writ to prohibit the Honorable Michele McElwee, District Judge, from enforcing her October 8, 2018, order directing that Defendant Robert A. Stevens be resentenced by a jury in Case No. CF-1994-5960 and/or compel Judge McElwee to conduct a judicial resentencing proceeding pursuant to and consistent with *Miller v. Alabama*, 567 U.S. 460, 132



S.Ct. 2455, 183 L.Ed.2d 407 (2012) and *Montgomery v. Louisiana*, 577 U.S. ____, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

The State sets forth that Defendant Stevens waived his right to a jury trial and entered an agreed plea of *nolo contendere* on April 19, 1996, to Murder in the First Degree. Defendant Stevens was 17 years and 215 days old at the time this crime was committed. He was sentenced in accordance with the negotiated plea agreement to life without the possibility of parole (LWOP), to be served consecutively to his sentence in Canadian County Case No. CF-1994-90 (LWOP) and concurrently with his sentences in Canadian County Case No. CF-1944-91 (10 years) and CF-1994-230 (10 years).

Citing *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), *Montgomery v. Louisiana*, 577 U.S. ____, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), *Luna v. State*, 2016 OK CR 27, 387 P.3d 956, and *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741, Defendant Stevens filed a subsequent post-conviction application in the District Court on May 31, 2018. The State conceded Defendant Stevens was entitled to collateral relief based on the intervening changes in law, but did not agree to modification of his sentence to life imprisonment. On August 24, 2018, Judge McElwee granted Defendant Stevens'

application, vacated his LWOP sentence, and ordered resentencing. Following a hearing held on September 18, 2018, Judge McElwee found Defendant Stevens' request for jury resentencing should be granted pursuant to *Stevens v. State*, 2018 OK CR 11, ¶¶ 38-39, 422 P.3d 741, 750-751, and 22 O.S. § 929.

The State argues that Defendant Stevens has no right to be resentenced by a jury where he was originally sentenced pursuant to a *nolo contendere* plea and that Judge McElwee's order granting the request for jury resentencing constitutes an exercise of judicial power that is unauthorized by law and from which the State has no adequate remedy. The State is seeking extraordinary relief from this Court to reverse the order granting jury resentencing and to direct a resentencing proceeding be conducted by the trial court.

In an Order issued November 7, 2018, Respondent, or her designated representative, was directed to file a response to Petitioner's application to this Court. The response was filed in this Court on November 20, 2018, by attorney Debra K. Hampton, Respondent's designated representative.

For a writ of prohibition, Petitioner must establish that (1) a court, officer or person has or is about to exercise judicial or quasi-

judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App. (2019). The State has not met this burden.

When the District Court's order denying Mr. Stevens post-conviction relief was reversed by this Court and the matter was remanded to the District Court for resentencing, the procedures for conducting said resentencing was set forth by this Court. *See Stevens v. State*, 2018 OK CR 11, ¶¶ 38-39, 422 P.3d 741. The trial court was directed to schedule the matter for resentencing in accordance with both Sections 812.1 and 929 of Title 22 and to conduct resentencing pursuant to Section 929 of Title 22. Section 929(B) directs that when a criminal case is remanded for vacation of a sentence, the trial court *may* (1) set the case for a nonjury sentencing proceeding; or (2) if the defendant or the prosecutor so requests in writing, impanel a new sentencing jury. Section 929(C) also directs that if a written request for a jury trial is filed within twenty days of the date of the appellate court order, the trial court *shall* impanel a new jury for the purpose of a new sentencing proceeding.

The record in this case does not reflect that a written request for a jury trial was filed within twenty days from the date of this Court's Order. Thus, Section 929(C)'s mandatory language is not at issue. However, Section 929(B) gives the trial judge the discretion to impanel a jury if requested or to set the case for a nonjury sentencing proceeding. In this case Judge McElwee ordered that the sentencing proceeding be to a jury. The State has not shown that Judge McElwee exercised judicial or quasi-judicial power unauthorized by law.

Accordingly, Petitioner's application to this Court for an extraordinary writ is **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th day of May, 2019.

DAVID B. LEWIS, Presiding Judge

DANA KUEHN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

Robert L. Hudson CIR - joined J. Rowland
ROBERT L. HUDSON, Judge

Scott Rowland CIR by separate writing
SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden
Clerk
OA

ROWLAND, JUDGE, CONCURRING IN RESULT:

I concur in today's result based upon the doctrine of *stare decisis* because *Stevens v. State,* 2018 OK CR 11, 422 P.3d 741 directs the use of 22 O.S.2011, § 929 for resentencing hearings such as these, without regard to whether the defendant has validly waived his right to jury sentencing. That is what Judge McElwee did. I believe we should clarify *Stevens* to hold that it does not restore one's right to jury sentencing if that right has been validly and previously waived.

