

No. 04-928

**In the Supreme Court
of the United States**

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the
Oregon Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Oregon Supreme Court held that a defendant facing the death penalty must be permitted to introduce and use, as mitigating evidence in the penalty phase, evidence that calls into question the jury finding of guilt beyond a reasonable doubt. The court based its holding squarely on its reading of this Court's Eighth Amendment jurisprudence. The State challenged that holding and only that holding in the question presented to this Court.

Respondent does not address the question this Court granted certiorari to address. Instead, he argues that the Court should not address that issue because (1) there is no federal question properly before this Court because the Oregon Supreme Court misapprehended the facts, (2) state law provides an alternate basis for the state court's ruling, and (3) the federal Due Process Clause provides an alternate basis for the state court's ruling. This Court should reject respondent's efforts to recast the issue in this case. On the merits, this Court should clarify that the Eighth Amendment requirement that capital sentencing juries consider mitigating evidence about the "circumstances of the offense" does not sweep so broadly as to include evidence which, if believed, calls into question the defendant's conviction.

A. The Oregon Supreme Court did not make a mistake about the factual record that requires dismissal or remand to the state court for clarification.

Respondent urges this Court to dismiss review or ask the state court to clarify the basis of its holding. Resp. Br. 10-19. Respondent asserts that the state court misapprehended the factual record and that, had the court properly understood the facts, state law would provide an alternate basis for the state court's holding. To the contrary, the federal question presented in the petition for certiorari is properly presented in

this case and properly before this Court. There are no barriers to this Court reaching the federal issue that the Oregon Supreme Court addressed.

Respondent questions the state court's holding by asserting that the state court mistakenly believed that respondent's mother never testified in the guilt-phase portion of this case. As a result, he claims a state-law basis for the court's holding that respondent must be permitted to introduce any alibi evidence in the upcoming fourth sentencing proceeding. Resp. Br. 10-13. A review of the case demonstrates that the state court made no mistake, but properly understood the context in which this issue arose.

As described in detail in the State's brief, respondent was convicted of two counts of aggravated murder for the deaths of Rod and Lois Houser and was sentenced to death. *State v. Guzek*, 310 Or. 299, 797 P.2d 1031 (1990) (*Guzek I*). In the guilt-phase portion of the trial, respondent presented alibi testimony from his grandfather and his mother that, if believed, would place respondent somewhere other than the victims' home at the time of the crime. See J.A. 31-52 (testimony of respondent's grandfather), 60-79 (testimony of respondent's mother). The jury necessarily rejected that evidence. On direct and automatic review, the Oregon Supreme Court upheld respondent's convictions, but remanded the case for a new sentencing proceeding. *Id.*, 310 Or. at 304, 797 P.2d at 1034. The court's review of the second sentencing proceeding also resulted in a remand. *State v. Guzek*, 322 Or. 245, 270-71, 906 P.2d 272, 287 (1995) (*Guzek II*).

In the third sentencing proceeding, respondent filed a Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence. J.A. 94. In the notice, respondent alerted the State and the trial court that he intended to offer as mitigating evidence "[t]he prior court testimony of Clarence Guzek" (respondent's grandfather) and "[t]he testimony of Kathleen Guzek" (re-

spondent's mother). *Id.* As respondent himself describes it, he sought to introduce “the live testimony of his mother and the prior recorded testimony of his deceased grandfather[.]” Resp. Br. 3-4. In other words, respondent did not treat the alibi evidence from his grandfather and his mother in the same manner—he sought to introduce the transcript of his grandfather's testimony from the guilt phase, but did not similarly seek to introduce the transcript of his mother's testimony from the guilt phase. That may seem like a minor distinction, but it is critical to the Oregon Supreme Court's analysis because state law treats the two proffers of evidence differently, as the Oregon Supreme Court properly concluded. What's more, respondent clearly sought to introduce this alibi evidence as “mitigating evidence” that the penalty-phase jury would consider under the state's “fourth question” under Or. Rev. Stat. § 163.150(1)(b), that is, “[w]hether the defendant should receive a death sentence.” *See* State's Br. App 3.

