No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY LEE JONES,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

In this capital case, the Tennessee courts permitted the State to introduce a transcript of prior testimony of its "primary witness" rather than presenting the living witness at trial. Did depriving the Petitioner of his ability to confront and cross-examination the key evidence at his capital trial violate the Sixth, Eighth, and Fourteenth Amendments?

LIST OF PARTIES

The appellant below, who is the Petitioner in this Court, was Henry Lee Jones. The appellee below was the State of Tennessee.

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PETITION FOR A WRIT OF CERTIORARI

Henry Lee Jones respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Tennessee upholding Mr. Jones's convictions and sentences.

OPINION BELOW

Petitioner seeks review of the judgment of the Supreme Court of Tennessee entered on January 30, 2019 upholding Mr. Jones's convictions and sentences upon direct appeal. The relevant opinion of the Supreme Court of Tennessee in this matter is included with this Petition as Appendix A.

STATEMENT OF JURISDICTION

The Supreme Court of Tennessee entered its judgment and opinion on January 30, 2019. *State v. Jones*, 568 S.W.3d 101 (2019), *see* Appendix A. On April 18, 2019, Justice Sotomayor extended the time for filing up to and including July 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in pertinent part: "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The State of Tennessee indicted Henry Lee Jones on October 7, 2003, with alternative counts of first degree premeditated and first degree felony murder in the August 2003 deaths of Clarence and Lillian James. *State v. Jones*, 568 S.W.3d 101, 110 (2019). The State filed notice of its intention to impose a death sentence upon Mr. Jones on February 17, 2004. *Id.* The State chose to indict alleged accomplice Tevarus Young with two counts of facilitation of first degree murder rather than more severe charges. *See* Shelby County Case No. 03-07865, *State v. Young* (case filed and indictment issued November 13, 2003). The State incarcerated Mr. Young without bringing his case to trial from the time of Mr. Young's arrest up to, and throughout, the May 2009 trial of Henry Lee Jones.[1]

At Mr. Jones' trial, Tevarus Young was the State's "primary witness"[2] and testified that he was present with Mr. Jones at the time of the offenses and for a few

[1] Young was arrested in Florida in August 2003 on an outstanding Florida criminal warrant. *State v. Jones*, 450 S.W.3d 866, 873, 876 (Tenn. 2014). The exact date of his arrival back in Tennessee is unclear from the record but the docket reflects a jail entry on January 27, 2004, and a jail arraignment on January 29, 2004, at which point he was appointed a public defender. Shelby County Case No. 03-07865. He was criminally charged in three separate cases while in Shelby County custody—assaulting a correctional officer by punching him in the head (Case No. 05920357-01, July 28, 2005) and indecent exposure (Case No. 06920199-01, June 20, 2006; Case No. 08900160-01, April 9, 2008). *See* https://cjs.shelbycountytn.gov/CJS/.

[2] *See* Brief of Appellee State of Tennessee, p. 44, filed in the Supreme Court Tennessee in Case No. W2015-02210-SC-DDT-DD on February 5, 2018.

days thereafter as they drove back to Florida. 2009 Trial, Vol. XX, 484–510. He claimed that Mr. Jones killed the victims. 2009 Trial, Vol. XX, 526, 540, 573–74; Vol. XXI, 648. Despite the fact that there was no DNA or forensic evidence at the scene linking Mr. Jones to the murders, Petitioner was convicted of all counts and sentenced to death. *State v. Jones*, 450 S.W.3d 866 (Tenn. 2014).

Following Mr. Jones's trial, on July 10, 2009, Tevarus Young pleaded guilty to two counts of facilitation of first degree murder in return for two concurrent thirteen-and-one-half-year sentences. *See* Shelby County Case No. 03-07865, *State v. Young*; *State v. Jones*, 568 S.W.3d 101, 111 (Tenn. 2019). Young remained in the custody of the State of Tennessee from 2009 to 2015 while Mr. Jones appealed his convictions and sentences—which were secured by the State's use of other bad acts/crimes evidence at trial regarding an alleged homicide in Florida.