Defendant Robert A. Stevens waived his jury rights over two decades ago pleading no contest to murder charges in Oklahoma and Canadian Counties. He was sentenced by a judge to life imprisonment without the possibility of parole (LWOP) for each case. The validity of those waivers has never been called into question. What has changed is the application of the Eighth Amendment's ban on cruel and unusual punishments to those who commit crimes while they are juveniles. *See Montgomery v. Louisiana,* ___U.S.___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016); *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012);

Luna v. State, 2016 OK CR 27, 387 P.3d 956 and *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741.

Although Oklahoma's statutory right to jury sentencing creates a federal liberty interest under the Fourteenth Amendment, *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), there is no federal constitutional right to jury sentencing under the Sixth Amendment. *Clemons v. Mississippi*, 494 U.S. 738, 746, 110 S.Ct. 1441, 1447, 108 L.Ed.2d 725 (1990). Notably, in *Clemons* the Supreme Court held that when one of the two aggravating circumstances relied upon to sustain a death sentence at trial is found invalid, the appellate court may reweigh aggravating and mitigating circumstances itself to uphold the sentence rather than remanding for a new jury sentencing. Given that the United States Constitution does not mandate a death sentence go back before the sentencing jury, I find it likewise does not require a jury sentencing in a *Stevens/Luna* hearing if that right was previously waived.

Nothing in either *Miller* or *Montgomery* requires the constitutionally-required individualized sentencing hearing be done by a jury, and in fact both cases specifically refer to a sentencing

judge. *Montgomery,* 136 S.Ct. at 733 ("Miller requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different...."); *Miller,* 567 U.S. at 489, 132 S.Ct. at 2455 ("Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.") Nor do these cases create any new Constitutional right; the right to be free of cruel and unusual punishments is as old as the Bill of Rights. These cases extend the protections of the Eighth Amendment to forbid the imposition of life without parole on juvenile offenders unless certain factors are proved beyond a reasonable doubt.

Finally, a jury resentencing is not mandated by the applicable Oklahoma statute. Section 929 applies when "the appellate court" finds prejudicial error only with respect to the sentencing proceeding and remands the case to the district court for vacation of the imposed sentence and resentencing. Stevens' posture before the District Court of Oklahoma County case is different because his application for post-conviction relief was granted, his LWOP sentence has been vacated and the district court is proceeding with

resentencing. A district court's authority to resentence in a non-capital post-conviction proceeding derives from 22 O.S.2011, § 1085, not Section 929.

Section 1085 states:

> If the court finds in favor of the applicant, it shall vacate and set aside the judgment and sentence and discharge or resentence him, or grant a new trial, or correct or modify the judgment and sentence as may appear appropriate. The court shall enter any supplementary orders as to rearraignment, retrial, custody, bail, discharge, or other matters that may be necessary and proper.

Under Section 1085, the district court has options to correct error it finds in the original proceeding. These options correlate with the nature of the error found, namely whether the error warrants dismissal, a new trial or resentencing. Because the error raised by Stevens affected the validity of his LWOP sentence only, the district court correctly found that resentencing him in a sentencing proceeding that comported with current sentencing procedures for juvenile homicide offenders would cure any Eighth Amendment problem under *Montgomery/Miller/Luna/Stevens*.

Stevens knowingly and voluntarily entered his no contest plea and received the sentence of life imprisonment without parole that

he had bargained for in his plea agreement. A defendant who enters a voluntary guilty plea waives his constitutional rights, including the right to jury trial and all non-jurisdictional defects. *See Lewis v. State,* 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142; *Huddleston v. State,* 1985 OK CR 12, ¶ 12, 695 P.2d 8, 10; *Dobbs v. State,* 1970 OK CR 124, ¶ 6, 473 P.2d 260, 262. No new constitutional right has been created which has yet to be waived, and although he is certainly entitled to new sentencing hearing, he is not entitled to a new sentencing entity.

I am authorized to state that Judge Hudson joins in this writing.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 28 2022

JOHN D. HADDEN
CLERK

ROBERT AKINS STEVENS

Petitioner,

v.

No. MA-2022-478

THE HONORABLE AMY PALUMBO JUDGE OF THE DISTRICT COURT, OKLAHOMA COUNTY

Respondent.

ORDER DENYING EXTRAORDINARY RELIEF

On May 20, 2022, Petitioner filed a petition for a writ of mandamus in Oklahoma County District Court Case No. CF-1994-5960 asking this Court to vacate the April 27, 2022 Order by the Honorable Amy Palumbo, District Judge, granting the State's Motion to Reinstate Life-Without-Parole Sentence and Vacate Order Granting Second Application for Post-Conviction Relief.

On April 19, 1996, Petitioner entered a negotiated plea of nolo contendere to the sole count of First-Degree Murder. On June 21, 2013, Petitioner filed an Application for Post-Conviction Relief in the trial court challenging the constitutionality of his life-without-parole sentence under *Miller v. Alabama*, 567 U.S. 460 (2012). On October

30, 2013, the Honorable Donald L. Deason, District Judge, denied the application and Petitioner did not seek a post-conviction appeal with this Court.

