No. 17-_____

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

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
District of Arizona

Jessica L. Felker
Counsel of Record
Amanda C. Bass
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
Jessica_Felker@fd.org
Amanda_Bass@fd.org

Attorneys for Petitioner Wood

****CAPITAL CASE****
****NO EXECUTION DATE SCHEDULED****

QUESTIONS PRESENTED

Tremane Wood, a black prisoner of mixed-race heritage, was sentenced to death in the State of Oklahoma for the 2002 stabbing-death of Ronnie Wipf, a white man, in Oklahoma City, Oklahoma.

In 2017, prior to the conclusion of Mr. Wood's federal habeas proceedings, the results of a statistical study on race and capital-sentencing patterns in Oklahoma were first published. The study found that non-whites accused of killing white males are statistically more likely to receive a sentence of death in Oklahoma on that basis alone, and controlling for other aggravating circumstances.

Under Oklahoma's post-conviction statute, a death-sentenced prisoner has just sixty days to file a successor post-conviction application based upon newly available evidence. In compliance with this rule, Mr. Wood filed a post-conviction application in the Oklahoma Court of Criminal Appeals ("OCCA") wherein he argued that this study constituted new evidence that he was convicted and sentenced to death in violation of his rights under the Oklahoma Constitution, as well as under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The OCCA denied Mr. Wood's successor application on the basis of a state procedural bar.

The questions presented by this case are the following:

1. Whether a complex statistical study that indicates a risk that racial considerations enter into Oklahoma's capital-sentencing determinations proves that Mr. Wood's death sentence is unconstitutional under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

2. Whether Oklahoma's capital post-conviction statute, specifically Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), and the OCCA's application of the statute in Mr. Wood's case, denies Mr. Wood an adequate corrective process for the hearing and determination of his newly available federal constitutional claim in violation of his rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption, *supra*. The petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tremane Wood, an Oklahoma death-row prisoner, respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals ("OCCA") which denied his third application for post-conviction relief, along with his accompanying requests for discovery and an evidentiary hearing.

OPINIONS BELOW

The OCCA's order denying Mr. Wood's third application for post-conviction relief, along with his motions for discovery and an evidentiary hearing, are attached hereto in the Appendix at A-1. Also attached hereto in the Appendix at A-2 is the OCCA's order denying Mr. Wood's motion for leave to file a petition for rehearing from the OCCA's denial of his third post-conviction application.

STATEMENT OF JURISDICTION

The OCCA denied Mr. Wood's successor post-conviction application on August 28, 2017. (A-1.) Three weeks later, on September 18, 2017, Mr. Wood filed in the OCCA a motion for leave to file a petition for rehearing[1] from the OCCA's denial

[1] Mr. Wood framed his request as a motion for leave to file a petition for rehearing due to the fact that the OCCA's rules prohibit post-conviction petitioners from petitioning for rehearing. Rule 3.14(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) ("OCCA Rules"); *see also* OCCA Rule 5.5 (explaining that once the OCCA has rendered its decision on a post-conviction appeal, "the petitioner's state remedies will be deemed exhausted" and "[a] petition for rehearing is not allowed and these issues may not be raised in any subsequent proceeding in a court of this State").

of his successor post-conviction application, which that court denied on September 27, 2017. (A-2.)

In compliance with Rule 13(1) of this Court's Rules, Mr. Wood now timely files his petition for a writ of certiorari to review the judgment of the OCCA within ninety days after entry of that court's judgment. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Tremane Wood was sentenced to death for the felony murder of a white man during a motel-room robbery. The victim and another white man had solicited sex from two young women posing as prostitutes and brought them back to their motel room, where the robbery and murder occurred.

Mr. Wood's older brother, a co-defendant, confessed to committing the murder. Throughout Mr. Wood's trial, he and his brother were referred to as black men of mixed-race heritage; Mr. Wood's mother is white and his father was black. (A-3 at 20 n.9.) Given the interracial nature of the crime for which Mr. Wood, a non-white defendant, stood accused, the specter of race was present throughout his trial from the earliest stages.

A. The Study

On April 25, 2017, a novel study of capital sentencing in Oklahoma, entitled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012" ("the Study"), was first published. (A-5.) The central question that researchers Pierce, Radelet, and Sharp set out to answer was whether race—either of homicide defendants and/or victims—"affects who ends up on death row" in Oklahoma. (*Id.* at 212.) In order to answer this question, they studied all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012.[2] (*Id.*) They then compared these

[2] The authors explain that "[u]sing 23 years of homicide data allowed us to use a sample with

cases to the subset of cases that resulted in the death penalty being imposed.[3] (*Id.*) Importantly, the data set used by researchers included, in addition to the race of the victim, information on "the number of homicide victims in each case" as well as "what additional felonies, if any, occurred at the same time as the homicides." (A-5 at 216.) Pierce, Radelet and Sharp explain that "[t]hese variables are key" to the Study's analysis and conclusions. (*Id.*)

Researchers found that 3.06 percent of homicides with known suspects that occurred in Oklahoma between 1990 and 2012 resulted in the imposition of a death sentence. (A-5 at 217.) Most troublingly, they also found that "[h]omicides with white victims *are the most likely* to result in a death sentence" in Oklahoma. (*Id.* (emphasis added).) To be more specific: researchers found that 3.92 percent of homicides with white victims resulted in death sentences compared to just 1.88 percent of homicides that involved nonwhite victims. (*Id.*) In other words, a criminal defendant in Oklahoma is over *two times* more likely to receive a sentence of death if the victim he is accused of killing is white than if the victim is nonwhite.[4]

In addition to this, researchers found that of those homicides with exclusively male victims, 2.26 percent of cases with male victims who are white resulted in death sentences compared to just .77 percent of cases with male victims who are

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enough cases in it to detect patterns." (A-5 at 215.) Throughout this twenty-three year period, Oklahoma recorded "some 5,090 homicides, for an annual average of 221." (*Id.*)

[3] Out of the final sample size of 4,668 cases, researchers identified 153 death sentences imposed on 151 defendants for homicides committed between 1990 and 2012. (A-5 at 216.)

