No. 19-8873

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JUSTIN SMITH and EFRAIN DIAZ, Jr., *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, *Respondent*

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ARGUMENT

I. The Petitioners' Claim Is Final and Reviewable by this Court.

The Commonwealth's response highlights the importance of the issue and the need for review. The Commonwealth's position is that this Court's jurisdiction would not be triggered in this case unless a death sentence is actually imposed. The Commonwealth equates the question of whether a death sentence is constitutional with the evidentiary matters discussed in *Di Bella v. United States*, and *Florida v. Thomas*.[1] In doing so, the Commonwealth specifically contrasts the underlying Eighth Amendment claim in this case with the First Amendment claims that were heard by this Court pretrial in *Fort Wayne Books, Inc. v. Indiana* and *Mills v. Alabama*.[2]

The Commonwealth acknowledges that there are a number of different circumstances where this Court has considered criminal cases sufficiently "final" to permit review prior to conviction and sentence, but insists that none of those circumstances are present here. In *Cox Broadcasting Corp. v. Cohn*, this Court identified four circumstances where a case could be reviewed by this Court pretrial, almost all of which are met in this case.[3] The first and third categories clearly apply

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[1] See *Di Bella v. United States*, 369. U.S. 121 (1962); *Florida v. Thomas*, 532 U.S. 774 (2001)

[2] See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Mills v. Alabama*, 384 U.S. 214 (1966)

[3] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)

to the present case.[4] The first category includes "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," review is possible.[5] The Commonwealth argues this category does not apply, because Petitioners are not seeking merits review of the underlying Eighth Amendment claim. However, the claim Petitioners are seeking review on – whether the trial court had the authority to review the federal claim – is a federal issue on which the Kentucky Supreme Court's judgment is unquestionably conclusive. There is no way for the Petitioners – or any other Kentucky litigant, for that matter – to ever seek review of the trial court's authority to review an Eighth Amendment claim, as a result of the underlying decision.

The third category includes "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."[6] The Commonwealth does not address this issue in their brief, but this clearly describes the current situation. Unless the Court accepts review now, the claim presented in this action – whether the trial court has the authority to consider an Eighth Amendment challenge to a sentence prior to imposition of a death

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[4] Both the second and fourth categories, while not directly applicable to the case at bar, also speak to the same basic issue presented in this case: an otherwise unreviewable ruling on an important matter of federal law.
[5] *Id.* at 479.
[6] *Id.* at 481.

sentence by the jury – cannot be reviewed by this Court, or any other. If the proceedings continue and the Petitioners are not sentenced to death, they will have no claim to press. If the proceedings continue and they are sentenced to death, the issue of the trial court's authority will be moot. In either case, it's now or never.

The issue actually presented to this Court in this case – whether a trial court has the authority to prevent an unconstitutional sentencing trial – has repeatedly been the basis for this Court's jurisdiction prior to trial. For example, in *Bullington v. Missouri*, the Court considered and decided a case in an identical posture to the case at bar.[7] This case commenced in the Kentucky Supreme Court as a pretrial appeal by the state from a ruling by the trial court that the death penalty is inapplicable. The Kentucky Supreme Court held that the matter was not yet justiciable as neither Petitioner had been sentenced to death. The injury to the Petitioners is the same as the injury to Bullington—a trial over a penalty that the Petitioners believe they are ineligible to receive. Although the constitutional basis for the claim in *Bullington* might be different (double jeopardy versus the Eighth Amendment), the injury is not. *Bullington* stands for the proposition that a threat of a trial is a sufficient injury for a claim to be adjudicated; the certainty of a capital sentencing hearing should be a sufficient injury as well.

Similarly, in *Justices of Boston Municipal Court v. Lydon* this Court likewise considered a claim where the injury presented was an unnecessary trial.[8] In *Lydon*,

