Case No. 17-6891

IN THE SUPREME COURT OF THE UNITED STATES

TREMANE WOOD,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

On Petition for Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Should this Court grant certiorari review of the Oklahoma Court of Criminal Appeals' application of a procedural bar to a claim raised in Petitioner's third application for post-conviction relief?

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October Term, 2017

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Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the Oklahoma Court of Criminal Appeals entered August 28, 2017. *See* 8/28/2017 *Order Denying Third Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2017-653).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case

No. CF-2002-46. In 2004, Petitioner was tried by jury for one count of first degree murder. A bill of particulars was filed alleging three statutory aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; (2) the murder was especially heinous, atrocious, or cruel; and (3) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *See* Okla. Stat. tit. 21, § 701.12. At the conclusion of the trial, the jury found Petitioner guilty as charged, found the existence of each statutory aggravating circumstance and recommended a death sentence. Petitioner was sentenced accordingly.[1]

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions and sentences in a published opinion filed on April 30, 2007. *See Wood v. State*, 158 P.3d 467 (Okla. Crim. App. 2007). Rehearing was denied by the OCCA on May 31, 2007, *see* 5/31/2007 *Order Denying Petition for Rehearing and Request to Stay the Mandate* (OCCA No. D-2005-171), and this Court denied Petitioner's certiorari request on October 29, 2007. *See Wood v. Oklahoma*, 552 U.S. 999 (2007).

Petitioner filed an application for state post-conviction relief on April 25, 2007, which was denied by the OCCA in an unpublished opinion on June 30, 2010. *See* 6/30/2010 *Order Denying Application for Post-Conviction Relief* (OCCA No. PCD-2005-143).

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[1] Petitioner was also convicted of one count of robbery with firearms and one count of conspiracy to commit a felony, both after former conviction of a felony. Petitioner was sentenced to life imprisonment for both of these convictions.

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on June 30, 2011. On October 30, 2015, the district court issued an order denying Petitioner's petition for habeas corpus relief. *See Wood v. Trammell*, No. CIV-10-829-HE, slip op. (W.D. Okla. Oct. 30, 2015) (unpublished).

During the pendency of his habeas petition, on July 6, 2011, Petitioner filed a second application for state post-conviction relief, which was denied by the OCCA in an unpublished opinion on September 30, 2011. *See* 9/30/2011 *Order Denying Second Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2011-590).

Petitioner appealed the Western District of Oklahoma's denial of habeas relief to the Tenth Circuit. The case has been argued and is awaiting a decision.

On June 23, 2017, Petitioner filed his third application for state post-conviction relief, which is the subject of his petition for writ of certiorari. The OCCA denied relief on August 28, 2017. *See* 8/28/2017 *Order Denying Third Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2017-653) ("3rd PC Order").

Petitioner's petition for a writ of certiorari was placed on this Court's docket on November 27, 2017. Respondent was granted a thirty day extension of time in which to respond.

STATEMENT OF FACTS[2]

The OCCA set forth the relevant facts in its published opinion on direct appeal:

> Appellant Tremane Wood and three others were involved in and charged with the murder of Ronnie Wipf and the robbery of Arnold Kleinsasser. Clarity requires us to set forth the relationship between these defendants and the outcome of their cases. In addition to Tremane Wood, the defendants include Tremane's older brother Zjaiton Wood, Zjaiton's girlfriend Lanita Bateman, and the mother of one of Tremane's sons, Brandy Warden.[3] Brandy Warden entered into a plea agreement, cooperated with the State and testified against her co-defendants. She pled guilty to Accessory After the Fact and Conspiracy.[4] Zjaiton and Lanita were each found guilty in separate trials of felony murder, robbery with firearms, and conspiracy.[5]
>
> [FN] 3 Brandy had previously dated Tremane, but was not in a romantic relationship with him at the time this crime was committed.
>
> [FN] 4 The district court sentenced her to 45 years for accessory after the fact and 10 years for conspiracy.
>
> [FN] 5 Zjaiton Wood was sentenced to life imprisonment without the possibility of parole for felony murder and 60 years imprisonment for robbery and conspiracy. This Court affirmed his convictions in *Wood v. State*, Case No. F-2005-246 (Okl.Cr., Dec. 20, 2006)(unpublished opinion). Lanita Bateman was sentenced to life imprisonment for felony murder, 101 years imprisonment for robbery and 10 years imprisonment for conspiracy. This Court affirmed her convictions in *Bateman v. State*, Case No. F-2003-647 (Okl.Cr., April 19, 2004) (unpublished opinion).