[4] "The probability of a death sentence is [ ] 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites." (A-5 at 218.)

black. (*Id.* at 219-20.) That is, a defendant, like Mr. Wood, accused of killing a white man in Oklahoma is nearly *three times* more likely to receive a death sentence than if his victim were a nonwhite man. (*Id.*) When looking at the combined effect of both a homicide suspect's and victim's race and ethnicity, researchers also discovered the following:

> The percentage of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences was 1.9 and 1.8 percent death sentence respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence compared to 5.8 percent of nonwhites suspected of killing white victims.

(*Id.* at 219.) In other words, nonwhites, like Mr. Wood, are nearly *three times* more likely to receive a sentence of death where the victim who they are accused of killing is white than if the victim is nonwhite; furthermore, minorities like Mr. Wood are *two times* more likely to receive a death sentence where their alleged victim is white than are white defendants accused of killing white victims.

Even where researchers controlled for aggravating factors such as "the presence of additional felony circumstances and the presence of multiple victims," they found that cases like Mr. Wood's, which involve a white male victim, "are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims." (*Id.* at 221-22.)

If the imposition of a death sentence is indeed supposed to reflect a "community's outrage" at the crime that a defendant stands accused of committing,

Furman v. Georgia, 408 U.S. 238, 303 (1972) (Brennan, J., concurring), then this Study demonstrates that communities in Oklahoma—a majority-white state[5]—are significantly more outraged when white lives are lost than when nonwhite lives are forfeited. This is precisely the kind of race-based discrepancy in meting out death that is repugnant to both modern societal mores and to the United States Constitution. *McCleskey v. Kemp*, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting) (noting that racial disparity in capital sentencing is "constitutionally intolerable"). In light of this, Mr. Wood's death sentence cannot stand.

B. The Invidious Presence of Race

The race of the victims and the interracial nature of Mr. Wood's crime was never far from the surface in his case. On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser, two white men from rural Montana, celebrated New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (A-3 at 11.) While there, the men met and socialized with two young women, Brandy Warden and Lanita Bateman. (*Id.*) After the Bricktown Brewery closed for the night, Warden and Bateman agreed, after speaking with Mr. Wood and his elder brother, Zjaiton "Jake" Wood, to accompany the men to a motel. (*Id.* at 11-12.)

Once inside the motel room, the four agreed on $210.00 in exchange for sex. (*Id.* at 12.) Bateman pretended to place a call to her mother. (*Id.*) In actuality,

[5] "Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population." (*Id.* at 21 n.15.)

however, she called Jake.[6] (*Id.*) Soon thereafter, Jake and Mr. Wood arrived at the motel room, and Jake began to bang on the door. (*Id.*) Jake and Mr. Wood ran into the motel room, and Bateman and Warden ran out outside. (*Id.*) Jake approached Kleinsasser with a gun; Mr. Wood, meanwhile, approached Wipf with a knife, and he began to put up a fight. (*Id.*) Jake left Kleinsasser in order to assist Mr. Wood, who struggled with Wipf. (*Id.*) After Mr. Wood left to demand more money from Kleinsasser, he returned to the struggle and Kleinsasser fled the room. (*Id.*)

Wipf died from a single stab wound to the chest. (*Id.* at 12.) At Mr. Wood's trial, Kleinsasser was unable to identify who had stabbed Wipf—Jake or Mr. Wood. (*Id.*) Jake testified that he grabbed the knife and stabbed Wipf in the chest. (*Id.*) The jury found Mr. Wood guilty on all counts and sentenced him to death on the murder charge, and the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 12-13.)

The prosecutors and the trial court repeatedly emphasized that the victim, Ronnie Wipf, as well as his friend and the State's lead witness, Arnold Kleinsasser—both of whom were white—were two young men from rural Montana. (*Id.* at 22.) Mr. Wood and his brother were only a couple of years older than the victims, but nonetheless, the court repeatedly told prospective jurors during voir dire that Wipf and Kleinssasser were "young men from Montana," and even referred

[6] Petitioner will refer to Jake Wood as "Jake" and to Tremane Wood as "Mr. Wood" throughout this petition for the purpose of distinguishing them.

to them more than once as "the Montana boys," but never referred to Mr. Wood or his brother as boys. (*Id.*) At sentencing, the prosecutor emphasized that Mr. Wood's age, twenty-two years old at the time of the crime, was irrelevant as far as mitigation.

The prosecutor, a white man, also raised the specter of race at least twice during the proceedings. When a witness utilized an accent different than his, he told jurors that he spoke only "red neck." (*Id.* ("I don't understand anything but red neck.").) This comment also communicated to jurors that the prosecutor saw himself as a "red neck"—a term not without particularized historical and racialized meaning. In contrast, the prosecution asserted during closing arguments that a witness who was present at the motel on the night of the crime must have overheard Mr. Wood and his brother there because that witness claimed to have heard "black voices." (*Id.*)

In describing Wipf and Kleinsasser, the prosecutors often highlighted their rural Montana heritage as well as their background as Hutterites. (*Id.*) At one point, the prosecutor described Kleinsasser as just "a rural kid from Montana . . . . Don't judge him too harshly." (*Id.*)

As an additional matter, Judge Ray Elliott, who presided over Mr. Wood's trial and an evidentiary hearing on an ineffective-assistance-of-counsel claim brought on direct appeal, displayed troubling attitudes towards people of color, which came to light in 2011. (*Id.* at 22-23.) According to the affidavit of Michael S.

Johnson, Judge Elliott was overheard referring to Mexicans as "nothing but filthy animals" who "deserve to all be taken south of the border with a shotgun to their heads" and "if they needed volunteers [to do so] that he would be the first in line." Nolan Clay, *Attorney's affidavit expands on claims of unfairness against judge in Ersland case*, NewsOK (Jan. 7, 2011), http://newsok.com/article/3530111; *see also* Nolan Clay, *Judge in OKC pharmacist's case to announce ruling Monday*, NewsOK (Dec. 8, 2010), http://newsok.com/article/3521788 (noting that Judge Elliott's former clerk, Isla Box, testified that "the judge also said . . . [i]f they needed somebody to hold a shotgun to their heads to get them back across the border, he'd be the first to volunteer," and that Judge Elliott "has made other derogatory statements about Hispanics"). Judge Elliott even admitted that he used the racial epithet "wetbacks" to refer to Mexicans. *Id.*; *see also* American Bar Association Journal, *Okla. Judge Admits 'Wetback' Comment, But Denies Calling Workers 'Filthy Animals'* (Jan. 7, 2011).

