No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS DARIUS JONES, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

****CAPITAL CASE****

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Federal Public Defender
District of Arizona

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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Petitioner,	)	NOT FOR PUBLICATION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-2017-1313
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

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

Before the Court is Petitioner Julius Darius Jones's third 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

[1] Jones's 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

Judgment and Sentence on direct appeal[2] and in collateral proceedings in this Court.[3] Jones too has unsuccessfully challenged his convictions and death sentence in federal habeas proceedings.[4]

Jones now claims that newly discovered evidence establishes that a juror harbored racial animus toward him. According to Jones, an investigator working on his case sent a Facebook

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(15) years imprisonment on Count 2, and twenty-five (25) years imprisonment on Count 3.

[2] On January 27, 2006, this Court affirmed Jones's Judgment and Sentence. *Jones v. State,* 2006 OK CR 5, 128 P.3d 521. On March 14, 2006, the Court granted Jones's petition for rehearing, but finding relief was not warranted denied Jones's 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).

[3] This Court denied Jones's original and second applications for post-conviction relief in unpublished opinions. *See Jones v. State,* Case No. PCD-2002-630 (Okl.Cr., Nov. 5, 2007) (unpublished); *Jones v. State,* Case No. PCD-2017-654 (Okl.Cr., Sept. 5, 2017) (unpublished).

[4] 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's petition for certiorari review in *Jones v. Duckworth,* __ U.S. __, 137 S. Ct. 109, 196 L. Ed. 2d 88 (2016).

message to Juror V.A. to arrange a meeting to discuss the case.[5] 3rd PC App. at 20. Juror V.A. purportedly responded:

> During the trial I was the juror who went to the judge with the comment from another juror about how it was a waste of time and "they should have just take the nigger out and shoot him behind the jail" although that juror was never removed and nothing further came of it[.]

Petitioner's Exhibit A. Jones contends this evidence establishes that "racial prejudice influenced the decision of at least one juror to convict [him] and sentence him to death" in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments, and parallel provisions of the Oklahoma Constitution.

We note first that Petitioner's Exhibit A provides screen shots of Juror V.A.'s alleged response to substantiate this claim. Petitioner does not provide this Court with an affidavit from Juror V.A. or the investigator. An affidavit specifically averring Petitioner has reason to believe juror misconduct occurred is required to support such an accusation. *See Hatch v. State*, 1996 OK CR 37, ¶ ¶ 57, 924 P.2d 284, 296 (granting any relief based upon bald allegations or suspicions goes against "the presumption of

[5] V.A. served as a juror in Jones's 2002 jury trial.

correctness we attach to trial proceedings, and to the presumption we use in dealing with counsel as officers of the court."); *see also* Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).

Nonetheless, notwithstanding this omission and having reviewed Jones's claim and supporting exhibits, we find Jones's claim is barred on grounds of *res judicata* and waiver. 22 O.S.2011, §§ 1089(C)(1), 1089(D)(8); *see also* 22 O.S.2011, § 1086. While this claim was not raised in this exact manner previously, a factually similar claim of juror misconduct made by this same juror was litigated both at trial and on direct appeal. *Jones v. State*, 2006 OK CR 5, ¶¶ 19-20, 128 P.3d 521, 535. Jones's original juror misconduct claim involved the same two jurors at issue here—Juror V.A. and Juror J.B. During the second stage of trial, prior to deliberations, Juror V.A. notified the trial court that she had heard Juror J.B. make "a comment that they should place him in a box in the ground for what he has done." *Jones*, 2006 OK CR 5, ¶ 19 n.3, 128 P.3d at 535 n.3. Juror V.A.'s concerns regarding Juror J.B.'s comments were fully vetted by the trial court. The trial court

denied Jones's motions to excuse Juror J.B. and to declare a mistrial. *Id.*, 2006 OK CR 5, ¶ 19. On direct appeal, this Court affirmed those rulings finding Jones had failed to show the alleged misconduct, i.e., Juror J.B.'s premature deliberations, was prejudicial.