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[2] Record references in this response are abbreviated as follows: citations to Petitioner's Petition for Writ of Certiorari will be cited as "Pet." and citations to the transcript of the jury trial will be cited as (mm/dd/yyyy Tr.). *See* Sup. Ct. R. 12.7.

On New Years Eve 2001, Ronnie Wipf and Arnold Kleinsasser went to the Bricktown Brewery in Oklahoma City where Zjaiton, Tremane, Lanita and Brandy were celebrating. Near closing time, Wipf and Kleinsasser met Lanita and Brandy believing they were two ordinary girls celebrating the new year together. Lanita and Brandy agreed to accompany Wipf and Kleinsasser to a motel on the pretext of continuing to celebrate the new year. Brandy, Lanita, Tremane, and Zjaiton then made a plan whereby the women would pretend to be prostitutes and the brothers Wood would arrive at the motel later and rob Wipf and Kleinsasser.

Once in their room at a Ramada Inn, Lanita made a telephone call to Zjaiton to let him know where they were, ending her conversation by saying, "Mom, I love you" so the victims would not be suspicious. The call to "Mom" was followed by some general conversation among the four which included a discussion of what each did for a living. Lanita told Kleinsasser that "this" is what she did and he realized that she meant she earned her living by having sex with men. That revelation was followed by a negotiation whereby the two women agreed to have sex with Wipf and Kleinsasser for $210.00. Since neither man had that much money, Brandy drove Kleinsasser to a nearby ATM. He gave her the money he withdrew and they returned to the room.

Back at the motel, the women went into the bathroom together, and shortly after, someone pounded on the door and called out, "Brandy, are you in there? Brandy, are you ready to go home?" Wipf refused to open the door and urgently told Kleinsasser to call the police. Before he could reach the phone, Lanita picked it up and pretended to call the police. Since it was now clear that the women were not going to have sex with them, Wipf demanded the return of their money. After a brief period of pandemonium in the room, Wipf opened the door and the women ran out. Recognizing a white car as the one Zjaiton and Tremane were driving, they got in and waited. Meanwhile, two masked men rushed into the motel room, a larger man, subsequently identified as Zjaiton Wood, holding a gun and a smaller man, subsequently identified as Tremane Wood,

brandishing a knife.[6] Zjaiton pointed the gun at Kleinsasser's head and demanded money. Kleinsasser gave him the rest of the money in his wallet. Zjaiton then joined Tremane in his attack on Wipf. As the three struggled, Kleinsasser heard one of the intruders say, "Just shoot the bastard" and then a gunshot. Tremane then turned his attention to Kleinsasser, demanding more money. Kleinsasser showed him his empty wallet, and Tremane hit him on the head with the knife. Tremane rejoined the struggle with Wipf and the fight moved into the bedroom area. Kleinsasser could see Wipf was bleeding and knew that he was seriously injured. While the two intruders struggled with Wipf, Kleinsasser escaped and sought help from the motel office. Before anyone could unlock the office door and help him, however, Kleinsasser fled to a nearby apartment complex to hide. From his vantage point there, he watched the motel and saw a white car leave the parking lot. He saw people come and go throughout the night, but, with no sense of whom they were, remained in hiding. It was 6:00 a.m. before he returned to the scene of the attack and learned of Wipf's death from a police detective.

> [FN] 6 Kleinsasser could not identify his attackers because they remained masked throughout the entire incident so he described the men's actions distinguishing the men by their size. Zjaiton is the larger of the Wood brothers. According to their mother's estimates, Zjaiton is the taller of the two brothers and outweighs Tremane by some 50 pounds, making him easily distinguishable from Tremane.

The medical examiner concluded that Wipf died as the result of a stab wound to the chest. There was no evidence he had sustained any kind of gunshot wound. Surveillance videotape from the motel's camera showed Brandy and Lanita renting the room with Wipf and Kleinsasser. The motel's phone records showed that three calls were made from the room to Zjaiton's pager and one to the house where Tremane lived. Surveillance videotape from a local Wal–Mart showed Brandy, Lanita, Zjaiton, and Tremane buying ski masks and gloves earlier in the evening.[7] As part of her plea bargain, Brandy testified against Tremane

> detailing the events of the evening from buying the masks and gloves through their actions the morning after the murder.
>
> > [FN] 7 Prior to going to the Bricktown Brewery, Zjaiton and Tremane robbed a local pizza restaurant and attacked the owner, wearing the masks and gloves they had just purchased and using the gun and knife that they later used in the robbery-murder at the Ramada Inn. According to the restaurant owner, the smaller man had the knife and the larger man had the gun.
>
> Zjaiton testified for the defense, against the advice of counsel. He said that it was he who stabbed Wipf, aided in the crime by a man named Alex. Zjaiton claimed that he took the knife from Alex and stabbed Wipf with it. He testified that Tremane was not involved in the crime.

