Case No. 17-6943

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS DARIUS JONES,

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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CAPITAL CASE
QUESTION PRESENTED

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 second application for post-conviction relief?

No. 17-6943

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2017

JULIUS DARIUS JONES,

***Petitioner*,**

-vs-

STATE OF OKLAHOMA,

Respondent.

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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 September 5, 2017. *See* 9/5/2017 *Order Denying Second Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2017-654).

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-

1999-4373. In 2002, Petitioner was tried by jury for one count of first degree murder. A bill of particulars was filed alleging two statutory aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person and (2) 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 both statutory aggravating circumstances 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 January 27, 2006. *See Jones v. State*, 128 P.3d 521 (Okla. Crim. App. 2006). The OCCA granted Petitioner's petition for rehearing, but denied relief, on March 14, 2006. *Jones v. State*, 132 P.3d 1 (Okla. Crim. App. 2006). This Court denied Petitioner's certiorari request on October 10, 2006. *See Jones v. Oklahoma*, 549 U.S. 963 (2006).

Petitioner filed an application for state post-conviction relief on February 25, 2005, which was denied by the OCCA in an unpublished opinion on November 5, 2007. *See* 11/5/2007 *Order Denying Application for Post-Conviction Relief and Related Motion* (OCCA No. PCD-2002-630).

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[1] Petitioner was also convicted of one count of possession of a firearm after former conviction of a felony, for which he was sentenced to fifteen years imprisonment, and one count of conspiracy to commit a felony, for which he was sentenced to twenty-five years imprisonment.

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on November 3, 2008. On May 22, 2013, the district court issued an order denying Petitioner's petition for habeas corpus relief. *See Jones v. Trammell*, No. CIV-07-1290-D, slip op. (W.D. Okla. May 22, 2013) (unpublished).

Petitioner appealed the Western District of Oklahoma's denial of habeas relief to the Tenth Circuit. The Tenth Circuit affirmed the Western District's denial of relief on December 5, 2014. *Jones v. Trammell*, 773 F.3d 68 (10th Cir. 2014). The court subsequently granted rehearing and vacated the opinion, only to again affirm the district court's decision on November 10, 2015. *Jones v. Warrior*, 805 F.3d 1213 (10th Cir. 2015). This Court denied Petitioner's request for certiorari review on October 3, 2016. *Jones v. Duckworth*, ___ U.S. ___, 137 S. Ct. 109 (2016).

On June 23, 2017, Petitioner filed a second application for state post-conviction relief, which was denied by the OCCA in an unpublished opinion on September 5, 2017. *See* 9/5/2017 *Order Denying Second Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2017-654) ("2nd PC Order"). This second application for post-conviction relief is the subject of Petitioner's petition for writ of certiorari.

On December 29, 2017, Petitioner filed his *third* application for state post-conviction relief. This application is still pending.

Petitioner's petition for a writ of certiorari was placed on this Court's docket on November 28, 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:

> On Wednesday, July 28, 1999, Paul Howell was fatally shot in the driveway of his parents' Edmond home. Howell, his sister, Megan Tobey, and Howell's two young daughters had just returned from a shopping trip in Howell's Chevrolet Suburban. Howell pulled into the driveway and turned the engine off. As Tobey exited from the front passenger side, she heard a gunshot. Tobey turned to see her brother slumped over the driver's seat, and a young black male, wearing a white T-shirt, a stocking cap on his head, and bandana over his face, demanding the keys to the vehicle. Tobey rushed to get herself and Howell's daughters out of the Suburban. As Tobey escorted the girls through the carport, she heard someone yelling at her to stop, and then another gunshot. Tobey got the girls inside and summoned for help. Howell's parents ran outside to find their son lying on the driveway. His vehicle was gone. Howell died a few hours later from a single gunshot wound to the head.
>
> Two days after the shooting, Oklahoma City police found Howell's Suburban parked near a convenience store on the south side of town. Detectives canvassed the neighborhood and spoke with Kermit Lottie, who owned a local garage. Lottie told detectives that Ladell King, and another man he did not know, had tried to sell the vehicle to him the day before. Lottie realized at the time that the vehicle matched the description given in news reports about the Howell carjacking. Ladell King, in turn, told police that he had

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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 (Tr.). *See* Sup. Ct. R. 12.7.

agreed to help Christopher Jordan and Jones find a buyer for a stolen vehicle. On the night of the shooting, Jordan came to King's apartment driving a Cutlass; Jones arrived a short time later, wearing a white T-shirt, a black stocking cap, and a red bandana, and driving the Suburban. King told police that Jones could be found at his parents' Oklahoma City home.