The only perceivable difference between Jones's original claim and his current claim is Juror V.A.'s new assertion that Juror J.B. made a racial epithet. Juror V.A.'s recollection of what was said by J.B. on February 27, 2002, was no doubt better on that day when she reported it to the trial court than it is now. Moreover, Juror V.A.'s concern with Juror J.B.'s alleged comment was obviously significant enough that she felt compelled to report it to the trial court. Thus, it is highly improbable that Juror V.A. neglected to add, during the trial court's investigation into the matter, that J.B. used a clearly offensive racial epithet or for that matter, failed to mention that another juror possibly engaged in similar conduct. Consequently, to the extent Jones's present claim was previously raised on direct appeal, his claim is barred by *res judicata*. *Stevens v. State*, 2018 OK CR 11, ¶ 14, 422 P.3d 741, 745-46; *Logan v.*

State, 2013 OK CR 2, ¶ 6 n.5, 293 P.3d 969, 973 n.5, *as corrected* (Feb. 28, 2013) ("if appellate counsel actually did raise the issue (on direct appeal) that is now being re-asserted on post-conviction . . ., any rejection of the issue on direct appeal would make the issue *res judicata*[.]"). *See also Braun v. State*, 1997 OK CR 26, ¶ 17, 937 P.2d 505, 511 ("as the basis for [this] issue was raised on direct appeal, *res judicata* applies and this Court cannot address it").

Furthermore, to the extent Jones potentially raises a new claim related to the same issue, his claim is barred from review under 22 O.S.2011, § 1089(D). *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29 ("This Court may not consider a [subsequent] 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."). At the heart of Jones's claim is his assertion of juror misconduct. Juror J.B.'s alleged remark was made during the second stage proceedings—not during deliberations. Nothing presented in Jones's application for post-conviction relief indicates otherwise.

Jones was not precluded by law from further investigating Juror V.A.'s allegations post-trial. *See McGregor v. State*, 1997 OK CR 10, ¶ 7, 935 P.2d 332, 334-35 (Petitioner failed to demonstrate why his claim could not have been previously raised given that the facts generating the claim were available as the persons in possession of evidence were known to trial counsel); *cf. Crider v. State ex rel. Dist. Court of Oklahoma City.*, 2001 OK CR 10, ¶ 4, 29 P.3d 577, 579 ("defense representatives are entitled to contact jurors as part of the investigation of possible appellate issues, in order to determine whether any impermissible outside influence was introduced into deliberations"). Thus, contrary to Jones's assertion, the Supreme Court's decision in *Pena-Rodriquez v. Colorado*, __ U.S. __, 137 S. Ct. 855, 869 (2017), was not needed to bring today's claim of juror misconduct. The legal basis for this claim was therefore not unavailable. 22 O.S.2011, § 1089(D)(8)(a).

Additionally, for reasons discussed above, Jones's claim is also barred under 22 O.S.2011, § 1089(D)(8)(b), because he fails to show (1) 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; and (2) 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 racial prejudice, no reasonable fact finder would have found him guilty or rendered the penalty of death. *Sanchez*, 2017 OK CR 22, ¶¶ 8, 11, 406 P.3d at 29, 30.

Thus, for the foregoing reasons, we find Jones's claim is barred. Jones's third 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. (2018), 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 this 18th day of September, 2018.

GARY L. LUMPKIN, Presiding Judge

DAVID B. LEWIS, Vice Presiding Judge

ROBERT L. HUDSON, Judge

- CIR separate writing

DANA KUEHN, Judge

SCOTT ROWLAND, Judge

ATTEST:

Clerk

KUEHN, J., CONCURRING IN RESULT:

Upon review of the application and exhibits, I cannot agree that the doctrine of res judicata bars consideration of the proposed newly discovered evidence. *Hale v. State*, 1991 OK CR 27, ¶ 2, 807 P.2d 264, 266–67. I do, however, agree that the Third Application for Post-Conviction Relief should be denied. Petitioner does not meet the basic minimum pleading requirements necessary before this Court may consider whether to grant relief on a subsequent capital post-conviction application based on its merits.[1]

Petitioner's Application, supported by a cell phone screen shot of a hearsay statement, is a bare-bones attempt to motivate the Court to make a decision based on emotion. The alleged statement

[1] This Court may not consider the merits on a subsequent post-conviction application unless:

> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
>
> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder. . . would have rendered the penalty of death. 22 O.S. § 1089 (D)(8)(b)(1) and (2).

is appalling, intolerable and maddening. However, this Court should not deny this claim based upon res judicata, or any procedural barrier, upon the slim presentation filed by Petitioner. As the record is not complete, I cannot join the Majority's leap to the res judicata conclusion. Just as easily as the Majority finds res judicata, I believe what was submitted could support the contrary argument. The direct appeal did not raise the proposition of juror misconduct or mandatory juror dismissal for racial statements that violated his Sixth, Eighth, and Fourteenth Amendment rights. It addressed only the issue of juror misconduct of premature deliberations. The statement which was at issue on direct appeal, regarding putting the defendant "in a box" for killing a man, is completely different from the statement alleged here, that the defendant should die solely for the color of his skin. The latter, of course, is deplorable not only to the American system of justice, but to the core of liberty and decency. Again, we cannot reach either conclusion based on the meager information Petitioner provides.

