No. 17-6891

IN THE SUPREME COURT OF THE UNITED STATES

TREMANE WOOD, Petitioner

vs.

STATE OF OKLAHOMA, Respondent.

*****CAPITAL CASE*****

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In its Brief in Opposition ("BIO"), Respondent advances a number of arguments in opposition to Mr. Wood's petition for a writ of certiorari ("Petition"), all of which must be rejected. As Mr. Wood will demonstrate herein, Respondent fails to show that the procedural bar applied by the OCCA to Mr. Wood's case was adequate to support its judgment and independent of federal constitutional guarantees. Respondent's arguments further fail to appreciate the character of Mr. Wood's constitutional challenge to Oklahoma's capital post-conviction statute, Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), as well as the importance—and heretofore unsettled nature—of the questions that he has presented before this Court. Finally, Respondent's dismissal of a complex statistical study demonstrating that race unfairly influences capital-sentencing outcomes in Oklahoma as "meaningless" (BIO at 17) counsels in favor of this Court granting certiorari review in Mr. Wood's case because confronting and weeding out racial prejudice in the imposition of capital punishment are matters that the State of Oklahoma, and its courts, have proven unwilling to address.

I. The OCCA's rejection of Mr. Wood's successor post-conviction application does not rest upon an adequate or independent state procedural bar.

This case is not, as Respondent would have this Court believe, one that can simply be reduced to Mr. Wood's "mere[ ] disagree[ment]" with the OCCA's application of an adequate and independent procedural bar to his case. (BIO at 7-9.) Rather, Mr. Wood asks this Court to decide whether Okla. Stat. Ann. tit. 22,

§ 1089(D)(8)(b) facially and as applied to him comports with the requirements of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Respondent's attempt to transform the OCCA's "freakish[ ]," *Walker v. Martin*, 562 U.S. 307, 320 (2011) (internal quotation marks omitted), and "unexpected[ ]," *id.*, application of Oklahoma's successor post-conviction procedural bar into one that is "firmly established," *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (internal quotation marks omitted), and therefore adequate to support its judgment is futile. First, Respondent's contention that Mr. Wood "fails to claim, much less present evidence that, Oklahoma does not consistently follow the rule in question" (BIO at 10) is not accurate and ignores Mr. Wood's extended discussion of the inadequacy of the procedural bar applied by the OCCA below. (Pet. at 22-30.) Also notably absent from Respondent's defense of the adequacy of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and the OCCA's application of this provision to Mr. Wood is any mention of even a *single* case where the OCCA asked whether the factual basis of the claim was ascertainable *not* on the date that the initial post-conviction application was filed, as is required under Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), but rather years after that application was filed, as the OCCA did here. (*See* Pet. at 22-28.) The patent inadequacy of the OCCA's procedural ruling here is, on its own, sufficient to confer upon this Court jurisdiction to reach the merits of Mr. Wood's federal constitutional claims. *Beard v. Kindler*, 558 U.S. 53, 59 (2009) (finding state procedural rule "not 'firmly established' and therefore [ ] not an independent and

adequate procedural rule sufficient to bar [federal court] review of the merits" of federal claims).

Second, Respondent does not dispute Mr. Wood's assertion that the OCCA's determination—that "Race and Death Sentencing for Oklahoma Homicides, 1990-2012" ("the Study"), on which Mr. Wood's claim in his application for post-conviction relief is based, did not constitute "clear and convincing evidence that, but for the improper influence of race and/or gender discrimination, no reasonable fact finder would have . . . rendered the penalty of death" (A-1 at 3)—is not independent of federal law.

II. This case squarely presents a question that this Court has recognized is a serious and heretofore unresolved question of federal law.

Respondent claims that Mr. Wood has not shown that the OCCA's denial of his successor post-conviction application raises an important and unsettled question of federal law. (BIO at 7, 19, 22-28.) This contention, however, ignores the substance of Mr. Wood's constitutional challenge to Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), as well as to the OCCA's application of this statute in a manner that discriminates against him, as an indigent death-row prisoner, and against his newly available federal constitutional claim.