While Judge Elliot made these remarks in 2011, a few years after the judge presided over an evidentiary hearing in Mr. Wood's case and several years after Mr. Wood was sentenced to death, they are nonetheless troubling. Indeed, Judge Elliott's comments raise concerns both as to his attitude towards people of color both times that he presided over Mr. Wood's case, and his impartiality as a judge in cases, like Mr. Wood's, in which racial issues are implicated.

Significantly, when jurors were polled after announcing its decision to recommend that Mr. Wood receive a death sentence, the jury foreperson, a black woman, said, "Yeah, besides the one. I didn't - - but everybody else did and so I - -" (*Id.* at 23.) When asked to repeat herself, she said: "I signed the one for death because everybody was waiting on me. I didn't want everyone to be here." (*Id.*) Judge Elliot, then said, "My question is are those your verdicts? . . . Because if they are not, I will send you back up. And you will keep going. Are those your verdicts?" (*Id.*) In response to the court, the jury foreperson said "Yes." (*Id.*)

All of these circumstances demonstrate how racial dynamics cast a shadow over Mr. Wood's case—which involved an interracial crime—and infected the proceedings from the very get-go.

C. Proceedings Below

On June 23, 2017, Mr. Wood timely filed a third application for post-conviction relief in the Oklahoma Court of Criminal Appeals. (A-3.) Therein, he argued that the Study constituted previously unavailable evidence that, in Oklahoma, the race of the victim who he was accused and convicted of killing, combined with his own race, increased the likelihood that he would be sentenced to death in violation of his rights under the Oklahoma Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Id.* at 9; *see also id.* at 13, 24-38.) Mr. Wood set out in considerable detail why he overcame

Oklahoma's successor post-conviction procedural bar[7] (*see id.* at 15-18), explaining that he could not have raised this claim previously either on direct appeal or in his initial post-conviction application because its factual basis became available only on April 25, 2017 with the publication of the Study (*id.* at 16). Mr. Wood argued further that the facts underlying his claim were sufficient to establish that but for the race of the victim and his own race, he would not have been sentenced to death. (*Id.* at 18.) While he maintained that he was entitled to sentencing relief on the record before the OCCA, Mr. Wood asked the OCCA to grant his requests for discovery and an evidentiary hearing if that court "determine[d] that further factual development is necessary." (*Id.* at 33.)

In a three-page order, the OCCA, on August 28, 2017, denied Mr. Wood's third application for post-conviction relief, along with his related motions for

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[7] Okla. Stat. Ann. tit. 22, § 1089, which governs post-conviction applications in capital cases and, by its express terms, was intended to "expedite" them, provides that the OCCA "may not consider the merits or grant relief" based on a subsequent post-conviction application unless:

> (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application … because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
>
> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Notably, Okla. Stat. Ann. tit. 22, § 1086, which governs *non*-capital post-conviction applications, imposes no such limitations on subsequent post-conviction applications, providing only that "[a]ny ground finally adjudicated or not so raised … may not be the basis for a subsequent application, unless the court finds a ground for relief asserted *which for sufficient reason was not asserted* or was inadequately raised in the prior application." Okla. Stat. Ann. tit. 22, § 1086 (emphasis added).

discovery and an evidentiary hearing. (A-1.) The OCCA reasoned that its denial of a successor post-conviction application in a case decided only days earlier, *Sanchez v. State*, No. PCD-2017-666, 2017 OK CR 22, __P.3d__ (Okla. Crim. App. Aug. 22, 2017), "is dispositive and controls our decision in this case." (*Id.* at 3.) "For the reasons explained in *Sanchez*," the court stated, "we find Wood's claim is procedurally barred." (*Id.*)

On September 18, 2017, Mr. Wood filed in the OCCA a motion for leave to file a petition for rehearing wherein he argued that rehearing was necessary because the OCCA's order denying his successor post-conviction application had overlooked issues dispositive of the matter before it, and was premised upon erroneous factual and legal determinations. (A-4.) The OCCA denied Mr. Wood's request to file a petition for rehearing on September 27, 2017. (A-2.) This petition for a writ of certiorari follows.

REASONS FOR GRANTING CERTIORARI

I. Compelling evidence demonstrates that Mr. Wood faced a statistically greater risk of being sentenced to die by the mere happenstance that the victim who he was accused of killing was white and that he is black, in direct contravention of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This Court has long recognized that race is among the factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *see also Rose v. Mitchell*, 443 U.S. 545,

555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice."). Indeed, this Court recently reaffirmed a "basic premise of our criminal justice system," which is that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). For "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice").

In *McCleskey v. Kemp*, this Court entertained an Eighth and Fourteenth Amendment challenge to a sentence of death brought by Warren McCleskey—an African-American prisoner on death row in Georgia at the time. 481 U.S. 279 (1987). The central question before this Court was "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." *Id.* at 282-83.

In support of his constitutional challenges, Mr. McCleskey put before this Court a statistical study ("the Baldus study") that demonstrated a stark disparity in the imposition of death sentences in Georgia "based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. The Baldus study indicated that "defendants charged with killing white persons received the death penalty in 11% of the cases," however "defendants charged with killing blacks

received the death penalty in only 1% of the cases." *Id.* Taking into account the races of both the defendant and victim, the study also demonstrated that "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* The Baldus study also determined that "prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." *Id.* at 287. In sum, "the Baldus study indicate[d] that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty." *Id.*

Based on this statistical study, Mr. McCleskey challenged the constitutionality of Georgia's capital sentencing statute generally as violating the Fourteenth Amendment's Equal Protection Clause. *Id.* at 291. First, he contended that the evidence demonstrated that "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." *Id.* Second, Mr. McCleskey argued that he, himself, was discriminated against as a black defendant accused of killing someone white. *Id.* at 292.

