No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS DARIUS JONES, Petitioner,

vs.

THE STATE OF OKLAHOMA, Respondent.

*** CAPITAL CASE ***

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JULIUS DARIUS JONES,)
)
Petitioner,) NOT FOR PUBLICATION
)
-vs-) No. PCD-2017-654
)
STATE OF OKLAHOMA,)
)
Respondent.)

ORDER DENYING SECOND APPLICATION FOR POST-CONVICTION RELIEF AND RELATED MOTIONS FOR DISCOVERY AND EVIDENTIARY HEARING

Before the Court is Petitioner Julius Darius Jones' second application for post-conviction relief and related motions for discovery and an evidentiary hearing. A jury convicted Jones in 2002 in the District Court of Oklahoma County, Case No. CF-1999-4373, of the first degree murder of Paul Howell and sentenced him to death.[1] Since then Jones has unsuccessfully challenged his Judgment and Sentence on direct appeal and in collateral proceedings in this Court.[2] Jones too has unsuccessfully challenged his convictions and death sentence in federal habeas proceedings.[3]

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1 Jones' jury convicted him of Count 1: First Degree Felony Murder, in violation of 21 O.S.Supp.1998, § 701.7(B); Count 2: Possession of a Firearm after Conviction of a Felony, in violation of 21 O.S.Supp.1998, § 1283; and Count 3: Conspiracy to Commit a Felony, in violation of 21 O.S.Supp.1999, § 421. The jury recommended the death penalty on Count 1 after finding that Jones knowingly created a great risk of death to more than one person and that Jones posed a continuing threat to society. *See* 21 O.S.2001, §§ 701.12(2) and (7). The jury recommended, and the trial court sentenced, Jones to fifteen (15) years imprisonment on Counts 2, and twenty-five (25) years imprisonment on Count 3.

2 On January 27, 2006, this Court affirmed Jones' Judgment and Sentence. *Jones v. State,* 2006 OK CR 5, 128 P.3d 521. On March 14, 2006, the Court granted Jones' petition for rehearing, but finding relief was not warranted denied Jones' motion to recall the mandate. *Jones v. State,* 2006 OK CR 10, 132 P.3d 1. The United States Supreme Court denied certiorari review on October 10, 2006. *Jones v. Oklahoma,* 549 U.S. 963, 127 S. Ct. 404, 166 L. Ed. 2d 287 (2006). This Court denied Jones' original application for post-conviction relief in an

Jones now claims that newly discovered evidence of a "greater risk of execution" due to his race and/or the race of the victim violates his rights under the Sixth, Eighth, and Fourteenth Amendments, and parallel provisions of the Oklahoma Constitution. Jones relies principally on the findings of Glenn L. Pierce, Michael L. Radelet, and Susan Sharp, authors of "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," a draft study of the impact of race, gender, and other factors on the likelihood of capital punishment. The study was publicly released on April 25, 2017, as Appendix IA to *The Report of the Oklahoma Death Penalty Review Commission.*[4] In his related motions, Jones requests court-ordered discovery and an evidentiary hearing to explore "whether and to what degree race—both of [Jones] and that of his victim—impacted" various decision makers in his case. He seeks, *inter alia,* the Oklahoma County District Attorney's office policies and procedures for seeking the death penalty; extensive race and gender data for homicides from 1990 to 2012; data for all first degree murder cases prosecuted for the same period; data for all cases from 1990 to 2012 in which the death penalty was sought;

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unpublished opinion. *See Jones v. State,* Case No. PCD-2002-630 (Okl.Cr., Nov. 5, 2007) (unpublished).

[3] The United States District Court denied a petition for writ of habeas corpus in *Jones v. Trammell,* No. CIV-07-1290-D, 2013 WL 12205578 (W.D.Okla. 2013). The United States Court of Appeals for the Tenth Circuit subsequently granted Jones a certificate of appealability on the single issue of ineffective assistance of counsel, but denied Jones relief in *Jones v. Warrior,* 805 F.3d 1213 (10th Cir. 2015). On October 3, 2016, the United States Supreme Court denied Jones' petition for certiorari review in *Jones v. Duckworth,* __ U.S. __, 137 S. Ct. 109, 196 L. Ed. 2d 88 (2016).

[4] https://drive.google.com/file/d/0B-Vtm7xVJVWONmdNMmM5bzk3Qnc/view

the race, gender, and names of victims in these cases; and the ultimate sentence imposed.

This Court recently rejected an almost identical claim in a second capital post-conviction appeal in *Sanchez v. State,* 2017 OK CR 22, ___P.3d___. Sanchez argued "that newly discovered evidence of a 'greater risk of execution' due to his race and/or the race and/or gender of the victim violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and parallel provisions of the Oklahoma Constitution." *Id.* at ¶ 3. Sanchez relied on the same study as Jones for newly discovered evidence to support his claim. *Id.* We held that Sanchez's claim was procedurally barred under 22 O.S.Supp.2016, § 1089(D)(8)(b)(1), (b)(2) because he neither showed 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 nor showed that the factual basis of his current 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 improper influence of race and/or gender discrimination, no reasonable fact finder would have found him guilty or rendered the penalty of death. *Id.* at ¶¶ 8 & 11.

