No. 19-5493

IN THE SUPREME COURT OF THE UNITED STATES

DAVID RAY TAYLOR,

Petitioner,

v.

STATE OF OREGON,

Respondent.

# RESPONDENT'S BRIEF IN OPPOSITION

On Petition for Writ of Certiorari of the
Supreme Court of the State of Oregon

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## CAPITAL CASE

## QUESTIONS PRESENTED

1. At the time of petitioner's trial, the Governor of Oregon had imposed a moratorium on carrying out death sentences. To eliminate the possibility that the jury would mistakenly minimize the importance of its death penalty determination, the jurors were expressly instructed that the reprieve was only temporary—it would last only as long as the governor remained in office—and that the jurors "should assume that death sentences handed down * * * will ultimately be carried out." In light of those facts, does the Eighth Amendment prohibit imposition of a death sentence?

2. After petitioner was convicted and sentenced to death, the trial court learned of previously undisclosed biases of an alternate juror who had not participated in any of the jury's deliberations. The trial court conducted an investigation and found that the alternate juror had not shared any impermissible knowledge or opinions with the jurors who actually decided the case. The Oregon Supreme Court was "persuaded that the alternate juror's bias had no effect on the jurors who actually determined defendant's guilt and penalty." Does that fact-bound holding warrant further review?

## TABLE OF CONTENTS



## APPENDIX

## TABLE OF AUTHORITIES

### Cases



### Statutes

## RESPONDENT'S BRIEF IN OPPOSITION

## INTRODUCTION

Neither of the issues that petitioner raises warrants review by this Court. Although petitioner was sentenced to death during a moratorium on executions that the governor had announced, the jury was instructed that it should assume that a death sentence would be carried out. The Oregon Supreme Court's affirmance of the sentence did not conflict with *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which requires that the jury understand its responsibility for determining whether to impose a death sentence, and does not conflict with any decisions of other state supreme courts or federal circuits. And although new information came to light after the trial about an alternate juror's bias, the state courts concluded as a matter of fact that the bias had no effect on the verdict, because the alternate juror—who did not participate in the deliberations—did not share any information or opinions with the jurors who actually decided the case. That fact-bound holding does not conflict with any other decision and does not warrant this Court's review.

## STATEMENT OF THE CASE

### A. Petitioner lures a stranger to his house and murders him to steal his car for an armed bank robbery he had planned.

1. The murder for which petitioner received a death sentence in this case was not his first. In 1977, petitioner kidnapped, robbed, and murdered a

young woman who was working the night-shift as a gas station attendant in Eugene. Tr. 5908-09, 5929-30, 5937-39. Petitioner was convicted of murder and sentenced to life in prison for that crime. Tr. 5911-12, 5915, 5940. After serving 27 years in prison, he was paroled in 2004, and then discharged from parole in 2007. Tr. 5912, 5915-16.

2. In 2011 and 2012, petitioner committed a series of armed, take-over style bank robberies across Oregon. Tr. 6289, 5177, 5907, 244-45; Pet. at 12. Petitioner would have an accomplice drive him to and from a location near the target bank, and then he would use a bicycle to ride the final distance to the bank and then back to the waiting getaway car after the robbery. Tr. 243, 530-32; Pet. App. A, 364 Or. at 367.

On June 8, 2012, petitioner robbed the Siuslaw Bank in Creswell in that manner. Pet. App. A, 364 Or. at 367. But two days later, petitioner broke both his heels. Tr. 4494-95; Pet. App. A, 364 Or. at 368. Additionally, petitioner learned from media reports that the van they had used for the previous robbery had been captured on surveillance video, and police had identified it as likely being associated with the robbery. Tr. 4747, 5022-23; Pet. App. A, 364 Or. at 368. Because petitioner had not fully recovered from the broken bones, he needed another person to assist him in carrying out the next take-down robbery he had planned for early August at a branch of the Suislaw Bank in Mapleton.

Tr. 4744-45, 5028-29; Pet. App. A, 364 Or. at 368. And, because he would not be able to ride a bicycle to the bank, he needed to find a car that was not traceable to him, that he could drive all the way to the parking lot of the bank and then abandon after using it to flee from the robbery. Tr. 4745, 5023-31; Pet. App. A, 364 Or. at 368.

3. After the first attempt to rob the Mapleton bank was aborted when the disposable getaway car he had procured broke down on the way to the bank, petitioner decided that he and his accomplices would steal a car and murder the owner so that the car would not be reported stolen before they robbed the bank. Tr. 4756-58; Pet. App. A, 364 Or. at 368-69. He devised a plan to accomplish that. Two accomplices (one male, one female) would wait in the parking lot at a bar near petitioner's house until an unaccompanied man left the bar, at which point they would stage a loud domestic argument, the male would drive away, and the female would approach the man and ask for a ride under the pretense that she had been stranded by her boyfriend. Tr. 4764-66, 5052-58; Pet. App. A, 364 Or. at 368-69.