This Court articulated the standard that would guide its analysis of Mr. McCleskey's Fourteenth Amendment claim as follows: "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *Id.* (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). "Thus, to prevail under the Equal Protection Clause," this Court explained, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* (emphasis in original). This Court rejected Mr. McCleskey's argument that the Baldus study, standing alone, "compel[led] an inference that his sentence rest[ed] on purposeful discrimination." *Id.* at 293.

This Court also rejected Mr. McCleskey's argument that "the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment." *Id.* at 299. In this Court's view, the statistics that Mr. McCleskey had put forward "[a]t most . . . indicate[ ] a discrepancy that appears to correlate with race." *Id.* at 312. And rather than creating a constitutionally significant risk of racial prejudice influencing Georgia's capital-sentencing scheme, this race-based discrepancy in sentencing is "an inevitable part of our criminal justice system," this Court pronounced. *Id.*

In the thirty years since *McCleskey* was decided, growing support has emerged for the principle that racial disparities are not simply "an inevitable part" of the U.S. criminal justice system. Rather, these disparities persist so long as our society and institutions are willing to condone them. Indeed, this Court has begun

to repudiate the "inevitability of racism" line of thinking stemming from *McCleskey* in its recent jurisprudence. In the 2017 case of *Peña-Rodriguez v. Colorado*, for example, this Court emphasized that "[r]acial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." 137 S. Ct. 855, 868 (2017) (internal quotation marks omitted). Likewise, in *Buck v. Davis* this Court reversed a death sentence due to the invidious role that race "may" have played in its imposition. 137 S. Ct. at 778. This Court explained that "departure[s] from [the] basic premise of our criminal justice system"—that "[o]ur law punishes people for what they do, not who they are"—are "exacerbated" where "it concern[s] race." *Id.* The time has come for this Court to recognize that the Constitution cannot tolerate, nor treat as "inevitable," racial disparities—or *any* risk of racial bias—in the imposition of "the most awesome act that a State can perform"—that is, the deliberate taking of another human life. *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting).[8] *McCleskey* must therefore be overruled.

Even under *McCleskey*, however, Mr. Wood is entitled to relief. For unlike the petitioner in *McCleskey* who relied on statistical evidence of racial disparities in Georgia's capital sentencing system *alone* to establish a violation of his rights under the Eighth and Fourteenth Amendments, Mr. Wood is relying not just upon the new statistical study demonstrating how race dictates capital sentencing outcomes in

[8] Justice Powell, who provided the decisive vote against Mr. McCleskey and authored the majority opinion, has since recognized that his vote, and the reasoning that informed it, was wrong. John C. Jeffries, Justice Lewis F. Powell, Jr.: A Biography 451 (1994).

Oklahoma. Rather, in addition to this new statistical evidence, Mr. Wood is also relying upon the ways in which "the decisionmakers in *his* case"—from prosecutors, and judges, to the jurors who ultimately sentenced him to die—"acted with discriminatory purpose." *McCleskey*, 481 U.S. at 293. Indeed, Mr. Wood has set out above how race both infected and "cast[ ] a large shadow," *id.* at 321-22 (Brennan, J., dissenting), over his case from voir dire through the sentencing proceedings. *See supra*, 6-10.

This Court's decisions since *Furman* have delimited "a constitutionally permissible range of discretion in imposing the death penalty," *McCleskey*, 481 U.S. at 305, that is consistent with the Eighth Amendment guarantee against cruel and unusual punishment. This Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner.")

While this Court has upheld the propriety of a capital sentencer's discretion to impose a sentence of death under the appropriate circumstances, it has unequivocally condemned race playing any role in a sentencer's exercise of that

discretion. *Zant*, 462 U.S. at 885 (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck*, 137 S. Ct. at 778; *Mitchell*, 443 U.S. at 555 ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital-sentencing determinations are rendered "arbitrary and capricious" in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

As set forth in great detail above, the risk that racial considerations impacted both prosecutors' pursuit of the death penalty against Mr. Wood in the first instance, and jurors' decision to condemn him to die is "constitutionally unacceptable." *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986); *see also McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one"); *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (observing that a sentence of death cannot withstand constitutional muster whenever the circumstances under which it has been rendered "creat[e] an unacceptable risk that

'the penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).

Under the Sixth Amendment to the Constitution, a criminal defendant is guaranteed the right to an impartial jury. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…"); *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that the Fourteenth Amendment to the Constitution also guarantees a fair and impartial jury as "a basic requirement of due process" (internal quotation marks omitted)). However as set forth, *supra*, Mr. Wood's race and that of the man who he stood accused of killing infected his capital prosecution from the very earliest stages and unconstitutionally compromised the partiality of the jury that ultimately sentenced him to death.

A jury is "impartial" within the meaning of the Sixth Amendment guarantee where each member of the jury does not favor a party or an individual, but rather enters jury service "indifferent." *Irvin*, 366 U.S. at 722 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). This Court has emphasized that special care is required to safeguard jurors' impartiality, particularly in capital cases, and to guard against the operation of racial bias. "Racial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S. Ct. at 868 (internal quotation marks omitted). "Permitting racial

prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Id.*

In *Turner*, this Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36-37. In reaching this conclusion, four justices recognized that, "because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Id.* at 35) (plurality opinion of White, J., joined by Blackmun, Stevens, and O'Connor, JJ.). Moreover, "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." (*Id.*) Justice Brennan similarly concluded that "[t]he reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent." (*Id.* at 39) (Brennan, J., concurring in part and dissenting in part) (explaining that he would go further than the majority and vacate the conviction as well).

While this Court in *Turner* expressed the hope that the individual questioning of jurors during voir dire could help to eliminate the risk of racial prejudice influencing trial and sentencing outcomes, the study of death-sentencing patterns in Oklahoma for the time period in which Mr. Wood was sentenced to die

demonstrates that racial prejudice continues to play a statistically significant role in shaping capital-sentencing outcomes in Oklahoma. That is, the Study demonstrates that capital juries in Oklahoma impose death sentences far more often on nonwhite defendants, like Mr. Wood, who are accused of killing white men.

