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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

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INTRODUCTION

The error in this case is very simple. The United States Court of Appeals for the Tenth Circuit granted Respondent Alonzo Cortez Johnson partial relief on his *Batson v. Kentucky*[1] claim based upon an argument

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[1] A claim or objection predicated on *Batson v. Kentucky*, 476 U.S. 79 (1986), involves three steps: 1) a defendant must make a *prima facie* case sufficient to raise an inference of discrimination in the trial court's mind; 2) if the defendant presents a *prima facie* case, the burden shifts to the State to provide race-neutral reasons for the strikes; and 3) following the State's race-neutral explanations, the trial court must determine whether

(predicated on step two of *Batson*) Johnson *did not raise* to the Oklahoma Court of Criminal Appeals ("OCCA") when it had an opportunity to review the merits of Johnson's *Batson* claim *on direct appeal*. Pet.App.7a-27a. The Tenth Circuit thereby violated the backward-looking nature of § 2254(d) of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the clear mandates announced by this Court in *Sexton v. Beaudreaux*, 138 S.Ct. 2555, 2560 (2018) (*per curiam*), *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), and *Harrington v. Richter*, 562 U.S. 86, 102 (2011), when it considered—and based its ultimate decision upon—an argument Johnson *never even made* to the OCCA on direct appeal.

Johnson's attempt to defend the Tenth Circuit's decision unwittingly proves Petitioner's position. Indeed, Johnson *repeatedly and openly* acknowledges that he did not raise his step two *Batson* argument when he first raised his *Batson* claim to the OCCA on direct appeal. Opp.6, 9-11. In doing so, Johnson also repeatedly reminds this Court that he instead raised his new step two argument when he raised his *Batson* claim *for the second time* on post-conviction appeal to the OCCA. Opp.6, 9-11. In other words, Johnson admits he did not raise his step two *Batson* argument (the very argument upon which the Tenth Circuit granted partial relief) to the OCCA when the OCCA had the opportunity to consider the merits of Johnson's *Batson* claim on direct appeal; therefore, the Tenth Circuit's analysis of the OCCA's direct appeal decision contained consideration of an argument the OCCA could not have logically considered on direct appeal.

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the defendant has proved purposeful discrimination. *Johnson v. California*, 545 U.S. 162, 168 (2005).

In his *certiorari* petition, Petitioner showed that the Tenth Circuit gravely erred under AEDPA and this Court's precedents, and he showed that the Tenth Circuit's pattern of defiance with respect to AEDPA must come to an end. Pet.18-34. Johnson has now effectively admitted the Tenth Circuit's error. Petitioner thus respectfully urges this Court to grant *certiorari* review.

ARGUMENT

I. JOHNSON ADMITS THAT THE TENTH CIRCUIT CONSIDERED AN ARGUMENT HE DID NOT RAISE ON DIRECT APPEAL; THUS, HE ADMITS ERROR UNDER THIS COURT'S PRECEDENTS.

Consistent with Petitioner's argument in the petition for writ of *certiorari*, Johnson *repeatedly* and *openly* admits that he failed to raise his specific step two *Batson* argument on direct appeal when the OCCA had an opportunity to review the *Batson* claim on the merits. Opp.6, 9-11. Instead, Johnson did not raise his specific step two *Batson* argument until post-conviction appeal, Opp.6, 9-11, which raises an interesting question: Why was it necessary for Johnson to raise his *Batson* claim for the *second time* during his post-conviction appeal? The answer is obvious. Johnson's *Batson* claim on post-conviction appeal was supplemented with new and stronger arguments that were not included on direct appeal.

Despite these repeated admissions, Johnson insists that the Tenth Circuit did not err in considering his new argument from post-conviction appeal, and he engages in a nonsensical discussion of procedural bars,

res judicata, and the alleged existence of *two merits* decisions by the OCCA on the *Batson* claim. Opp.6-11. At bottom, Johnson repeats the mistakes of the Tenth Circuit and his arguments do not withstand scrutiny.

