No. 19-6101

IN THE

Supreme Court of the United States

RAYMOND EUGENE JOHNSON,

Petitioner,

v.

TOMMY SHARP, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

Reply to Brief in Opposition

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

CAPITAL CASE

REPLY TO BRIEF IN OPPOSITION

I. Introduction.

In the questions he presented in his petition for a writ of certiorari, Petitioner asked the Court to clarify/fine-tune clearly-established law in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Lockett v. Ohio*, 438 U.S. 586 (1978), due to confusion evinced in Petitioner's case and many other cases around the country. Contrary to Respondent's argument, Petitioner did not ask the Court to overrule anything, and was not required to issue a reminder to the lower court not to forget the legal framework of the case.

Respondent essentially asserts that certiorari is unattainable in modern habeas corpus, and Petitioner must show, for example, that all fairminded jurists would have granted Petitioner relief. This is not true for a number of reasons. Not only have there been numerous habeas certiorari grants/wins post-dating AEDPA,[1] there have been many cases

[1] *See, e.g., Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Lafler v. Cooper*, 566 U.S. 156 (2012); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Rompilla v. Beard*, 545 U.S. 374 (2005);

where this Court has granted habeas relief over strong dissent, suggesting that the "fairminded jurist" language is not to be construed as requiring unanimity, or as suggesting that jurists who disagree with a grant of habeas relief are not fair-minded. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930 (2007) (5–4 decision); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (5–4 decision).

The fact that the crime was horrific does not negate the fact there were alarming malfunctions of law at trial and on appeal in Petitioner's case.[2] Nor does it negate courts' duties in capital cases to search for

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Wiggins v. Smith, 539 U.S. 510 (2003); *Penry v. Johnson*, 532 U.S. 782 (2001); *(Terry) Williams v. Taylor*, 529 U.S. 362 (2000).

[2]Respondent unnecessarily spends time arguing about various factual disputes in the case. An example is the rushing of the defense case and curtailing of defense evidence, and niceties in that regard such as the level of voluntariness of defense counsel's capitulations. Trial defense counsel wrote a memo after the trial was over that said "[i]t was clear that the judge was trying to hurry the second stage along. On Friday she announced we would work through lunch until mitigation evidence was presented. We had not done this at any point during the trial. Further we were not allowed to present a video of the client preaching." Doc. 23, Ex. 3 at ¶4. *See also, e.g.,* Tr. X 2075, compared with, *e.g.*, Tr. III 452, Tr. IV 742, Tr. V 1031, Tr. VII 1436, Tr. VIII 1642-43, Tr. X 2075. *See also* Tr. VIII 1766; Tr. IX 1946. Also, from the defense trial investigator: "When it came time for the trial, the trial judge made clear that we were going to finish this case in two weeks. We felt rushed the entire time. I remember thinking we shouldn't let her do this. She should not be allowed to push

constitutional error with exacting and painstaking care. *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The facts of this case reveal multiple letdowns and malfunctions that are simply not supposed to happen in capital cases, truly the most serious of cases, where mere money is not at issue but rather life itself.

As this Court has seen, however, it is unfortunately all too common for cases with bad facts to suffer from bad malfunctions. There are many cases to choose from: *Williams v. Taylor*, 529 U.S. 362 (2000) serves as but one example. In *Williams*, this Court granted sentencing stage relief although Williams brutally murdered a friend for a few dollars, and had a history of preying on and viciously assaulting the elderly, including placing one elderly woman "in a 'vegetative state'" from which she was "not expected to recover." *Id.* at 368. He also set fire to a home, stole two cars, set a fire in the jail while awaiting trial, stabbed a man during a robbery, and confessed to having strong urges to choke and otherwise

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us into finishing early, especially since a man's life was on the line." Doc. 23, Ex. 36, ¶¶6-7. From the judge herself: "I am going to start sustaining cumulative objections. . . . even if the next two come in and say, 'we have a prison ministry and [Johnson] organized it and he was great' . . . even if it's a different facility." Tr. X 2033. Contrary to Respondent's protestations, a pattern in Mr. Johnson's case clearly emerged.

assault other inmates while incarcerated. *Id.* at 368, 418. It is a touchstone of this Court's jurisprudence there is no crime so bad that a death penalty can or should be mandated. *See Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). As the petition well demonstrated, certiorari is appropriate in this case.