Wood, 158 P.3d at 471-472 (paragraph numbers omitted).

REASONS FOR DENYING THE WRIT

Petitioner claims his death sentence is unconstitutional by virtue of a single research study which allegedly found racial disparity in capital sentencing in Oklahoma. The OCCA procedurally barred the claim when it was raised in Petitioner's third post-conviction application, filed thirteen years after his sentence was imposed. Petitioner has failed to show that the OCCA has decided an important question of federal law in a way that conflicts with another state court of last resort or of a United States court of appeals. Nor has Petitioner shown that the OCCA decided an important question of federal law that has not been, but should be, settled by this Court. Rather, Petitioner merely disagrees with the OCCA's application of a procedural bar to his case. Petitioner presents no compelling reason for this Court to

review the OCCA's decision. This Court should not grant certiorari to review this particular case.

PETITIONER'S CHALLENGE TO THE OCCA'S APPLICATION OF A PROCEDURAL BAR TO A CLAIM NOT RAISED UNTIL HIS THIRD STATE POST-CONVICTION APPLICATION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner seeks this Court's review of a claim that was procedurally barred in state court. Petitioner's challenges to the bar as inadequate and lacking independence do not present a compelling question of federal law. This Court should deny Petitioner's request for a writ of certiorari.

A. Petitioner's Barred Claim Presents No Compelling Reasons for this Court's Review

Petitioner filed a third post-conviction application in which he alleged his death sentence violated the Sixth, Eighth and Fourteenth Amendments because of a study which allegedly uncovered evidence of racial disparities in death sentences in Oklahoma. 6/23/2017 *Third Application for Post Conviction Relief – Death Penalty* (Okla. Crim. App. No. PCD-2017-653). The OCCA found the claim procedurally barred because it was not raised in Petitioner's original post-conviction application. 3rd PC Order at 3.

Petitioner presents this Court with two questions. First, Petitioner asks whether the aforementioned study proves his sentence is unconstitutional. Second, Petitioner asks whether the procedural bar applied in his case is adequate and

independent. Petitioner's questions, which center around a procedurally barred claim, do not present a compelling question for this Court's review.

1. Petitioner Presents No Evidence of a Conflict Among Courts

As stated above, Petitioner presents two questions for review. Petitioner has not shown that the OCCA's resolution of his claim conflicts with a decision of this Court, another state court of last resort or a United States court of appeals. Nor has Petitioner shown that the OCCA decided an important question of federal law that has not been, but should be, settled by this Court. In fact, this Court has squarely rejected the idea that a mere statistical study purportedly showing racial disparity in sentencing can establish a violation of the Constitution and instead requires a defendant to show that "the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (emphasis in original). Accordingly, the OCCA's rejection of this claim did not run afoul of federal law. Certiorari should be denied.

2. Petitioner's Case is not a Proper Vehicle for Deciding the Questions He Presents

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). On direct review, this rule is jurisdictional. *Id.* Petitioner's racial discrimination claim is procedurally barred. Accordingly, even if this Court were

inclined to revisit *McCleskey v. Kemp* as Petitioner requests, Pet. at 15-16, this is not the case in which to do so.

Petitioner attempts to avoid the procedural bar by raising an additional question which challenges the adequacy and independence of said bar. As to the adequacy of the bar, Petitioner claims the OCCA improperly applied one of its precedents to the facts of his case. Respondent will show that the OCCA did not err. However, the appropriateness of the OCCA's application of its procedural bar to the facts of Petitioner's case is a question of state law which is not reviewable by this Court. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) (this Court does not sit to review questions of state law). Although Petitioner claims the bar is not adequate, what he really alleges is that it should not have been applied to his case. Petitioner is not claiming that Oklahoma's bar of claims not raised in a first application for post-conviction relief is not "firmly established and consistently followed." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *see Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012) (concluding this bar is adequate); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012) (same); *Spears v. Mullin*, 343 F.3d 1215, 1254-55 (10th Cir. 2003) (same). As Petitioner fails to claim, much less present evidence that, Oklahoma does not consistently follow the rule in question, he does not present a federal question for this Court's review.