Or. Rev. Stat. § 138.012(2)(b) governs the use of testimony from the guilt phase in a remanded penalty-phase proceeding and provides:

The new sentencing proceeding is governed by the provisions of [Or. Rev. Stat. §] 163.150(1), (2), (3) and (5). A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence.

The Oregon Supreme Court addressed respondent's “argument that the trial court erred in excluding his alibi evidence during his third penalty-phase proceeding” and concluded that this statute mandated admission of the transcript of respon-

dent's grandfather's testimony "because it was 'previously offered and received' during the trial on the issue of guilt." Pet. App. 43. Respondent urges this Court to dismiss review of this case or to remand it to the state court because he claims all of the evidence at issue was admissible under this state statute as evidence offered and received during the guilt phase. Resp. Br. 16-18.

The state court treated respondent's proffered alibi testimony from his mother differently than his grandfather's prior alibi testimony, not because it incorrectly believed that respondent's mother had not testified in the guilt-phase portion of the trial, but because of the manner in which respondent sought to introduce her alibi testimony.¹ Even if respondent is correct that the state court overlooked the fact that respondent's mother testified in the guilt phase, it would not change the posture of this case. Respondent clearly sought to introduce, as mitigating evidence, his mother's live testimony and not the transcript of her testimony from the guilt phase. In order to admit testimony from a witness recalled under Or. Rev. Stat. § 138.012(2)(b), the evidence must be relevant. And, as the state court unanimously concluded, the question of relevance for mitigating evidence is governed strictly by this Court's Eighth Amendment jurisprudence. Pet. App. 44-52.²

¹ Respondent notes a general preference in Oregon law for live testimony, Resp. Br. 11 fn. 6, but that preference does not apply where a state statute affirmatively draws a distinction between prior recorded testimony and new live testimony, as the state court concluded exists in Or. Rev. Stat. § 138.012(2)(b).

² Similarly, even if the dissenting justices of the state court made a factual mistake about the record in this case, it would not affect the dissent's analysis because they, too, recognized a critical distinction between an offer of a transcript of testi-

The state court rejected any suggestion that the state statutes require a “quite broad and, possibly, unlimited” reading of the statutory category of “mitigating evidence.” Pet. App. 46.³ Instead, the court concluded that “the [state] legislature intended to limit the admission of ‘mitigating evidence’ in penalty-phase proceedings so as to satisfy the Eighth Amendment. Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider.” Pet. App. 52 (emphasis in original); Pet. App. 70.

The state court then turned to what it perceived to be the central question: “whether the alibi evidence that defendant proffered at his third penalty-phase proceeding—specifically, his mother’s testimony—fell within that federal constitutional category.” Pet. App. 52. The court turned to this question not because it “mistakenly concluded that its holding with regard to the grandfather’s testimony under Or. Rev. Stat. § 138.012 did not also control the admissibility of the mother’s ‘alibi testimony’ on retrial,” Resp. Br. 6, but because it properly concluded that the analysis necessarily differed because respondent chose to offer his alibi evidence in two critically distinct forms.

Respondent himself acknowledged the different analysis that must be applied to the transcript of his grandfather’s tes-

mony from the guilt phase and an offer of live testimony from a witness recalled during the penalty phase. Like the majority, the dissent clearly stated that the offer of live testimony as mitigating evidence implicated federal constitutional analysis. Pet. App. 70.

³ Thus, respondent is incorrect when he suggests that state law is so broad as to permit his alibi evidence without consideration of the Eighth Amendment, Resp. Br. 26.

timony, which was required to be admitted pursuant to Or. Rev. Stat. § 138.012, Opp. Br. 1, and the live testimony of his mother, where the admission “appears to be based largely on interpretation of federal constitutional law.” Opp. Br. 9. He waited until his brief on the merits to suggest that the state court misunderstood the facts in this case and that state law provided an alternate basis for admitting his mother’s live testimony in the same manner as the transcript of his grandfather’s testimony. Thus, contrary to what respondent asserts, any factual misunderstanding on the part of the Oregon Supreme Court does not alter the court’s analysis of the federal constitutional question presented in this case. The court took respondent at his word – he sought to admit his mother’s live alibi testimony as mitigating evidence. The answer to whether he must be permitted to admit that testimony for that purpose is a federal constitutional question that depends on the breadth of this Court’s Eighth Amendment mitigation case law.