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[7] *Bullington v. Missouri*, 451 U.S. 430 (1981).
[8] *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294 (1984)

the defendant was charged with knowing possession of implements designed for breaking into an automobile to steal property. He was convicted at a bench trial, but decided to also request a jury trial under the Massachusetts minor crimes "two-tier" system. As he awaited the jury trial, he pursued appellate review of the sufficiency of the evidence of intent to steal. The Massachusetts appellate courts rejected his argument, but on habeas review before the federal district court and the Court of the Appeals for the First Circuit, he prevailed. This Court ultimately held that Lydon's double jeopardy claim had been exhausted for purposes of its review. "This precise claim was presented to and rejected by the Supreme Judicial Court of Massachusetts. That court definitively ruled that Lydon had no right to a review of the sufficiency of the evidence at the first trial and that his trial de novo without such a determination would not violate the Double Jeopardy Clause. That Lydon may ultimately be acquitted at the trial de novo does not alter the fact that he has taken his claim that he should not be tried again as far as he can in the state courts."[9]

The Commonwealth never claims that the Kentucky Supreme Court was correct as a matter of federal law when it found that the trial court had no authority to consider Petitioners' Eighth Amendment claim. Rather, the Commonwealth poses scenarios that it states could render this case moot by virtue of a jury not returning a death sentence. This is a red herring.

[9] 466 U.S. 294 at 302.

In Kentucky, circuit court opinions are not published, and are not binding on other circuit courts, or even on subsequent cases before the same circuit court. Had the Commonwealth simply proceeded to trial, the trial court's ruling would not necessarily have prevented future death penalty prosecutions. However, rather than allowing the Petitioners' cases to go forward without a potential death sentence, the Commonwealth has instead gone to considerable time and expense to litigate the issue, risking an adverse statewide ruling in the process. There are two likely explanations for that decision. First, one has to assume that the Commonwealth genuinely believes that this case will likely result in a death sentence if allowed to proceed to a capital sentencing trial, in which case the Commonwealth's argument that it is unlikely either defendant will be sentenced to death is a smokescreen.

Second, the Commonwealth is surely aware that noticing the case for a death sentence process confers tremendous advantages to the prosecution, and concomitant disadvantages to the defense.[10] Where death is on the table, the risk of going to trial is extremely high, giving the Commonwealth a significant negotiating advantage.[11]

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[10] In this regard, the fact that this case arises out of Fayette County, Kentucky (Lexington) is significant. As the American Bar Association has noted, Fayette County (Lexington) prosecutors are much more aggressive than their counterparts in Jefferson County (Louisville) or around the state. *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report*, American Bar Association (2011) at pg. 150 ("ABA Report").

[11] Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 Am. L. & Econ. Rev. 116, 141 (2006)(finding that the death penalty increased the harshness of plea agreements); Sherod Thaxton, *Leveraging Death*, 103 J. Crim. L. & Criminology 475, 552 (2013)(examining data from Georgia, and

And, where a trial occurs, death qualifying the jury biases the jury in favor of the prosecution in certain identified ways.[12] The Petitioners' injury is, in large part, these intrinsic disadvantages. The Kentucky Supreme Court has now placed those injuries forever beyond appellate review.

Finally, Petitioners disagree that this Court considering "this claim pretrial will add to the 'proliferation of labyrinthine restrictions on capital punishment.'"[13] As the American Bar Association has noted, in Kentucky "[c]apital prosecutions occur in far more cases than result in death sentences, which places a significant burden on the Commonwealth['s] courts, prosecutors and defense counsel that will treat many cases as capital that will never result in a death sentence, taxing the Commonwealth's limited judicial and financial resources."[14] That inefficiency – more

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concluding that seeking a death sentence increases the probability of a plea agreement by 20-25%); see also Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 Just. Sys. J. 313, 333 (2008)(concluding, after conducting interviews with prosecutors and defense attorneys involved in death penalty cases, that "that the death penalty is a plea-bargaining tool.")

[12] Brooke Butler and Gary Moran, *The Role of Death Qualification in Venireperson's Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 Law & Hum. Behav. 175, 183 (2002)(finding that as a result of death qualification "defendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances"); see also Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect* 8 Law & Hum. Behav. 133–151(1984)(finding that death qualified jurors may be more "conviction prone"); Brooke Butler and Gary Moran, *The Role of Death Qualification and Need for Cognition in Venirepersons' Evaluations f Expert Scientific Testimony in Capital Trials*, 25 Behav. Sci. and the Law 561 (2007)(Finding that death qualified jurors were more conviction-prone than those not exposed to death qualification.)

[13] Respondent Brief in Opposition at 6, citing *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring).

[14] ABA Report, *supra*, at pg. 151.

than the system of appeals – is the principle reason for delays in death penalty cases. Completely taking the brakes off capital prosecutions will not improve that efficiency.