Finally, Petitioner claims the procedural rule at issue is not independent of federal law because the OCCA concluded Petitioner failed to present "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." Pet. at 28 (quoting 3rd PC Order at 3); *see* Okla. Stat. tit. 22, § 1089(D)(8)(b)(2). Respondent will discuss the independence of this bar below. For now, it will suffice to say that Petitioner's case is not the one in which to resolve any potential complaints about the independence of this bar. A state ground is independent where it "'does not appear to rest primarily on federal law, or to be interwoven with the federal law[.]'" *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). Further, a state procedural default will be respected even if the state court alternatively addressed a federal ground, so long as it also clearly and expressly based its decision on state law. *Id.*

Any claim raised in a subsequent post-conviction application will be barred unless it (a) rests on a legal basis that was previously unavailable or (b) rests on a factual basis that was previously undiscoverable through the exercise of reasonable diligence *and* "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 rendered the penalty of death." Okla. Stat. tit. 22, § 1089(D)(8). The OCCA denied Petitioner's application because he had both failed to show the factual basis for the claim was previously unavailable *and* failed to show he would not have been sentenced to death if not for alleged racial bias. 3rd PC Order at 3. Petitioner claims this latter

determination was interwoven with federal law. However, as the OCCA also denied Petitioner's claim because it was previously discoverable, an indisputably independent state law basis, Petitioner's case is not the one in which to consider whether the second consideration is independent of federal law.

For all of the foregoing reasons, Petitioner's case does not present this Court with an opportunity to answer his questions presented.

3. Petitioner's Claim Rests on a Fatally Flawed Study

As mentioned above, Petitioner asks this Court to overrule *McCleskey v. Kemp*. Petitioner's case is not the proper case in which to reconsider *McCleskey* because the study on which he relies is so flawed it cannot be relied upon to draw conclusions about the operation of Oklahoma's death penalty scheme.[3]

The petitioner in *McCleskey* claimed racial disparity in sentencing in Georgia based on a study showing that defendants who kill white victims are more likely to

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[3] The focus of this response is to show that this Court should not review Petitioner's case on the merits. Accordingly, a lengthy defense of *McCleskey* is unnecessary. However, Respondent in no way suggests that this Court should reconsider *McCleskey*. In fact, Respondent will show that there are innumerable factors which influence prosecutors and juries such that it is doubtful a study could be designed which would reliably measure any effect race might have. For this reason, among others, *McCleskey* rightfully requires a showing that race played a role in the particular case. Further, the two subsequent cases relied upon by Petitioner, Pet. at 15-16, involved evidence that the decisionmakers in those cases acted with discriminatory purpose. *See Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 861-62 (2017) (juror expressed racial bias against defendant and his witnesses); *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 768-69 (2017) (defense expert testified the defendant was likely to be a future danger based, in part, on his race). These two cases confirm, rather than call into question, *McCleskey*'s holding.

receive the death penalty than those who kill black victims, and that black defendants who kill white victims are more likely to be sentenced to death than white defendants who kill white victims. *McCleskey*, 481 U.S. at 286. The authors of the study attempted to account for "230 variables that could have explained the disparities on nonracial grounds." *Id.* at 287. It appears that some of the variables the authors attempted to control for included aggravating and mitigating circumstances. *Id.* at 288 n.6.

In *State v. Loftin*, 724 A.2d 129 (N.J. 1999), the New Jersey Supreme Court considered the constitutionality of a statute that attempted to limit that court's proportionality review of capital cases. The court did not reach that question, but in the course of its proportionality review of Loftin's sentence, considered the issue of possible racial bias. The court recognized that "statistical claims of racial bias in the administration of the death penalty present legal and methodological issues of exceptional complexity." *Loftin*, 724 A.2d at 273. One of the difficult issues discussed by the court is how to determine which cases to include in any statistical analysis. *Id.* at 278. Previously, the court had decided to consider cases in which a death sentence had been imposed, or sought, as well as "clearly death eligible homicides in which the prosecutor elected not to seek the death penalty." *Id.* (quoting *State v. Marshall*, 613 A.2d 1059, 1073 (N.J. 1992)). The court tasked a special master with determining whether to continue to include cases in which the prosecutor had not sought the death penalty, noting that the prosecutor's decision is complex and influenced by a number

of factors that have nothing to do with "deathworthiness". *Id.* at 286-91. Although the New Jersey Supreme Court rejected the reasoning of *McCleskey*, and is willing to entertain statistic-based claims of racial disparity, the court had repeatedly rejected such claims because there is an inadequate pool of "penalty-trial death-verdict cases" to produce reliable results. *Id.* at 298-300. The court also discussed another of its methods of proportionality review: a statistical analysis which uses as many as thirty-two variables including statutory and nonstatutory aggravating and mitigating factors. *Id.* at 295, 300-01.