On direct appeal, on September 25, 2014, the Supreme Court of Tennessee ordered a new trial. *State v. Jones*, 450 S.W.3d 866 (Tenn. 2014) (finding that the trial court erroneously admitted evidence of other alleged bad acts in Florida and ordering a new trial). The State did not seek rehearing of the case and the Supreme Court of Tennessee issued a mandate remanding the case on October 10, 2014. *State v. Jones*, No. W2009-01655-SC-DDT-DD. Mr. Jones filed a pro se motion for speedy trial on November 26, 2014. 2015 TR Vol. I, 51–61. The motion was heard on December 5, 2014. *Id.*, 93.

On December 5, 2014, the State filed a motion to require Mr. Jones to provide notice of intention to rely on the defense of alibi, 2015 TR Vol. I, 94–95, and a

demand for "Compliance With Victim's Bill Of Rights" insisting that the case be given priority over other cases and that "[a]ll parties shall make every effort to dispose of any charges against a defendant within one hundred eighty (180) days of the defendant's indictment." *Id.*, 96–97.[3] On that same date, the State also filed a response specific to whether any agreements had been entered into with Tevarus Young, a response to a motion for impeaching evidence that specifically referenced Tevarus Young, and a response to a motion for disclosure of witnesses, stating that the prosecution would supply a list of witnesses with last known addresses. *Id.*, 104, 111, 113.

On December 11, 2014, pursuant to his request, counsel for Mr. Jones were dismissed and he was permitted to represent himself. *Id.*, 119. On January 9, 2015, Mr. Jones filed a motion to obtain all discovery records on Indictment No. 03-07865, *State v. Tevarus Young*. 2015 TR Vol. II, 149–51.

Tevarus Young was released from state custody in Tennessee on January 5, 2015.[4] On January 30, 2015, the State responded to Mr. Jones's pro se discovery request regarding Tevarus Young, stating that the plea agreement with Mr. Young was public record and that he had pleaded guilty on July 10, 2008, and he was

[3] Notably, Mr. Jones was indicted over 11 years before the State filed this motion and significant delay occurred due to the State's insistence upon presenting evidence which deprived Mr. Jones of a fair trial.

[4] *See* Tennessee Offender Information, https://apps.tn.gov/foil-app/results.jsp, Tevarus Young, TOMIS ID 00373230.

sentenced to serve 13 years and 6 months for the offense.[5] The State did not disclose that Mr. Young had been released from Tennessee's custody.

Less than one month before the retrial, which was held on May 11–16, 2015,[6] on April 13, 2015, the State filed a petition to secure Tevarus Young's presence at the retrial. 2015 TR II, 225–27. The trial court found that Mr. Young was a material witness and ordered his appearance and advance payment of travel expenses. 2015 TR II, 221–24. Yet, the State did not secure Mr. Young's appearance, after years of pretrial detention in advance of his role as State's primary witness at Mr. Jones's trial and then subsequent post-trial incarceration.

On May 11, 2015, the State filed a motion to have Mr. Young declared an unavailable witness and sought permission to use a transcript of his testimony from the 2009 trial. *State v. Jones*, 568 S.W.3d 101, 112 (Tenn. 2019). Over Mr. Jones's objection that he would not have the opportunity to cross-examination Mr. Young, the court found that Mr. Young was unavailable and permitted the prosecutors to read Mr. Young's previous testimony to the jury in question and answer form. *Id*. at 113. Prosecutor Thomas Henderson, who represented the State at both trials, was the lawyer who presented the testimony of Tevarus Young at the 2009 trial. 2009 Trial Vol. XX, 466–579 (May 7); Vol. XXI, 634–59 (May 8). Prosecutor Jennifer Nichols was permitted to read the parts of all the lawyers questioning Tevarus

[5] The publicly available information from the Shelby County Criminal Court Clerk indicates that Mr. Young was taken into Tennessee's custody in January 2004, suggesting a release date in 2017 if his full sentence was served. https://cjs.shelbycountytn.gov/CJS/.