Sanchez is dispositive and controls our decision in this case. For the reasons explained in *Sanchez,* we find Jones's claim is procedurally barred. Jones's second application for post-conviction relief and related motions for discovery and evidentiary hearing are therefore **DENIED**. Pursuant to Rule

3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT ON THIS 5th **DAY OF** September, **2017.**

GARY L. LUMPKIN, PRESIDING JUDGE

DAVID B. LEWIS, VICE-PRESIDING JUDGE

Robert L. Hudson

ROBERT L. HUDSON, JUDGE

ATTEST

John D. Haddens

Clerk

A-2

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JULIUS DARIUS JONES,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2017-654
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION TO FILE PETITION FOR REHEARING

Appellant Jones filed a Motion to File Petition for Rehearing in his second Capital Post-Conviction appeal following this Court's denial of that appeal in an unpublished order issued September 5, 2017. *See Jones v. State,* Case No. PCD-2017-654 (unpublished). Under Rule 3.14(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), a Petition for Rehearing may be filed only in regular appeals as defined by Rule 1.2. Post-conviction appeals do not fall within the regular appeals identified in Rule 1.2. Furthermore, Rule 5.5 provides:

> Once this Court has rendered its decision on a post-conviction appeal, that decision shall constitute a final order and the petitioner's state remedies will be deemed exhausted on all issues raised in the petition in error, brief and any prior appeals. A petition for rehearing is not allowed and these issues may not be raised in any subsequent proceeding in a court of this State. The Clerk of this Court shall return to the movant any petitions for rehearing tendered for filing.

This Court does not allow petitions for rehearing in post-conviction appeals.

THEREFORE IT IS THE ORDER OF THIS COURT that the Motion to File Petition for Rehearing is **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 4th day of October, 2017.

GARY L. LUMPKIN, Presiding Judge

DAVID B. LEWIS, Vice Presiding Judge

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden
Clerk

A-3

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 22 2017

JULIUS DARIUS JONES Petitioner, vs. THE STATE OF OKLAHOMA Respondent.	)	Case No.: PCD-2017-654 **CAPITAL POST CONVICTION PROCEEDING** First Post-Conviction No.: PCD-2002-630 Direct Appeal No.: D-2002-534 District Court of Oklahoma County No.: CF-1999-4373

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner Julius Darius Jones, through undersigned counsel, hereby moves this Court for leave to file a petition for rehearing from its denial of his Second Application for Post-Conviction Relief (hereafter "Application"). Julius filed his Application on June 23, 2017, wherein he argued that newly discovered evidence establishes by clear and convincing evidence that race impermissibly played a role in dictating his death sentence in violation of the Oklahoma and United States Constitutions. (Application at 13-15.) Julius argued further that he could not have previously raised this claim since the grounds upon which it relies—that is, a highly sophisticated statistical analysis of Oklahoma cases spanning a twenty-year period—became available for the first time on April 25, 2017, when a preliminary study on race and the death penalty in Oklahoma was first published. (*Id.* at 15-18.)

On September 5, 2017, this Court denied Julius's Application, along with his accompanying motions for discovery and an evidentiary hearing. This Court ruled that *Sanchez v. State*, 2017 OK CR 22, __ P.3d __, "is dispositive and controls our decision in

this case." Order, 09/05/2017, at 3. The mandate issued the very same day. (Mandate, 09/05/2017.)

Julius now files this motion requesting permission to file a petition for rehearing because this Court has overlooked issues dispositive of the matter before it. *See* Rule 3.14(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016). Specifically, this Court failed to examine how Julius's Application differed from the successive application filed in *Sanchez* on its factual basis, argument, and in its procedural posture.

Julius respectfully requests that this Court grant him leave to file a petition for rehearing. His proposed petition is appended hereto as Attachment A.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the Attorney General of Oklahoma by depositing a copy with the Clerk of the Court of Criminal Appeals on the date that it was filed.

EVAN W. KING, ESQ.

Attachment A

Attachment A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JULIUS DARIUS JONES Petitioner, vs. THE STATE OF OKLAHOMA Respondent.	)	Case No.: PCD-2017-654 **CAPITAL POST CONVICTION PROCEEDING** First Post-Conviction No.: PCD-2002-630 Direct Appeal No.: D-2002-534 District Court of Oklahoma County No.: CF-1999-4373

PROPOSED PETITION FOR REHEARING

Petitioner Julius Darius Jones, through undersigned counsel, hereby files a petition for rehearing from this Court's denial of his Second Application for Post-Conviction Relief (hereafter "Application"). Julius filed his Application on June 23, 2017 wherein he argued that newly discovered evidence establishes by clear and convincing evidence that race impermissibly played a role in dictating his death sentence in violation of the Oklahoma and United States Constitutions. (Application at 13-15.) Julius argued further that he could not have previously raised this claim since the grounds upon which it relies—that is, a highly sophisticated statistical analysis of Oklahoma cases spanning a twenty-year period—became available for the first time on April 25, 2017, when a preliminary study on race and the death penalty in Oklahoma was first published. (Application at 15-18.)

