No. **21-896**

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY MARTIN, Warden,

Petitioner,

v.

ALONZO CORTEZ JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

At a jury trial in an Oklahoma criminal case involving an African-American defendant, the State prosecutor attempted to use peremptory challenges to strike all African-Americans from the jury venire, but was stopped from doing so by the trial court, which did not require the *prosecutor* to provide race-neutral reasons for the strikes, nor did the prosecutor offer any such reasons, but rather offered *its own* reasons, violating the mode of analysis set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986).

Johnson raised a *Batson* claim on direct appeal to the Oklahoma Court of Criminal Appeals. He also raised a *Batson* claim a second time in the Oklahoma Court of Criminal Appeals in a post-conviction appeal in which he made the specific argument that the trial judge had substituted its own reasons for the strikes without directing the prosecutor who actually made them to articulate the reasons. The state court addressed, and denied, the *Batson* claim on the merits both times without imposing a procedural bar. The Tenth Circuit Court of Appeals held that the decision of the state court was unreasonable under the AEDPA. The question presented is:

Is a habeas petitioner required to raise a legal claim *and* the specific argument in support of it on *direct appeal* in order to preserve it for federal review, even though he raised the claim and the specific argument in the state courts in a separate post-conviction appeal, and the state courts addressed the claim and denied it on the merits?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Alonzo Cortez Johnson hereby responds to the Petition seeking review of the decision of the United States Court of Appeals for the Tenth Circuit, and moves that the Petition be denied.

STATEMENT OF THE CASE

This case involves the prosecution of multiple defendants in a murder case in Tulsa County, Oklahoma. It began on May 12, 2010, when the State of Oklahoma charged Terrico Bethel with Murder in the First Degree and Conspiracy to Commit Murder. Mohammed Aziz and Respondent Alonzo Johnson were also charged with Conspiracy to Commit Murder.

A. PROCEDURAL SUMMARY.

The charging document was amended on May 14, 2010, alleging that Aziz committed Murder in the First Degree, Solicitation of Murder, and Conspiracy to Commit Murder. The charges

morphed again on July 1, 2010, this time charging two more defendants, Fred and Allen Shields, with Conspiracy to Commit Murder, and Fred Shields with Murder.[1]

As to the charges against Respondent Johnson specifically, an eighth Amended Information was filed on November 5, 2010, charging Johnson with Conspiracy to Commit Murder (Count 4), and Murder in the First Degree (Count 10).

Jury trial for Johnson commenced on December 3, 2012, before the Hon. Tom C. Gillert. At the conclusion of the evidence, the jury returned verdicts of guilty on both counts, and recommended sentences of Life Imprisonment on both counts.[2] Johnson was sentenced formally on January 4, 2013, to Life Imprisonment per the recommendation of the jury, the sentences to run consecutively. Johnson lodged a direct appeal to the Oklahoma Court of Criminal Appeals which denied relief in a written, but unpublished opinion, filed July 17, 2014. Pet. Appx. 92a.

Thereafter, Johnson sought post-conviction relief in the district court of Tulsa County, and on October 6, 2015, the Hon. William D. LaFortune denied relief. Pet. Appx. 80a. Johnson appealed, again, and the Oklahoma Court of Criminal Appeals again denied relief on April 7, 2016, in another written, but unpublished opinion. Pet. Appx. 74a.

Johnson sought habeas relief in the federal district court, which denied relief on September

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[1] Allen Shields also had other criminal charges pending against him at the time, including two counts of Trafficking, and he opted for a plea deal in this case. Concerning the plea deal, he explained, "[The criminal charges against him] get dismissed. Or not dismissed, but I get probation for them." P.H. Tr. 119. On October 29, 2010, Allen Shields pled guilty to Conspiracy to Commit Murder. He was given a ten-year suspended sentence for that crime. *Id.*

[2] The co-defendants fared no better than Johnson. Terrico Bethel had a jury trial, was found guilty of Murder in the First Degree, and sentenced to Life without the Possibility of Parole. Fred Shields was convicted of Murder in the First Degree, and Conspiracy, and also sentenced to Life without the Possibility of Parole. Mohammad Aziz pled guilty to Solicitation of Murder and was sentenced to 35-years.

17, 2019, as well as a Certificate of Appealability. Pet. Appx. 50a. Johnson sought a Certificate of Appealability in the United States Court of Appeals for the Tenth Circuit, which issued an order granting the COA on August 5, 2021. Pet. Appx. 48a. The Tenth Circuit thereafter issued a published opinion in this matter on July 2, 2021. Pet. Appx. 1a.

Both parties sought rehearing in the Tenth Circuit, which was denied as to each party on September 13, 2021. Pet. Appx. 46a.