II. *Strickland.*

In *Strickland*, this Court noted the trial sentencer found the mitigating circumstances did not outweigh the aggravating circumstances and "*therefore* sentenced respondent to death." 466 U.S. at 675 (emphasis added).[3] It made sense, then, for the Court to state "[w]hen a defendant challenges a death sentence such as the one at issue in this case, the

[3] *See also Washington v. Strickland*, 693 F.2d 1243, 1247 (5th Cir. 1982) (noting trial sentencer found "aggravating circumstances of the case would still 'clearly far outweigh' the factors in mitigation. He *therefore* sentenced Washington to death") (emphasis added). The former Fifth Circuit made this assertion in accordance with the contemporary state statute, Fla. Stat. § 921.141 (1982); *see also, e.g., Enmund v. Florida*, 458 U.S. 782, 785 (1982) (noting sentencer found "aggravating circumstances outweighed the mitigating circumstances [and] Enmund was therefore sentenced to death"). The cases cited by Respondent do not support his contentions or refute Petitioner's assertion that the jurors in *Strickland* were not given unfettered discretion and were not specifically told they could impose life even if they found aggravating circumstances outweighed mitigating circumstances.

question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

Not all states base their death sentences on the weighing of aggravators and mitigators, however. Exactly how fettered or unfettered a sentencer's discretion is depends on specifics of the state's sentencing system. In states that specifically inform the sentencer it may choose life if aggravators outweigh mitigators, for example, it is incorrect for a reviewing court to base its decision on the balance between aggravating and mitigating circumstances.

Petitioner noted this problem within the Tenth Circuit and other courts, and in particular stated:

> Many other circuit courts have had a hard time with this as well, frequently applying a "weighing" type of prejudice analysis in state systems where juries may impose a sentence of less than death for any reason or no reason at all. *See, e.g., Sonnier v. Quarterman*, 476 F.3d 349, 359 (5th Cir. 2007); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1268 (11th Cir. 2012); *Lovitt v. True*, 403 F.3d 171, 181-82 (4th Cir. 2005); *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001).

Petition for Writ of Certiorari at 29. Respondent did not dispute that this

is a problem, or address these cases from the Third, Fourth, Fifth, and Eleventh Circuits. There are a multitude of cases out there evincing this same problem.

Respondent also did not dispute Justice Scalia's contentions about the unpredictability and unguided discretion of a system much more "guided" than the explicit free rein given Oklahoma jurors to choose life. *See Penry v. Lynaugh,* 492 U.S. 302, 359-60 (1989). Because of the specific unguided discretion to choose life even if aggravating circumstances outweigh mitigating circumstances, Respondent also could not dispute the Tenth Circuit's incorrect framing of the claim in Petitioner's case and its use of non sequiturs in its analysis.

It is undisputed Petitioner never attempted to argue against the aggravating circumstances, or argue they were outweighed by the mitigating circumstances. He did not need to, thanks to the unfettered discretion given the jurors. The Tenth Circuit, then, was badly off track when it said:

> Johnson argues here that the video would have helped jurors visualize his dynamic style of preaching and recognize the good he could do for other prison inmates, *thus* rebutting the continuing threat aggravator.

Appendix A; *Johnson v. Carpenter*, 918 F.3d 895, 901 (10th Cir. 2019) (emphasis added). In framing the issue in terms of rebutting aggravators, the Tenth Circuit displayed a wrong-headed propensity often seen in opinions around the country to base analyses on the weighing of aggravators and mitigators in contravention of the state court system at issue. The Tenth Circuit did this more than once. *See* Appendix A, 918 F.3d at 902 (using the non sequitur "And yet the jury still found that this mitigating evidence did not outweigh the aggravating circumstances"). As Justice Scalia said (and Respondent did not dispute), "unguided discretion not to impose [death] is unguided discretion to impose as well." *Penry*, 492 U.S. at 360.

