OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

NO. 18-8848

ANTYANE ROBINSON,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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ARGUMENT

I. THIS COURT HAS JURISDICTION BECAUSE THE PENNSYLVANIA SUPREME COURT'S PROCEDURAL RULING WAS NOT INDEPENDENT OF THE MERITS OF PETITIONER'S CLAIM.

In the Petition, Mr. Robinson showed that the ruling of the Pennsylvania Supreme Court—as expressed in the opinions by two Justices in support of affirmance—was intertwined with and therefore not independent of federal law. Pet. 5-8 & n.4. Where a state court procedural ruling is intertwined with federal law, this Court has jurisdiction to review the state court's decision on the issue of federal law. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1984) (finding jurisdiction where state court waiver rule did not apply to fundamental error, including federal constitutional errors).

While the Commonwealth argues that this Court does not have jurisdiction, the Commonwealth does not dispute that the state high court's opinions in support of affirmance (OISAs) are intertwined with federal law.[1] Rather, the Commonwealth posits that the trial court denied relief on adequate and independent grounds, and the ruling was affirmed by an equally divided appellate

[1] As in Pet., we abbreviate the Opinion in Support of Reversal as "OISR," and the Opinions in Support of Affirmance as "OISA."

court, making the trial court ruling the only one relevant here. Brief in Opp. 9-10. The Commonwealth errs.

This Court has long recognized that it is "incumbent on this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). Jurisdiction should not be rejected "where there is strong indication . . . that the federal constitution as judicially construed controlled the decision below." *Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940).

Of course, it "is not always easy . . . to apply the independent and adequate state ground doctrine." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).[2] This Court has therefore adopted certain presumptions to ease application of the doctrine. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court held that when a "state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law," the Court will presume that the state court relied on federal law in the absence of a "plain statement" to the contrary. *Id.* at 1040-41. This rule "applies regardless of whether the disputed state-law ground is substantive . . . or procedural." *Harris v. Reed*, 489 U.S. 255, 261 (1989). Thus, the

[2] While the basis for applying the adequate and independent grounds doctrine in habeas cases is different from that in this Court's direct review cases, the same analysis applies to both types of cases. *Coleman*, 501 U.S. at 729-32.

reviewing court must determine whether "the decision of the last state court to which the petitioner presented his federal claims . . . fairly appear[s] to rest primarily on federal law or to be interwoven with federal law." *Coleman*, 501 U.S. at 735.[3]

Here, the trial court ruled that the petition was untimely because it should have been filed in 2014, not 2015. Pet'r's App. 31. That ruling was reviewed by the Supreme Court of Pennsylvania. The Commonwealth ignores the state high court's review. If the state high court had silently affirmed the trial court ruling, that would be appropriate. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991) (looking through *unexplained* state court order and applying presumption that such orders "rest upon the same ground" as the lower court ruling); *see also Lee v. Kemna*, 534 U.S. 362, 375-76 (2002) (addressing adequacy of procedural bar that was first invoked on appeal). Here, however, the state high court *was not silent*. Thus, to determine the basis for the "decision of the last state court to which the petitioner presented his federal claims," *Coleman*, 501 U.S. at 735, we must examine the Pennsylvania Supreme Court's decision.

[3] The Commonwealth's apparent suggestion that it does not matter *why* the OISA found the claim untimely, even if it did so based on an erroneous analysis of the merits of the federal claim, Brief in Opp. 12, is flatly inconsistent with this Court's adequate and independent ground jurisprudence discussed herein.

As discussed in Pet. 5-8, three Justices did not participate in the state high court's decision. Of the four who did participate, two Justices expressly rejected the trial court's ruling that the petition should have been filed in 2014. *See* Pet'r's App. 12 (Donohue, J., OISR) ("Based on the information publicly available in 2014, we conclude that Robinson did not have a basis to allege that Eakin was biased in order to bring his due process claim at that time."). The other two Justices relied on their own rationale for finding the petition untimely, one using the perceived lack of merit of the claim—because the allegations did not establish actual bias—as the ground for finding the claim untimely. *See* Pet'r's App. 20-21 (Dougherty, J., OISA); Pet. 6-7.

Nowhere in either of the two OISAs is there any mention whatsoever of the trial court's should-have-been-filed-in-2014 rationale. Reliance on a different rationale—without mentioning the lower court's rationale—indicates rejection of the lower court's rationale. If the Justices who voted to affirm had agreed with the lower court, they could have forgone writing an opinion altogether, or simply written that they affirmed based on the lower court's reasoning.[4] If those Justices

[4] *See Commonwealth v. Tilghman*, 673 A.2d 898, 904 (Pa. 1996) (explaining Pennsylvania Supreme Court practice regarding per curiam orders of affirmance: "Unless we indicate that the *opinion* of the lower tribunal is affirmed per curiam, our order is not to be interpreted as adopting the rationale employed by the lower tribunal in reaching its final disposition.") (emphasis in original).

had agreed with the lower court but also wanted to express their views on other aspects of the case, they could have expressly done so. But they chose to rely on an entirely different rationale, without the slightest mention of the lower court's rationale. As this Court explained in *Nunnemaker*, "The maxim is that silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Nunnemaker*, 501 U.S. at 804. Here, the affirmance *with* further discussion indicates disagreement with the reasons given below.