In contrast to the careful studies addressed in *McCleskey* and *Loftin*, Petitioner relies upon "an early draft" of a study which made no similar effort to ensure reliable data. "The Report of the Oklahoma Death Penalty Review Commission" by The Constitution Project published in March of 2017, Appendix 1A "Race and Death Sentencing for Oklahoma Homicides, 1990-2012" ("Study") at 211 n.1. The Study's data set includes "all Oklahoma *homicides* with an identified perpetrator over a 23 year period from 1990-2012." Study at 215 (emphasis added). This includes all murders and non-negligent manslaughters without differentiation. Study at 215. The data set also includes all suspects identified by law enforcement, whether they were subsequently charged, much less convicted, or not. Study at 215.

Respondent recognizes that the Study's data set was chosen in order to provide a large sample size. Study at 215. "As a matter of general principle, the broadest possible statistical database should provide the most useful information; [however

there is reason for] concern[] when the additional quantum of data may be unreliable." *Loftin*, 724 A.2d at 289; *see also id.* at 305 (noting "the dangers inherent in the improper use of statistics"). Here, the data set is far too inclusive to yield reliable results.

In New Jersey, the Supreme Court was concerned about the wisdom of including death-eligible homicides in its analyses. By contrast, the Study used all non-negligent homicides, thus including a large number of homicides which are not death eligible. The death penalty is reserved for the "worst of the worst" murderers. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005) (concluding juveniles may not be sentenced to death because they cannot reliably be classified "among the worst offenders"); *see also Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Thus, in Oklahoma, only persons convicted of first degree murder are potentially eligible for the death penalty. *See* Okla. Stat. tit. 21, § 701.9. Yet, the study includes everyone who was a *suspect* in every first degree murder, second degree murder and first degree manslaughter. Further, even those convicted of first degree murder are not eligible for the death penalty unless the State proves one of eight enumerated aggravating circumstances. *See* Okla. Stat. tit. 21, § 701.12. Thus, the Study is so over-inclusive that its results cannot be relied upon.

Further, the study considered only two factors aside from the race and gender of the suspects and victims: the number of persons killed and whether there were

additional felonies which occurred at the same time.[4] The study thus accounts for, at most, two of Oklahoma's eight aggravating circumstances, *i.e.*, that the defendant created a great risk of death to more than one person and that the murder was committed to avoid lawful arrest or prosecution. *See* Okla. Stat. tit. 21, § 701.12. In addition to failing to account for the vast majority of the aggravating circumstances, the study entirely fails to consider the presence or absence of mitigating circumstances. *See* Okla. Stat. tit. 21, § 701.10(C) (permitting the introduction of "any mitigating circumstance").

A jury may only sentence a defendant to death if the aggravating circumstances outweigh any mitigating circumstances. *See* Instruction No. 4-80, Oklahoma Uniform Jury Instructions-Criminal (2d). Even after the jury makes that finding, it has complete discretion to sentence the defendant to death, or not. *See id.* Respondent recognizes that it is at this final step that racial animus could enter the jury's decision-making process. However, there are also innumerable other variables which could bear on the jury's decision such as the victim's age or attractiveness, the defendant's age or attractiveness, the respective performances of the prosecutors and defense attorneys, the predilections of the individual jurors and/or the unique ways in which they interact with one another, etc. Although many of these variables cannot be accounted for, the Study's failure to attempt to control for, at a minimum, the

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[4] Once again, the Study relies upon law enforcement data, therefore, it is unknown whether other felonies were, in fact, committed.

aggravating circumstances and common mitigating circumstances, renders its results essentially meaningless.

Even if this Court were inclined to reconsider the holding in *McCleskey*, Petitioner's case is not the appropriate case in which to do so. The Study relied upon by Petitioner is so flawed that it can neither inform this Court's judgment as to whether the holding in *McCleskey* is sound, nor result in this Court granting relief. Petitioner's request for a writ of certiorari should be denied.

4. Petitioner Cannot Satisfy McCleskey

McCleskey requires Petitioner to show that he was discriminated against on the basis of his race. *McCleskey*, 481 U.S. at 292. This argument is a merits argument, and not a reason that certiorari should be granted. *See* Sup. Ct. R. 10 (a petition which seeks error-correction is rarely granted). Thus, as with Petitioner's suggestion that *McCleskey* should be overruled, Respondent provides only a brief response.

Petitioner first points to references at trial to the fact that the victims were young men from rural Montana. Pet. at 7-8. It is unclear why Petitioner emphasizes references to the victims' youth, which is unrelated to their race. Nor has Petitioner shown some sort of connection between being from Montana, or being from a Hutterite community, and being white. In any event, the jury knew the victims were white. The question is whether Petitioner can show that the prosecutor or jury made decisions based on that fact. This he has failed to do.