B. FACTUAL SUMMARY.

This case concerns the death of Mr. Neal Sweeney.

On September 4, 2008, Terrico Bethel shot Sweeney in the head. Sweeney died the next day. The story was told to the jury mainly by co-defendants who were flipped by the State. The first of these was Mohammed Aziz. Aziz had developed an "intense hatred toward Neal Sweeney." This prompted Aziz to seek out someone to murder Sweeney, and the person he asked to help him find a hitman was Allen Shields.

Aziz admitted during the trial to his part in soliciting the murder of Sweeney, and for this admission he was rewarded by the State by being allowed to plead guilty to solicitation of murder, instead of the actual murder and conspiracy counts faced by everyone else, in exchange for a sentence of 25-35 years.

The next defendant flipped by the State was Allen Shields. He secured an even more favorable deal than Aziz. In exchange for his testimony, Shields was allowed to plead guilty to conspiracy and receive a 10-year suspended sentence.

The State's theory of the case was that Fred Shields and Respondent Alonzo Johnson (who were cousins) were also involved in the murder of Sweeney. Specifically, the State alleged that

Johnson's role in the scheme was that he had supplied the van used by Terrico Bethel to commit the murder. The State's evidence was circumstantial, and there was no evidence at all that Johnson had participated directly in the murder itself.

He only provided a vehicle for the actual killer, if the State's evidence is to be believed.

Johnson is an African-American.

As it relates to this Petition, the relevant facts surround jury selection, where the prosecutors in this case utilized the State's peremptory challenges to kick off as many minorities as they could; and in fact would have succeeded in kicking all African-Americans from the panel had they not been stopped by the trial court. Defense counsel watched this, and let some of it go, until it came time for the prosecutor to use a peremptory challenge against venireman Prof. Wayne Dickens.

According to the prosecutor, Prof. Dickens "has a Ph.D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people[.]" Pet. Appx. 8a. The trial judge accepted this explanation as race-neutral, at which point defense counsel made the following observation on the record:

> MR. LYONS: Your Honor, I'd like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.

Pet. Appx. 8a-9a. The trial court disagreed that this constituted a pattern. Pet. Appx. 9a.

However, the trial court was concerned, because rather than asking the prosecution to offer race-neutral explanations for excusing minorities, the trial court itself provided *sua sponte* explanations of the State's behavior: (Ms. Martinez was "hardly involved in the process"; Ms. Carranza had difficulty with English; so did Ms. Aramburo de Wassom).

But, in case there was any doubt, when the State exercised its eighth peremptory challenge to excuse Ms. Williams–the *last* African-American left on the panel– even the trial judge noticed that doing so would "effectively eliminate all the African-Americans and I'm not going to do that." Pet. Appx. 9a. The trial court refused to allow the State to strike Ms. Williams. The State picked up on this cue from the trial judge and waived exercise of its ninth and final peremptory challenge.

Thus, we have a situation where the prosecutors were excusing one African-American after the other with peremptory challenges, defense counsel noticed the pattern, objected to it, the trial court failed to direct the State to proffer race-neural explanations, choosing instead to offer its own, and when the State attempted to kick the last African-American off the panel, the trial judge refused to let them do it–even though the prosecutor offered another nonsensical reason (that she was a pastor).

The other African-Americans that were excused by the State were clearly qualified to serve as jurors. Dr. Tawil was a physician, and had promised to listen to all the facts before making a judgment. Rena Carranza understood the process, answered appropriately regarding her opinion of the crime of conspiracy, and stated that she would be able to analyze the evidence presented. Ms. De Wassom had no trouble weighing the truthfulness of the witnesses.

Nor did Prof. Dickens have any trouble with any aspect of the trial procedure; nor did Ms. Williams, other than being "a pastor." Particularly instructive is the background of Prof. Dickens, who had a sister who had been a detective on the Tulsa Police Department, and his own father had been a police officer. This educated man would seem to be an ideal juror for the State.

All of this points to a clear pattern of racial discrimination by the State to use peremptory challenges to exclude African-American jurors from the panel in a case where an African-American

male was on trial for murder. This is a violation of clearly established federal law as set forth by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986).

On direct appeal to the Oklahoma Court of Criminal Appeals (hereinafter the "OCCA"), Johnson raised a *Batson* claim, cited *Batson* and the three-step test used to analyze such claims, and argued that the prosecutor had improperly engaged in the systematic removal of minorities from the jury pool. Pet. Appx. 153a-154a.

The OCCA recognized that Johnson "contends that the State systemically removed minorities from the jury contrary to [*Batson*]," but denied this claim on the merits, concluding that the trial court had not abused its discretion when it found that the State did not engage in systemic or specific discrimination. *Id.* 95a.

