No. 18-7658

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS DARIUS JONES, Petitioner

vs.

STATE OF OKLAHOMA, Respondent.

****CAPITAL CASE****

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSOTION

I. This case presents federal questions that the Court has recognized are important and unresolved.

A. Evidence that racial animus influenced the decision of at least one juror to convict and sentence Mr. Jones to death should not, as Respondent urges, be trivialized or dismissed as meaningless.

Respondent urges this Court to indulge in the fiction that the questions which Mr. Jones' case presents are "not . . . compelling," unimportant, and meaningless. (Brief in Opposition at 7-11, 13-14, 19, 25, 28.) It does so first by reframing the issues that Mr. Jones asks this Court to consider as ones pertaining exclusively to Oklahoma's procedural bars (Brief in Opposition at 1, 7), and second by contending that "the legitimacy of [those] state procedural rules, even when [they] preclude review of alleged violations of federal law, *is beyond question*" (Brief in Opposition at 8 (emphasis added)). However the legitimacy of Oklahoma's procedural bars and their application by the Oklahoma Court of Criminal Appeals notwithstanding, at the core of this case is the question of whether the State of Oklahoma may, consistent with the Constitution, execute Mr. Jones without a *single* court ever having considered on the merits—or allowed factual development of—his newly-available federal constitutional claim that anti-black racism tainted his convictions and death sentence.

The Court has recognized time and again the unique threat that racial prejudice poses to the integrity of the criminal justice system if left unaddressed. *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (holding that racial prejudice is "constitutionally

impermissible" if not "totally irrelevant" in the criminal justice context); *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice"); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (describing racial prejudice as "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice" (internal quotations omitted)). In the sentencing context, the Court's jurisprudence unequivocally condemns racial prejudice playing any role in a sentencer's exercise of its discretion to inflict punishment. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (reaffirming a "basic premise of our criminal justice system," which is that "[o]ur law punishes people for what they do, not who they are"); *Stephens*, 462 U.S. at 885; *Rose*, 443 U.S. at 555.

Respondent claims that Mr. Jones has failed to show that the state court's rejection of his postconviction application conflicts with a decision of another state or federal court. (Brief in Opposition at 8.) Yet, demonstrating a conflict among the lower courts on the federal questions which Mr. Jones' Petition presents is not a necessary precondition to the Court's exercise of certiorari review, contrary to what Respondent contends. *See* Sup. Ct. R. 10 (noting that the considerations governing certiorari review enumerated are "neither controlling nor fully measure[ ] the Court's discretion[ ]"). Mr. Jones' Petition additionally sets out in considerable detail why the state court's rejection of his postconviction application runs afoul of the Court's Sixth, Eighth, and Fourteenth Amendment jurisprudence (Petition at 11-20, 35-40), which is a consideration specifically contemplated by the rule governing certiorari review. *See* Sup. Ct. R. 10(c).

B. This case squarely presents a question that the Court has recognized is a serious and unresolved question of federal law.

Respondent's characterization of the questions that Mr. Jones has presented to the Court as unimportant (Brief in Opposition at 7-11, 14, 19) ignores the Court's recognition of the serious and undecided nature of the question presented here—that is, whether the Fourteenth Amendment requires that states afford prisoners some adequate corrective process for the hearing and determination of claims that their federal constitutional rights have been violated. *Mooney v. Holohan*, 294 U.S. 103, 110 (1935) (per curiam) (recognizing the "serious charges" raised by petitioner that the State of California violated his due process rights by failing to provide any corrective judicial remedy whereby he could seek to have his newly discovered federal constitutional claim heard and his conviction set aside); *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (noting that the Court originally granted certiorari review to decide "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees"); *Superintendent, Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 450 (1985) (recognizing the open question of whether the Fourteenth Amendment's Due Process Clause requires state judicial review of state prisoners' federal constitutional claims); *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (mem.) (Stevens, J., concurring) (explaining that the scope of states' obligation to provide collateral review of federal constitutional claims remains "shrouded in [ ] much uncertainty.").

In an effort to obscure the thread of reasoning woven throughout these cases

and its logical extension to Mr. Jones' case, Respondent claims that *Case* and *Superintendent, Mass. Corre. Inst., at Walpole* "illustrate perfectly the reason that [Mr. Jones'] Petition should be denied." (Brief in Opposition at 22.) Unlike the petitioners in those cases, so goes Respondent's argument, "[Mr. Jones] had the opportunity to present constitutional claims on *direct appeal*" and in his prior postconviction proceeding. (Brief in Opposition at 22 (emphasis added).) But, as explained *infra*, this argument misses the point.[1]

Respondent nowhere disputes that Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), by its express terms, imposes stricter limitations on the types of claims that a defendant can raise in a successor postconviction application before Oklahoma's courts if he is a capital defendant than if he is a non-capital defendant. *Compare* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) (limiting a capital defendant's successor postconviction claims based on newly available evidence only to those that "establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would