On September 5, 2017, this Court denied Julius's Application, along with his accompanying motions for discovery and an evidentiary hearing. This Court ruled that *Sanchez v. State*, 2017 OK CR 22, __ P.3d __, "is dispositive and controls our decision in

this case." Order, 09/05/2017 at 3. The mandate issued the very same day. (Mandate, 09/05/2017.)

Julius now petitions for rehearing because this Court has overlooked issues dispositive of the matter before it. *See* Rule 3.14(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016) [hereafter "Rules"]. Specifically, this Court failed to examine how Julius's Application differed from the successive application filed in *Sanchez* on its factual basis, argument, and in its procedural posture.

On February 25, 2005, Julius filed his original application for post-conviction relief. *Jones v. State*, No. PCD-2002-630, 02/25/2005. Precisely twelve years and two months later, an unprecedented study entitled, "Race and Death Sentencing for Oklahoma Homicides, 1990-2012" (hereafter "the Study"), was published as an appendix to The Report of the Oklahoma Death Penalty Review Commission. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n*, App. IA (Apr. 25, 2017), http://okdeathpenaltyreview.org/the-report/ [hereinafter "Attachment 5" because the Study was included as Attachment 5 to Julius's Application]. Importantly, the Study concluded that for crimes that occurred between 1990 and 2012, nonwhite defendants like Julius who were accused of killing a white victim were nearly *three times* more likely to receive the death penalty than white defendants who were accused of killing white victims. (Application at 20.) In addition, controlling only for the race of the victim, those defendants accused of killing a white victim were over *two times* more likely to receive the death penalty than those accused of killing nonwhite victims. (*Id.* at 19-20.)

Julius filed his Application within sixty days of the Study's publication, and alleged the following newly-available proposition for relief:

> Newly discovered evidence establishes that the race of the victim who Julius was accused and convicted of killing increased the likelihood that he would be sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution.

(*Id.* at 13.) He set out at length why his Application satisfies the successor post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of this Court's Rules. (*Id.* at 15-18.) In order to establish that the factual basis for this claim was not ascertainable through the exercise of reasonable diligence prior to April 25, 2017, Julius explained that neither the Study nor any comparable statistical analyses of death sentencing in Oklahoma for the time period in which he was sentenced to death existed prior to that date. (*See id.*) He also established that the raw data underlying the Study, that is, "the number of homicide cases and death sentences in Oklahoma" broken down according to the race and gender of the suspect and victim in each case, "were not previously available or known" through the exercise of reasonable diligence. (*Id.* at 18.)

Indeed, Julius explained that the authors of the study themselves recognized that the task that they had undertaken was a time-intensive and arduous one since "no state agency, organization or individual [ ] maintains a data set on all Oklahoma death penalty cases." (*Id.* (internal quotation marks omitted).) "We thus had to start from scratch in constructing what we call the 'Death Row Data Set,'" the authors explained. (*Id.* at 18 (internal quotation marks omitted).) The authors outlined how governmental and non-governmental crime data lacked the detail that they needed to examine the racial patterns

in Oklahoma death sentences from 1990 through 2012, and explained that they had to search websites, newspaper articles, judicial decisions, and other sources in order to marshal the information necessary to analyze the 4,668 Oklahoma homicide cases in the sample set. (Attachment 5 at 216.)

As for the second prerequisite for filing a successive application for post-conviction relief, Julius set forth detailed facts to demonstrate how race—both the victim's and his own—loomed over his trial and influenced individual decision makers in his case, including prosecutors, the judge, and members of the jury. (Application at 10-13, 21-29.) These tailored facts, Julius argued, coupled with the new statistical evidence of the racially disparate manner in which the State of Oklahoma metes out death, constituted clear and convincing evidence that but-for the fact that his alleged victim was a white man, he would not have been sentenced to death. (Application at 15-39.) Along with his Application, Julius also filed a Motion for Discovery and a Motion for an Evidentiary Hearing, in which he sought leave of this Court to further factually develop his claim. (Motion for Discovery, 06/23/2017; Motion for Evidentiary Hearing, 06/23/2017.) Therein, he argued that "[d]iscovery is necessary because [he] has raised a more than colorable claim that new evidence renders his sentence of death unlawful" under the United States and Oklahoma Constitutions. (Motion for Discovery, 06/23/2017, at 1.) He also asserted that "[w]hile sufficient evidence exists to warrant relief, if this Court should find that the evidence presented creates controverted, previously unresolved factual issues, then an evidentiary hearing is required." (Motion for Evidentiary Hearing,

06/23/2017, at 2.) Both requests for factual development were denied. Order, 09/05/2017, at 3.