B. There is no alternate state-law basis for the Oregon Supreme Court’s ruling.

1. In addition to the argument discussed above—that Or. Rev. Stat. § 138.012(2)(b) treats both forms of respondent’s proffered alibi evidence the same—respondent makes a somewhat-related argument that state law, as construed by the Oregon Supreme Court, “makes relevant and admissible at the penalty phase *all* evidence admitted at the guilt-innocence phase.” Resp. Br. 24. This assertion distorts state law. Specifically, respondent is incorrect in asserting that the state statutes “require and enable the re-sentencing jury to revisit all the evidence of the crime and to make a judgment that the death penalty not only is *factually* warranted by the evidence of the crime (the issue litigated at the guilt-innocence phase), but also and in addition that execution is *morally* warranted

by the evidence of the crime in its entirety (the issue at the penalty phase).” Resp. Br. 24 (emphasis in original).⁴

Simply because Or. Rev. Stat. § 138.012(2)(b) makes the record from the guilt phase admissible in the penalty phase does not automatically make the entirety of that record relevant for all purposes. The Oregon Supreme Court has identified clear limits in state law on what is relevant to the jury’s consideration of mitigating evidence and its determination whether the defendant should receive a death sentence. As the state court unanimously determined, what is relevant to the jury’s consideration whether the death penalty is “morally warranted” is limited to evidence that the jury must consider under this Court’s Eighth Amendment jurisprudence. *See* Pet. App. 44-52, 70. There is no separate state-law basis for the jury’s consideration of this evidence in answering the “fourth question” (whether the defendant should receive a death sentence). *See California v. Ramos*, 463 U.S. 992, 997 n. 7 (1983) (a possible state ground is not a bar to this Court’s review where the state court quite clearly rested its ruling on the Federal Constitution).

2. Nor does the Oregon Supreme Court’s ruling addressing a package of evidence respondent offered as impeachment evidence provide an alternate state-law basis for admitting his mother’s live alibi testimony on remand. In arguing that it

⁴ *See also* Resp. Br. 25 (“Under Oregon Law, the range of ‘mitigating circumstances’ is far reaching.”); Resp. Br. 26 (Under the state court’s interpretation of the fourth question, “jurors are permitted to decline to impose a death sentence for *any* reason having to do with its assessment of the crime or the defendant.”); Resp. Br. 27 (Under state law, the alibi evidence was relevant for the jury’s assessment in the penalty phase “whether the evidence provided a *morally* sufficient basis for executing” respondent.).

does, respondent misrepresents the Oregon Supreme Court's holding. After the trial court permitted the State to have the guilt-phase testimony of respondent's codefendants, Wilson and Cathey, read to the jury, respondent offered evidence to impeach that testimony, "including evidence of inconsistent statements by the witnesses themselves." Pet. App. 38-39. The State objected to that evidence, arguing, in part, that it was hearsay, and the trial court excluded it. Pet. App. 39-40.

The Oregon Supreme Court never suggested that the evidence at issue necessarily is admissible as impeachment evidence under state law. The court first noted that the transcripts of Wilson's and Cathey's guilt-phase testimony were admissible under Or. Rev. Stat. § 138.012(2)(b), just as the transcripts of the testimony of respondent's grandfather was admissible. Pet. App. 40. However, the State sought to use the transcripts of Wilson's and Cathey's testimony "to prove two elements of the state's case in the *penalty-phase proceeding*" (emphasis in original) that were not at issue in the guilt phase. Because the State sought to put that testimony to a new use in the penalty phase, it "made the credibility of Wilson and Cathey relevant to the *penalty-phase proceeding* and opened the door for defendant's impeachment of their testimony." Pet. App. 40-41 (emphasis in original).