Petitioner's application, supported by a screen shot of an investigator's phone conversation allegedly had with Juror V.A., does not contain a factual basis establishing this newly

remembered racially-charged statement was not ascertainable through the exercise of reasonable diligence for use in the direct appeal or any subsequent post-conviction applications. Post-conviction relief may be based on the discovery of "material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." 22 O.S. § 1080(d). These facts must have been undiscoverable for trial or original appeal despite the exercise of due diligence. *Romano v. State*, 1996 OK CR 20, ¶ 12, 917 P.2d 12, 15. The record is clear that the trial judge questioned all of the jurors about a statement made, yet the new statement was never brought up by Juror V.A. or any other juror during the *in camera* review at trial. The record is completely barren of any exhibits or affidavits to support a claim that the information was not ascertainable previous to this Third Application for relief.

Petitioner's application also fails to establish by clear and convincing evidence that the statement, if true, affected the fact-finders' rendering of a verdict recommending death. 22 O.S. § 1089 (D)(8)(b)(2). Recognizing the Legislature's intent to honor and preserve the legal principle of finality of judgment, we will narrowly

construe the post-conviction amendments to reflect that intent. *Smallwood v. State*, 1997 OK CR 25, ¶ 4, 937 P.2d 111, 114. The sparse information provided by Petitioner does not meet the minimum standards necessary to overcome this principle of finality of judgment.

The request for an evidentiary hearing must also be denied as Petitioner failed to follow the procedural mandates necessary for this Court to even consider his motion for evidentiary hearing. 22 O.S. § 1051; Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). Rule 9.7(D)(5) requires a petitioner to submit affidavits in support of the specific statements contained in the request for evidentiary hearing. *Id.* Petitioner's request for evidentiary hearing only incorporated by reference his Exhibits from this Post-Conviction Relief Application, which, as I discuss above, are not sworn affidavits and lack any value. Simply attaching the screen shot of a phone does not meet the threshold requirements required for the Court to remand the post-conviction application to the District Court for a hearing. Rule 9.7(D)(1)(a), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). The better approach is for Petitioner to follow

procedure, raise specific allegations of fact, and submit worthy affidavits in support of those allegations.

Because Petitioner has failed to comply with the Rules of this Court, I agree that the request for an evidentiary hearing should be denied. His subsequent post-conviction application does not meet the statutory requirements for this Court to consider his substantive claim on its merits, and I agree that the application should be denied.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JULIUS DARIUS JONES,
Petitioner,
v.
STATE OF OKLAHOMA,
Respondent,

SERVICE COPY

1041176876

Case Number: PCD-2017-1313

TCC Number(s): CF-1999-4373

MANDATE

To the Honorable Judge of the District Court in and for the County of OKLAHOMA, State of Oklahoma, Greetings:

Whereas, the Court of Criminal Appeals of the State of Oklahoma has rendered its decision in the above styled and numbered case on the 28th day of September, 2018, resolving the appeal from the District Court in Case Number CF-1999-4373.

DENIED

Now, therefore, you are hereby commanded to cause such Decision to be filed and spread of record in your court and to issue such process (see 22 O.S. 2001, §§ 978 & 979, and 22 O.S. 2004 §980) and to take such other action as may be required by said Order (see 22 O.S. 2001 §§ 1066 and 1072). You shall then make due and prompt return to this court showing ultimate disposition of the above case.

Witness, the Honorable Gary L. Lumpkin, Presiding Judge of the Court of Criminal Appeals of the State of Oklahoma, State Capitol Building, Oklahoma City, this 28th day of September, 2018 .