Respondent nowhere disputes that Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), by its express terms, imposes stricter limitations on the types of claims that a defendant can raise in a successor post-conviction application before Oklahoma's courts if he is a capital defendant than if he is a non-capital defendant. *Compare*

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) (limiting a capital defendant's successor post-conviction claims based on newly available evidence only to those that "establish by clear and convincing evidence that, but for the alleged error, no reasonable factfinder would have found the application guilty . . . or would have rendered the penalty of death"), *with* Okla. Stat. Ann. tit. 22, § 1086 (providing that a *non*-capital defendant's successor post-conviction application need only assert "a ground for relief which for sufficient reason was not asserted or was inadequately raised in the prior application"). Nor does Respondent dispute that Mr. Wood's newly available federal constitutional claim is simply not cognizable under Oklahoma law, which erects a procedural standard unique to capital defendants.[1]

Respondent instead mischaracterizes the questions that Mr. Wood has presented to this Court as unimportant (BIO at 7) and, in doing so, turns a blind eye to this Court's recognition of the serious and undecided nature of the question presented here—that is, whether the Fourteenth Amendment requires that states afford prisoners some adequate corrective process for the hearing and determination of claims that their federal constitutional rights have been violated.

[1] Respondent is correct that Oklahoma's rules preclude *both* non-capital and capital post-conviction petitioners from filing petitions for rehearing following a denial by the OCCA. Mr. Wood concedes that his argument to the contrary (Pet. at 38) is incorrect and that he inadvertently relied on a rule that permits petitions for rehearing on direct appeal. However, Respondent does not disagree with the crux of Mr. Wood's complaint, which remains the same: Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), by its express terms, imposes stricter limitations on the types of federal constitutional claims that a defendant can raise in a successor post-conviction application before Oklahoma's courts if he is a capital defendant than if he is a non-capital defendant. It is this state of affairs that Mr. Wood contends unconstitutionally deprives him of *any* corrective judicial remedy whereby he may seek to have his newly available federal constitutional claim heard before the State of Oklahoma takes his life. (*See* Pet. at 30-40.)

Mooney v. Holohan, 294 U.S. 103, 110 (1935) (per curiam) (recognizing the "serious charges" raised by petitioner that the State of California violated his due process rights by failing to provide any corrective judicial remedy whereby he could seek to have his newly available federal constitutional claim heard and his conviction set aside); *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (noting that the Court originally granted certiorari review to decide "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees"); *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 450 (1985) (recognizing the open question of whether the Fourteenth Amendment's Due Process Clause requires state judicial review of state prisoners' federal constitutional claims); *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (mem.) (Stevens, J., concurring) (explaining that the scope of states' obligation to provide collateral review of federal constitutional claims remains "shrouded in [ ] much uncertainty.").

In an effort to obscure the thread of reasoning woven throughout these cases and its logical extension to Mr. Wood's case, Respondent argues that *Case*, *Young*, *Superintendent, Massachusetts Correctional Institution, Walpole*, and *Mooney* "illustrate perfectly the reason that [Mr. Wood's] Petition should be denied." (BIO at 22.) Unlike the petitioners in these cases, so goes Respondent's argument, "[Mr. Wood] had the opportunity to present constitutional claims on *direct appeal*" and in prior post-conviction proceedings. (BIO at 22-23 (emphasis added)). But this argument misses the point that in the context of post-conviction, non-capital

prisoners are afforded greater process than capital prisoners to raise newly available federal constitutional claims.

III. Oklahoma's capital post-conviction statute facially and as applied to Mr. Wood by the OCCA below violates Mr. Wood's rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Respondent gives short shrift to Mr. Wood's facial and as-applied Fourteenth Amendment challenge to Oklahoma's capital post-conviction statute by asserting, in conclusory fashion, that "Oklahoma does afford adequate corrective process for the determination of federal claims." (BIO at 22.) As an example of the adequacy of Oklahoma's corrective process, Respondent points to the opportunities available to Mr. Wood on direct appeal and in his prior post-conviction proceedings "to present constitutional claims." (BIO at 22.) This argument misses the critical fact that while Mr. Wood *did* have the opportunity to present federal constitutional claims in prior state-court proceedings as a general matter, he *does not* have the opportunity to present previously unascertainable federal constitutional claims, like the one at issue here, to an Oklahoma court. Nor will he ever have that opportunity under Oklahoma law as it stands based on the mere fact that he is an individual sentenced to die.

