IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALFRED JUNIOR MILLS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2004-935**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ORDER GRANTING RELIEF ON REHEARING

Appellant, Alfred Junior Mills, through counsel, filed a Petition for Rehearing in the above-styled appeal, claiming this Court's Summary Opinion of April 6, 2007 overlooked the 85% issue, as the case was pending on appeal when *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 was decided. Appellant further claims our decision regarding the lesser included offense of illegal entry was in conflict with existing case law to which the Court's attention was not called in the briefs.

As to the first issue, it must be noted Proposition VIII was a claim based solely on an excessive sentence argument. As a tangential part of that argument the Appellant mentions that during trial the jury had a question about the percentage of time the Appellant would serve and the trial judge refused a request to instruct on the 85% statute addressed in *Anderson*. A petition for rehearing is governed by Rule 3.14, *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.2003, Ch.18, App. Pursuant thereto, we find the Petition for Rehearing

should be **GRANTED** based on the decision of a majority of the Court to apply *Anderson* to this type of case. The Court has the power to review the cases pending on appeal when *Anderson* was decided to determine if sentence modification is appropriate. Here, we cannot say jurors would have sentenced Appellant to thirty years had they known Appellant would serve at least 85% of the sentence they gave. We thus **MODIFY** Appellant's sentence to twenty (20), rather than thirty (30) years.

Regarding the second issue, the record indicates jurors were fully informed of Appellant's theory of defense, but rejected it. At sentencing they gave Appellant ten additional years than the statutory minimum, indicating an emphatic rejection of his story, which was rather farfetched. Under these circumstances and pursuant to this record, we see no possibility that jurors would have chosen to acquit Appellant of the greater offense of burglary and then convict Appellant of a lesser included misdemeanor. Appellant's cited authority does not change our decision regarding this issue.

It is so **ORDERED**.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 27th day of August, 2007.

Concur in Result

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

ARLENE JOHNSON, Judge

DAVID B. LEWIS, Judge

ATTEST:

Clerk