Before this Court, respondent repeatedly asserts that the Oregon Supreme Court then "ordered the trial court to admit at the upcoming re-sentencing hearing" the evidence offered to challenge the codefendants' statements from the guilt-phase proceeding. Resp. Br. 35; see also Resp. Br. 36 ("This undeniably admissible evidence that the codefendants lied at [respondent's] guilt-innocence trial * * *"); Resp. Br. 37 fn. 21 (statements made by the codefendants after the guilt-phase proceeding "have been held admissible at the upcoming re-sentencing trial as a matter of state law").

However, contrary to respondent's repeated assertions in this Court, the state court did not rule that any impeachment evidence was automatically admissible. In fact, the court specifically refused to make that ruling:

We also note that our conclusion that defendant's proffered evidence had a nonhearsay purpose does not require that that evidence be admitted at any subsequent penalty-phase proceeding. Whether the evidence is admissible in a subsequent proceeding will depend, first, on the purpose for which defendant offers it and, second, on the trial court's evaluation of any objection that the state might raise. Our conclusion here is solely that we disagree with the state that defendant proffered evidence of inconsistent statements by Wilson and Cathey for a hearsay purpose only.

Pet. App. 42 fn. 18. The court repeated the limited nature of its holding in its conclusion: "[I]n any subsequent penalty-phase proceeding, if defendant offers evidence of inconsistent statements by state witnesses to impeach their testimony, then the trial court must determine whether that evidence has a non-hearsay purpose. If it doesn't, then the evidence may not be excluded on the basis of the hearsay rule alone." Pet. App. 64. To the extent respondent argues that this "undeniably admissible" evidence provides a state-law basis for the admissibility of the proffered alibi testimony, this Court should reject the argument because it is based on an inaccurate representation of the state court's ruling.⁵

⁵ Even if the state court had ruled the impeachment evidence admissible in the new sentencing proceeding, it is unclear how that ruling would encompass respondent's alibi evidence. As explained above, respondent clearly offered the

3. A final point in response to respondent's arguments that state law provides an alternate basis for the Oregon Supreme Court's ruling is worth noting.⁶ Throughout respondent's brief, he focuses exclusively on what occurred in the third penalty proceeding in this case, and he ignores the import of the state court's ruling with respect to the next penalty-phase trial that must be held in this case. Even if he were correct that his mother's alibi testimony could have been admitted under the particular circumstances of the third penalty proceeding for purposes other than as mitigating evidence required by the Eighth Amendment, that argument does not somehow render the Oregon Supreme Court's holding insignificant with respect to the federal constitutional ruling it announced. The state court did not merely examine whether a specific ruling by the trial court was in error and required reversal of the judgment. Instead, knowing that the case must be remanded for a fourth sentencing proceeding based on the State's concession of error, the court addressed the issue of alibi evi-

alibi evidence as mitigating evidence. He first attempted to consolidate the alibi testimony with the package of impeachment evidence on appeal, *see* J.A. 102, but the State responded separately to the package of impeachment evidence and to the alibi evidence. State Respondent's Brief in Oregon Supreme Court 159-162. The State argued that the impeachment evidence was properly excluded hearsay and that the alibi evidence was properly excluded because it was not relevant to any issue in the penalty phase. *Id.* Similarly, the state court properly rejected respondent's effort to merge the two types of evidence and treated them separately. *Compare* Pet. App. 38-42 with Pet. App. 42-62.

⁶ This point applies equally to respondent's argument that the Due Process Clause provides an alternate basis for the state court's ruling.

dence as mitigating evidence as it might occur on remand. *See* Pet. App. 13. The rule of law the court announced—a rule that relies on the Eighth Amendment exclusively—applies broadly not only to the next penalty-phase proceeding(s) in this case, but to all other penalty-phase proceedings in capital cases.⁷

Thus, respondent’s efforts to demonstrate that his mother’s alibi testimony could have been admitted in the third penalty proceeding for a different purpose (such as to impeach the testimony of the codefendants) or on a different legal theory (such as a Due Process argument) are not to the point. For example, respondent’s argument that his mother’s alibi testimony should have been admitted in the third penalty-phase proceeding to rebut and impeach the state’s case on the first question the jury must decide (e.g., whether the defendant’s conduct was not simply intentional, but was deliberate) is improperly focused only on what occurred in the third sentencing proceeding. Resp. Br. 28-39. But because the state court announced a rule of law that will apply in any future penalty-phase proceeding for this and other capital defendants, it is purely speculative to suggest how the evidence might be offered and what other possible grounds there might