Respondent disagrees that the OCCA infringed upon Mr. Wood's due process rights in its application of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) because Mr. Wood "could have raised the same *McCleskey*-based claim of racial discrimination in his trial at any point" by using a 1984 Oklahoma-specific capital-sentencing study. (BIO

at 27.) This study, however, was published in 1984—20 years before Mr. Wood's trial—looked only at homicides and death sentences that occurred over a four-year period, from 1976 through 1980. (*Id.*) As such, the study's data was long outdated by the time Mr. Wood's case went to trial in 2004 and, importantly, excluded the time period in which Mr. Wood was convicted and sentenced to death. The 2017 Study on which Mr. Wood relies to raise his claim now was thus the very first comprehensive and methodologically sound statistical study to examine the impact of race on capital-sentencing outcomes in Oklahoma for the time period in which Mr. Wood was convicted and sentenced to die. Respondent has failed to show otherwise. *See* Section IV, *infra*.

Respondent also argues that Mr. Wood has not established an equal protection violation because he is not similarly situated to non-capital inmates. (BIO at 25.) However this Court has not so held and the cases cited by Respondent in support of this contention are not controlling here. (*See* BIO at 25-26.) Furthermore, this Court has likened life-without-parole sentences to the death penalty which points, at the very least, to the similarly situated nature of prisoners sentenced to death by execution and non-capital prisoners sentenced to death in prison. *Graham v. Florida*, 560 U.S. 48, 69-70 (2010) ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration,

except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."); *Miller v. Alabama*, 567 U.S. 460, 474-75 (2012) ("Imprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable" (internal quotation marks omitted)).

Indeed, the Supreme Court of Ohio has struck down, on equal protection grounds, a provision of state law, Ohio Revised Code Annotated § 2953.73(E)(1), which afforded non-capital prisoners the automatic right to appeal denied applications for post-conviction DNA testing, while capital prisoners had to seek leave to appeal. *See State v. Noling*, 75 N.E.3d 141, 145 (Ohio 2016). In doing so, the court rejected the state's argument that capital and non-capital prisoners were not similarly situated regardless of the difference in sentences. *Id.* at 147-48. The court held that there was "no legitimate purpose in a two-track appellate process that discriminates between capital and noncapital offenders." *Id.* at 150. Similarly, Respondent here does not show that a rational basis exists for the Oklahoma legislature's decision to more strictly limit the types of federal constitutional claims that capital prisoners can raise in a successor post-conviction proceeding than those available to non-capital prisoners.[2]

[2] The cases relied upon by Respondent are inapposite as persuasive authority. In *Sheppard v. Early*, 168 F.3d 689 (4th Cir. 1999), the Court of Appeals held that a Virginia statute requiring an execution date to be set within sixty or seventy days following the notification by the Attorney General or the attorney for the Commonwealth of the Court of Appeals' decision denying habeas relief did not violate the Equal Protection Clause. For the additional reason that Mr. Wood is not here challenging the Oklahoma legislature's time requirements for the setting of execution dates, this case is inapposite. *Rhines v. Weber*, 544 U.S. 269 (2005), also cited by Respondent, supports Mr. Wood's complaint about Oklahoma's capital post-conviction procedure. In *Rhines*, this Court observed that while some capital prisoners "might" engage in dilatory tactics they should, as a

Respondent's defense of the fewer procedural protections that the State of Oklahoma provides to capital defendants in post-conviction proceedings than it affords non-capital defendants furthermore turns this Court's Eighth and Fourteenth Amendment jurisprudence—which calls for *more* reliability in the imposition of capital punishment, not *less*—on its head. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Carter v. Illinois*, 329 U.S. 173, 186 (1946) (Murphy, J., dissenting) ("When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society here is attempting to take the life or liberty of one of its members. That attempt must be tested by the highest standards of justice and fairness that we know."); *see also Noling*, 75 N.E.3d at 148 (noting that "we are mindful that this case involves a person sentenced to death, and 'the finality of the death sentence imposed warrants protections that may or may not be required in other cases.'" (brackets omitted) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring).