The prosecutor's reference to being a "red neck" in no way indicates that he acted with a discriminatory purpose when he chose to seek the death penalty in Petitioner's case. The prosecutor was attempting to develop a rapport with victim Arnold Kleinsasser, who had a German accent and was apparently difficult to understand (3/31/2004 Tr. 119-20). Similarly, during closing arguments, the prosecutor stated that another witness, Harry Patel, "had a hard accent. Hard for me to understand. I don't understand anything but red neck." (4/2/2004 Tr. 152). The prosecutor's attempts at self-depricating humor do not indicate racial bias towards Petitioner.

When the prosecutor referred to a witness hearing "black voices" he was simply accurately recounting identification testimony (4/2/2004 Tr. 151, 164). Coleman Givens was in the vicinity of the crime scene and heard the perpetrators trying to enter the motel room (3/31/2004 Tr. 224-27). Although Mr. Givens saw the perpetrators, he could not see their features but "[t]heir voice[s] made me think they were black men." (3/31/2004 Tr. 229). *Cf. United States v. Card*, 86 F. Supp. 2d 1115, 1118 (D. Utah 2000) (surveying cases and holding that lay opinions as to a person's race based on their voice are admissible). Again, there is no evidence that Petitioner was discriminated against based on his race.

Petitioner also alleges the trial judge has "displayed troubling attitudes towards people of color[.]" Pet. at 8. Petitioner refers to statements the judge allegedly made regarding Mexicans. Pet. at 8-9. Petitioner is not Mexican. In any event, Petitioner

does not point to a single fact in the record which indicates *he* was discriminated against on the basis of his race.

Finally, Petitioner notes that, when the jury was polled after sentencing him to death, one juror expressed reluctance. Pet. at 10 (citing 4/5/2004 Tr. 165). Petitioner claims that juror was black, but provides no evidence to support that assertion. Nor does Petitioner provide information regarding the races of the other jurors. Petitioner also fails to provide any evidence that the one juror's reluctance had anything to do with race. For all of these reasons, Petitioner cannot satisfy *McCleskey*.

5. The Procedural Bar is Adequate and Independent

Petitioner complains that the procedural bar imposed by the OCCA was neither adequate nor independent. Respondent will briefly show below that the bar is both adequate and independent. However, the merits of Petitioner's complaints notwithstanding, he has entirely failed to show that this is an important question which warrants this Court's review. There is no conflict between lower courts on this issue and Petitioner does not explain how it might affect any case other than his own. The Petition should be denied.

a. Adequacy

Petitioner acknowledges that a procedural default rule is adequate if it is "firmly established and regularly followed' by the time as of which it is to be applied." Pet. at 25 (quoting *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984))). There can be no dispute that the OCCA's bar of claims raised

in successive post-conviction applications satisfies that requirement. *See e.g., Banks*, 692 F.3d at 1145 (affirming prior cases finding Oklahoma's bar of claims not raised in first post-conviction application to be adequate); *Cummings v. Sirmons*, 506 F.3d 1211, 1223 (10th Cir. 2007) (anticipatorily barring an unexhausted claim because it was "beyond dispute" the claim would be barred in a second post-conviction application); *Smallwood v. Gibson*, 191 F.3d 1257, 1268-69 (10th Cir. 1999) (finding Oklahoma's bar of claims not raised in first post-conviction application to be adequate). Petitioner's complaint that the OCCA failed to make a particular factual finding, *i.e.,* that he could not have raised his claim earlier, does not change the fact that this bar was firmly established and regularly followed at the time it was applied.[5] The bar is adequate.

b. Independence

Petitioner also claims the bar is not independent because the OCCA found that Petitioner had failed to show "by clear and convincing evidence that, but for the improper influence of race . . . no reasonable fact finder would have found him guilty or rendered the penalty of death." Pet. at 28 (quoting 3rd PC Order at 3). In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), this Court held that when

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[5] Petitioner also places far too much emphasis on the OCCA's citation to *Sanchez*. Pet. at 24-25. The OCCA recognized Petitioner's claim was "almost identical" to that presented in *Sanchez*. 3rd PC Order at 3. The OCCA barred Petitioner's claim because he failed to prove the factual basis for the claim was not available when he filed his previous post-conviction applications *not* because he failed to prove the factual basis was not available when the petitioner in *Sanchez* filed his previous post-conviction application.

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we 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.