Finally, Petitioner must address Respondent's assertion that "either Petitioner was lying about his faith while he was in prison or that he was quick to throw it away when he felt like someone did him wrong." Brief in Opposition at 25. This is incorrect as a matter of fact and faith. Most or all of the Oklahoma Bible-oriented jurors know about the vast imperfection of man and earlier murderous ways of biblical favorites such as David and Paul (formerly Saul of Tarsus). They know Peter denied

Christ not once, not twice, but *three* times, yet God still made Peter the Rock of the Church. And they know forgiveness can come more than some single-digit number of times (like seven), but rather seventy *times* seven. Petitioner can think of no better (or more perfectly legitimate) reason for an Oklahoma juror to choose a sentence of life than in the service of mercy and evangelism in action. Certiorari should be granted in this case.

III. *Lockett*.

Respondent claims there is no need to clarify the law because Respondent agrees with Petitioner's position. *See, e.g.*, Brief in Opposition at 26-27. Petitioner appreciates Respondent's concession, but the fact remains that prosecutors and courts across the country keep making the same mistake over and over.

This Court has used terminology such as "most expansive terms" (*Tennard v. Dretke,* 542 U.S. 274, 284 (2004)) and "virtually no limits" (*Payne v. Tennessee,* 501 U.S. 808, 822 (1991)) in describing the bounds of mitigating evidence. Moreover, the Court has noted mitigating evidence and inferences need not relate specifically to moral culpability, but may be mitigating merely "in the sense that they might serve 'as a basis for a

sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). Perhaps a stronger, more explicit pronouncement is needed, such as the Oklahoma Court of Criminal Appeals' statement "there is no restriction *whatsoever* on what information might be considered mitigating." *Grant v. State*, 205 P.3d 1, 21 (Okla. Crim. App. 2009) (emphasis added).

It is explainable why prosecutors might not want to understand the law. They want to exert control over the narrative, and keep juries firmly focused on aggravating circumstances and moral culpability. They fear the positive and forward-looking evidence (such as all the good Raymond Johnson can do if he is not put to death) that is unrelated to moral culpability. It is not something they can control.

The continued misreading by courts around the country of the virtually unlimited nature of mitigating evidence may be more reflexive and based on a misbegotten bent toward weighing and balancing. Thus, the Tenth Circuit felt the need to link Mr. Johnson's "dynamic style of preaching" and "good he could do for other prison inmates" to the rebutting of an aggravating circumstance. Appendix A; 918 F.3d at 901.

But there simply is no balance, as this Court has firmly held: "'In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.'" *Penry v. Lynaugh*, 492 U.S. at 327 (1989) (emphasis in original) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987)).

Aside from the problems discussed in Arizona, Texas, and California addressed in the petition (and left unaddressed by Respondent), other examples of the need for clarification by this Court exist. One example can be seen from another very recent case from the Tenth Circuit, *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885 (10th Cir. 2019). In *Cuesta-Rodriguez*, the Tenth Circuit relied on old law to hold statements of a capital defendant's family members that they love him are not relevant mitigating evidence. *Id.* at 908. Or consider Jeffrey L. Kirchmeier, *Beyond Compare? A Codefendant's Prison Sentence As A Mitigating Factor in Death Penalty Cases*, 71 Fla. L. Rev. 1017 (2019), which discusses how courts are currently split on the issue of whether a capital codefendant's

prison sentence may be mitigating evidence. It *appears* Respondent would agree with Petitioner's position that such matters represent absolutely protected mitigating evidence, "in the sense that they might serve 'as a basis for a sentence less than death.'" *Skipper*, 476 U.S. at 4-5.

In truth, there is a pervasive, fundamental misunderstanding of the law in this regard, well represented in multiple ways in Petitioner's case, and greatly in need of resolution. This Court meant what it said in cases such as *Skipper*, a case now over thirty years old. Raymond Johnson presents a case where this misunderstanding of the law is translating into the execution of a man who could do so much good in the world if allowed to live. Certiorari is well warranted.

Respectfully submitted,

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