Further, Mr. Wood's complaint is not just that Oklahoma's capital post-conviction statute discriminates against his newly available federal constitutional claim simply because of his status as a death-row prisoner, but also that the

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general matter, be allowed to air their federal constitutional grievances before a state court before such claims are either dismissed or passed upon by a federal district court. 544 U.S. at 278 ("[A] petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions.").

OCCA's determination that he should have marshalled the resources to undertake the Study back in 2009 discriminates against him on account of his *poverty*. *Draper v. Washington*, 372 U.S. 487, 496 (1963) ("[T]he State must provide the indigent defendant with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."). Respondent does not argue that a rational basis exists for the OCCA's decision to deny Mr. Wood "meaningful access to the appellate system" due to his indigence. *Ross v. Moffitt*, 417 U.S. 600, 611 (1974).

IV. Respondent's attack upon the statistical study demonstrating that Mr. Wood's race and that of the victim statistically predisposed him to receiving a death sentence is without merit.

Respondent argues that Mr. Wood's case is not the proper vehicle through which this Court should reconsider *McCleskey* because the Study upon which Mr. Wood relies is allegedly "so flawed it cannot be relied upon to draw conclusions about the operation of Oklahoma's death penalty scheme." (BIO at 12.) Respondent is wrong, as will be demonstrated below. However, even assuming that Respondent's attack on the Study has a modicum of merit, its arguments raise disputed issues of fact that should have been resolved at the evidentiary hearing that Mr. Wood requested (A-3 at 39) and which the OCCA denied (A-1 at 3); *see also* Okla. Stat. Ann. tit. 22, § 1089(D)(5) (providing that controverted and previously unresolved factual issues material to the legality of a capital petitioner's confinement should be resolved in the trial court that imposed the sentence).

First, Respondent faults Mr. Wood for relying on an "early draft" of the Study. (BIO at 14.) What Respondent fails to mention is that Mr. Wood was *required* to rely on the early draft, which was publicly released, in order to comply with Oklahoma's 60-day statute of limitations that applies uniquely to capital successor post-conviction applicants. Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) (providing that in capital cases "[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable . . . factual basis serving as the basis for a new issue is announced or discovered). Furthermore, Respondent provides no argument whatsoever explaining why the fact that the Study is an early draft—commissioned by a bipartisan group of prominent Oklahomans, including former Oklahoma governor Brad Henry and former United States Magistrate Judge Andy Lester—should render it inherently unreliable. Importantly, the Study has now gone through peer reviews and has been published in one of the leading scholarly journals in the field of criminal law and criminology, and its substantive conclusions have not changed in the process. Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides, 1990-2012*, 4 J. Crim. L. and Criminology 107, 733-56 (2017).

Next, Respondent argues that the Study's authors "made no similar effort to ensure reliable data," unlike the authors of the studies addressed in *McCleskey* and *Loftin*, because "the data set is far too inclusive to yield reliable results." (BIO at 14-15.) Respondent points to the Study's inclusion of all non-negligent homicides in its

data set as a "fatal[ ] flaw[ ]" because its analysis takes into account "a large number of homicides which are not death eligible." (BIO at 12, 15.) Respondent urges that the correct approach would begin with only the pool of death-eligible cases. (BIO at 13-15.) Respondent's critiques are misguided and must be rejected.

Importantly, one of the fundamental flaws with studies of race and capital punishment that take the approach of the New Jersey Supreme Court in *State v. Loftin*, 724 A.2d 129 (N.J. 1999), and which look only at the pool of death-eligible cases, is that they may significantly underestimate the degree of bias in death sentencing cases because the identification of death-eligible cases is, in itself, subject to potentially discriminatory charging decisions. More specifically, the inclusion, exclusion, or construction of evidence to determine death eligibility can be subject to the same types of implicit or explicit bias that impacts conviction and sentencing decisions. This is a process of endogenous system bias that can arise when officials who are responsible for system outcomes are also, at least in part, responsible for the collection and organization of evidence on which those outcomes are determined.