JOHN D. HADDEN
Clerk

(seal)

By: Cynde Robertson
Deputy

A-2

Search documents in this case: Search

No. 18A641 *** CAPITAL CASE ***

Title:	**Julius Darius Jones, Applicant** **v.** **Oklahoma**
Docketed:	December 18, 2018
Lower Ct:	Court of Criminal Appeals of Oklahoma
Case Numbers:	(PDC-2017-1313)

DATE	PROCEEDINGS AND ORDERS
Dec 14 2018	Application (18A641) to extend the time to file a petition for a writ of certiorari from December 27, 2018 to January 26, 2019, submitted to Justice Sotomayor. **Main Document** **Other** **Proof of Service**
Dec 18 2018	Application (18A641) granted by Justice Sotomayor extending the time to file until January 28, 2019.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Dale A. Baich Counsel of Record	Arizona Public Defender, Capital Habeas Unit 850 W. Adams St Suite 201 Phoenix, AZ 85007 dale_baich@fd.org	602-382-2816
Party name: Julius Darius Jones		

A-3

Victoria Coates

You and Victoria Coates aren't connected on Facebook

Lives in [redacted], Oklahoma

Studied at OSU-OKC, OCCC, Rose State

You added Victoria on October 31, 2017

Create Group

OCT 31, 9:08 AM

Hi Victoria,
My name is Rebecca and I'm an investigator with the Federal Public Defender. My office was recently appointed to the Julius Jones case for the purposes of clemency. That means that Julius has exhausted all his appeals and could receive a date of execution in the near future. I understand you are one of the jurors that served in his

of the jurors that served in his case. I was really hoping we could meet at a coffee shop or some place similar so I can ask you about some concerns that have been brought to my attention by other jurors and just get your general opinion on some things that happened at trial. Also there is important evidence we have uncovered through our investigation that was never presented to the jury that I was hoping to speak with you about. I am in Oklahoma this week from my office in Arizona. Are you available this week anytime? Again this is very important, as a man's life is at stake and timing is of the essence.

Victoria Coates accepted your request.

NOV 1, 12:29 PM

NOV 1, 12:29 PM

I am only in Oklahoma until Friday. Please consider meeting to chat. I won't take up much of your time. Thanks!

NOV 2, 7:13 AM

[redacted] We can communicate this way

NOV 2, 12:25 PM

Anything you want to ask me? I was recently contacted by a producer from dateline doing a feature on Julius Jones' case. I am curious to find out any new information as I do believe that other members of the jury were biased. During the trial I was the juror who went to the judge with the comment from another juror about how it was all a waste of time and "they should just take the nigger out and shoot him behind the jail"

your time. Thanks!

NOV 2, 7:13 AM

[redacted] We can communicate this way

NOV 2, 12:25 PM

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[redacted]

A-4

Comprehensive Report

Date: 08/04/17

Report processed by:
Federal Public Defender - District of AZ
407 W CONGRESS ST STE 501
TUCSON, AZ 85701
520-879-7500 Main Phone

Report Legend:
S - Shared Address
D - Deceased
✓ - Probable Current Address

Subject Information
(Best Information for Subject)
Name: VICTORIA LYNN COATES

Date of Birth: [redacted]**1977**
Age: **39**
LexID: [redacted]
SSN: [redacted]8760 issued in **Oklahoma** between **1/1/1989** and **12/31/1990**
View All SSN Sources

AKAs
(Names Associated with Subject)
VICTORIA L COATES
Age: **39** SSN: [redacted]8760
VICTORIA COATES
Age: **39** SSN: [redacted]8760
VICTORIA L ARMSTRONG
Age: **39** SSN: [redacted]8760
VICTORIA L COATS
Age: **39** SSN: [redacted]8760
VICTORIA L MORELAND
Age: **39** SSN: [redacted]8760
VICTORIA LYNN ARMSTRONG
Age: **39** SSN: [redacted]8760
VICTORIA COATS
Age: **39** SSN: [redacted]8760
VICTORIA ARMSTRONG
Age: **39** SSN: [redacted]8760
VICTORIA COATES
Age: **39** SSN: [redacted]xxxx
VICTORIA ARMSTRONG
Age: **39** SSN: [redacted]xxxx

Indicators

Bankruptcy: **No**
Property: **No**
Corporate Affiliations: **No**

A-5

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PCD 2017 1313

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

THIRD APPLICATION FOR POST-CONVICTION RELIEF

DEATH PENALTY CASE

Mark H. Barrett, OK Bar # 557
P.O. Box 896
Norman, Oklahoma 73070
405.364.8367 (telephone)
barrettlaw@sbcglobal.net
ATTORNEY FOR PETITIONER

JULIUS DARIUS JONES
December 29, 2017

PART A: PROCEDURAL HISTORY

Petitioner, Julius Darius Jones, through undersigned counsel, hereby submits his third application for post-conviction relief under Okla. Stat. tit. 22, § 1089. Pursuant to Rule 9.7(A)(3) of the Rules of the Oklahoma Court of Criminal Appeals, a copy of Mr. Jones' original application for post-conviction relief and a copy of his second application for post-conviction relief are attached hereto as Attachments 1 and 2. The appendix of attachments to the original and subsequent applications have not been attached hereto, but they are available should this Court find them necessary for its review of Mr. Jones' application. The convictions and sentences from which relief is sought are: murder in the first degree, sentence of death by lethal injection; possession of a firearm after former conviction, sentence of fifteen (15) years imprisonment; conspiracy to commit a felony, sentence of twenty-five (25) years imprisonment.