Police then drove to Jones's parents' home, called a telephone number supplied by King, and spoke to someone who identified himself as Julius Jones. Jones initially agreed to come out and speak to police, but changed his mind. Police made several attempts to re-establish telephone contact; eventually a female answered and claimed Jones was not there. While some officers maintained surveillance at the home, others sought and obtained warrants to arrest Jones and search his parents' home for evidence. Police found a .25–caliber handgun, wrapped in a red bandana, secreted in the attic through a hole in a bedroom ceiling and found papers addressed to Jones in the bedroom. Police also found a loaded, .25–caliber magazine, hidden inside a wall-mounted door-chime housing. Further investigation revealed that the bullet removed from Howell's head, and a bullet shot into the dashboard of the Suburban, were fired from the handgun found in the attic of the Jones home.

Christopher Jordan was arrested on the evening of July 30. Jones, who managed to escape his parents' home before police had secured it, was arrested at a friend's apartment on the morning of July 31. The two men were charged conjointly with conspiracy to commit a felony, and with the murder of Howell. Jordan agreed to testify against Jones as part of a plea agreement. At trial, Jordan testified that the two men had planned to steal a Chevrolet Suburban and sell it; that they followed Howell's vehicle for some time with the intent to rob Howell of it; that once Howell pulled into the driveway, Jordan stayed in their vehicle while Jones, armed with a handgun, approached the Suburban on foot; that after the robbery-shooting, Jones drove the Suburban away and told Jordan to follow him; and that

> Jones subsequently claimed his gun had discharged accidentally during the robbery.

Jones, 128 P.3d at 522-23 (paragraph numbers omitted).[3]

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 second post-conviction application, filed fifteen 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.

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[3] As he did in the Tenth Circuit, Petitioner tries to make it appear that Ms. Tobey's description of the shooter more closely matches Mr. Jordan based on "half an inch of hair sticking out from underneath the stocking cap" worn by the shooter. Pet. at 3. The Tenth Circuit recognized that Ms. Tobey described "hair between [the shooter's] stocking cap and 'where his ear connect[ed] to his head'", not hair sticking *out* from beneath the shooter's cap. *Jones*, 805 F.3d at 1214 (alteration adopted).

PETITIONER'S CHALLENGE TO THE OCCA'S APPLICATION OF A PROCEDURAL BAR TO A CLAIM NOT RAISED UNTIL HIS SECOND 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 second 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 *Second Application for Post-Conviction Relief – Death Penalty Case* (Okla. Crim. App. No. PCD-2017-654). The OCCA found the claim procedurally barred because it was not raised in Petitioner's original post-conviction application. 2nd 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 17-18, 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 29 (quoting 2nd 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. 2nd 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.[4]

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 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

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[4] 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 18, 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.

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.[5] 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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[5] 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 references defense counsel's motion for a change of venue, which was denied. Pet. at 5. However, Petitioner does not allege that the motion had anything to do with Petitioner's race.

Petitioner next relies upon statements made by the District Attorney, Bob Macy, before trial referring to the fact that the crime occurred in what was supposed to be a safe neighborhood and was motivated by drugs. Pet. at 6. Although Petitioner claims the idea that the neighborhood in which Paul Howell was murdered was supposed to be safe necessarily implies it was a "homogenous white neighborhood" he provides no

evidence to that effect. Pet. at 6 n.6 (quoting Rich Benjamin, Searching for Whitopia: An Improbable Journey to the Heart of White America, 185 (2009)). In fact, Petitioner's black co-defendant was from Edmond (Tr. IV 68-69; Tr. VIII 96-97). More importantly, Petitioner provides no evidence that Mr. Macy pursued the death penalty against him based on his or Paul Howell's race. Mr. Macy's point was that Mr. Howell was minding his own business and in no way should have foreseen the possibility that he could be gunned down in the driveway of his parents' home. Regarding the alleged drug motive, it is far more plausible that Mr. Macy was referring to the senselessness of the murder than trying to send a coded message to his potential jurors that the defendant was black.