4. On the evening of August 3, 2012, the 21-year-old victim left his parents' home and met a group of friends at the bar to play pool. Tr. 4203-07, 4420, 4352. When he left the bar to go home for the night, petitioners' accomplices set their plan in action. The scheme worked as intended, and the

victim drove the female accomplice to petitioner's house, where he and the male accomplice were waiting. Tr. 5057-58, 5076-78; Pet. App. A, 364 Or. at 369.

Petitioner and his male accomplice held the victim at gunpoint and forced him to kneel on the floor. Tr. 5093; Pet. App. A, 364 Or. at 369. They bound him, used a railroad spike to drive a cross-bow bolt into his head through his ear and, when that did not kill him, petitioner wrapped a chain around his throat and strangled him. Tr. 5094-5107, 5291; Pet. App. A, 364 Or. at 369. After petitioner killed the victim, he and his accomplices carried the victim to petitioner's bathtub and, with petitioner taking the lead, dismembered the body. Tr. 5112-20.

The next morning, petitioner and the male accomplice drove to the Mapleton bank using the victim's car. Pet. App. A, 364 Or. at 369. They entered the bank carrying guns, ordered the employees to get on the ground, threatened to kill anyone who did not comply, demanded the victims' wallets, and collected the money from the tills. Pet. App. A, 364 Or. at 369. They left the bank and drove to a rendezvous point where they abandoned the victim's car. Pet. App. A, 364 Or. at 370. After the robbery, petitioner and the male accomplice buried the victim's body and disposed of various evidence of the murder in a forested area outside of Eugene—the same area where the body of

petitioner's 1977 murder had been discovered 35 years before. Tr. 4461-62, 4595-4604, 4781-86, 5908-09, 5924, 5939.

**B. Petitioner is convicted of aggravated murder and sentenced to death.**

For his conduct related to committing the robberies of the Creswell and Mapleton banks, as well as the kidnapping, robbery, and murder of the victim whose car he used for the Mapleton robbery, petitioner was indicted on 31 counts, including aggravated murder. (Pet. App. C). The state sought the death penalty on the aggravated murder charges.

1. At the time of petitioner's trial, the Governor of Oregon had imposed a "moratorium" or indefinite reprieve on the carrying out of all death sentences in Oregon, pursuant to his authority under Article V, section 14, of the Oregon Constitution. Pet. App. A, 364 Or. at 385-86; *see also Haugen v. Kitzhaber*, 306 P. 3d 592 (Or. 2013) (addressing governor's authority to grant reprieves); Or. Const., Art. V, § 14. To prevent any misconceptions or confusion about the effects of the moratorium, the trial court instructed the jurors in petitioner's case that they should nonetheless assume that a death sentence would ultimately be carried out:

> Some of you may have heard that Governor Kitzhaber has declared a moratorium on the death penalty. In legal terms, what he has done is to grant temporary reprieves of existing death sentences. Those reprieves last only as long as he remains in office. Thus you should assume that death sentences handed down while he is Governor will ultimately be carried out.

Tr 1148; Pet. App. A, 364 Or. at 386.

2. The jury found petitioner guilty on all counts as charged except for one, for which they convicted him on lesser-include charge instead. Pet. App. A, 364 Or. at 371. After a three-day penalty phase, the jury unanimously voted to impose the death penalty on the aggravated murder charges. Pet. App. A, 364 Or. at 371. The trial court entered a death sentence.

3. While the case was on direct appeal to the Oregon Supreme Court, the trial court learned of information calling into question whether one of the alternate jurors had given inaccurate information during *voir dire.* Resp. App. 1a; Pet. App. A, 364 Or. at 387. The alternate juror worked as a data entry clerk at the county courthouse. Tr. 3465-66; Resp. App 1a. During *voir dire*, she denied having obtained any knowledge of the case, or having formed any opinions about the case, as a result of her work. Tr. 3467; Resp. App. 3a. Because she was an alternate juror, she was excused prior to deliberations and did not participate in determining petitioner's guilt or the penalty. Resp. App. 3a. But the trial court later learned of an email that she had sent at the time she was summoned for juror service. Resp. App. 3a. In the email, the alternate juror described information about the details of the crimes and expressed opinions about the case:

> He is the guy who (with the 2 younger black kids from Portland) killed a boy (and chopped him up to pieces and burned his body) and took his car to Florence to rob a bank. He was out of prison for a couple of years for murder in the 70's. He needs to die. There is no way I would get on that jury, and not sure I would want to hear the details after reading the search warrants. I will have to defer.