Here, the independence of the bar is apparent from the face of the opinion. The OCCA expressly applied its precedent and a state statute. 3rd PC Order at 3. The OCCA did not cite any federal law. The statute requires any petitioner bringing a successive post-conviction application to show that the legal basis for the claim was previously unavailable, or that the factual basis for the claim was previously unavailable *and* no reasonable fact finder would have rendered the same verdict if not for the error. Okla. Stat. tit. 22, § 1089(D)(8). Petitioner has failed to point to one of this Court's decisions, or any federal law, which applies this "no reasonable fact finder" standard. This is a state law standard that applies to every claim, regardless of what federal law might require for the claim at issue.

In any event, Petitioner failed to show that the factual basis for the claim was previously unavailable. Accordingly, Petitioner's claim would have been barred even if he satisfied the "no reasonable fact finder" standard. *Cf. Johnson v. State*, 841 P.2d 595, 596-97 (Okla. Crim. App. 1992) (recognizing that "and" refers to the conjunctive and reversing a conviction where a jury instruction used the word "and" instead of "or", improperly requiring the jury to find two prongs where "only" one was required). The OCCA's denial of this claim was not interwoven with federal law.

6. *Petitioner's Challenges to the Constitutionality of Oklahoma's Statute are not Compelling*

As noted above, the procedural posture of this brief renders a full exploration of the merits of Petitioner's arguments unnecessary. However, Respondent will briefly show that Petitioner's complaints about section 1089(D) are without merit and do not warrant certiorari review.

a. *Case v. Nebraska*

Petitioner first asks this Court to answer the question "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." Pet. at 31 (quoting *Case v. Nebraska*, 381 U.S. 336, 337 (1965)). Oklahoma does afford adequate corrective process for the determination of federal claims.

In *Case*, the state apparently had no post-conviction procedure available. *Case*, 381 U.S. at 337. This Court did not answer the question presented, however, because after certiorari was granted, the state legislature enacted a post-conviction procedure. Petitioner also cites *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 449-51 (1985), in which this Court found it unnecessary to decide whether the Constitution requires judicial review of prison disciplinary proceedings because such review was provided.

These two cases illustrate perfectly the reason that the Petition should be denied. Petitioner had the opportunity to present constitutional claims on direct

appeal and in *two* previous post-conviction applications. The fact that Petitioner failed to follow the statute by presenting his claims as soon as they were available does not equate to the complete unavailability of post-conviction review in *Case*.

Petitioner also relies upon *Mooney v. Holohan*, 294 U.S. 103 (1935), another case fatal to his petition. In *Mooney*, the State conceded in state court it had knowingly used perjured testimony. *Mooney*, 294 U.S. at 110-11. The state court denied relief because the petitioner had failed to follow the proper procedure. *Id.* at 113-15. This Court declined to entertain the petitioner's request for an original writ of habeas corpus, thereby approving the state courts' failure to grant relief--even where the State acknowledged error--when state procedures were not followed. *See also Carter v. People of State of Illinois*, 329 U.S. 173, 175 (1946) ("Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases.").

Petitioner also recognizes that *Young v. Ragen*, 337 U.S. 235 (1949) is inapposite. Pet. at 33. In *Young*, 337 U.S. at 236-39, the state court provided no procedure by which due process claims could be heard.

Petitioner has had numerous opportunities, in state and federal court, to have his constitutional claims heard. Petitioner's failure to comply with Oklahoma's reasonable requirement that claims be brought at the first available opportunity is not grounds for this Court's review. *Cf.* 28 U.S.C. § 2244(b)(2) (prohibiting subsequent

habeas petitions unless the petitioner can show that the claim relies on a new rule of law or facts which could not have been discovered previously with due diligence).

b. Equal protection and due process

Finally, Petitioner presents a litany of equal protection and due process challenges, none of which present compelling questions for this Court's review. Petitioner claims section 1089(D) violates equal protection because non-capital inmates do not face an identical procedural bar rule. Pet. at 36-40. Petitioner again fails to identify a conflict among the lower courts or an important federal question which is implicated by his claim.

Nor has Petitioner demonstrated an equal protection violation. The right to equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Where persons who are similarly situated are not treated alike, a statute is presumed valid and will be found unconstitutional only if the classification it draws is not rationally related to a legitimate state interest. *Id.* at 440. This general rule does not apply if the classification is based on race, alienage, national origin or gender. *Id.* at 440-41. The general rule is also inapplicable to statutes which "impinge on personal rights protected by the Constitution" such as the right to vote, the right to travel interstate and the right to have children. *Id.* at 440 (citing *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969) (right to vote), *Shapiro v. Thompson*, 394

U.S. 618 (1969) (right to travel) and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children)).