II. This Court Should Accept Review to Set the Guideposts for When an Appellate Court May Review a Matter *Sua Sponte* in a Criminal Case.

Responding to Petitioners' due process argument, the Commonwealth offers two responses. First, it claims that courts have routinely addressed jurisdictional matters *sua sponte*, so there was no sin in the Kentucky Supreme Court doing do here. Second, it claims that the Kentucky Supreme Court's resolution of the matter was so straightforward not to require the participation of the parties. Both contentions do not bear scrutiny.

The Commonwealth's initial argument that *sua sponte* review of jurisdiction is so common to be unworthy of this Court's attention. However, the commonality of the Kentucky Supreme Court's ruling in this case is a reason to grant review, not to deny it. As the Commonwealth has laid out in detail, it is clearly a common practice for Kentucky and the nation to conduct a *sua sponte* review of jurisdiction. However, this Court has never identified any guideposts to clarify when a *sua sponte* ruling is appropriate, or when it is not. As a result, appellate courts to make that determination without any constitutional guidance – a circumstance which in this case resulted in a questionable ruling which placed an entire category of litigation beyond the capacity for appellate review, without briefing or even notice to any party.

To be clear, there certainly are guideposts that limit when a *sua sponte* decision is appropriate. It is well established that where the state established an appellate process, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."[15] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[16] Further, a state criminal appeal ". . .is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."[17]

Taken together, these cases speak to the principle that generally, a criminal defendant seeking the protection of the appellate courts should be afforded the opportunity to brief any issue that may affect his or her Constitutional rights. There are almost certainly exceptions to that rule, such as where the defect is obvious at the outset of the case, or where exigencies require that the Court make a fast decision, but those exceptions would not apply here.

This case is an excellent example of the need for this court to lay out the guideposts for review. The lynchpin of the Kentucky Supreme Court's ruling is its finding that a litigant must establish an "actual or imminent injury" under *Lujan v. Defs. of Wildlife* before a court may review a claim.[18] That principle was not a rule in

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[15] *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).
[16] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted).
[17] *Evitts, supra*, at 396.
[18] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)

Kentucky until *after* the briefing in this case was completed. As such, Petitioners never had the opportunity to brief this issue.

Moreover, this case was the first time any Kentucky court had extended that principle to a criminal defendant's claim that his or her constitutional rights were violated. Such an extension treading on ground that this Court has not paved. As noted in the original Petition for Certiorari, pp. 18-20, this Court has never embraced the idea now asserted by the Kentucky Supreme Court that a criminal defendant – who is only enmeshed in a case due to the actions of the state – can nevertheless be precluded from raising a constitutional claim directly related to that prosecution on the grounds that they lack a sufficiently imminent injury. As such, the Kentucky Supreme Court's ruling was a novel application of a new doctrine that only arose after the briefs were filed.

The harm in failing to allow briefing is that the conclusion reached by the Kentucky Supreme Court is by no means obvious or correct. Contrary to the Commonwealth's brief, the injury Petitioners were seeking to rectify was not limited to the imposition of punishment. Rather, the injury was an unnecessary capital trial, with all of the attendant disadvantages to the entire criminal process that any capital defendant experiences. As noted above, this Court has repeatedly reviewed and reversed on similar grounds, and so there is a strong history for finding a constitutionally prohibited sentencing trial to be cognizable injury under *Lujan*, even if the doctrine applies.

CONCLUSION

Without hearing briefing or argument, the Kentucky Supreme Court held that this Court's doctrine in *Lujan* prevented a criminal defendant seeking to prevent an unconstitutional sentencing trial. The effect of this ruling is to prohibit pretrial litigation of the availability of the death penalty in almost every case. As that litigation is prohibited, and Kentucky has no procedure for pretrial appellate review by the defense, that ruling will be the law forever, unless this Court accepts review. This is a critical issue for which this Court is the only hope. Accordingly, Petitioners ask that certiorari be granted, and the Kentucky Supreme Court's decision vacated.

WHEREFORE, for the reasons set forth above, and in the initial Petition for Writ of Certiorari, Petitioners Justin Smith and Efrain Diaz pray that this Court grant this Petition for a Writ of Certiorari, vacate the ruling of the Kentucky Supreme Court, and remand the matter for further proceedings.

Respectfully submitted,

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