Pet. App. A, 364 Or. at 387.

At the parties' request, the Oregon Supreme Court granted a limited remand to the trial court to inquire into whether the alternate juror engaged in juror misconduct and, if so, whether any juror misconduct tainted the other jurors' consideration of the case. Pet. App. E. The trial court conducted an investigation pursuant to that order. Resp. App. 2a-3a. The court identified any documents relating to the case that the alternate juror potentially could have seen in her job with the court, to determine what extrajudicial information she could have shared with other jurors. Tr 55-56; Resp. App. 2a, 4a. The court then called in all of the other jurors and questioned them individually under oath to determine whether the alternate juror had shared with any of them any information that she learned in the course of her work at the court, or whether she had offered any of them her opinions of what should happen to petitioner. Resp. App. 2a, 4a-6a.

After conducting its investigation, the trial court issued a report concluding that—even assuming that the alternate juror had engaged in

misconduct, which the court did not decide—there was no evidence that she did anything to influence the jury's decisions on either guilt or the penalty. Resp. App. 6a. As the court explained, because the alternate juror did not participate in any of the deliberations, "the only way [her] knowledge and feelings could implicate the fairness of the proceeding would be if she had shared those things with the jurors who did in fact participate in the deliberations." Resp. App. 6a. And based on its investigation, the court concluded that she had not in fact done so. Resp. App. 6a.

Of the 12 jurors who participated in the deliberations of this case, seven affirmatively stated that the alternate juror had never discussed with them any facts relating to the case or relating to petitioner. Resp. App. 4a. Each of the other five jurors had expressed a lack of knowledge or recollection in response to one or more of the court's questions. Resp. App. 4a-6a. The court therefore examined the testimony of each of those five jurors in detail, considering their responses in the context of their entire testimony. Resp. App. 4a-6a. For example, in one instance, the court found that although one juror "d[id] not have a memory of any specific conversations with [the alternate juror], [the juror] d[id] remember that she did not hear any information about [petitioner] or the crimes with which he was charged other than what she learned in the courtroom." Resp. App. 4a. Ultimately, the trial court found that each of the

five jurors "testified in a manner that supports the conclusion that [the alternate juror] never disclosed any information to [the juror]." Resp. App. 4a-6a.

4. On direct review before the Oregon Supreme Court, petitioner raised 131 assignments of error, including the two claims that he now reasserts before this Court. Pet. App A, 364 Or. at 371. The court rejected all of those claims of error and affirmed the sentence of death. Pet. App. A, 364 Or. at 393.

With respect to petitioner's challenge to allowing the jury to vote for the death penalty during the governor's moratorium, the court concluded that the jury instruction given by the trial court "corrected any impression that the jurors may have had about the meaning of the moratorium and reinforced that, if they voted to sentence defendant to death, that sentence would 'ultimately be carried out.'" Pet. App. A, 364 Or. at 386-87. Thus, the instruction eliminated the constitutional concern at issue in *Caldwell v. Mississippi*, 472 US 320, 328-29 (1985), namely, that the jury would minimize the importance of its death penalty determination. Pet. App. A, 364 Or. at 386.

The Oregon Supreme Court also concluded that petitioner was not entitled to a new trial based on the conduct of the alternate juror. Although the court concluded that the alternate juror harbored undisclosed bias of a nature that would implicate a defendant's right to a fair trial, the court ruled that "we are persuaded that the alternate juror's bias had no effect on the jurors who

actually determined [petitioner's] guilt and penalty and, thus, conclude that [petitioner] is not entitled to a new trial." Pet. App. A, 364 Or. at 387.

## REASONS TO DENY REVIEW

### A. This case does not present the Eighth Amendment concern at issue in *Caldwell*.

Petitioner's first claim for review relies solely on *Caldwell v. Mississippi*. Petitioner contends that this court should grant review to hold that the principle outlined in *Caldwell* applies when an ongoing moratorium on carrying out death sentences is in effect in the state. Petitioner argues that "a juror cannot constitutionally undertake the awesome responsibility of weighing life and death when there is no indication a death sentence will be carried out." Pet. at 22.

But *Caldwell* involved a very different concern that is not present here. In *Caldwell*, this Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. *Caldwell* involved a situation where the prosecutor had forcefully argued to the jury that its decision to impose the death sentence was not the final decision; that the defense counsel had been unfair and inaccurate to insinuate that the jury had the final decision; and that an appellate court would be the ultimate decision-maker. 472 U.S. at

325. And, in overruling the defendant's objections to the state's arguments, the trial court had effectively endorsed them. 472 U.S. at 339. Under those circumstances, this Court determined that the prosecutor's arguments had potentially distorted the jury's deliberations by minimizing the jury's sense of responsibility for determining the appropriateness of death and, as a result, the sentencing decision did "not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341.