1. Court in which sentence was rendered:

   A. District Court of Oklahoma County, State of Oklahoma
   B. Case No. CF-1999-4373

2. Date of sentence: April 19, 2002

3. Terms of sentence:

   Count I: Death
   Count II: Fifteen years
   Count III: Twenty-five years

4. Name of Presiding Judge: The Honorable Jerry D. Bass

5. Petitioner currently in custody at the Oklahoma State Penitentiary, H-Unit, McAlester, Oklahoma.

6. Does Petitioner have criminal matters pending in other courts? No.

   A. If so, where? Not Applicable

B. List charges: Not Applicable

7. Does Petitioner have sentences (capital or non-capital) to be served in other states/jurisdictions? No

A. If so, where? Not Applicable
B. List convictions and sentences: Not Applicable

I. CAPITAL OFFENSE INFORMATION

8. Petitioner was convicted of the following crime(s), for which a sentence of death was imposed:

A. Murder in the First Degree
B. Aggravating factors alleged and found (if more than one murder conviction, list aggravators by conviction):

a. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;
b. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

C. Mitigating factors listed in jury instructions:

a. Julius did not premeditate the death of Paul Howell.

b. Julius did not bear a grudge against Mr. Howell.

c. Julius did not intend for Mr. Howell to die.

d. Julius was not the sole perpetrator in this shooting. There was another person involved, Christopher Jordan.

e. Julius was 19 years old on the night of the shooting.

f. Julius has a family that loves and cares for him, and his life has value and meaning to them.

g. Julius has a little boy and wants to be a father to his son even if it is limited to the confines of prison.

h. Julius loves and cares for his family and has maintained close contact with his parents, brother and sister since his incarceration.

i. Due to Julius' belief in the goodness of all people, he fostered friendships with everyone, regardless of whether or not they were affiliated with gangs.

j. Julius has never been a gang member.

k. Although Julius has prior felony convictions, none of these convictions are for violent offenses.

l. According to Julius' family and former teachers, he was a good boy who did well in school and sports. He was tender and compassionate with others. [H]e (sic) used to be employed by Le Petite Academy, a day care, where the children fondly referred to him as "Daddy Julius."

m. Julius has strong religious convictions and tries to better himself by being a devout Christian.

n. While Julius was in high school, he was the president of the O-Club, which is a club for those students who letter in a particular sport.

o. While Julius was in high school, he was a member of the National Honor Society, the National African Boys Club, the Fellowship of Christian Athletes and the Presidential Leadership Club.

p. While Julius was in high school, he was the team co-captain of his football, baseball, and track teams.

q. Julius graduated from John Marshall High School with a grade point average of 3.68. His class ranking was 12 out of 143 students.

r. Julius' teachers looked to him as a leader and a person to step up and take charge.

s. Julius was one of the students named as one of the "Who's Who of American High School Students."

t. Julius attributes his success in high school and in sports to his perfectionist personality.

u. Since Julius has been incarcerated, he has become more patient and dependent on the Lord.

v. Julius received an academic scholarship to the University of Oklahoma.

w. Julius was a student of the University of Oklahoma when he was incarcerated for this offense.

x. Julius has been able to conform to the rules of conduct while incarcerated.

y. Julius is of sufficient intelligence and has a strong work ethic to enable him to be a productive member of society in prison and enable him to give something back to society.

z. Julius has expressed sorrow in the fact that Mr. Howell has dies (sic) as a result of the shooting.

aa. Julius has brain damage.

bb. Julius has friends who love him and his life has meaning to them.

cc. Julius does not use drugs or consume alcohol.

9. Was Victim Impact Evidence introduced at trial? Yes.

10. Check whether the finding of guilty was made:

After a plea of guilty ( ) After plea of not guilty (X)

11. If found guilty after plea of not guilty, check whether the finding was made by:

A. A jury (X) A judge without a jury ( )
B. Was the sentence determined by (X) a jury, or ( ) the trial judge.

II. NON-CAPITAL OFFENSE INFORMATION

12. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).