Yet, this Court's order denying Julius's Application included erroneous factual conclusions regarding the availability of the data underlying the Study. (*See infra* at 8-12.) Those conclusions could not be reached without more. Had the Court allowed factual development, as requested by Julius, the Court's concerns would have been addressed based on evidence rather than on speculation. To illustrate this, Julius has attached hereto the affidavits of Michael Radelet, one of the Study's lead authors, and Vicki Werneke, who was the head of the Capital Post Conviction Division at the Oklahoma Indigent Defense System (alternatively "OIDS") at the time that the agency represented Julius during his first post-conviction appeal. (*See* Exs. A, B.) He has put these affidavits forward in an effort to diligently address this Court's erroneous factual determinations.

In a four-page order, this Court rejected Julius's Application without any discussion of the facts that he put forth to establish that he satisfied the successive post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Instead, the Court relied on *Sanchez*, explaining that:

> We held that Sanchez's claim was procedurally barred . . . because *he* neither showed 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 nor showed that the factual basis of *his* current 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.

Order, 09/15/2017, at 3 (emphasis added). The Court then summarily stated that "*Sanchez* is dispositive and controls our decision in this case. For the reasons explained in *Sanchez*, we find Jones's claim is procedurally barred." (*Id.*)

In reaching this conclusion, however, this Court overlooked the following decisive question: how Julius's Application differed from Sanchez's in material ways, including in its procedural posture, factual basis, and legal arguments. In this circumstance, rehearing is not only appropriate, but necessary. *See* Rule 3.14(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016) (explaining that rehearing is appropriate where "[s]ome question decisive of the case ... has been overlooked by the Court"). For the reasons detailed below, it was erroneous for this Court to rely on *Sanchez* to reject Julius's Application when Sanchez did not make the same arguments or present the same facts to support the highly fact-specific inquiry of whether the claim was permitted under Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b).

In *Sanchez*, this Court found only that Sanchez had "not shown sufficient specific facts to establish that the identified patterns of race and gender were 'not ascertainable through the exercise of reasonable diligence on or before' *his* original post-conviction application in 2009." *Sanchez*, 2017 OK CR 22, ¶ 8 (emphasis added) (quoting Okla. St. Ann. tit. 22, §§ 1089(D)(4)(b)(1)). Unlike Sanchez's application, however, Julius's original application was filed in 2005. *Jones v. State*, No. PCD-2002-630, 02/25/2005. Yet, in its order denying Julius's present Application, this Court failed to make a finding on the question of whether the data that it ruled in *Sanchez* was available in 2009 would have also been available on or before 2005.

As an additional matter, Sanchez, unlike Julius, said very little about when the factual basis for his claim first arose. He asserted only that the Study "was the first study since 1990 to focus on Oklahoma," and put forward no argument concerning the unavailability, through the exercise of reasonable diligence, of the data that the Study's authors' relied upon. *See Sanchez v. State*, No. PCD-2017-666, Pet'r Anthony Sanchez's Second Application for Post-Conviction Relief at 11 (Okla. Crim. App. June 26, 2017) [hereinafter "Sanchez Application"]. Julius, meanwhile, outlined in considerable detail why the Study, and its underlying data, constituted new evidence previously undiscoverable through the exercise of due diligence. (Application at 16-18.) This Court failed to recognize this significant difference between the applications submitted by the two defendants and, as a result, failed to analyze the facts that Julius cited—not mentioned in Sanchez's application—to establish the unavailability of the data supporting his proposition.[1]

As one of the Study's authors, Michael Radelet, explains, this Study could not have been completed at the time of Julius's original post-conviction application due to the time- and resource-intensive, not to mention highly specialized, nature of this

[1] In *Sanchez*, for example, this Court cited a 1984 study on race and capital sentencing outcomes in Oklahoma to support its conclusion that Sanchez failed to demonstrate 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." *Sanchez*, 2017 OK CR 22, ¶ 8 n.3. Whereas Sanchez's application said nothing about this earlier study, Julius explained in his Application that this 1980's study relied upon antiquated data that did not encompass the time period during which he was charged with capital murder and sentenced to death. (*See* Application at 17.) Thus, this earlier study said nothing about *his* statistical likelihood of being sentenced to death based on his race and that of his victim, evidence of which first became available on April 25, 2017, with the publication of the Study.

undertaking. (Ex. A at ¶¶ 4, 6-7.) He estimates that the Study cost nearly $50,000 in today's currency to complete, required the labor of three highly trained researchers and several graduate students, and relied upon data that was very difficult to access and organize. (*Id.* at ¶¶ 3-4, 6-7.) Mr. Radelet explains further how the Study's statistical analysis and conclusions would have been negatively impacted had the time-frame for analysis ended in 2004, rather than in 2012: "[b]y using data for our Oklahoma study from 1990 ... through 2012, we were able to obtain enough cases to make solid statements about the obtained patterns." (*Id.* at ¶ 7.)