[1] Respondent's characterization of *Mooney*, 294 U.S. 103 as "fatal to [Mr. Jones'] petition" makes little sense, and its description of that decision is simply wrong. (Brief in Opposition at 22.) The petitioner in *Mooney* argued before this Court, as Mr. Jones does here, that newly discovered evidence established a violation of his constitutional rights and that the State of California had violated his due process rights by failing to provide any corrective judicial remedy whereby he could seek to have his federal claim heard and his conviction set aside. *Id.* at 110. The Court took up these "serious charges," *id.*, but ultimately denied the petition "but without prejudice," *id.* at 115, because the petitioner had not yet shown "[t]hat corrective judicial process . . . to be unavailable." *Id.* at 115. Far from "approving the state courts' failure to grant relief" (Brief in Opposition at 22), as Respondent argues, the *Mooney* Court directed that "[o]rderly procedure . . . requires that before this Court is asked to issue a writ of habeas corpus, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the state may still remain open." *Id.* at 115. Respondent additionally fails to explain why "*Young v. Ragen*, 337 U.S. 235 (1949) is inapposite." (Brief in Opposition at 22.) As in Mr. Jones' case, in *Young*, the State of Illinois and its courts deprived prisoners of a "clearly defined method by which they may raise claims of denial of federal rights." *Id.* at 239. The Court determined that "th[is] requirement must be met," and that "it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right." *Id.* at 238. And yet, this is precisely what occurred in Mr. Jones' case before the state court.

have found the applicant guilty . . . or would have rendered the penalty of death"), *with* Okla. Stat. Ann. tit. 22, § 1086 (providing that a *non*-capital defendant's successor postconviction application need only assert "a ground for relief [ ] which for sufficient reason was not asserted or was inadequately raised in the prior application" (emphasis added)). Nor does Respondent dispute that Mr. Jones' newly-available federal constitutional claim is simply not cognizable under Oklahoma law, which erects a successor postconviction standard unique to capital defendants that is different from and, in fact, higher than that required to establish a federal constitutional violation *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (referring to the "unacceptable risk that the [death] penalty [may have been] meted out arbitrarily or capriciously or through whim or mistake" (internal quotation marks omitted)).

Instead, Respondent gives short shrift to Mr. Jones' facial and as-applied Due Process challenge to Oklahoma's capital postconviction statute by simply concluding that "Oklahoma does afford adequate corrective process for the determination of federal claims." (Brief in Opposition at 21.) As an example of the adequacy of Oklahoma's corrective process, Respondent points to the opportunities available to Mr. Jones on direct appeal and in his prior postconviction proceeding "to present constitutional claims." (Brief in Opposition at 22.) This argument misses the critical fact that while Mr. Jones *did* have the opportunity to present federal constitutional claims in prior state-court proceedings as a general matter, he has *never* had the opportunity to present *this particular* newly discovered federal constitutional claim to an Oklahoma Court. Nor will he ever have that opportunity under Oklahoma law

as it stands based on the mere fact that he is an individual sentenced to die.

II. The state court's rejection of Mr. Jones' successor postconviction application does not rest upon an adequate or independent state procedural bar.

Mr. Jones does not dispute that the Court's jurisdiction to review the merits of his newly-available federal constitutional claim requires that he first surmount the procedural bars invoked by the state court to deny his postconviction application. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional."). Mr. Jones contends, however, that he has done so here. (*See* Petition at 20-32.) Respondent has failed to show otherwise.

Respondent takes the position that the legitimacy of Oklahoma's procedural bars are "beyond question." (Brief in Opposition at 8.) Nearly a century ago, however, Justice Holmes disagreed, observing that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). More recently, in *Walker v. Martin*, the Court reaffirmed its "repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights. 562 U.S. 307, 321 (2011).

State procedural rules are not ipso facto legitimate. Rather, the legitimacy of state procedural rules that may operate as a jurisdictional bar to the Court's review of a federal constitutional question depends upon "whether the asserted non-federal ground independently and adequately supports the judgment" of the state court. *Abie*

State Bank v. Bryan, 282 U.S. 765, 773 (1931); *NAACP v. Ala.*, 357 U.S. 449, 455 (1958). And because state procedural rules that are "applied infrequently, unexpectedly, or freakishly" may "discriminat[e] against the federal right[ ] asserted," they must yield and the Court's exercise of jurisdiction over a federal constitutional question is appropriate. *Walker*, 562 U.S. at 320 (citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990)); *Ford v. Georgia*, 498 U.S. 411, 423 (1991) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." (internal quotations omitted) (quoting *Nat'l Ass'n for Advancement of Colored People*, 357 U.S. at 457-58)).