On May 31, 2018, Petitioner filed a Second Application for Post-Conviction Relief in the trial court alleging he was entitled to relief from the life-without-parole sentence pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 577 U.S. 190 (2016), *Luna v. State*, 2016 OK CR 27, 387 P.3d 956, and *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741. On August 24, 2018, the Honorable Michelle McElwee, District Judge, granted Petitioner's second application, vacated his sentence, and ordered a new individualized sentencing hearing.[1]

Before the District Court held the resentencing hearing, the United States Supreme Court decided *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), and we, applying *Jones*, decided *White v. State*, 2021 OK CR 29, 499 P.3d 762. In *White*, we found that Oklahoma's sentencing procedure was constitutionally sufficient to permit a juvenile convicted of first-degree murder to receive a sentence of life-without-parole. *Id.*,

[1] Respondent's original sentence was vacated by the order granting post-conviction relief. The trial court retained jurisdiction of the matter until resentence was pronounced. *Jackson v. Page*, 1966 OK CR 28, ¶ 9, 411 P.2d 555, 557

2021 OK CR 29, ¶ 7. A sentencer must have discretion to consider youth before imposing a life-without-parole sentence however no separate findings or explanations by the sentencer are required concerning this sentencing factor to comply with the federal constitution. *Id.*, 2021 OK CR 29, ¶ 5.

On December 13, 2021 the State filed a Motion to Reinstate Life-Without-Parole Sentence and Vacate Order Granting Second Application for Post-Conviction Relief which was granted by the trial court.[2] Petitioner asserts the district court's order constitutes an exercise of judicial power which is contrary to clear precedent, unauthorized by law, and in violation of the constitutional rights of the Petitioner.

On August 19, 2022, we instructed Judge Palumbo, or a designated representative, to respond to the claims presented in the petition. Judge Palumbo's representative, Brant M. Elmore, filed the response on September 9, 2022.

[2] The order granting post-conviction relief to the second application is a final order that was not timely appealed by the state and therefore the trial court does not have the legal authority to vacate the order. Rule 5.2 (C), *Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2022).* The order vacated Petitioner's sentence and moved the case back in time to await resentencing by the trial court. There was no need to vacate the order granting post-conviction relief since the case was already properly before the trial court for resentencing and the trial court had all options before it for the resentencing based on the original plea. The trial court had the authority to reimpose the sentence and in doing so had the discretion to reconsider whether Petitioner was legally entitled to a sentencing hearing by jury.

For a writ of mandamus, Petitioner has the burden of establishing that (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. *See* Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022).

The record Petitioner has submitted to this Court for review does not establish he has a clear legal right to a resentencing hearing. Petitioner was sentenced to life-without-parole under a discretionary sentencing system that was constitutionally sufficient. *See White v. State*, 2021 OK CR 29, ¶ 7, 499 P.3d 762, 767. Petitioner's life-without-parole sentence complied with the Eight Amendment "because the sentence was not mandatory and the [sentencer] had discretion to impose a lesser punishment in light of [Petitioner's] youth." *Id.*, (citing *Jones v. Mississippi*, 41 S. Ct. 1307, 1322, 209 L.Ed.2d 390 (2021)).

Petitioner's argument that he did not receive an adequate sentencing hearing because he chose to enter a negotiated plea is not persuasive. The trial court did not have to accept the negotiated plea which included a sentence of life-without-parole. A district judge has discretionary authority to accept a plea agreement and if the court does

not accept the plea agreement then the defendant has the right to withdraw their guilty plea. *See* Form 13.10, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022). Petitioner has failed to show that the trial court, in determining whether to accept the negotiated plea, failed to consider the Petitioner's youth and its attendant circumstances. The trial court had the discretion to reject the plea agreement therefore the sentence was not mandatory, and the court could have imposed a lesser punishment. Given the holdings of *Jones* and *White*, Petitioner has failed to show that he has a "clear legal right to the relief sought." Petitioner's request for extraordinary relief is **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 28 day of October, 2022.

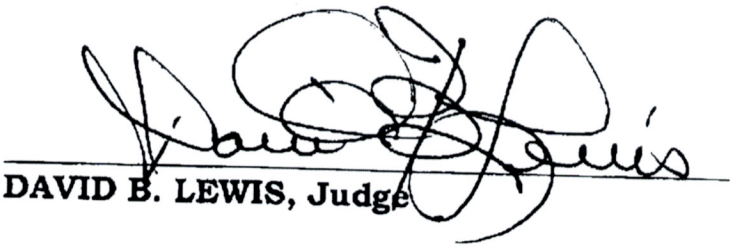
Scott Rowland

SCOTT ROWLAND, Presiding Judge

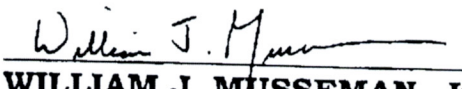
Robert L. Hudson

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

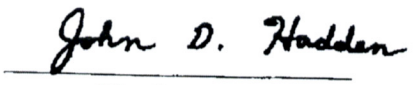


DAVID B. LEWIS, Judge



WILLIAM J. MUSSEMAN, Judge

ATTEST:



Clerk

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