Meanwhile, Vicki Werneke, who was the Chief of the Capital Post Conviction Division at the Oklahoma Indigent Defense System (hereafter "OIDS") at the time that Julius's original application was filed by OIDS, explains that the agency did not have the institutional or the financial resources to pay experts upwards of $50,000 to undertake this study back in 2004. (*See* Ex. B at ¶¶ 10-11.) It was around this time that "OIDS experienced a severe budget crisis that required an extensive reduction in work force and furlough days for those employees who remained." (*Id.* at ¶ 9.) The Capital Post Conviction Division in particular "lost two positions" during this period and "[t]he agency also had limited funds for experts and travel." (*Id.*) "It took a couple of years before the Oklahoma legislature appropriated minimally adequate funds for litigation purposes," Ms. Werneke explains. (*Id.*) She adds further that OIDS "did not have the staff to undertake such a study" and its "staff did not have the necessary training to conduct a statistical analysis." (*Id.* at ¶ 11.) Nor could Julius's post-conviction attorney, Laura Arledge, have assembled the data and authored such a study herself: Ms. Arledge lacked

the specialized training, time, resources, and physical well-being[2] necessary for such an endeavor. (*Id.* at ¶¶ 5-6, 8-11.) As the foregoing further illustrates, the data underlying the Study could not have been discovered by Julius on or before 2005 even through the exercise of reasonable diligence. (*Id.* at ¶ 11.)

Finally, with respect to Okla. St. Ann. tit. 22, §§ 1089(D)(4)(b)(2), Sanchez did not make the individualized argument that Julius made regarding the specific role that race played throughout his trial, and its impact upon various decision makers. Indeed, Sanchez cited no particular facts from his case to demonstrate either that the race of the victim or his race tainted his trial. What is more, Sanchez, unlike Julius, did not argue that his race was an issue at all. Rather, Sanchez's argument centered exclusively on the race and gender of the victim. (*See, e.g.*, Sanchez Application at 8, 10-11.) This Court, however, overlooked these critical differences between the claims, the arguments, and the facts set forth in Julius's and Sanchez's respective applications.

Accordingly, this Court should grant Julius's petition for rehearing in order to allow this Court to address the dispositive question—how the successive applications of Julius and Sanchez differed—that it failed to address.

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[2] Ms. Arledge was diagnosed with breast cancer during her post-conviction representation of Julius. (Ex. B at ¶ 6.) She made her inability to effectively represent Julius during those proceedings due to her illness known to this Court. (*Jones v. State*, No. PCD-2002-630, Third Verified Application that Post-Conviction Proceedings be Held in Abeyance or Extension of Time, 12/17/2004; *see also* Ex. B at ¶ 6.)

Respectfully submitted,

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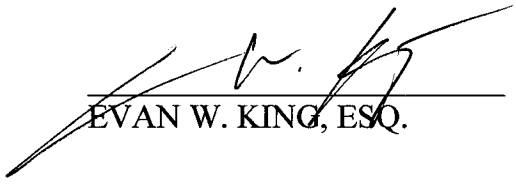
CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the Attorney General of Oklahoma by depositing a copy with the Clerk of the Court of Criminal Appeals on the date that it was filed.



EVAN W. KING, ESQ.

Exhibit A

Declaration of Michael L. Radelet

I, Michael L. Radelet, do declare the following:

1. Professors Susan Sharp (University of Oklahoma), Glenn Pierce (Northeastern University), and I (University of Colorado-Boulder) recently completed a paper entitled, "Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012," which will be published later this month in the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, a highly respected and visible outlet.

2. We did this research on our own volition, and were not asked to do the study by any individuals litigating death penalty cases in Oklahoma.

3. None of us were paid for the work we did on the project. Professor Sharp estimates that she spent approximately 60 hours on the project.[1] Professor Pierce also spent approximately 60 hours on this effort.[2] I spent roughly 75 hours.[3]

4. Doing a study like this requires a rather specialized skill-set, and Professor Pierce and I have done more race studies in the U.S. than any other sociologists, legal scholars, or criminologists. Professor Sharp is a highly esteemed criminologist with a strong national and international reputation for high-quality scholarship. To do this study, researchers would need to be familiar with (and know how to use) the "Supplemental Homicide Reports," which are compiled by the FBI and stands as the best data source for homicide information in the U.S. Researchers would also have to know how to build a data set that includes everyone sentenced to death in a given jurisdiction – and for this project we had to start this task from scratch. They would need to know how to merge the data sets to identify which homicides ended with a death sentence. They would also need expertise in large-scale data analysis, and knowledge of the fairly sophisticated statistical techniques that can be used to discern patterns in the data. The three of us brought complimentary skills to the table, and this skill-set would be very difficult to find in another team of researchers (especially if they are not paid).

5. Had financial support been available, we would have charged $200 per hour, or $39,000 for our professional time for our combined 195 hours of labor.