⁷ The court did not direct the trial court to admit only respondent’s mother’s alibi testimony if offered as mitigating evidence in a future proceeding, but ordered that—under the Eighth Amendment—“any alibi evidence that defendant proffers in mitigation shall be admissible.” Pet. App. 64. And, as the dissent pointed out, the ruling is not limited to alibi evidence, but would appear to encompass any evidence calling into question a capital defendant’s guilt. Pet. App. 84 n. 34 (“it is conceivable that, after this opinion, scientific evidence challenging the accuracy of eyewitness testimony or fingerprint evidence admitted during the guilt phase could be considered relevant to a ‘circumstance of the offense.’” *Id.*

be for ruling it admissible. In short, respondent's argument does not give this Court an alternate basis for resolving the issue that is squarely presented to it.

C. The Due Process Clause does not provide an alternate basis for the Oregon Supreme Court's holding that respondent's alibi evidence must be considered in the penalty-phase proceeding.

1. Respondent's due process argument is not well developed and was not presented in a clear manner to the Oregon Supreme Court or as a reason for denying certiorari in his Opposition Brief. Moreover, the Oregon Supreme Court did not address this issue because it ruled that the alibi evidence must be admitted under this Court's Eighth Amendment jurisprudence. So it is unclear how the state court might resolve this issue if respondent clearly presented it to that court. Those are sufficient reasons why this Court need not address the Due Process Clause.

2. On the merits, respondent summarizes this Court's due-process case law holding that a state cannot prevent a capital defendant from responding to the state's evidence in support of a death sentence. Resp. Br. 20-23. Respondent then "invokes" the constitutional provision, but his argument is difficult to discern. Part of the problem is respondent's reliance on mischaracterizations about state law. For example, he asserts that state law broadly defines "mitigating evidence" and permits the jury to revisit the guilt-phase evidence and to determine whether the death penalty "is *factually* warranted by the evidence of the crime." Resp. Br. 24-26. He then appears to argue that, given this state law, the Due Process Clause requires that respondent be given a fair opportunity to address

the state's evidence on this point and rebut it. Resp. Br. 26-27.⁸

The first problem with respondent's argument is that state law does not put his guilt at issue again for the penalty-phase jury. Although that jury must consider respondent's actions in committing the crime in order to answer some of the questions they must resolve, *see* State's Br. App 2-3 (setting out the four questions presented to the penalty-phase jury), the jury does not have a new opportunity to determine the factual basis of respondent's convictions. What's more, when those factual issues were in question in the guilt phase, respondent had sufficient opportunity to present evidence and argument in response.

3. Similarly, to the extent that new issues are raised in the penalty phase, respondent was and will be given a fair opportunity to address the state's evidence. Respondent focuses primarily on the first question the penalty-phase jury must address: whether respondent's conduct in causing the death of the victims "was committed deliberately and with the reasonable expectation that death of the deceased or another would

⁸ Respondent also argues that excluding his mother's alibi testimony violated due process because the trial court applied state law to permit the State to introduce testimony previously admitted at the guilt phase, but denied respondent that same opportunity. Resp. Br. 39-41. As discussed above, respondent simply misreads the statute and his own offer of evidence. Because he sought to introduce his mother's live testimony, his offer was covered under a different portion of the statute than the State's offer of the transcripts of Wilson's and Cathey's testimony during the guilt phase. The statute applies in an even-handed manner and would allow respondent, like the State, to introduce the transcript of any testimony previously admitted in the guilt phase.

result[.]” Or. Rev. Stat. § 163.150(1)(b)(A), set out at State’s Br. App. 2. Respondent is correct that the Oregon Supreme Court has treated “deliberately” in this statute as a more culpable mental state than “intentionally,” which the jury necessarily found in the guilt phase. Resp. Br. 29. However, that difference does not make respondent’s alibi evidence necessary to rebut the state’s evidence that he acted deliberately.