The approach of the Study's authors to addressing this form of bias was to examine the broadest possible set of cases in order to capture the potential operation of bias throughout the criminal-justice process, including the determination of death eligibility in the first instance, conviction, and sentencing. Thus, theirs is a much sounder approach to examining the operation of bias on

criminal-justice outcomes in Oklahoma than using a smaller number of cases that have already, potentially, been whittled down by decisions correlated with race.

In addition, the Study's authors do effectively exclude less aggravated cases as their analysis proceeds due to the fact that they examine racial differences in death sentencing among: 1) all homicide cases with identified suspects; 2) only those cases with additional felony circumstances present; 3) only those cases with multiple victims; and 4) only those cases with *both* additional felony circumstances and multiple victims. In other words, Respondent's critique of the Study's methodology ignores the critical fact that *even among the most aggravated cases*, the Study's authors identified significant race and gender effects in sentencing.

V. Mr. Wood has demonstrated that racial prejudice impacted decision-makers in his case and the explicit as well as coded racialized appeals to which he points should not, as Respondent urges, be minimized or dismissed as harmless.

Respondent argues that the prosecutor's self-identification at Mr. Wood's trial as a "red neck" "in no way indicates" that he was influenced by race in Mr. Wood's case. (BIO at 18.) This is because, in Respondent's view, the prosecutor was merely "attempting to develop a rapport" through the use of "self-deprecating humor." (BIO at 18.) Respondent's argument is not only based upon unsupported speculation but it also ignores the historically racialized meaning of the term "red neck." As historian Patrick Huber explains in his examination of the etymology of the term, "red neck" has "[f]or approximately the last one hundred years" referred to a "poor white man of the American South and particularly one who holds conservative,

racist, or reactionary views." Patrick Huber, *A Short History of Redneck: The Fashioning of a Southern White Masculine Identity*, 1 Southern Cultures 145, 145 (1995). "The virulent racism of some poor and working-class white southerners also came to be closely associated with the word *redneck*, and . . . it was increasingly used to describe a racist, bigot, or reactionary." *Id.* at 148; *see also* 13 *The New Encyclopedia of Southern Culture: Gender* 196 (Nancy Bercaw & Ted Ownby, eds., 2009) (explaining that "redneck" historically refers to poor whites who were seen as "ignorant," who "displayed a tendency toward violence," and whose "aggression is racially motivated and directed").

Respondent also dismisses as irrelevant references at Mr. Wood's trial to the victims' rural Montana heritage and to "black voices." (BIO at 17-18.) While, on the surface, these references might appear to be merely descriptive, they invariably called attention to Mr. Wood's race and to that of the victims in his case.[3]

Finally, Respondent argues that because Mr. Wood is not Mexican, the trial judge's publicly reported racist remarks about Mexicans are irrelevant to the *McCleskey* analysis. (BIO at 18-19.) This, however, is far from correct. Respondent agrees that *McCleskey* requires an individual to show that "race played a role in [a]

[3] For example, Montana's population is historically over 90% white. *See* U.S. Census Bureau, The White Population: 2000, at 4 (Aug. 2001), https://www.census.gov/prod/2001pubs/c2kbr01-4.pdf (showing 92.7% of Montana's residents were white in 1990, decreasing slightly to 90.6% in 2000, when mixed-race individuals were separately identified). Moreover, its population of black or African-American residents is exceedingly small; in 2000, Montana had the smallest population of black or African-American people in the entire United States, both in total number (2,692) and percentage-wise (0.3%). *See* U.S. Census Bureau, The Black Population: 2000, at 4 (Aug. 2001), https://www.census.gov/prod/2001pubs/c2kbr01-5.pdf. Thus, like "red neck," "rural Montana boys," has clear racial undertones.

particular case." (BIO at 12 n.3.) And the sitting trial judge's subscription to racist ideas about a race/ethnic group certainly demonstrates race impacting a key decision-maker in Mr. Wood's case; it furthermore raises troubling questions about the trial judge's attitudes towards people of color more generally, including towards black defendants like Mr. Wood.

CONCLUSION

Respondent has advanced no meritorious argument in opposition to Mr. Wood's request for this Court to consider the important questions presented by his case. For this and the foregoing reasons, Mr. Wood asks that this Court grant his petition for a writ of certiorari.

Respectfully submitted: February 12, 2018.

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