The demonstrable increased likelihood that an individual will be sentenced to death in Oklahoma based on race raises the question posed by the *Turner* plurality: "at what point does that risk become[ ] constitutionally unacceptable[?]" 476 U.S. at 36 n.8 (plurality opinion). Justice Marshall's opinion, concurring and dissenting in part, which was joined by Justice Brennan, agreed with the plurality's assessment of the "plain risk" of racial prejudice in any interracial crime involving violence. *Id.* at 45 (Marshall, J., concurring and dissenting in part) ("As the Court concedes, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence.").

Here, the "rather large disparities in the odds of the death sentence" in Oklahoma for those accused of killing a white person, surpasses the constitutionally acceptable tipping point. (A-5 at 222.) Where Mr. Wood's jury was *two times* more likely to sentence him to death based on the race of his alleged victim *alone*, and *three times* more likely to do so simply because Mr. Wood is also nonwhite,[9] his right to that impartial jury guaranteed to all criminal defendants, particularly those on

[9] That Mr. Wood confronted a greater statistical likelihood of being condemned to die because of the immutable quality of his skin color indicates that, in Oklahoma, Mr. Wood's race—like that of the victim—functions as a *de facto* aggravating circumstance.

trial for their life, has been transgressed. *Turner*, 476 U.S. at 35 (explaining that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence[,]" and "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" (internal quotation marks omitted)). Furthermore, the record evidence detailed *supra*, indicates that racial biases tangibly tainted the fairness of Mr. Wood's trial and sentencing proceeding. *Id.* at 41 (Marshall, J., concurring in judgment and dissenting in part) ("[T]he opportunity for racial bias to taint the jury process is not 'uniquely' present at a sentencing hearing, but is equally a factor at the guilt phase of a bifurcated capital trial."). The Sixth Amendment guaranteed to Mr. Wood a jury comprised of men and women whose minds were open, rather than whose attitudes were tainted by racial prejudice. Mr. Wood was denied this most elemental right, rendering his death sentence a violation of the Constitution.

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

In its three-page order denying Mr. Wood relief, the OCCA found the claims in his third post-conviction application defaulted on state-procedural grounds, reasoning that its denial of a successor post-conviction application in an earlier case, *Sanchez v. State*, "is dispositive and controls our decision in this case." (A-1 at

3.) The OCCA denied Sanchez's successor post-conviction application on two grounds.

First, the OCCA concluded that Sanchez "has not shown sufficient specific facts to establish that the identified patterns of race and gender disparity were not ascertainable through the exercise of reasonable diligence on or before his original post-conviction application in 2009." (A-6 at 4 (internal quotation marks omitted).) "Post-conviction relief on this claim is therefore procedurally barred." (*Id.*)

Second, the OCCA determined that Sanchez's "proffered evidence, even 'if proven and viewed in light of the evidence as a whole,' is insufficient 'to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death,' as required for post-conviction review under 22 O.S. 2011, § 1089(D)(8)(b)(2)." (*Id.* at 4-5.) Citing this Court's decision in *McCleskey*, the OCCA found that "[c]urrent research, indicating rather large disparities in the odds of a death sentence that correlated with the gender and race of the victim in Oklahoma homicides generally over the last two decades, is simply *not* clear and convincing evidence that the prosecutors who sought, or the jury that imposed, this death sentence improperly considered race and/or gender in making complex discretionary decisions." (*Id.* at 5.) "[Petitioner's] claim is therefore procedurally barred under 22 O.S. 2011, § 1089(D)(8)(b)(2)." (*Id.* at 5-6.) In Mr. Wood's case, the OCCA stated that "[f]or the reasons explained in *Sanchez*, we find Wood's claim is

procedurally barred." (A-1 at 3.) This state procedural ruling is neither adequate nor independent, and therefore does not bar this Court's consideration of the merits of his claims.

A. The OCCA's determination regarding the availability of data was not an adequate state law ground.

In a motion asking for permission to file a petition for the rehearing of his post-conviction application, Mr. Wood argued that rehearing was necessary because the OCCA's order denying his successor post-conviction application had overlooked issues dispositive of the matter before it and was premised upon erroneous factual and legal determinations. (A-4.) More particularly, Mr. Wood outlined how the OCCA had failed to consider the ways in which his successor post-conviction application "differed on its factual basis, argument, and procedural posture from the successive application filed in *Sanchez*." (*Id.* at 1.) There, Mr. Wood pointed out the factual and legal errors of the OCCA's determination that he had not shown that the evidence underlying the Study was previously unascertainable within the meaning of Oklahoma's successor post-conviction statute.

For example, the OCCA held in *Sanchez* that Sanchez had failed to make the required showing that the data underlying the Study were unascertainable through the exercise of reasonable diligence at the time of *his* first post-conviction application in 2009. (A-6 at 4.) The OCCA denied Mr. Wood's application relying on its factual finding that Sanchez had not demonstrated the data were unavailable in

2009. Mr. Wood's first post-conviction application, however, was filed in 2007. (A-4 at 4-5.) The finding in *Sanchez* that Sanchez did not prove the data were unavailable in 2009 was largely irrelevant and not dispositive to the question of whether Mr. Wood had demonstrated in his application that the data were unavailable in 2007.

In addition, the OCCA relied on the facts that Sanchez had presented in his application to demonstrate that the data were previously unascertainable. Sanchez failed to provide much if any evidence of the novelty of the data. (A-4 at 5.) Mr. Wood's application, on the other hand, provided a detailed explanation of how the data for the Study were collected to demonstrate that Mr. Wood's post-conviction counsel—a solo practitioner—did not have the expertise, time, or resources to collect—much less analyze—the statewide data underlying the Study. (*Id.* at 2-3.) When Mr. Wood pointed out the error in the reliance on *Sanchez* to the OCCA in a motion for leave to file a petition for rehearing, the OCCA simply denied Mr. Wood's request, stating that petitions for rehearing are prohibited in capital cases. (A-2.)

In order for a state procedural rule to constitute an adequate bar to this Court's review of a federal constitutional claim, that rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)); *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).