In the guilt phase, the jury necessarily found that respondent acted intentionally in causing the deaths of Rod and Lois Houser and necessarily rejected respondent’s alibi testimony. Establishing in the penalty phase that he was not present at the murders does not respond to the state’s evidence that he acted more than intentionally. Respondent’s alibi evidence, if believed, would compel the penalty-phase jury to conclude that he did not act intentionally, counter to the finding necessarily made beyond a reasonable doubt in the guilt phase.

Respondent attempts to sidestep that problem by asserting that he does not wish to offer the alibi evidence to establish his innocence, but merely to rebut the testimony of his codefendants that he conceived, plotted and choreographed the double homicide. Respondent’s theory appears to be as follows: The State will rely on the prior testimony of Wilson and Cathey to prove he acted deliberately; if he can convince a juror that, instead, he was not involved in the homicides, the juror would be free to disregard the entirety of the testimony by Wilson and Cathey. Resp. Br. 30-33. But a juror who believed respondent on this point would not simply be free to disregard the testimony of Wilson and Cathey with respect to whether respondent acted deliberately. The juror’s belief would necessarily challenge respondent’s conviction itself. Yet, for the reasons discussed in the State’s brief on the merits, any penalty-phase juror’s belief about the validity of the conviction is not at issue. In the penalty phase, the jurors must choose, not between a death sentence and no sentence, but

between a death sentence and a sentence of life in prison. Evidence that takes its force from challenging the defendant's guilt is not relevant to the penalty-phase determination about the appropriate sentence for that guilt and is not required to make the proceeding fair.

4. Nor does the Due Process Clause require that, because the penalty-phase juror will be asked to consider evidence to establish that respondent acted deliberately, respondent must be permitted to counter with evidence that he did not act at all. The Due Process Clause requires that a death sentence not be imposed "on the basis of information which [the capital defendant] had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (the right "to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"). And this Court has focused primarily on procedural safeguards rather than the specific facts the penalty-phase jury must consider. Determining what factors are relevant to the sentencing decision has been left to the states. *Ramos, supra*, 463 U.S. at 999; *Chambers, supra*, 410 U.S. at 302-303 (cautioning that holding narrowly applies to the particular facts and circumstances and does not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures").

This Court has never suggested that due process principles entitle a capital defendant to counter the state's evidence indirectly by challenging—during the penalty phase—the findings necessarily made beyond a reasonable doubt in the guilt phase. Instead, the Court has been concerned with the exclusion of evidence that directly counters the state's case in the penalty phase, but does not revisit the defendant's guilt. Thus, in *Skipper v. South Carolina*, 476 U.S. 1, 5 n. 1 (1986), this Court held it was a denial of due process for the state court to

admit evidence showing future dangerousness, but to exclude the defendant's proffered evidence of good behavior in prison. Similarly, in *Gardner*, 430 U.S. at 362, a plurality of the Court concluded that due process requires a capital defendant be given the opportunity to rebut a presentence report that the state used in support of its case in the penalty phase. *See also Simmons v. South Carolina*, 512 U.S. 154, 161-162 (1994) (where the state relies on future dangerousness in support of imposing the death penalty, due process requires that the defendant be permitted to establish for the jury that he is ineligible for parole); *Ake v. Oklahoma*, 470 U.S. 68, 83-87 (1985) (due process requires an indigent capital defendant be given assistance of experts to respond directly to expert testimony in support of the state's future-dangerousness argument); *Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*) (due process requires defendant be permitted to establish his respective role in the crime).

Just as the Eighth Amendment requires jury consideration of mitigation evidence in capital cases in order for the sentencing determination to reflect moral considerations beyond the finding of guilt, *see State's Br. 20-27*, one reason for heightened due process concerns is the need for greater reliability in the determination that death is the appropriate sentence. *See Ramos, supra*, 463 U.S. at 1004 (no diminution in reliability to instruct the sentencing jury on the governor's commutation power); *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980) (because of severity and finality of death penalty, due process requires greater concern that procedural rules must not diminish the reliability of the guilt determination); *see also Simmons, supra*, 512 U.S. at 172 (Souter, J., concurring) (discussing need for heightened reliability in the determination that death is the appropriate sentence).