6. In addition, we were able to obtain approximately $10,000 from the Constitution Project in Washington, D.C., to employ students at the University of Oklahoma to assist with this research. Their jobs were to assist Professor Sharp with gathering information on the death penalty cases, largely through examination of appellate decisions and relevant newspaper articles, about the characteristics of the offender, victim, and offense that ended in a death sentence. The Constitution

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[1] Of these, approximately 50 hours were spent researching information and coding the death penalty cases (victim/offender gender, race, etc.), and ten hours reviewing and giving input on drafts of the final paper.

[2] Professor Pierce's main responsibility was to obtain the Supplemental Homicide Reports (hereafter "SHR," which is the data set we used for all Oklahoma homicides), check the data, merge these data with our Death Row Data Set, and run all the statistical analyses used therein.

[3] I obtained all the names of people sentenced to death for Oklahoma homicides that were committed during the study period, matched them (by hand) with the corresponding case in the SHR, and took primary responsibility for drafting our final report.

Project is a nonpartisan organization that assembles experts from across the political spectrum to propose consensus-based solutions to some of the most pressing constitutional challenges of our time. See https://constitutionproject.org.

7. We have recently been asked by attorneys representing Julius Darius Jones to explain whether we could have completed this study in 2004 and why we only recently undertook this effort. There are three principal reasons:

A. Professors Radelet and Pierce specialize in studying race and death sentencing, an area of research that (unfortunately) attracts few academics. Since 2005, we have finished major studies on race and death sentencing in California (SANTA CLARA LAW REVIEW), Colorado (COLORADO LAW REVIEW), Baton Rouge (LOUISIANA LAW REVIEW), and North Carolina (NORTH CAROLINA LAW REVIEW). Like Professor Sharp, we also publish in other areas, and have teaching responsibilities at our respective universities. Without sources for funding, doing these studies *pro bono* necessarily puts them on our back burners. We also need huge time blocks for these studies to be sure that the data are accurate and the methodology we employ is appropriate, or even cutting-edge. This type of work is complex and resource-intensive, and we see no need to do studies of this type unless they are done well.

B. The only reasons we began work on this project in 2015 were academic and scholarly: there had never been a comprehensive post-*Furman* study of the possible impact of race and ethnicity on death sentencing in Oklahoma, even though the state has had an unusually high death-sentencing and execution rate (per capita). Even if funds had been offered by defense attorneys, we probably would not have done this study to avoid accusations of bias on the ground that (as the saying goes) "he who pays the piper calls the tune."

C. To get a reliable picture of the possible impact of race and ethnicity on death sentencing, we needed to work with large samples. That is, if we are determining whether or not a coin is biased, we need 100 or more flips, not just ten. By using data for our Oklahoma study from 1990 (when Oklahoma hosted its first post-*Furman* execution) through 2012, we were able to obtain enough cases to make solid statements about the obtained patterns.

I declare under the penalty of perjury that the foregoing is true to the best of my information and belief.

Signed: Michael L. Radelet Date: Sept 14, 2017

Michael L. Radelet

Exhibit B

Declaration of Vicki Ruth Adams Werneke

I declare under penalty of perjury the following is true and correct to the best of my knowledge and belief.

1. I am an attorney licensed in the States of Oklahoma and Ohio.
2. I am an Assistant Federal Public Defender with the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Ohio, in Cleveland, Ohio. I have been in this position since June 2008.
3. I was asked by current counsel for Julius Jones to prepare this declaration.
4. From February 2002 through May 2008, I was the Chief of the Capital Post Conviction (CPC) Division with the Oklahoma Indigent Defense System (OIDS). Bryan Dupler was the Deputy Chief of the Division while I was there until he left in July or August 2005 to take a position as a Judicial Assistant to Judge David Lewis on the Oklahoma Court of Criminal Appeals.
5. During the time that I was the Chief, the CPC represented Julius Jones, an inmate on Oklahoma's death row. Laura Arledge, Assistant Appellate Counsel, was assigned to Mr. Jones's case.
6. Mr. Jones's post-conviction petition was filed in February 2005 after the Court granted three extensions of time by which to file it. Before the petition was filed, while Ms. Arledge was reviewing and preparing the petition, she was diagnosed with breast cancer. She underwent surgery and then aggressive chemo therapy, but she was able to continue to work as best she could. After Ms. Arledge's diagnosis, some of her cases were reassigned to other attorneys in the CPC.