According to Respondent, Mr. Jones was not precluded at any prior stage of his case from inquiring into "improper comments" made by jurors during his trial. (Brief in Opposition at 11.) However Respondent's argument is contradicted by longstanding Oklahoma law. Prior to *Peña-Rodriguez*, Oklahoma's no-impeachment rule squarely prohibited defendants from challenging the fairness and impartiality of a jury's verdict by inquiring into jurors' decision making processes. *See* Okla. Stat. Ann. tit. 12, § 2606(B); *Wacoche v. State*, 644 P.2d 568 (Okla. Crim. App. 1982); *Matthews v. State*, 45 P.3d 907, 914-15 (Okla. Crim. App. 2002); *Wood v. State*, 158 P.3d 467, 480 n.29 (Okla. Crim. App. 2007). Respondent claims that Mr. Jones could have inquired into jurors' racial attitudes at any point post-trial. (Brief in Opposition at 12.) But that argument ignores the fact that Oklahoma law specifically prohibited Mr. Jones from asking jurors how their racial attitudes may have impacted their decision making. *Matthews*, 45 P.3d at 915 ("[U]nder section 2606(B), parties may

only question former jurors to determine if improper [or] prejudicial information was revealed to the jury or any outside influence was improperly brought to bear upon any juror." (emphasis added))

Respondent's argument also sidesteps the fact that at the time of Mr. Jones' trial, the trial court placed strict parameters on the questions that defense counsel could ask jurors, including Ms. Armstrong, which effectively precluded any inquiry into whether racial prejudice impacted the second stage—or any stage—of the process. (Tr. XIII 19-20, 22-23.) Respondent claims that Mr. Jones has failed to show that racism tainted the deliberations of Mr. Jones' jury. (Brief in Opposition at 12.) However common sense dictates that a racist comment made by a juror outside of deliberations raises the inference that racism impacted the deliberations themselves; it does not imply the opposite—that deliberations were not tainted by racial prejudice—as Respondent suggests. *See Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (mem.) (finding that a juror's remarks, brought to light years after trial, "present[ ] a strong factual basis for the argument that Tharpe's race affected [that juror's] vote for a death verdict").

Respondent concedes that the state court assumed that Mr. Jones' evidence of racial prejudice was reliable notwithstanding the absence of affidavits (Brief in Opposition at 14 ("The [state court's] decision did *not* rest on Petitioner's failure to present reliable evidence" (emphasis added))). Respondent nonetheless defends the state court's *res judicata* and waiver findings as adequate (Brief in Opposition at 14, 17-19). Mr. Jones relies upon the arguments set forth in his Petition concerning the inadequacy of these procedural rulings. (*See* Petition at 28-30.)

III. Oklahoma's capital postconviction statute facially and as applied to Mr. Jones violates his rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Respondent argues that Mr. Jones' Due Process and Equal Protection challenges to Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) must fail because he has "made no attempt to demonstrate that the factual basis for his claim was not ascertainable" before now, and because he has "failed to show—or even attempt to show—that the factual basis for his claim was unavailable." (Brief in Opposition at 23.) However Mr. Jones set forth explicitly why the state court's determination concerning the prior availability of the factual basis for his newly discovered federal constitutional claim was inadequate. (*See* Petition at 30-32.)

Respondent's further contention that the constitutional defect in § 1089(D)(8)(b) was somehow cured here because "the [state court] modified section 1089(D)(8)(b)(2) in [Mr. Jones'] case to account for the potential that the racial prejudice alleged by [Mr. Jones] influenced the jury's verdict" (Brief in Opposition at 23), reflects its failure to appreciate the character of Mr. Jones' constitutional challenge to this statutory provision, under which Mr. Jones' newly discovered constitutional claim simply is not cognizable.[2] (*See* Petition at 35-38.) Respondent nowhere disputes this fact.

Finally, Respondent argues that Mr. Jones has not established an Equal

[2] Respondent further claims that Mr. Jones' Fourteenth Amendment challenge to Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) must fail because he has allegedly failed to show that it erects a prejudice standard higher than that required to establish a federal constitutional violation. (Brief in Opposition at 24 ("The defendant claims this standard is higher than the federal standard . . . However, the defendant cites no authority explaining what the federal standard is.").) This argument ignores the extended discussion of these matters included in Mr. Jones' Petition. (*See* Petition at 11-20.) Respondent's arguments and its misrepresentation of the content of Mr. Jones' Petition should be rejected.

Protection violation because he is not similarly situated to non-capital prisoners. (Brief in Opposition at 25-26.) However the Court has not so held and the cases cited by Respondent in support of this contention are not controlling here. (*See* Brief in Opposition at 25-26.) Furthermore, the Court's jurisprudence has likened life-without-parole sentences to the death penalty which points, at the very least, to the similarly situated nature of prisoners sentenced to death by execution and non-capital prisoners sentenced to death in prison. *See Graham v. Florida*, 56 U.S. 48, 69-70 (2010); *see also Miller v. Alabama*, 567 U.S. 460, 474-75 (2012).