The controlling decision for purposes of determining whether the state court procedural ground was adequate and independent is the OISA issued by the Supreme Court of Pennsylvania. As explained in Pet. 6-7, the OISA was not independent of federal law. Accordingly, this Court has jurisdiction to review the state court judgment.

II. THE PARTICIPATION OF AN ALLEGEDLY BIASED JURIST IS OF PARTICULAR CONCERN GIVEN THE STRONG RACIAL OVERTONES INJECTED BY THE TRIAL PROSECUTOR.

The Commonwealth appears to suggest that the courts that previously reviewed Petitioner's case have preclusively rejected any notion that the trial prosecutor injected racial overtones into the case. Brief in Opp. 4-5. Any such suggestion is inconsistent with the record.

The trial record speaks for itself. *See* Pet. 10-11 (discussing trial record). The prosecutor's argument was improper and racially charged. Prior decisions make clear that the argument was improper; the key decision on whether it was racially charged is the one authored by Justice Eakin that is at issue in this appeal.

On direct appeal, the defense did not argue that the prosecutor's argument was racially improper, but that the underlying evidence was inadmissible, and that the prosecutor had improperly used the inadmissible evidence to argue Mr. Robinson's propensity to kill and ability to form the specific intent to kill. The defense also argued that exclusion of defense rebuttal evidence about why Mr. Robinson owned guns was erroneous. The state high court agreed that the lower court's evidentiary rulings were erroneous. The court also indicated that it was "troubled by the fact that the Commonwealth implied the reason that appellant possessed guns was so he would feel like a 'big city man.'" *Commonwealth v. Robinson*, 721 A.2d 344, 353

(Pa. 1998).[5] While the court found the errors harmless, *id.* at 351-53, it was openly critical of the prosecutor's conduct.

In post-conviction, Petitioner did bring a claim regarding the racially charged arguments. The state high court—in an opinion authored by Justice Eakin—rejected that claim. *Commonwealth v. Robinson*, 877 A.2d 433, 441-42 (Pa. 2005).[6] In his dissenting opinion, however, Justice Saylor wrote that the prosecutor's statements were prohibited "character and propensity-based arguments," and the "sort of 'outsider-based' argumentation" previously disapproved of by the court. *Id.* at 451 (Saylor, J., dissenting). Justice Saylor further opined that the improper evidence, "coupled with the district attorney's character- and propensity-based arguments . . . had the potential to color the jurors' eligibility determination [with respect to the death sentence]." *Id.* at 452.

In habeas proceedings, the district court denied relief on a claim regarding the prosecutor's race-based and other improper arguments, giving deferential review under 28 U.S.C. § 2254(d) and (e) to the state court decisions denying relief, including that authored by Justice Eakin. *Robinson v. Beard*, No. 1:05-CV-1603,

[5] At the time the direct appeal opinion was issued, Justice Eakin was not on the court, and did not participate in the decision.

[6] Not only was Justice Eakin implicated in the email scandal, he was also a former colleague of the trial prosecutor, who, when the email scandal arose, wrote a letter to the Judicial Conduct Board supporting Justice Eakin. *See* Pet. 10 n.6.

2011 WL 4592366, *33-40 (M.D. Pa. Sept. 30, 2011). The Third Circuit reviewed only claims under *Simmons v. South Carolina*, 512 U.S. 154 (1994), and regarding the validity of Pennsylvania's "grave risk" aggravating circumstance. *Robinson v. Beard*, 762 F.3d 316, 324-32 (3d Cir. 2014).

Thus, the only reported decision directly addressing (without deference) a claim that the trial prosecutor improperly injected race into the proceedings was the one authored by Justice Eakin. Under *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), if Justice Eakin was in fact biased, his participation on the appellate panel that decided the case—let alone his authorship of the opinion—violated due process and therefore that underlying claim deserves review by an untainted court. *Id.* at 1909-10 (due process violated when biased jurist on multimember court fails to recuse; case remanded for further review). This Court should grant certiorari to review the questions presented in the Petition.

CONCLUSION

For the reasons set forth in the certiorari petition and herein, this Court should grant certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2019, I caused a copy of the foregoing *Reply Brief in Support of Petition for Writ of Certiorari* to be served on the following person at the location and in the manner indicated below:

VIA FIRST CLASS MAIL TO:

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_/s/ Enid W. Harris_____
Enid W. Harris

Dated: May 24, 2019