A state procedural rule fails this requirement, thus giving this Court jurisdiction to review the state-court judgment as well as merits of the federal constitutional question, where "discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law." *Walker v. Martin*, 562 U.S. 307, 320 (2011) (internal quotation marks omitted); *see also id.* (citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990) (noting that a state ground "applied infrequently, unexpectedly, or freakishly" may "discriminat[e] against the federal rights asserted" and therefore rank as "inadequate"). This is precisely what occurred in Mr. Wood's case, rendering the OCCA's rejection of his successor post-conviction application inadequate to shield its judgment from this Court's review.

Counsel for Mr. Wood has found not a *single* case where the OCCA measured "fact[s] . . . not ascertainable through the exercise of reasonable diligence" *not* from the date of a timely filed initial post-conviction application, as required under Okla. Stat. Ann. tit. 22, §1089(D)(8)(b), but rather from a later point in time, as the OCCA did here. Indeed, in all of the cases that counsel for Mr. Wood has located in which the OCCA interprets § 1089(D)(8)(b)'s diligence requirement, the OCCA in every case has measured diligence from the time at which a petitioner's first post-conviction application was filed. *See, e.g.*, *Duvall v. Ward*, 957 P.2d 1190, 1191

(Okla. Crim. App. 1998) (declining to reach the merits of claims raised in a subsequent application for post-conviction relief because "Petitioner has failed to present sufficient specific facts establishing that these claims could not have been presented in a previously considered application for post-conviction relief"); *Torres v. State*, 58 P.3d 214, 215 (Okla. Crim. App. 2002) (reciting the rule that the court "may not consider the merits of a subsequent application for post-conviction relief 'unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a timely original application'"); *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010) (holding that matters of subject matter jurisdiction can never be waived and so addressing that issue regardless of timing in collateral review, but noting that all other claims in successor post-conviction applications are subject to the requirement that the factual and legal bases upon which it is based were not available and could not have been presented in a timely original application); *Smith v. State*, 245 P.3d 1233, 1236 (Okla. Crim. App. 2010) (refusing to consider a claim in a successor post-conviction application "unless the claim could not have been presented previously in a timely application for post-conviction relief because the factual basis for the claim was not available or ascertainable through the exercise of reasonable diligence on or before that date").

Moreover, it violates Mr. Wood's right to due process for the OCCA to fail to consider the evidence and argument Mr. Wood provided. The OCCA's reliance on

Sanchez to deny Mr. Wood's application, and its decision to gauge Mr. Wood's diligence for the purposes of § 1089(D)(8)(b) not from the date of his first post-conviction filing in 2007, but rather from the time that Sanchez's first post-conviction application was filed *two years later*, and for the OCCA to rely only on the evidence Sanchez provided, renders its ruling "unexpected" and "freakishly" applied and, thus, inadequate to bar this Court's entertainment of Mr. Wood's federal constitutional claim.[10] *Prihoda*, 910 F.2d at 1383.

B. The OCCA's alternate ruling—that Mr. Wood did not show a likelihood of success--was not adequate nor independent of federal law.

The OCCA's rejection of Mr. Wood's successor post-conviction petition rested on the inadequate ground described *supra* but also on the ground that the Study 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.) This ground is not independent of the merits of the underlying federal constitutional claim.

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[10] As an additional matter, courts around the country, unlike the OCCA here, recognize that newly published studies may constitute previously unavailable evidence. *See e.g.*, *State v. Edmunds*, 746 N.W.2d 590, 595 (Wis. 2008) (holding that significant developments in medical research and literature on the so-called shaken baby syndrome in the ten years since trial and post-conviction proceedings ended constituted newly discovered evidence and entitled the defendant to a new trial); *State v. Celaya*, No. 2 CA-CR 2013-0554-PR, 2014 WL 4244049, at *5-6 (Ariz. Ct. App. Aug. 27, 2014) (unpublished) (requiring the post-conviction court to hold an evidentiary hearing to determine if the 2009 National Academy of Sciences report "'debunking the certainty of firearms comparison analysis" constituted newly discovered evidence" under the state's post-conviction rules); *State v. Behn*, 375 N.J. Super. 409, 429 (App. Div. 2005) (holding that the results of the firearms-examination studies constituted newly discovered evidence since the studies were not published until after defendant's trial).

Where an ambiguous state-court decision "appears to rest primarily on federal law, *or to be interwoven with the federal law*," then this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (emphasis added). In such cases, this Court applies "a conclusive presumption of jurisdiction" due to the fact that the state procedural ground of decision cannot be said to be "independent" of federal law. *Coleman v. Thompson*, 501 U.S. 722, 733 (1991).

Here, to overcome the procedural hurdle to a successor post-conviction application under Oklahoma law, Mr. Wood had to demonstrate that, in addition to the facts underlying the new claim being previously unascertainable, those facts "if proven" must be "sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have . . . rendered the penalty of death." Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Whether the Study established by clear and convincing evidence that the prosecutor, the judge, or the jury impermissibly considered race in Mr. Wood's is "interwoven" with the merits of his federal constitutional claim. That is, the OCCA's decision that he had failed to overcome this second procedural hurdle is not independent of federal law as it is "interwoven" with questions concerning the Eighth Amendment's prohibition on arbitrary considerations, like race, influencing capital sentencing outcomes, as well as the Fourteenth Amendment's Due Process and Equal Protection guarantees.

Accordingly, neither parts of the procedural bar applied by the OCCA in Mr. Wood's case are sufficient to prevent this Court from reaching the merits of his constitutional claim. As will be discussed in detail below, the state procedural law is also entirely inadequate because it fails to afford an appropriate corrective process and is therefore unconstitutional.

III. Oklahoma's capital post-conviction statute, specifically Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), deprives Mr. Wood of an adequate corrective process for the hearing and determination of his newly available federal constitutional claim in violation of his rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

The merits of Mr. Wood's claim that race unconstitutionally infiltrated his capital case should be considered by this Court because the OCCA's decision did not rest on an adequate and independent state court ground. In addition, Oklahoma's capital post-conviction statute's limitation on successor post-conviction applications—specifically, Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)—is, in and of itself, unconstitutional. This is because that statute, and the OCCA's application of it in the instant matter, fails to provide Mr. Wood with *any* corrective judicial remedy whereby he may seek to have his newly available federal constitutional claim heard before the State takes his life. Furthermore, the statute treats Mr. Wood and other capital defendants unequally to noncapital defendants, making the successor post-conviction application procedural requirements much more onerous on the condemned. Such a macabre state of affairs cannot be reconciled either with

this Court's Eighth Amendment jurisprudence or the Fourteenth Amendment's Due Process and Equal Protection guarantees.