Here, by contrast, the jurors were expressly instructed that the reprieve was only temporary—it would last only as long as the governor remained in office—and that the jurors "should assume that death sentences handed down * * * will ultimately be carried out." Pet. App. A, 364 Or. at 386. Unlike in *Caldwell*, the jurors were not led to believe that responsibility for determining the appropriateness of petitioner's death rested elsewhere or that the death sentence would not be carried out. As this Court recognized in *Caldwell*, "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." 472 U.S. at 333. But there was no such uncorrected suggestion here—the trial court's instruction corrected any incorrect assumption jurors might have had about the effect of the moratorium.

Petitioner also argues, in the alternative, that this Court should hold that, even if it is ever permissible for a jury to impose a death sentence during a moratorium, the trial court's instruction in this case was inadequate to remedy the *Caldwell* issue. According to petitioner, the jury should have been instructed that "it must conclude that its sentence will be carried out." Pet. at 25. That claim is without merit for two reasons. First, the instruction given in this case was sufficient to correct any impression that the jurors may have had about the meaning of the moratorium and to eliminate any risk that the jury would have minimized the importance of its death penalty determination. Second, petitioner's proposed instruction would not have been legally correct. The jury's duty was to determine whether or not defendant should be sentenced to death. It was not the jury's role to speculate and draw conclusions about whether the sentence would be carried out in the future. Petitioner's proposed wording would invite the type of harm that the precautionary instruction was intended to forestall.

The question that petitioner presents does not warrant this Court's review. Petitioner cites no decision—much less a decision from a state supreme court or a federal circuit—holding that a governor's temporary moratorium on carrying out executions categorically precludes the imposition of a death sentence. The Oregon Supreme Court correctly held that the trial court's

instructions ensured that the jury understood its responsibility notwithstanding the moratorium. That holding does not conflict with any decision of this Court or any other court.

**B. Further review is not warranted of the fact-bound holding that the alternate juror's bias had no effect on the jurors who actually determined defendant's guilt and penalty.**

The Oregon Supreme Court's ruling on the juror-bias question was narrow and based on the factual record: It held that any bias that the alternate juror may have harbored did not affect the jurors who decided the case because she did not share any outside information with those jurors. That factual conclusion does not warrant this Court's review.

Petitioner nonetheless urges this court to grant review in order to adopt a rule that a presumption of prejudice exists "when an unquestionably biased courthouse employee fails to disclose pertinent factual information during *voir dire* and secures a position as an alternate juror despite concrete evidence that he or she harbors an emphatic desire to see a defendant put to death." Pet. at 25. But whether there should be such a presumption is not a question that warrants this Court's attention, and in any event does not matter on the facts here.

First, as petitioner recognizes, the facts of this case are "unusual," *id.*, — so unusual, in fact, that they are unlikely to recur. Petitioner does not contend

that there is a conflict in the law that requires resolution by this Court. And because facts like those presented here are so rare, any ruling on a presumption of prejudice when a courthouse employee who is selected for a juror fails to disclosure relevant information will likely lack forward-looking significance.

Second, there is no legal basis for such a presumption. As the Oregon Supreme Court explained: "There is a significant difference between presuming that a defendant's right to an impartial jury has been impaired by improper influence when the jurors actually were exposed to improper considerations and [petitioner's] proposal that we should presume that the jury was improperly influenced when there is no evidence that jurors were exposed to improper considerations." Pet. App. A, 364 Or. at 393. Petitioner offered no authority or "persuasive rationale," *id.*, for a presumption of prejudice when there is no evidence that the jurors were exposed to improper considerations.

Finally, even if this Court wished to consider adopting petitioner's rule, this case would not be a good vehicle to do that because there was sufficient evidence in the record to affirmatively rebut petitioner's proposed presumption. As previously noted, seven of the jurors who actually participated in the deliberations affirmatively stated that the alternate juror had never discussed any of the impermissible facts or opinions with them. And the trial court concluded that the testimony of each of the remaining five jurors supported the

conclusion that the alternate juror did not disclose any information to those jurors. In other words, evidence in the record affirmatively establishes that the alternate juror did not share any of the impermissible knowledge or feelings with any of the jurors who actually deliberated in the case and thus, necessarily, the alternate juror did not influence the jury's decisions and there was no prejudice. Thus, as the Oregon Supreme Court stated, "the alternate juror's bias had no effect on the jurors who actually determined defendant' guilt and penalty." Pet. App. A, 364 Or. at 387. To the extent that petitioner would disagrees with the factual findings, the issue before the Court would simply devolve into a dispute over the correct interpretation of the contents of the record. For all of those reasons, petitioner's second question presented does not merit review.

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## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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