In *Sheppard v. Early*, 168 F.3d 689, 690-91 (4th Cir. 1999), a death row inmate claimed a statute which determined the time for setting an execution date limited the time within which he could file a petition for writ of certiorari. The petitioner claimed this limitation, which was not applicable to non-capital inmates, violated equal protection. *Sheppard*, 168 F.3d at 692. The court denied the claim because death row inmates are not a suspect class and "[c]apital and non-capital inmates are not similarly situated." *Id.* at 692-93; *cf. Harris v. Johnson*, 81 F.3d 535, 541 (5th Cir. 1996) (expressing skepticism that capital and non-capital defendants are similarly situated); *Roybal v. Davis*, 148 F. Supp. 3d 958, 1103-04 (S.D. Cal. 2015) (denying equal protection claim based on differences in state habeas procedures for capital and non-capital inmates because they are not similarly situated). The court recognized that non-capital inmates have an interest in promptly pursuing relief whereas inmates sentenced to death have an incentive to delay. *Id.* at 693.

Petitioner is not similarly situated to non-capital inmates. Accordingly, Petitioner has no valid equal protection claim. Further, Petitioner is not a member of a suspect class, nor does he complain about the impingement of a fundamental personal right. As recognized in *Sheppard*, capital inmates have an incentive to delay that non-capital inmates do not. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) ("capital petitioners might deliberately engage in dilatory tactics to prolong their

incarceration and avoid execution of the sentence of death"). Accordingly, the Oklahoma Legislature's choice to impose stricter requirements on successive post-conviction applications in capital cases is rationally related to the legitimate state interest in timely carrying out death sentences. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality op.) (recognizing states have a legitimate interest in carrying out death sentences in a timely manner). Petitioner's equal protection claim is meritless.

Petitioner next claims that he lacked notice of the procedural bar. Pet. at 37. As shown above the OCCA has been applying this same rule for decades and Petitioner's argument that the OCCA erroneously relied upon *Sanchez* is a red herring.

Petitioner's complaint about his inability to file a petition for rehearing must similarly be denied due to his failure to support it with legal authority. *See* Sup. Ct. R. 14.4. Further, as shown above, the OCCA did not make any "materially incorrect factual [or] legal conclusions" nor unforeseeably bar Petitioner's claim. Pet. at 38. Finally, Petitioner falsely states that non-capital post-conviction petitioners are permitted to file petitions for rehearing. Pet. at 38. Petitioner cites a rule that applies to *direct appeals* heard by emergency panels. Rule 12.9, *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. The rule governing non-capital post-conviction appeals plainly states that "[a] petition for rehearing is not allowed[.]" Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App.; *see also* Pet. at 1 n.1 (quoting this very rule).

In his final challenge to the constitutionality of the statute, Petitioner claims his indigence should excuse his lack of diligence. Pet. at 38-39. Petitioner claims he could not possibly have conducted a similar study. Once again, Petitioner fails to present a compelling reason to grant certiorari review.

Petitioner was represented by counsel on direct appeal and in his first post-conviction application. Petitioner could have raised the same *McCleskey*-based claim of racial discrimination in his trial at any point. As for a claim based on statistics, the Study explains that there is an abundance of research on the potential influence of race on capital sentencing. Study at 213-14. In 2003, before Petitioner's trial, the professor who conducted the study relied upon in *McCleskey* published a review of 18 studies. Study at 213. There was even a study specific to Oklahoma. Study at 214. While that study's data set ended in 1980, it could have been supplemented with studies from other states in order to show a pattern, if one exists.

Finally, to the extent Petitioner suggests the *current* Study is essential to his claim, he fails to show that his indigence played any role in these proceedings. The Study was not conducted at the behest of a wealthy capital inmate. It was conducted by third parties. Further, there is no evidence Petitioner ever requested and was denied court funding for conducting a study of his own. The State has in no way singled Petitioner out due to his indigence. Pet. at 39 (quoting *Ross v. Moffitt*, 417 U.S. 600, 611 (1974)).

Petitioner's list of reasons that he thinks the proceedings were unfair, many of which are not supported by authority other than bare references to fairness, simply do not present a compelling reason for this Court's review. The OCCA applied an adequate and independent procedural bar to a claim raised in Petitioner's *third* post-conviction application. This Court should deny certiorari review.

CONCLUSION

Petitioner's claim that the OCCA improperly applied a procedural bar does not present this Court with a "compelling reason" to grant a writ of certiorari. *See* Sup. Ct. R. 10 (stating that a petition for writ of certiorari will be granted only for compelling reasons). Therefore, and for the reasons stated above, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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