First, in essence, Johnson contends that it does not matter when or how a defendant raises a claim or argument to a state court, only that such a claim is raised at some point. Opp.6-11. Therefore, he argues, because he *eventually* raised his specific step two argument to the OCCA even despite the constraints of post-conviction review, it was fair game for the Tenth Circuit to consider that new argument on the merits when analyzing the OCCA's direct appeal decision. This is incorrect even under the most basic reading of § 2254(d). "Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision *at the time it was made*." *Pinholster*, 563 U.S. at 181-82 (emphasis added). *See also Dunn v. Reeves*, 141 S.Ct. 2405, 2411 (2021) (*per curiam*) ("We start, as we must, with the case as it came to the [state] court.").

Second, much like the Tenth Circuit, Johnson misapprehends Petitioner's *Beaudreaux* argument and reads Petitioner's question presented as invoking some sort of procedural bar. Opp.6-11. However, Petitioner has *never* argued that Johnson's *Batson claim* is unexhausted, waived, or should be procedurally barred. Pet.25-28. Rather, Petitioner simply requested that the Tenth Circuit obey the mandates of AEDPA and focus on what the OCCA "knew and did" at the time it rendered its direct appeal decision with respect to Johnson's *Batson* claim, consider those "arguments or theories" that could support the OCCA's decision,

and decline to consider any arguments Johnson "never even made" to the OCCA when it considered Johnson's *Batson* claim on the merits on direct appeal. *Beaudreaux*, 138 S.Ct. at 2560 (admonishing federal courts against considering "arguments against the state court's decision that [a defendant] never even made" to the state court rather than "considering the 'arguments or theories [that] could have supported' the state court's summary decision. . . ." (quoting *Richter*, 562 U.S. at 102)); *Pinholster*, 563 U.S. at 181-82. Clearly, Petitioner is not invoking (and did not invoke) a procedural bar in this case.

Likewise, Johnson's suggestion that Petitioner is arguing that *Beaudreaux* established a *new rule* with respect to procedural bars is incorrect. Opp.10-11. Rather, Petitioner repeatedly emphasized that this Court's decision in *Beaudreaux* forcefully reiterated a concept *already* woven throughout AEDPA and this Court's precedents: proper deference to state courts. Pet.18-34. Indeed, Petitioner agrees with Johnson that this Court's decision in *Beaudreaux* serves as a "rebuke of the Ninth Circuit for failing to apply properly the deference owed to the state appellate courts under the AEDPA. . . ." Opp.10. However, Johnson is *incorrect* to claim that the aforementioned is "an issue not pressed by [Petitioner] in its Petition here." Opp.10. Indeed, *it is the exact and precise issue pressed by Petitioner*—the Tenth Circuit failed to afford the OCCA proper AEDPA deference here.

Third, Johnson also falls victim to the Tenth Circuit's tortured and nonsensical *res judicata* reasoning, arguing that the OCCA, on post-conviction appeal, both confirmed Johnson's step two *Batson* argument had been raised on direct appeal simply by applying *res judicata* and issued a second merits ruling on his

Batson claim. Opp.6-11. However, as already demonstrated by Petitioner in the petition for writ of *certiorari*, the OCCA's *res judicata* ruling on post-conviction review did nothing more than confirm that Johnson already raised a *Batson* claim on direct appeal and that the OCCA would decline to review anew a claim, even repackaged with new or stronger arguments, it had already adjudicated on direct appeal. Pet.27-28. *See Trice v. State*, 912 P.2d 349, 353 (Okla. Crim. App. 1996) ("Post-conviction review does not afford defendants the opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings."). In other words, the OCCA's application of *res judicata* on post-conviction appeal did not confirm that Johnson raised his specific step two argument on direct appeal, nor did it act as a second merits adjudication of Johnson's *Batson* claim.[2]

Relatedly, Johnson's invocation of this Court's decision in *Cone v. Bell*—to argue that the Tenth Circuit properly considered Johnson's heavy supplemented *Batson* claim—is inapposite. Opp.7. Johnson is correct that, in *Cone*, this Court determined that

> [w]hen a state court refuses to readjudicate a claim on the ground that it has been previ-

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[2] Johnson seizes on, and takes out of context, Opp.6, the OCCA's statement on post-conviction review 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.App.77a. What the OCCA was saying here was that Johnson's same *Batson* claim had been raised on direct appeal, and thus it was *res judicata*, not that Johnson's arguments were all previously raised. Indeed, the OCCA specifically referenced Johnson's "supplemental arguments" and his assertion that issues had not been "fully develop[ed]" on direct appeal. Pet.App.75a-78a.

> ously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is ripe for federal adjudication.