Nor are the cases relied upon by Respondent apposite as persuasive authority.[3] (Brief in Opposition at 25-26.) Respondent has failed to show that any rational basis exists for the Oklahoma legislature's decision to more strictly limit the types of federal constitutional claims that capital prisoners can raise in a successor postconviction proceeding than those that are available to noncapital prisoners. With respect to each group, the State's interest in enforcing the punishments imposed—capital and noncapital alike—remains the same.

Respondent's defense of the fewer procedural protections that the State of Oklahoma provides to capital defendants in postconviction proceedings than it affords

[3] In *Sheppard v. Early*, 168 F.3d 689 (4th Cir. 1999), the Court of Appeals held that a Virginia statute requiring an execution date to be set within sixty or seventy days following the notification by the Attorney General or the attorney for the Commonwealth of the Court of Appeals' decision denying habeas relief did not violate the Equal Protection Clause. For the additional reason that Mr. Jones is not here challenging the Oklahoma legislature's time requirement for the setting of execution dates, this case is inapposite. *Rhines v. Weber*, 544 U.S. 269 (2005), also cited by Respondent, supports Mr. Jones' complaint about Oklahoma's capital postconviction procedure. In *Rhines*, this Court observed that while some capital prisoners "might" engage in dilatory tactics, they should, as a general matter, be allowed to air their federal constitutional grievances before a state court before such claims are either dismissed or passed upon by a federal district court. 544 U.S. at 278 ("[A] petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions.").

non-capital defendants furthermore turns the Court's Eighth and Fourteenth Amendment jurisprudence—which calls for *more* reliability in the imposition of capital punishment, not *less*—on its head. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Carter v. Illinois*, 329 U.S. 173, 186 (1946) (Murphy, J., dissenting) ("When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society is here attempting to take away the life or liberty of one of its members. That attempt must be tested by the highest standards of justice and fairness that we know.").

IV. The State of Oklahoma must afford Mr. Jones an evidentiary hearing on the question of whether his convictions and death sentence were tainted by racial prejudice.

Respondent concedes that Mr. Jones "needed an evidentiary hearing to attempt to prove his claim" that racial prejudice tainted his convictions and death sentence (Brief in Opposition at 15), but nonetheless asks this Court to deny certiorari review on the grounds that Mr. Jones' threshold showing of racial prejudice is "weak" (Brief in Opposition at 28). However any alleged weakness in Mr. Jones' evidentiary proffer is the direct result of the state court's refusal to permit him to factually develop this claim—a refusal that Respondent defended below and again defends in this Court. (Brief in Opposition at 14-16.) In addition, Respondent fails to explain how, in light of its recognition of Mr. Jones' obvious "need[ ] [for] an evidentiary hearing" on his federal constitutional claim, the state court's rejection of his application and request for a hearing was nonetheless consistent with the Fourteenth

Amendment's Due Process guarantees.

Respondent instead asks the Court to agree that Mr. Jones' newly discovered evidence that racial prejudice tainted the decision making of at least one juror "simply defies belief" (Brief in Opposition at 28), and thus implicates no right protected by the Constitution. This argument disregards anti-black racism's deep and enduring roots throughout the United States' history, *see, e.g.*, *Calhoun v. United States*, 568 U.S. 1206 (2013) (mem.) (Sotomayor, J., & Breyer, J., dissenting from denial of certiorari) (referring to the "deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation" as evidenced through the use of the term "nigger"); *see also Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 579 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (finding that the comment "Get out of my office nigger" would "by itself [ ] establish a hostile work environment for purposes of federal anti-discrimination laws")—a reality that Respondent prefers to disbelieve.

The Court should not, as Respondent urges, sanction the state court's refusal to confront disturbing new evidence that overt bigotry infected the fairness of Mr. Jones' capital trial and sentencing proceedings. *Peña-Rodriguez*, 137 S. Ct. at 869 (holding that it is incumbent upon courts "to consider the evidence of [a] juror's [racially prejudiced] statement and any resulting denial of the jury trial guarantee"). Mr. Jones' case is one in which the State of Oklahoma "is here attempting to take away the life . . . of one of its members." *Carter*, 329 U.S. at 186 (Murphy, J., dissenting). "That attempt must be tested by the highest standards of justice and fairness that we know." *Id.*

CONCLUSION

Respondent has advanced no meritorious argument in opposition to Mr. Jones' request for this Court to consider the important questions presented by his case. For this and the foregoing reasons, Mr. Jones asks that this Court grant his petition for a writ of certiorari.

Respectfully submitted: March 14, 2019.

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