A. This case presents the question that this Court took up, but never answered, in *Case v. Nebraska*—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.

In *Case v. Nebraska*, 381 U.S. 336 (1965), this Court granted certiorari to decide "whether the Fourteenth Amendment requires that States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Case*, 381 U.S. at 337. This Court never answered that question, however, because while certiorari was pending, the Nebraska legislature enacted a statute that, facially, provided an avenue through which the petitioner in *Case* could have the merits of his federal constitutional claim heard by the courts of that state. *Id.* at 337. The intervening change in Nebraska law thus rendered the matter before this Court moot.

Nearly twenty years later, in *Superintendent v. Hill*, 472 U.S. 445 (1985), this Court recognized, but notably declined to reach, the open question of whether the Fourteenth Amendment's Due Process Clause requires state judicial review of state prisoners' federal constitutional claims. *Id.* at 450. In the more than thirty years since *Hill*, and the more than half-century since *Case*, the scope of states' obligation to provide collateral review of federal constitutional claims remains "shrouded in [ ] much uncertainty." *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J.,

concurring). This Court should thus take up the important constitutional question presented by Mr. Wood's case that it has yet to address, but which its jurisprudence strongly suggests must be answered affirmatively.

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (per curiam). The petitioner in *Mooney* argued before this Court, as Mr. Wood does here, that newly discovered evidence established a violation of his constitutional rights, and that the State of California had violated his due process rights by failing to provide any corrective judicial remedy whereby he could seek to have his federal claim heard and his conviction set aside. *Id.* at 110. This Court took up these "serious charges," *id.*, but ultimately denied the petition without prejudice because the petitioner had not shown "[t]hat corrective judicial process . . . to be unavailable." *Id.* at 115. More than a decade later, this Court, in *Carter v. Illinois*, 329 U.S. 173, 175 (1946), articulated the following principle: "[a] State must give one to whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface." This principle applies with even greater force where the deprivation that the State seeks to exact is one's life. *Id.* at 186 (Murphy, J., dissenting) ("When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society is here attempting to take

away 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.").

Without squarely addressing the question presented here, this Court in *Young v. Ragen*, 337 U.S. 235 (1949), explained that there is a "requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights." 337 U.S. at 239. While recognizing "the difficulties" that States might confront in "adapting state procedures to [this] requirement," this Court nonetheless stated that "[this] requirement must be met." *Id.* Nearly twenty years later, when this Court took up—but failed to answer—this very question in *Case*, Justices Brennan and Clark concurred, putting forth their view as to why the Constitution mandates full, fair, and adequate state post-conviction processes for the vindication of federal constitutional guarantees. *Case*, 381 U.S. at 338 (Clark, J., concurring) (declaring that the "wide variety" of then-current post-conviction techniques had proven "entirely inadequate" to vindicate federal rights, leading to a "tremendous increase" in federal habeas filings); *id.* at 344 (Brennan, J., concurring) ("Our federal system entrusts the States with *primary* responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well."); *id.* at 346-47 (arguing that "desirable attributes of a state postconviction procedure" include that they "be swift and simple and easily

invoked," and "should be sufficiently comprehensive to embrace *all* federal constitutional claims" (emphasis added)).

In light of these controlling principles, Oklahoma's capital post-conviction statute, Okla. Stat. Ann. tit. 22, § 1089, fails to provide an adequate corrective process as required by the Constitution both generally and as applied to Mr. Wood's case.

This Court's jurisprudence makes it clear that "if a State establishes postconviction proceedings, [then] these proceedings must comport with due process." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 293 (1998) (Stevens, J., concurring); *see also Yates v. Aiken*, 484 U.S. 211, 217-18 (1988) (per curium) (unanimous court making clear that state post-conviction proceedings are subject to due process protections). Likewise, this Court has recognized that Equal Protection guarantees extend to state collateral proceedings. *Smith v. Bennett*, 365 U.S. 708, 712-713 (1961) ("We repeat what has been so truly said of the federal writ [of habeas corpus]: 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution. When an equivalent right is granted by a State, financial hurdles must not be permitted to condition its exercise." (citation omitted)); *id.* at 714 ("Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each."); *see also Lane v. Brown*, 372 U.S. 477, 484 (1963) (noting that in *Smith*, the Supreme

Court "made clear that [Equal Protection] principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings").

The question of "what process is due," *Woodard*, 523 U.S. at 293 n.3 (Stevens, J., concurring) (emphasis omitted), to state prisoners seeking to vindicate their federal rights, was answered, in part, by this Court in *Young*. There, this Court announced the requirement that states give prisoners "some clearly defined method by which they may raise claims of denial of federal rights." 337 U.S. at 239. "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois," this Court stated, "we wish to be advised of that fact upon remand of this case." *Id.* More generally, Due Process also requires, at *minimum*, that before the State can deprive a defendant of his life, a defendant must receive notice of the State's grounds for denying review of his federal constitutional claim, and an opportunity to be heard where those grounds turn out to be factually and materially incorrect. *See Woodard*, 523 U.S. at 290 (O'Connor, J., concurring) (recognizing that Due Process protections would be transgressed where capital petitioner failed to receive notice of a clemency hearing and an opportunity to participate in clemency interview prior to his execution, but finding no such transgression to have occurred); *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (due process requires "notice and an opportunity to be heard" before one is deprived of a constitutionally protected interest); *Woodard*, 523 U.S. at 291 (Stevens, J., concurring) ("There is, however, no

room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.").

B. Oklahoma's statutory restrictions on successor post-conviction applications for capital defendants are unconstitutional.

