NO. 19-5062

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY LEE JONES,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Did the Tennessee Supreme Court reasonably apply binding federal law in determining that the petitioner's right to confrontation was not violated?

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The opinion of the Tennessee Supreme Court is reported at *State v. Jones*, 568 S.W.3d 101 (Tenn. 2019). The opinion of the Tennessee Court of Criminal Appeals is unreported. *State v. Henry Lee Jones*, No. W2015-02210-CCA-R3-DD, 2017 WL 4124164 (Tenn. Crim. App. Sept. 18, 2017).

STATEMENT OF JURISDICTION

The judgment of the Tennessee Supreme Court was filed on January 30, 2019. (Pet'r. App. A.) No petition for rehearing was filed. Justice Sotomayor extended the time for filing a petition for writ of certiorari until July 1, 2019. *Jones v. Tennessee*, No. 18A1081 (U.S. Apr. 22, 2019). The petitioner filed his petition on July 1, 2019. He invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). (Pet. 1.)

CONSTITUTIONAL PROVISIONS INVOLVED

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

In August 2003, the petitioner and Tevarus Young traveled from Fort Lauderdale, Florida, where they both were living at the time, to Bartlett, Tennessee, where the petitioner had previously lived. *Jones*, 568 S.W.3d at 113-14. Once in Bartlett, the petitioner and Young went to the home of Clarence and Lillian James. *Id*. at 114. There, the petitioner bound and strangled both victims, and slit each victim's throat. *Id*. at 114-16, 120-21. He then stole various items from the home, including money and Mrs. James's jewelry. *Id*. at 115.

The petitioner and Young returned to Florida. *Id*. at 115. On the way, they stopped in Batesville, Mississippi, where the petitioner purchased another car with proceeds from the robbery. *Id*. In Florida, a police officer stopped the vehicle Young was driving and arrested him on an unrelated warrant. *Id*. at 115-16. Young later told police that he had witnessed the petitioner kill the victims in Bartlett. *Id*. at 119-20.

On October 7, 2003, the Shelby County Grand Jury indicted the petitioner for alternate counts of first degree premeditated murder and first-degree felony murder of each victim. *Id*. at 110. At the petitioner's trial in 2009, Young testified regarding the petitioner's involvement in the murders. *Id*. at 111. The jury convicted the petitioner as charged and sentenced him to death for all four convictions; the trial court merged the two felony murder convictions into the two premeditated murder convictions. *Id*. at 109-110. The Tennessee Court of Criminal Appeals affirmed. *Id*. However, on September 25, 2014, the Tennessee Supreme Court reversed on an evidentiary issue and remanded for a new trial.[1] *Id*.

During the retrial in 2015, the State was unable to secure Young's presence and presented his testimony from the first trial.[2] *Id*. at 111-13. The jury again convicted the petitioner as charged and sentenced him to death for all four convictions, which were again merged into two convictions for premeditated murder; each with a death sentence. *Id*. at 122, 124. On automatic review, both the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed. *Id*. at 124, 143.

[1] The Tennessee Supreme Court's opinion from the first appeal is reported at *State v. Jones*, 450 S.W.3d 866 (Tenn. Sept. 25, 2014).

[2] Following the petitioner's first trial, Young pleaded guilty to two counts of facilitation of first degree murder and received an effective sentence of 13.5 years. *Jones*, 568 S.W.3d at 111. By the time of the petitioner's second trial, Young had served his sentence and returned to Florida. *Id*. Although the petitioner suggests that Young was in Tennessee's custody from 2009 until 2015 (Pet'r. Br. 3, 4), that is not evident from the record.

The petitioner now seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

The petitioner seeks review of the Tennessee Supreme Court's decision affirming his convictions for first-degree murder. He contends that the State's introduction of Tevarus Young's prior testimony at his retrial violated his right to confrontation. However, the state court reasonably applied settled federal law in determining that the petitioner's right to confrontation was not violated. This Court should deny review.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10; *see also City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 (2015) ("Because certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion'") (citing Sup. Ct. R. 10). Here, there is no reason, let alone a compelling one, to grant the petition. The Tennessee Supreme Court did not decide an important federal question in conflict with another state court of last resort or a United States Court of Appeals; it did not decide an important question of federal law that should be settled by this Court; nor did it decide an important federal question that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness "is unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). In order to satisfy the defendant's right of confrontation, the State must show that the declarant is truly unavailable after good faith efforts to obtain his presence and that the evidence carries its own indicia of reliability. *Barber v. Page*, 390 U.S. 719, 724-725 (1968). Good faith is defined as

"[t]he lengths to which the prosecution must go to produce a witness . . . [and] is a question of reasonableness." *Ohio v. Roberts*, 448 U.S.56, 74 (1980), overruled on other grounds by *Crawford*, 541 U.S. 36 (2004) (quoting *California v. Green*, 399 U.S. 149, 189, n. 22 (1970) (Harlan, J., concurring)). "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Roberts*, 448 U.S. at 74-75.

In addressing the petitioner's confrontation issue, the Tennessee Supreme Court cited to binding federal law and accurately described the legal standard. *Jones*, 568 S.W.3d at 128-29. In applying that standard, the court reviewed all of the prosecution's efforts to obtain Young's appearance for the retrial. *Id*. at 129. The retrial was set for May 11, 2015. *Id*. at 111, 129. Prosecutors believed that Young was living in Florida, so they contacted multiple Florida authorities for assistance in tracking Young down. *Id*. at 129. In early April, they were able to get a phone number after getting in touch with Young's mother, but Young told the prosecutor that he would not return to Tennessee to testify. *Id*.