[6] *See State v. Jones*, 568 S.W.3d 101, 110 (Tenn. 2019).

Young in his 2009 testimony, while Thomas Henderson read the responses of Mr. Young. 2015 Trial Vol. XIII, 778–79, 782–944. The testimony included an uncharged allegation by Mr. Young that Mr. Jones had raped him. *Jones*, 568 S.W.3d at 131. Prosecutor Thomas Henderson, shortly after playing the role of Tevarus Young, argued in closing at the 2015 trial:

> And that's where Tevarus tells us that he was forced into having anal sex by the defendant. The defendant's penis in Tevarus Young's anus. As disgusting at that sounds, evaluate it objectively for a moment, though. How better to reinforce your control over a young man than to force him to have anal sex. How better to control a young man of dubious mental strength himself, how better to control him than to put your penis in his rectum? Can you make the message any stronger? You're mine, boy, you'll do what I tell you to do.

2015 Trial Vol. XV, 1233.[7]

Mr. Jones's request that the court inform the jury that Mr. Young was evading process was denied. *Jones*, 568 S.W.3d at 113. The trial court instructed the jury to "regard this prior sworn testimony the same as you would as if any other witness had testified to it here in open court and this witness's credibility will be determined by the same rules by which you determine the credibility of other witnesses." *Id.* As a result, Mr. Jones was convicted and sentenced to death. The Court of Criminal Appeals and Supreme Court of Tennessee affirmed Mr. Jones's convictions and death sentences.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

[7] Mr. Henderson is Caucasian; Mr. Jones and Mr. Young are African-American.

Where a state makes insufficient efforts to obtain the testimony of a living witness to present at trial, the State impinges upon the federal constitutional right under the accused's Sixth and Fourteenth Amendment to confront the witnesses against him. *Barber v. Page*, 390 U.S. 719 (1968). In *Barber*, this Court noted that the right to personal examination and cross-examination of a witness is designed to provide the accused an opportunity to test the recollection and "sift[] the conscience of the witness," as well as to "compel[] him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.* at 721 (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)).

Since this Court's decision in *Barber*, the Court has found that under certain circumstances the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" *Ohio v. Roberts*, 448 U. S. 56, 66 (1980) (non-capital case involving charges of forgery, receiving stolen property, and possession of heroin). In later revisiting *Roberts*, this Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination" for the evidence to be admitted. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (non-capital case involving assault and attempted murder).

However, this Court has never specifically addressed the question of whether the heightened due process standards applicable in capital cases pursuant to the Eighth and Fourteenth Amendments preclude a state from using previous

testimony of an "unavailable" witness to secure a conviction and death sentence where the witness is living and "unavailable" due to the State's delay in securing his attendance at trial.

The State's use of the prior testimony of Tevarus Young deprived Mr. Jones of his ability to confront and cross-examination the key evidence at his capital trial in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has long recognized the heightened need for reliability in death penalty cases. *See Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment . . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). Death is different. *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) ("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments.").

The heightened need for reliability in capital cases has been employed by this Court in a variety of contexts as an important rationale for its decisions:

- *Woodson v. North Carolina*, 428 U.S. at 304–05 (invalidating mandatory capital sentencing statute);
- *Gardner v. Florida*, 430 U.S. 349 (1977) (requiring disclosure to defendant of all information contained in confidential presentence investigation report in sufficient time to allow defendant a meaningful opportunity for response);
- *Lockett v. Ohio*, 438 U.S. 586, 603–05 (1978) (requiring consideration of all relevant mitigating evidence to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty");

- *Green v. Georgia*, 442 U.S. 95 (1979) (forbidding the exclusion of relevant mitigating evidence due to the state's hearsay rule);

- *Beck v. Alabama*, 447 U.S. 625 (1980) (requiring instruction on lesser included offenses supported by the evidence in the guilt phase of a capital trial);

- *Bullington v. Missouri*, 451 U.S. 430 (1981) (holding that double jeopardy bars death sentence on retrial after defendant sentenced to life at first trial);