In light of these controlling principles, Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), by its express terms and through its application by the OCCA in Mr. Wood's case, violates Mr. Wood's rights under the Fourteenth Amendment. First, under this statutory provision, which Oklahoma reserves only for those who it seeks to execute, Mr. Wood has no "clearly defined method" by which to raise his newly available federal constitutional claim that the race of his alleged victim, and his own race, predisposed him to receiving a sentence of death. *Young*, 337 U.S. at 239. This is because § 1089(D)(8)(b), unlike its non-capital counterpart, *see* Okla. Stat. Ann. tit. 22, § 1086, limits the types of claims that a capital defendant can bring in a successor post-conviction application to those with underlying facts that "would be sufficient to establish by clear and convincing evidence that, but for the alleged error, *no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death*." § 1089(D)(8)(b)(2) (emphasis added). Thus, Mr. Wood's newly available federal constitutional challenge to his sentence of death, which is based on the invidious role that race played in its imposition, is simply not cognizable under Oklahoma law, which erects a standard different from, and in fact higher than, that required to establish a

violation of the federal constitution. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (referring to the "unacceptable *risk* that 'the [death] penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis added)); *see also McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one" (emphasis in original)). And the OCCA so held in denying Mr. Wood's successor application for relief. (*See* A-1 at 3 (holding that Sanchez, and thus Mr. Wood, failed to show that the factual basis of his federal constitutional claim "would be sufficient to establish by clear and convincing evidence that, but for the improper influence of race and/or gender discrimination, no reasonable fact finder would have found him guilty or rendered the penalty of death").)

Second, the OCCA's denial of Mr. Wood's successor application deprived Mr. Wood of notice of the grounds that the court would invoke to deny review of his federal constitutional claim. As explained in greater detail above, *see supra* at 24-28, Mr. Wood could not have anticipated based on express language of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and the OCCA's application of this provision, that the court would rely on *Sanchez*, and not on the particularized facts and arguments that Mr. Wood put forth in his application, to deny review of his federal constitutional claim.

Furthermore, the OCCA's denial of Mr. Wood's motion for leave to petition for rehearing—and, in particular, the OCCA's rules precluding post-conviction petitioners from *ever* petitioning for rehearing from a decision of that court—denied Mr. Wood the opportunity to be heard and, in particular, to correct the materially incorrect factual and legal conclusions that the OCCA unforeseeably invoked to deny review of his federal constitutional claim. (A-2.) This, too, is rule applied exclusively to capital defendants; noncapital defendants are permitted to file petitions for rehearing. *See* OCCA Rule 12.9. Oklahoma's capital successor post-conviction application law thus violates Mr. Wood's equal protection and due process rights.

The OCCA's rejection of Mr. Wood's successor application violated his constitutional rights in yet another way. The OCCA reasoned that Sanchez, and thus Mr. Wood, failed to show "that the factual basis for his claim was unascertainable through the exercise of reasonable diligence on or before the filing of his original post-conviction application." (A-1 at 3.) In other words, the OCCA's decision to deny Mr. Wood a forum within which to press his federal constitutional challenge to his death sentence was based upon its view that Mr. Wood, an indigent death-row prisoner, should have marshalled the resources to put this study together back in 2009.[11] But, as an indigent prisoner, Mr. Wood was represented in post-

[11] As Mr. Wood explains above, Oklahoma law required the OCCA to ask whether the new evidence that Mr. Wood put forward in support of his claim was unascertainable through the exercise of reasonable diligence at the time of *his* first post-conviction filing, which occurred in 2007,

conviction by a solo, court-appointed practitioner, so such an endeavor was financially and institutionally impossible for him to undertake at the time of his first post-conviction filing. *See State v. Behn*, 375 N.J. Super. 409, 428 (App. Div. 2005) (explaining that "reasonable diligence" does not mean "totally exhaustive or superhuman effort").

In light of his indigence, the OCCA's conclusion that Mr. Wood, had he been diligent, would have marshalled the evidence forming the basis of the Study back at the time of his first post-conviction filing discriminates against him on account of his poverty in violation of his rights under the Fourteenth Amendment's Equal Protection Clause. *Draper v. Washington*, 372 U.S. 487, 496 (1963) ("[T]he State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions"); *Ross v. Moffitt*, 417 U.S. 600, 611 ("Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty"); *see also Burns v. Ohio*, 360 U.S. 252, 257 (1959) (states "may not foreclose indigence from access to *any phase* of [their criminal review] procedure because of their poverty" (emphasis added)); *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) ("It cannot be denied

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rather than at the time of Sanchez's first post-conviction filing two years later, in 2009. *See supra* at 24-25.

that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.").

As Justice Murphy observed in *Carter v. Illinois*, "[w]hen the life of a man hangs in the balance, we should insist upon the fullest measure of due process" and the Constitution's Equal Protection guarantees. 329 U.S. 173, 186 (Murphy, J., dissenting) (1946). The State of Oklahoma "is here attempting to take away the life [ ] of one of its members." *Id.* This attempt "must be tested by the highest standards of justice and fairness that we know." *Id.*

CONCLUSION

For the foregoing reasons, Mr. Wood asks that this court grant his petition for a writ of certiorari.

Respectfully submitted: November 27, 2017.

JON M. SANDS
Federal Public Defender
District of Arizona

Jessica L. Felker
Amanda C. Bass
Assistant Federal Public Defenders

/s Jessica L. Felker
Jessica L. Felker (IL Bar No. 6296357)
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
Jessica_Felker@fd.org
Amanda_Bass@fd.org
Counsel for Petitioner Wood

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

TREMANE WOOD, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent

CERTIFICATE OF SERVICE

I, Jessica L, Felker, a member of the bar of this Court, hereby certify that on November 27, 2017, the original and 10 copies of the Petition for Writ of Certiorari and supporting documents were sent by Federal Express, postage prepaid, to the Clerk of Court, 1 First Street NE, Washington DC 20543. I certify that one copy of these documents was mailed via first-class mail to Jennifer L. Crabb, at 313 NE 21st Street, Oklahoma City, Oklahoma 73105.

I further certify that all parties required to be served have been served.

Respectfully submitted: November 27, 2017.

JON M. SANDS
Federal Public Defender
District of Arizona

Jessica L. Felker
Counsel of Record
Amanda C. Bass
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
Jessica_Felker@fd.org
Amanda_Bass@fd.org

Counsel for Petitioner Wood

/s Jessica L. Felker
Counsel of Record