Prosecutors then intensified their collaboration with Florida authorities in an attempt to secure Young's presence at the petitioner's trial. *Id*. Upon requests by the State, the trial court issued certificates for Young's presence in court.[3] *Id*. In the second certificate, the court stated that Young appeared to be evading process and had indicated his unwillingness to appear and testify. *Id*. The court ordered that Young be taken into custody and delivered to Tennessee. *Id*. Based on the certificates, a Florida Court issued a summons for Young. *Id*. However, the court found that Young was "actively evading service of the summons to appear" and later ordered his arrest. *Id*.

[3]Tennessee has enacted the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings. Tenn. Code Ann. §§ 40-17-201 to -212. The statute includes provisions for compulsory attendance of out-of-state witnesses at criminal proceedings in Tennessee courts.

Even after the trial began, the State continued to try to locate Young. *Id*. This included contacting his relatives in Florida and a previous girlfriend in Oklahoma. *Id*.

The record supports the state court's findings regarding the prosecution's efforts to secure Young's presence at trial. (II, 223-34; III, 267-307; XIII, 769; XXVII, 20-21.) And, the state court reasonably applied federal Confrontation Clause precedent in determining that the State conducted a good faith search for Young. *See Hardy v. Cross*, 565 U.S. 65, 71-72 (2011) (stating that "the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising"). Because the State was unable to secure Young's presence by process, the trial court acted within its discretion in finding that he was unavailable. Thus, the admission of Young's prior testimony did not violate the petitioner's confrontation rights.

Despite the foregoing, the petitioner suggests that "heightened due process standards" should apply in capital cases. (Pet. 7.) The petitioner is essentially arguing that a different standard for addressing the right to confrontation of witnesses should be applied to capital defendants, but he never presented that precise issue to the state courts, (Pet'r. TSC Br. 49-56), and the state courts never addressed that issue. Thus, the issue is not subject to review by this Court. Under 28 U.S.C. § 1257(a), a petitioner cannot obtain review in this Court of an issue that he failed to properly raise in state court. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 85 (1997). Instead, this Court may only review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" when any right "is specially set up or claimed under the Constitution [of the United States]." 28 U.S.C. § 1257(a). Under this statute and its predecessors, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the

decision [this Court has] been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (internal quotation marks omitted).

Moreover, even if properly presented, the issue would not warrant review. Although the petitioner cites a number of cases for the proposition that capital cases should be analyzed differently, none of them suggests that a capital defendant has greater Sixth Amendment rights than any other defendant. Indeed, the majority of the cases cited by the petitioner address the actual sentence of death, which is not being challenged here.[4] While death sentences may be subject to heightened judicial scrutiny, [5] courts cannot re-write the provisions of the constitution for all issues raised in capital cases.

Because the Tennessee Supreme Court reasonably applied settled federal law to hold that admission of Tevarus Young's prior testimony at the petitioner's re-trial did not violate the petitioner's confrontation right, this case is not appropriate for certiorari.

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[4] *Woodson v. North Carolina*, 428 U.S. 280 (1976) (determining that the state's statute for mandatory death sentences for first-degree murder was unconstitutional); *Gardner v. Florida*, 430 U.S. 349 (1977) (concluding that the capital defendant was denied due process of law in the imposition of the death sentence because information was not disclosed to the defense); *Lockett v. Ohio*, 438 U.S. 586, 603-05 (1978) (concluding that the Ohio death penalty statute violated the Eighth and Fourteenth Amendments because it did not permit individualized consideration of mitigating factors); *Green v. Georgia*, 442 U.S. 95 (1979) (concluding that the defendant was denied a fair trial because the trial court excluded during the sentencing phase evidence that another person had told a witness that he had committed the murder); *Beck v. Alabama*, 447 U.S. 625 (1980) (concluding that a sentence of death may not be constitutionally imposed after a verdict of guilt when the jury did not consider a proper lesser-included offense); *Bullington v. Missouri*, 451 U.S. 430 (1981) (holding that principles of Double Jeopardy barred death sentence on retrial after the defendant was sentenced to life during the first trial); *Estelle v. Smith*, 451 U.S. 454 (1981) (recognizing the applicability of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel are applicable in capital sentencing proceedings); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (determining that a death sentence was unconstitutionally imposed where the jury was led to believe that the responsibility for determining the appropriateness of the death sentence rests elsewhere); *Turner v. Murray*, 476 U.S. 28 (1986) (determining that a defendant accused of an interracial capital murder was entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias); *Lankford v. Idaho*, 500 U.S. 110 (1991) (concluding that due process was violated at sentencing where, at the time of the sentencing hearing, the defendant and his counsel did not have adequate notice that the judge might sentence the defendant to death); *Riggins v. Nevada*, 504 U.S. 127 (1992) (concluding that it was error at trial to administer antipsychotic drugs to a defendant over his objection without finding that there were no less intrusive methods, that the medication was medically appropriate, and that it was essential for the safety of the defendant or others).

[5] "The death penalty is unique in both its severity and its finality, and the qualitative difference between a capital sentence and other penalties calls for a greater degree of reliability when it is imposed." *Monge v. California*, 524 U.S. 721, 722 (1998).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, postage prepaid, to: Kelly A. Gleason, Office of the Post-Conviction Defender, 404 James Robertson Parkway, Suite 1100, P.O. Box 198068, Nashville, TN 37219-8068, on this the 1st day of August, 2019. I further certify that all parties required to be served have been served.

s/ Leslie E. Price
LESLIE E. PRICE
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