- *Estelle v. Smith*, 451 U.S. 454 (1981) (recognizing that Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel are applicable to penalty phase of capital trial);

- *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (forbidding prosecutorial argument which, by assuring the jury that any error it made could be corrected on appeal, had the effect of diminishing the jury's sense of responsibility for its sentencing decision);

- *Turner v. Murray*, 476 U.S. 28 (1986) (requiring the states to permit voir dire about racial prejudice in interracial crimes);

- *Lankford v. Idaho*, 500 U.S. 110 (1991) (recognizing that capital defendant is entitled to fair notice of issue to be resolved at trial); and

- *Riggins v. Nevada*, 504 U.S. 127 (1992) (Finding error in involuntarily administering antipsychotic medication to capital defendant).

The same concern for reliability and heightened due process animating this Court's decisions above is present here, where Mr. Jones was convicted and sentenced to death by a jury deprived of the ability to judge the State's primary witness "by his demeanor upon the stand and the manner in which he gives his testimony . . . . " *Barber*, 390 U.S. at 721. Instead, the jury heard prosecutor Jennifer Nichols playing the role of the lawyers questioning Mr. Young at trial and prosecutor Thomas Henderson reading Mr. Young's answers. 2015 Trial Vol. XIII,

778–79, 782–944.[8] So, the demeanor and manner adjudged were the inflections and presentation style chosen by State actors seeking to convict and execute Mr. Jones.

The State of Tennessee had custody of Tevarus Young when it suited the State's purpose—including detaining him in Shelby County from January 2004 to July 2009, to secure his testimony against Mr. Jones at the May 2009 trial prior to accepting Mr. Young's guilty plea. The State of Tennessee chose to present bad acts evidence against Mr. Jones at his 2009 trial, which ultimately resulted in the Supreme Court of Tennessee granting a retrial in 2014. Upon remand, the State was fully on notice that Young's testimony would be critical and contested evidence at the retrial—as evidenced by pleadings filed by the prosecution in December 2014.

Mr. Jones asserted his right to a speedy trial in November of 2014, over 11 years after he was arrested. In December 2014, the State filed its own demand for a speedy trial as well. At that point, the State's primary witness Tevarus Young was still in the custody of the State of Tennessee. Yet, the State failed to take any steps to secure the testimony of its primary witness and failed to alert Mr. Jones of the witness's unavailability until May 2015, days before trial. The State should not be rewarded for its dilatory behavior by securing a conviction via introduction of a

[8] Prosecutor Henderson was the lawyer who presented the testimony of Young at the 2009 trial. 2009 Trial Vol. XX, 466–579 (May 7); Vol. XXI, 634–59 (May 8). Thus, Jennifer Nichols was portraying her co-prosecutor and Thomas Henderson was portraying the witness he presented at the earlier trial. When a prosecutor takes the witness stand, the dangers of vouching are all too apparent. *See, United States v. Birdman*, 602 F.2d 547, 551–55 (3d Cir. 1979); *United States v. Prantil*, 764 F.2d 548, 552–54 (9th Cir. 1985). "The advocate-witness rule," as it is called, "prohibits an attorney from appearing as both a witness and an advocate in the same litigation." *Prantil,* 764 F. 2d at 552–53. "Naturally, the potential for jury confusion is perhaps at its height during final argument when the prosecutor must marshall all the evidence, including his own testimony, cast it in a favorable light, and then urge the jury to accept the government's claims." *Id.* at 553. Prosecutor Henderson's closing argument demonstrates this problem. Trial Vol. XV, 1213–54.

transcript in lieu of testimony subject to the crucible of cross-examination, before a jury which is able to judge the demeanor of that witness. The Sixth Amendment should not countenance a trial where the part of the State's primary witness is played by the lawyers seeking the defendant's conviction and execution; similarly, the Eighth Amendment should protect a citizen from being death-sentenced while deprived of the ability to confront his primary accuser.

CONCLUSION

For the foregoing reasons, Mr. Jones respectfully requests that this Court grant his Petition for Certiorari to review the federal constitutional errors committed by the courts below.

Respectfully submitted,

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