Johnson re-asserted his *Batson* claim in state post-conviction proceedings, in which he argued specifically that the trial judge had erred under step two of the *Batson* analysis by speculating on the reasons for the strikes by the prosecutors instead of directing the prosecutors to provide their own reasons for the strikes. *Id.* 178a-179a ("That was the task, exclusively, for the prosecutor making the challenge to know; not to be coached by the court as to those reasons.")

Again, he appealed to the OCCA, which denied relief on the merits, concluding that Johnson's renewed *Batson* claim was *res judicata* in that "[w]e find nothing in Johnson's alleged claims of error espoused in his application for post-conviction relief that differs substantively from these same arguments which were presented on direct appeal." Pet. Appx. 76a, 77a.

It is important to note that, in denying relief on Johnson's *Batson* claim in the post-conviction appeal, the OCCA did *not* apply a state-law based procedural default; rather, the court stated simply that it had reviewed and denied the claim on direct appeal, and the matter was *res judicata*.

Res judicata is not a procedural default or an exhaustion bar in federal habeas litigation; it is merely an expression of the understanding of the state appellate court that a claim had already been raised and adjudicated on the merits. *Cone v. Bell*, 556 U.S. 449 (2009) (*res judicata* by state appellate court is not a procedural default in federal habeas).

Thus, the opinion by the OCCA in the post-conviction appeal is a second opinion on the merits by the state appellate court, and one in which the second-step *Batson* claim was specifically raised by Johnson, but again rejected on the merits by the OCCA.

Having lost in the OCCA on his *Batson* claim, twice, Johnson presented his claim to the federal district court. Pet. Appx. 202a. In response, the State acknowledged that Johnson had made a *Batson* claim specifically under step two of the *Batson* analysis, but simply argued that there was no error. *See* Respondent Appendix at 19-20. The State made no mention of the argument that it makes now, that somehow Johnson failed to articulate the claim to its satisfaction on direct appeal (even though he did so in the post-conviction appeal).

The first time the State asserted the claim of procedural default that it now makes, was in its response brief in the Tenth Circuit. The Tenth Circuit characterized this claim as having been raised "in passing" by the State because the State devoted two sentences to the argument and cited a single case from this Court that did not concern procedural bars. Pet. Appx. 12a (*citing Sexton v. Beaudreaux*, 138 S.Ct. 2555 (2018) (*per curiam*)).

The Tenth Circuit rejected the State's argument because both the state trial court and the OCCA held that Johnson *did* raise the *Batson* claim on direct appeal (and certainly did so in the post-conviction litigation), and the State had acknowledged this as well in its pleadings in the lower courts. Pet. Appx. 13a.

After rejecting the State's attempt to apply a procedural default, the Tenth Circuit found constitutional error under this Court's precedent of *Batson v. Kentucky*, 476 U.S. 79 (1986), concluding that, contrary to the decision of the lower courts, Johnson had made out a *prima facie* showing of racial discrimination by the prosecutor during jury selection, and the OCCA had applied unreasonably *Batson* by offering race-neutral reasons for the strikes rather than directing prosecutors to perform this function. Pet. Appx. 20a, 23a.

Petitioner seeks review of the ruling of the Tenth Circuit on the basis that Johnson purportedly raised a new argument in the federal courts that he had not made in the state courts (he did not), and that this Court's decision in *Sexton v. Beaudreaux*, 138 S.Ct. 2555 (2018) (*per curiam*) creates some sort of new procedural default rule in federal habeas cases (it does not).

The Petition should be denied.

REASONS FOR DENYING THE PETITION

1. The Issues Raised by Petitioner are not Substantial.

The criteria, or at least some of the possible criteria, for legal issues meriting the attention of this Court are set forth in Rule 10 of the Rules of this Court. The character of such legal issues include conflicts of decisions among the Circuit Courts of Appeals, or with this Court; a drastic departure by a state court of last resort on a constitutional issue; or a decision by a state court or federal appellate court on a legal issue that has not been, but should be, settled by this Court. *Id.*

The issues raised by the Petitioner do not approach the weighty importance of issues requiring consideration and decision by this Court. Both the OCCA and the Tenth Circuit applied, in a straightforward fashion, this Courts precedents under *Batson* and its progeny, the AEDPA deference provisions, and neither court created new law nor applied clearly established federal law

in a way that it is outside lodestar of the normal course of business in the federal courts; nor is there a conflict on a question of law between the Tenth Circuit and any other federal Court of Appeals, nor a conflict regarding a question of law between the Tenth Circuit and the OCCA (there is only a disagreement regarding the *application* of clearly established federal law to the facts of this case).