A. Count II: Possession of a Firearm After Former Conviction;

Fifteen years.

B. Count III: Conspiracy to Commit a Felony;

Twenty-five years.

13. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X)

14. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ( )

III. CASE INFORMATION

15. Name and address of lawyer in trial court:

David Troy McKenzie
204 N. Robinson Ave., Ste. 3030,
Oklahoma City, OK 73102

16. Names and addresses of all co-counsel in the trial court:

Malcolm Maurice Savage
200 N. Harvey, Ste 810
Oklahoma City, OK 73102

Robin Michelle McPhail
320 Robert S. Kerr, #611
Oklahoma City, OK 73102

17. Was lead counsel appointed by the court?

Yes (X) No ( )

18. Was the conviction appealed? Yes (X) No ( )

A. To what court or courts? Oklahoma Court of Criminal Appeals

19. Date Brief in Chief filed: March 8, 2004

20. Date Response filed: July 2, 2004

21. Date Reply Brief filed: July 21, 2004

22. Date of Oral Argument (if set): January 11, 2004

23. Date of Petition for Rehearing (if appeal has been decided):

February 16, 2006

24. Has this case been remanded to the District Court for an evidentiary hearing on direct appeal?

Yes (X) No ( )

25. If so, what were the grounds for remand? Ineffective assistance of trial counsel for failing to present an alibi defense.

26. Is this petition filed subsequent to supplemental briefing after remand?

Yes (X) No ( )

27. Name and address of lawyer for appeal?

Wendell Blair Sutton
1512 S.E. 12th St.
Moore, OK 73160-8342

Carolyn Merritt, Assistant Public Defender
611 County Office Building
Oklahoma City, OK 73102

28. Was an opinion written by the appellate court?

Yes (X) No ( )

A. If "yes," give citations if published: Jones v. State, 128 P.3d 521 (Okla. Crim. App. 2006)
B. If not published, give appellate case no.: Not Applicable

29. Was further review sought?

Yes (X) No ( )

Petition for writ of certiorari to the United States Supreme Court.

Denied: *Jones v. Oklahoma*, 549 U.S. 963 (Mem.) (2006).

(First) Application for Post-Conviction Relief, filed Feb. 25, 2005.

Denied: *Jones v. State*, Case No. PCD-2002-630, Unpublished Order (Okla. Crim. App. Nov. 5, 2007).

Petition for a Writ of Habeas Corpus, Julius Jones v. Anita Trammell, United States District Court for the Western District of Oklahoma.

Denied: *Jones v. Trammell*, No. CIV-07-1290-D, 2013 WL 2257106 (W.D. Okla. May 22, 2013).

Appeal to the United States Court of Appeals for the Tenth Circuit.

Denied: *Jones v. Warrior*, 805 F.3d 1213 (10th Cir. 2015).

Petition for writ of certiorari to the United States Supreme Court.

Denied: *Jones v. Duckworth*, 137 S. Ct. 109 (Mem.) (2016).

Issues raised in First Post-Conviction Application:

Proposition I: Julius received ineffective assistance of appellate and trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.

Proposition II: The cumulative impact of errors identified on direct appeal and in post-conviction proceedings rendered the proceeding resulting in the death sentence arbitrary, capricious, and unreliable. The death sentence in this case constitutes cruel and unusual punishment and a denial of due process of law and must be reversed or modified to life imprisonment without parole.

Issues raised in Second Post-Conviction Application:

Proposition I: 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.

Issues raised in Habeas Petition:

Ground I: Failure to effectively cross-examine Christopher Jordan, and failure to present available evidence to show that Christopher Jordan was the actual shooter, and Ladell King his accomplice, deprived Julius of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

Ground II: Trial counsel was ineffective in contravening Julius' Sixth Amendment rights, in failing to seek a *Franks v. Delaware* hearing and/or to object on the basis of this case to suppress admission of a handgun and other items found in the residence of Julius's parents.

Ground III: Prosecutorial misconduct deprived Julius of his right to Due Process of law under the Eighth and Fourteenth Amendments to the federal constitution.

Ground IV: Removal of juror for-cause without defense opportunity to further question this juror deprived Julius of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution.