7. In June 2002, the U.S. Supreme Court issued its ruling in *Atkins v. Virginia*, declaring a constitutional ban on the execution of defendants with intellectual disability. In response to *Atkins*, the Oklahoma Court of Criminal Appeals ruled that those defendants with death sentences with a potential *Atkins* claim would be entitled to jury trials on their post conviction claims. The Executive Director of OIDS determined that the CPC attorneys would handle those cases including the jury trials. From 2002 to 2005, the CPC conducted several evidentiary hearings, jury trials, and appeals for about sixteen clients who had potential *Atkins* claims.
8. After Ms. Arledge was diagnosed with breast cancer, the *Atkins* cases to which she had been assigned were reassigned to other attorneys in the CPC.
9. Also in 2002-2003, the OIDS experienced a severe budget crisis that required an extensive reduction in work force and furlough days for those employees who remained. The CPC lost two positions during the reduction in work force: one attorney, and one secretary. The agency also had limited funds for experts and travel. It took a couple of years before the Oklahoma legislature appropriated minimally adequate funds for litigation purposes.
10. I have reviewed a declaration of Professor Michael J. Radelet about the research project he participated in with Professors Susan Sharp and Glenn Pierce, entitled "Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012."
11. The attorneys with the CPC when Mr. Jones's post-conviction petition was being investigated, reviewed, prepared and filed could not have conducted such an extensive study. First, OIDS did not have the financial resources to engage such a study. Second, because of the heavy caseload, the CPC did not have the staff to undertake such a study. Third, the CPC staff did not have the necessary training to conduct a statistical analysis

even if we did have access to the data. Even with reasonable diligence, Ms. Arledge and the rest of the CPC could not have discovered the information contained within the report concerning the racial disparity of death sentences in Oklahoma.

12. I was a capital litigator in Oklahoma from 1993 until I left for Ohio in 2008. It did seem to me there was racial disparity about whom was sentenced to death and who was not, especially when the race of the victim was considered. However, the factual basis of the issue was not available to properly litigate.

9/19/2017
Date

Vicki Ruth Adams Werneke
Vicki Ruth Adams Werneke

A-4

ORIGINAL

2017 OK CR 22
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY CASTILLO SANCHEZ,) **FOR PUBLICATION**
)
Petitioner,)
)
v.) Case No. PCD-2017-666
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

ORDER DENYING SECOND APPLICATION FOR POST-CONVICTION RELIEF AND RELATED MOTIONS FOR DISCOVERY AND EVIDENTIARY HEARING

¶1 Anthony Castillo Sanchez, Petitioner, was tried by jury and found guilty of Count 1, first degree murder, in violation of 21 O.S.Supp.1996, § 701.7(A); Count 2, first degree rape, in violation of 21 O.S.1991, § 1114(A)(3); and Count 3, forcible sodomy, in violation of 21 O.S.Supp.1992, § 888(B)(3), in Cleveland County District Court, Case No. CF-2000-325. The jury found three aggravating circumstances[1] and sentenced Petitioner to death in Count 1, forty (40) years imprisonment and a $10,000 fine in Count 2, and twenty (20) years imprisonment and a $10,000 fine in Count 3. The Honorable William C. Hetherington, District Judge, pronounced the judgment and sentence on June 6, 2006. On December 14, 2009, this Court affirmed. *Sanchez v. State*, 2009 OK CR 31, 223 P.3d 980. The Supreme Court denied certiorari in *Sanchez v. Oklahoma*, 562 U.S. 931, 131 S.Ct. 326, 178 L.Ed.2d 212 (2010).

[1] The murder was especially heinous, atrocious, or cruel; the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and the existence of a probability that Appellant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1991, § 701.12(4), (5), and (7).

¶2 Petitioner sought capital post-conviction relief in an original application filed on January 26, 2009, which this Court denied in an unpublished order. *Sanchez v. State*, No. PCD-2006-1011 (Okl.Cr., April 19, 2010)(unpublished). The United States District Court denied a petition for writ of habeas corpus in *Sanchez v. Trammell,* 2015 WL 672447 (W.D.Okla. 2015). The United States Court of Appeals for the Tenth Circuit denied a certificate of appealability, *Sanchez v. Warrior*, 636 Fed. Appx. 971 (10th Cir. 2016), and the Supreme Court again denied certiorari. *Sanchez v. Duckworth*, ___ U.S. ___, 137 S.Ct. 119, 196 L.Ed.2d 96 (2016).

¶3 Mr. Sanchez has now filed a second application for post-conviction relief with related motions for discovery and an evidentiary hearing. Petitioner claims that newly discovered evidence of a "greater risk of execution" due to his race and/or the race and/or gender of the victim violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and parallel provisions of the Oklahoma Constitution. Petitioner relies principally on the findings of Glenn Pierce, Michael Radelet, and Susan Sharp, authors of "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," a draft study of the impact of race, gender, and other factors on the likelihood of capital punishment. The study was publicly released on April 25, 2017 as Appendix IA to *The Report of the Oklahoma Death Penalty Review Commission ("The Report").*[2]

¶4 Pierce, Radelet, and Sharp found that for the studied period, Oklahoma homicides with white victims were about twice as likely to result in capital

[2] https://drive.google.com/file/d/0B-Vtm7xVJVWONmdNMmM5bzk3Qnc/view

punishment as those with non-white victims, *id.,* at 218; and the odds of capital punishment for homicides with white female victims were about 9.6 times that of cases with non-white male victims. *id.,* at 219. From these findings, Petitioner asserts that his race and/or the race and/or gender of his victim were "decisive" factors in his punishment; that the prosecutors' decision to seek the death sentence and the jury's decision to impose it are tainted by unlawful race and gender discrimination; and that the death sentence violates his constitutional rights.