2. Petitioner has waived its claims.

The State presses a newly-found type of quasi-procedural default in this case, but never once mentioned it in the state courts during the two appeals where Johnson raised his claim of error under *Batson*, never once mentioned it in the federal district court when Johnson articulated the same claim, and as the Tenth Circuit stated, the State made its claim in the Tenth Circuit, for the first time, in passing, via a two-sentence statement and cited *Beaudreaux* which is a *per curiam* case from this Court that did not deal with procedural default.

Now, claims the State, despite arguing at every step of this litigation that there was no *Batson* error at all, there is some sort of procedural problem because Johnson did not raise his *Batson* claim as specifically as the State would have liked on direct appeal–despite the fact that Johnson did raise the *Batson* claim to the State's specifications in the post-conviction appeal where the OCCA found no state procedural default and addressed the claim on the merits as *res judicata*.

Thus, despite having failed to make its assertions in the OCCA or the federal court, and for the first time in the Tenth Circuit via a two-sentence statement, the State now characterizes its claim as of the utmost importance deserving the attention of this Court. The State's arguments in the lower courts undercut this assertion, and this Court should deem the State's arguments as having been waived.

3. *Beaudreaux* did not create a new rule and it does not matter if it did.

The centerpiece of the Petitioner's claim is an asserted conflict between the Tenth Circuit and this Courts decision in *Sexton v. Beaudreaux*, 138 S.Ct. 2555 (2018) (*per curiam*). *See* Petition at 20, 23-24. There is no conflict, much less one warranting the attention of this Court.

First, as the Tenth Circuit pointed out, *Beaudreaux* is not a procedural default case. It is a rebuke of the Ninth Circuit for failing to apply properly the deference owed to the state appellate court under the AEDPA (an issue not pressed by the State in its Petition here).

As to the mode of analysis, this Court stated that the Ninth Circuit considered arguments against the state court's decision that Beaudreaux never even made in his state habeas petition. *Beaudreaux*, 138 S.Ct. at 2560. The State has seized upon this language as somehow creating a new procedural bar that arguments–as opposed to claims–not raised on direct appeal, are somehow waived. The State is incorrect for a few reasons.

First, it is unlikely that this Court created a new procedural default doctrine governing all habeas cases nationwide in a *per curiam* opinion that did not deal with procedural default, was not mentioned in the opinion, and not briefed by the parties.

Second, even if this Court in *Beaudreaux* did fashion some sort of new procedural default rule, it would not apply to Johnson because he *did* raise not only the legal claim in the OCCA, but also the specific argument in support of that claim in the post-conviction appeal, which was considered and rejected by the OCCA. Thus, even under *Beaudreaux*'s own terms, Johnson did not violate any procedural rule, nor did the OCCA or any federal court so find.

The State appears to argue that if the specific *legal argument*, not just the *Batson* claim itself, but the specific argument as to the mode of analysis, is not raised exclusively on direct appeal, then

it is an "inversion" of the federal structure under the AEDPA and the deference owed to state courts for a federal court to consider the claim at all. There is no rational basis for such an assertion.

The overarching point of the cases of this Court and the AEDPA is to provide the state courts the opportunity to pass on federal claims first, and then to accord deference to those decisions. The constitutional *claim* made here by Johnson, in the OCCA on both direct appeal and on post-conviction appeal (and in the federal courts), is that under *Batson* the prosecutors struck potential jurors on the basis of race.

This is the claim that the OCCA addressed, and rejected, on the merits *twice*. The rulings of the OCCA denying this claim on the merits are the only thing at issue in federal habeas. The OCCA on direct appeal recognized and cited *Batson* and its three-part analysis, but there was no legal requirement that it do so. As this Court has stated, there is no requirement that the OCCA cite to, or even be aware of, the existence of *Batson* for it to issue a decision on the merits of the claim. *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (decision by a state court does not require a citation to, or awareness of, the decisions of this Court).

The State does not dispute that both the argument and the claim under *Batson* were made by Johnson in the post-conviction appeal, but argues that it is only the direct appeal that counts. Aside from the fact that the State has waived that argument, there is no rule or precedent from this Court that directs such a result; nor is there any pressing need for this Court to consider the question because the entire point of the AEDPA and the associated cases from this Court implementing it, is whether the claim was raised in the state court and decided on the merits without a state procedural default precluding review.

This is what happened in this case. No further review is necessary.

CONCLUSION

There is no conflict in the lower courts that needs to be resolved by this Court, nor is there a federal question presented of sufficient constitutional heft to deserve this Court's attention. Thus, the Petition should be denied.

DATED this 13th day of January, 2022.

Respectfully submitted,

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