No increase in reliability is achieved by giving the capital defendant a second opportunity to challenge factual determi-

nations that were necessarily rejected by the guilt-phase jury beyond a reasonable doubt. Unlike the need for explanations of legal terms used to describe sentences or the requirement that a defendant be permitted to offer evidence of good behavior in prison to counter the state's argument of future dangerousness, respondent's alibi evidence does not increase the reliability that a proper sentence will be imposed. And, unlike the requirement that a defendant be permitted to see and respond to a presentence report used as a basis for determining the sentence, this is not a case in which the State has presented new evidence to the jury but not permitted a fair opportunity for a response.

In short, respondent had an opportunity to present his alibi evidence in the guilt phase, did present his alibi evidence in the guilt phase, and the guilt-phase jury necessarily rejected that evidence in convicting respondent beyond a reasonable doubt. The Due Process Clause does not require the State to give respondent a second opportunity to use that evidence to counter the State's case in the penalty phase in a manner that is inconsistent with the jury's finding of guilt.

D. The State has not mischaracterized how respondent sought to use the alibi evidence and whether the State characterizes the problem with the state court's ruling in terms of "residual doubt" or improper mitigating evidence, the ruling is similarly flawed.

Respondent asserts that the State mischaracterizes his mother's alibi testimony as "residual" or "lingering doubt" evidence, "based on the unfounded speculation that jurors will put the evidence to improper use in violation of appropriate limiting instruction *to consider the evidence solely insofar as it rebuts and undermines the credibility of the codefendants' penalty-phase testimony.*" Resp. Br. 41 (emphasis in original). It is not speculation to suggest the jurors might use alibi evidence for something other than impeachment. The Oregon

Supreme Court simply took respondent at his word that he sought to introduce the alibi evidence *as mitigating evidence*, see J.A. 94, and ruled that jurors must consider the evidence as mitigating evidence addressed to the question whether respondent should receive the death penalty for his convictions. The State has no doubt that jurors are able to properly follow limiting instructions, but the rule of law announced by the Oregon Supreme Court in no way requires that a limiting instruction be given.

Respondent incorrectly asserts that the state court permitted him to introduce the alibi evidence “because of its capacity to rebut and impeach the state’s own case at the *capital-sentencing* phase.” Resp. Br. 42 (emphasis in original). This statement appears to be based on his confusion over the court’s ruling on the evidence offered to impeach Wilson’s and Cathey’s testimony. Pet. App. 38-42. Contrary to respondent’s assertion, it was not “exactly on this ground that the Oregon Supreme Court majority concluded that the ‘alibi testimony’ was *not* ‘residual doubt’ evidence and distinguished it from the type of ‘residual doubt’ evidence this Court addressed in *Franklin v. Lynaugh*, [487 U.S. 164 (1988)].” The majority attempted to distinguish *Franklin* based not on the purpose for which the evidence was offered (for impeachment or as substantive mitigating evidence), but based on whether the defendant sought an *instruction* (as in *Franklin*) or to introduce *evidence* (as in this case). Pet. App. 62-63 fn. 30.

In sum, respondent seeks to present testimony at his penalty-phase retrial that, if believed, necessarily would require the penalty-phase jury to conclude that he was not at the scene of the crimes for which he was convicted, and that he played no role in those crimes. Respondent thus seeks to present testimony that, if believed, necessarily would require the penalty-phase jury to make a factual determination that is at odds with the verdict entered by the guilt-phase jury. Nothing in

this Court's Eighth Amendment or Due Process jurisprudence suggests that such a logically incoherent result is constitutionally required. Because the Oregon Supreme Court nonetheless held that the Eighth Amendment entitles respondent to present "any alibi evidence that [he] proffers" at his next penalty-phase trial, this Court should reverse.

* * * * *

For the foregoing reasons, as well as those in the opening brief, this Court should reverse the Oregon Supreme Court's holding that the Eighth Amendment requires the jury in the penalty phase of a capital case to consider in mitigation evidence that calls into question the defendant's guilt.

Respectfully submitted,
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