Ground V: Denial of Julius' right to be present at all critical stages of the proceedings against him deprived Julius of his rights under the Sixth and Fourteenth Amendments to the federal constitution.

Ground VI: Julius was deprived effective assistance of appellate counsel through failure to investigate and interview jurors, failure to determine the existence of additional Christopher Jordan confessions, and failure to argue existence of structural errors in the Oklahoma capital punishment system. Julius is entitled to relief under the Sixth, Eighth, and Fourteenth Amendments to the federal constitution.

Ground VII: Julius is entitled to the issuance of the writ of habeas corpus because the trial court unconstitutionally refused to deliver an instruction defining life without parole.

Ground VIII: The continuing threat aggravator is unconstitutional because it has become a catchall, therefore Oklahoma does not have a means of narrowing the field of homicides to determine which ones are appropriate for the death penalty. Julius's death sentence and the Oklahoma death penalty are unconstitutional.

PART B: GROUNDS FOR RELIEF

1. Has a motion for discovery been filed with this application?

   Yes (X) No ( )

2. Has a Motion for Evidentiary Hearing been filed with this application? Yes.

3. Have other motions been filed with this application or prior to the filing of the application? No.

   If yes, specify what motions have been filed:

   Not Applicable.

4. List propositions raised (list all sub-propositions).

   A. PROPOSITION I: Newly discovered evidence establishes that racial prejudice influenced the decision of at least one juror to convict Mr. Jones and sentence him 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.

PART C: FACTS

I. Preliminary Matters

References to the record will be made as follows:

1. The Original Record is referred to as (O.R. using the volume number in roman numerals and the page number).

2. Transcripts of the Preliminary Hearing will be referred to as (PH Tr. ___ ___ using the volume number in roman numerals and the page number).

3. Transcripts of the jury trial will be referred to in this application as (Tr. ___ using the transcript volume number in roman numerals and the page number).

4. Motion Hearings will be referred to in this application as (M. Tr. Date) setting out the date of the hearing and the page number).

II. Pertinent Facts

A. The Crime

At approximately 9:30 p.m. on Wednesday, July 28, 1999, Paul Howell was shot in Edmond, Oklahoma. (*See* Tr. IV 135.) Mr. Howell's adult sister, Megan Tobey, as well as his two young daughters were with him at the time. (Tr. IV 97-102, 122-23, 135.) They had just pulled into the driveway of the home belonging to Mr. Howell's parents, and were driving Mr. Howell's 1997 Suburban. (Tr. IV 102, 104-05.) Mr. Howell turned off the car's engine and opened his door. (*Id.*) Ms. Tobey, meanwhile, gathered her belongings and instructed her nieces to do the same. (Tr. IV 104.) She opened the passenger-side door and stepped out of the vehicle when she heard a gunshot. (*Id.*) She also heard someone asking for the vehicle's keys. (*Id.*) According to Ms. Tobey, she "took a fast glance back" and saw a black man who she described as wearing jeans, a white t-shirt, a black stocking cap, and a red bandana over his face. (Tr. IV 104, 108, 116-19.) Importantly, Ms. Tobey also described the man as having half an inch of hair sticking out from underneath the stocking cap.[1] (*Id.*; PH I 22.) He stood in the doorway of the driver's side of the vehicle, was bent

[1] Mr. Jones had very short and closely cropped hair on July 19, 1999, the week before Mr. Howell's death, and on July 31, 1999 at the time of his arrest for the Edmond shooting. *Jones v. Sirmons*, No. 5:07-CV-01290-D (W.D. Okla.), Dkt. 22-1 to 22-11, Appendix Attachments at 22-4, 11/03/2008; Tr. V 205-07, Exs. 97-100; *see also* Tr. IX 28-29. Mr. Jones' hair was thus not long enough to fit Ms. Tobey's description of the man who shot

over the steering wheel, and held keys in his left hand, Ms. Tobey recalled. (Tr. IV 104, 108, 116-19.) Ms. Tobey rushed her nieces towards the house, and heard the gunman yell "stop," along with another gunshot. (Tr. IV 104-06.) Mr. Howell died at approximately 1:45 a.m. the following morning. (Tr. IV 158-60, 212.)