Petitioner also asserts that the print media commended Mr. Macy for seeking the death penalty. Pet. at 7. Petitioner shot an unarmed man in his own car, without provocation, and in front of Mr. Howell's two young daughters. Petitioner then fired at Ms. Tobey and the children as they fled. Petitioner also had a criminal history that was "replete with the use and threat of violence: armed robbery, carjackings, assault." *Jones*, 132 P.3d at 3. Petitioner's death-worthiness was unrelated to his race, or that of Paul Howell.

Petitioner also alleges that a judge who presided over a single pre-trial hearing "harbored troubling attitudes towards people of color[.]" Pet. at 7-8. Petitioner refers to statements the judge allegedly made regarding Mexicans. Pet. at 8. 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. Although Petitioner suggests the pre-trial motion to suppress was improperly denied (presumably due to his race) because the evidence that was the subject of the hearing was "illegally seized by the police", the OCCA affirmed the judge's ruling. *Jones*, 128 P.3d at 536-37. Again, Petitioner has failed to demonstrate that the judge discriminated against him.

Petitioner next claims the prosecutor "explicitly call[ed] the jury's attention to Mr. Howell's physical appearance"--including calling him "handsome"--and the fact that he owned an insurance agency. Pet. at 8. It is entirely unclear what those facts have to do with Mr. Howell's race.

Petitioner also accuses the prosecutors of "t[aking] every opportunity to racialize Mr. Jones by appealing to the deeply entrenched and stereotypical association between blackness and dangerousness." Pet. at 9. Petitioner then points to only one alleged "example." Pet. at 9-10. Petitioner notes the prosecutor said Petitioner was "out prowling the streets"[6], thereby appealing to vicious racial stereotypes, in spite of the fact that Petitioner had no prior violent felony convictions. Pet. at 10.

The truth is that the word "prowl" is a very apt description for what Petitioner and Mr. Jordan did when they drove around until they found a person to rob (Tr. VIII 146-47, 150-55). After the two found Mr. Howell, they followed him to a restaurant, parked by the exit and waited until Mr. Howell got his food from the drive-through,

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[6] Petitioner fails to support this allegation with a citation to the record.

and then followed him home (Tr. VIII 155-62). Mr. Jordan let Petitioner out before they arrived at Mr. Howell's house, at which time Petitioner ran up to Mr. Howell and shot him (Tr. IV 104; Tr. VIII 164). It is far from inaccurate to say that Petitioner stealthily searched for his prey. Pet. at 10 n.10 (quoting Oxford English Dictionary, https:/en.oxforddictionaries.com/definition/prowl).

The prosecutor was also likely referring to evidence that Petitioner had committed armed robbery on three prior occasions -- two of which were in the week before Mr. Howell was murdered -- by pointing a gun at the head of his victims (Tr. XI 53, 58-62, 105-12, 119-27, 134-53; Tr. XII 14-18, 58-60, 62-64). The prosecutor's arguments, which were fully supported by the record, are not indicative of racial bias.

Finally, in another section of the Petition, Petitioner claims "the record evidence that at least one juror in [his] case expressed the view that he deserved to be put 'in a box in the ground' (Tr. XII 95-96, 106), even before the close of the evidence further indicates that racial biases" affected his trial. Pet. at 24. During second stage, but before deliberations, one juror reported that she overheard another juror say "they should place him in a box in the ground for what he has done." *Jones*, 128 P.3d at 535 n.3; (Tr. XII 95-96). The jurors were questioned, the trial court denied Petitioner's motion to excuse the juror who allegedly made the comment and the OCCA affirmed. *Jones*, 128 P.3d at 535; (Tr. XII 96-107; Tr. XIII 29-91). The alleged comment has absolutely nothing to do with the race of Petitioner or Mr. Howell.

There is simply nothing in this record to indicate Petitioner was sentenced to death based on racial considerations, as opposed to the murder and aggravating circumstances. 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 27-28 (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.[7] 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 no reasonable fact finder would have found him guilty or rendered the penalty of death if not for the influence of race. Pet. at 29. In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), this Court held that when

> 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.

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[7] Petitioner also places far too much emphasis on the OCCA's citation to *Sanchez*. Pet. at 26-27. The OCCA recognized Petitioner's claim was "almost identical" to that presented in *Sanchez*. 2nd 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 application *not* because he failed to prove the factual basis was not available when the petitioner in *Sanchez* filed his previous post-conviction application.

Here, the independence of the bar is apparent from the face of the opinion. The OCCA expressly applied its precedent and a state statute. 2nd 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 30-31 (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 his initial post-conviction application. 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 32. 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 36-37. 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 37.

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, only one year after 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 second 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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