Cone v. Bell, 556 U.S. 449, 467 (2009). However, nothing Petitioner is arguing here is contrary to *Cone*. Where the OCCA, as here, declined to revisit the merits of Johnson's *Batson* claim on post-conviction appeal, "*Cone* would simply instruct that the OCCA's refusal to consider the claim [on] post-conviction on *res judicata* grounds creates no barrier to [a federal court's] review of its resolution of this claim *on direct appeal*." *Grant v. Royal*, 886 F.3d 874, 929 (10th Cir. 2018) (emphasis in original).

Moreover, and again, contrary to Johnson's nonsensical assertions, an application of *res judicata* is *not* a ruling on the merits. *Id*. (noting that "the OCCA *never considered* [supplemental post-conviction materials in support of a claim already raised on direct appeal] *on the merits* due to its *res judicata* ruling" (emphasis added)). Thus, by applying *res judicata* and declining to consider the merits of Johnson's heavily supplemented *Batson* claim on post-conviction review, the OCCA did not render a second merits decision, nor did the OCCA's application of *res judicata* open up Johnson's repackaged post-conviction *Batson* claim for federal review. *Id.* All the *res judicata* ruling did was confirm that the version of the *Batson* claim Johnson raised on direct appeal is ripe for federal review. In the end, Johnson is right about one thing: it *is* "only the direct appeal that counts." Opp.11.

In sum, despite Johnson's clear misunderstanding of the question presented in this case, Johnson ulti-

mately admits the error in the Tenth Circuit's decision. This Court's intervention is necessary to remind the Tenth Circuit of its proper role under AEDPA, the limitations of AEDPA (to protect comity, finality, and federalism), and to ensure the Tenth Circuit's faithful adherence and fidelity to Congress's mandate that federal courts interfere with state court convictions *only* when necessary to correct egregious errors and extreme malfunctions.

II. PETITIONER DID NOT WAIVE THE ARGUMENT AT ISSUE, NOR DID THE TENTH CIRCUIT FIND SUCH ARGUMENT WAIVED.

Johnson's passing and ironic assertion that this Court should find Petitioner's question presented waived and deny *certiorari* review merits little discussion here, as Petitioner's question presented is clearly adequately preserved and ripe for *certiorari* review. Opp.7, 9, 11. Unmentioned by Johnson, this Court's "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). Importantly, "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon. . . ." *Id.* In other words, even if a petitioner fails to explicitly press an issue in the courts below, this Court may still properly grant *certiorari* review if a lower court nevertheless decided (*i.e.*, "passed upon") the issue relevant to the question presented. *Id.*

Here—in response to Johnson's act of evolving his *Batson* claim with every new appeal—Petitioner pressed the issue of Johnson's ever-evolving *Batson* claim to the Tenth Circuit, cited this Court's decision

in *Beaudreaux*, and reminded the Tenth Circuit to decline to consider arguments Johnson failed to make to the OCCA when the OCCA had the opportunity to consider the merits of the *Batson* claim on direct appeal. Pet.App.235a-236a ("For starters, [Johnson] did not make this argument to the OCCA on direct appeal"; thus, "this Court should not consider this argument now, and to do so would be improper." (citing *Beaudreaux*, 138 S.Ct. at 2560)). What else was there to say? Clearly, Petitioner pressed the very issue relevant to the question presented here.

Additionally—while repeatedly mischaracterizing Petitioner's argument, Oklahoma law, and the decisions of the OCCA—the Tenth Circuit also *explicitly* rejected Petitioner's *Beaudreaux* argument by finding the lack of a "procedural bar" and proceeding to review Johnson's *Batson* claim *with* the new step two argument. Pet.App.12a-13a. And, even though the Tenth Circuit criticized Petitioner's *Beaudreaux* argument as being raised "in passing" and only spanning "two sentences," the Tenth Circuit did not find Petitioner's *Beaudreaux* argument waived and still devoted several paragraphs and a footnote to rejecting Petitioner's *Beaudreaux* argument. Pet.App.12a-13a. Clearly, then, the Tenth Circuit also "passed upon" Petitioner's *Beaudreaux* argument by rejecting it before proceeding to the merits of Johnson's *Batson* claim. Pet.App.12a-13a.

Because Petitioner's question presented was pressed *and* passed upon below, *certiorari* review is entirely proper here.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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