¶5 In his related motions, Petitioner requests court-ordered discovery and an evidentiary hearing to explore "the ways in which race and gender influenced various decision makers in his case," including access to the district attorney's office policies and procedures for seeking the death penalty; extensive race and gender data for homicides from 1990 to 2012; data for all first degree murder cases prosecuted for the same period; data for all cases from 1990 to 2012 in which the death penalty was sought; the race, gender, and name of victims in these cases; and the ultimate sentence imposed.

¶6 This Court may not consider a second application for capital post-conviction relief unless its claims "have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable," as defined in section 1089(D) of Title 22. Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S.Supp.2016, Ch. 18, App. Such an application must be filed within sixty (60) days "from the date the previously

unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3).

¶7 The factual basis for a capital post-conviction claim is "unavailable" when the facts underlying the claim "were not ascertainable through the exercise of reasonable diligence" on or before the filing of the original post-conviction application; and when those facts, 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." 22 O.S.Supp.2016, § 1089(D)(8)(a), (b)(1) and (2).

¶8 The factual basis for Petitioner's new post-conviction claim is the statistical analysis of race, gender, and comparative sentencing outcomes in Oklahoma homicides in the 2016 study by Pierce, Radelet, and Sharp. While we understand Petitioner's view that *this* study is "newly discovered evidence" as of its publication in 2017, Petitioner 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.[3] Post-conviction relief on this claim is therefore procedurally barred. 22 O.S.2011, §§ 1089(D)(8)(a), (b)(1).

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[3] See, e.g., Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27, 95 (1984)(finding that "the race of the victim had sizable and statistically significant effects on the likelihood that a defendant would receive the death penalty in Oklahoma")(cited as prior research in *The Report*, at 203-4). Pierce, Radelet, and Sharp assembled the demographic data for their 2016 analysis of race, gender, and sentencing outcomes in Oklahoma homicides from 1990 to 2012 from FBI Supplemental Homicide Reports, other publicly available resources, and independent research. *The Report*, at 204.

¶9 Secondly, Petitioner'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). On direct appeal, this Court "reviewed the record of this trial and concluded the jury was not improperly influenced by passion, prejudice, or any other arbitrary factor" in its finding of specific aggravating circumstances, and that those circumstances outweighed the mitigating evidence. This Court independently concluded that the jury's death sentence was "factually supported and appropriate." *Sanchez*, 2009 OK CR 31, ¶ 106, 223 P. 3d at 1014.

¶10 Current research, indicating "rather large disparities in the odds of a death sentence that correlated with the gender and race of the victim"[4] 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. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 296-97, 107 S.Ct. 1756, 1769, 95 L.Ed.2d 262 (1987) (finding a statistical study indicating pattern of racial disparity insufficient to raise an inference of purposeful discrimination in the inherently discretionary administration of capital punishment). The legitimate and far more plausible reason for Petitioner's death sentence is his guilt of a premeditated, aggravated murder for which the death penalty was authorized by

[4] *The Report*, at 222.

law. His claim is therefore procedurally barred under 22 O.S.2011, § 1089(D)(8)(b)(2).

¶11 This Court "may not consider the merits of or grant relief" on a procedurally barred claim in a second or subsequent capital post-conviction proceeding. 22 O.S.2011, § 1089(D)(8). Petitioner has not shown that the current claim could not have been presented in earlier proceedings, or that its factual basis was not ascertainable through the exercise of reasonable diligence on or before the date of Petitioner's original post-conviction application. We further find that the factual basis of the current claim, if proven and viewed in light of the evidence as a whole, would be insufficient 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 Petitioner guilty or rendered the penalty of death. 22 O.S.Supp.2016, § 1089(D)(8)(b)(1), (b)(2). Petitioner's second application for post-conviction relief and related motions for discovery and evidentiary hearing are therefore **DENIED**.

¶12 **IT IS SO ORDERED.**

¶13 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT ON THIS** 2nd **DAY OF** August **, 2017.**

GARY L. LUMPKIN, PRESIDING JUDGE

DAVID B. LEWIS, VICE-PRESIDING JUDGE

Robert L. Hudson

ROBERT L. HUDSON, JUDGE

ATTEST:

John D. Hadden

Clerk

No._____

IN THE SUPREME COURT OF THE UNITED STATES

Julius Darius Jones, Petitioner,

vs.

State of Oklahoma, Respondent

CERTIFICATE OF SERVICE

I, Dale A. Baich, a member of the bar of this Court, hereby certify that on November 27, 2017, this Petition for Writ of Certiorari and supporting documents were electronically filed in this Court. I also certify that on November 28, 2017 the original and 10 copies of this Petition for Writ of Certiorari and supporting documents will be 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 will be mailed first-class mail to Jennifer Crabb, at 313 NE 21st, Oklahoma City, OK 73105. .

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

Respectfully submitted: November 27, 2017.

JON M. SANDS
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District of Arizona

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