B. The Aftermath

Police recovered Mr. Howell's Suburban, which the gunman had stolen, two days later in the early-morning hours of Friday, July 30, 1999. (Tr. IV 222-24, 242; Tr. V 94.) Not long thereafter, Sergeant Tony Fike, with the Edmond Police Department, received information about the crime from Kermit Lottie, a convicted felon (*see* Tr. X 54) and longtime informant for the Oklahoma City Police. (*See* 08/03/1999 Police Interview of Kermit Lottie.) Lottie owned and operated an auto body shop located just blocks from where Mr. Howell's suburban was recovered by the police. (Tr. V 43-44, 46-48, 50, 54, 66, 82-83 87.) Lottie testified that Ladell King approached him on July 29, 1999 wanting to sell him a vehicle that matched the description of the one stolen in Edmond during the shooting that resulted in Mr. Howell's death. (Tr. V 50-52, 75-77, 80-84, 94.) Lottie also testified that King had the keys to the Suburban and represented to him that it came from a mall in Edmond. (Tr. V 92-93.) Sergeant Fike knew King prior to the Edmond shooting due to the fact that King was one of his informants. (01/25/2001 Letter to U.S. Attorney from Police Sergeant re Sentencing.) Like Lottie, King was a convicted felon and self-

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and killed her brother. However Mr. Jones' co-defendant, Christopher Jordan, fit Ms. Tobey's description of the shooter. At the time of the Edmond shooting and his arrest, Jordan's hair was substantially longer than Mr. Jones' and he wore it in corn rows. (*See* State Tr. Ex. 99.)

described "car thug." (PH I 130-35, 221; Tr. V at 209.) In fact, King even admitted to stealing cars and selling them to Lottie in 1992. (*Id.*)

King directed the police to Mr. Jones as the perpetrator of the Edmond shooting and car robbery. (08/03/1999 Police Interview of Ladell King.) He testified that Mr. Jones arrived to his apartment on the evening of July 28, 1999 after 9:30 p.m. driving a Suburban and wearing jogging pants.[2] (Tr. V 144-46, 157-62, 164-65, 202.) Jordan had arrived alone at the Renaissance Apartments approximately twenty-minutes earlier, King further testified.[3] (Tr. V 139-42; *see also* Tr. V 144-46, 164-65, 202.) King also claimed to have heard Mr. Jones admit to shooting Mr. Howell. (Tr. V 187-96; *see also* Tr. V 197-99, 200.) King's friend and neighbor told the police that he had seen Mr. Jones at the Renaissance Apartments with King and next to a Suburban on the night of July 28, 1999. (08/10/1999 Police Interview of Gordon Owens.) However, Owens was unable to identify Mr. Jones when asked to do so in court. (Tr. V 268-70.)

Owens also testified that on the afternoon of Friday, July 30, 1999, he saw Jordan and Mr. Jones at the Renaissance Apartments looking for King. (Tr. V 272-73.) Owens claimed that Mr. Jones told him that he had left his house out of a window. (Tr. V 273.) According to King's then-girlfriend, Vickson McDonald, Mr. Jones told her on the afternoon of July 30, 1999 that he had avoided the police by leaving his parents' home out

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[2] Significantly, the only eyewitness to the shooting, Ms. Tobey, described the shooter as wearing jeans. (Tr. IV 104, 108, 116-19); s*ee also* Section II(A), *supra.*

[3] Contrariwise, Jordan testified that after Mr. Jones shot Mr. Howell and stole his Suburban, he followed Mr. Jones back to King's residence at the Renaissance Apartments. (*See* Tr. VIII 165.)

of a second story window. (Tr. VII 148.)

Police arrested Christopher Jordan, Mr. Jones' co-defendant, on the evening of July 30, 1999. (Tr. VII 186-87, 241-44, 248.) Like King, Jordan claimed that Mr. Jones had perpetrated Mr. Howell's murder.[4] (Tr. VIII 164-65, 167-70.) Mr. Jones was subsequently arrested on the morning of July 31, 1999 (Tr. VII 193-98) and charged with capital murder.[5]

Mr. Jones continues to maintain his innocence.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

Newly discovered evidence establishes that racial prejudice influenced the decision of at least one juror to convict Mr. Jones and sentence him 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.

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[4] Both Jordan and King benefitted from their testimony against Mr. Jones. Jordan pled guilty to first-degree murder (Count 1) and conspiracy to commit a felony (Count 3), and received a life sentence with all but the first thirty (30) years suspended. (Tr. VIII 94; OR 1659; *see also* Tr. X 117.) In other words, the terms of Jordan's plea required him to serve thirty (30) years of his life sentence before becoming eligible for parole. Mr. Jones' jury was told by prosecutor Sandra Elliott that, "Mr. Jordan has already entered a plea of guilty to the crime of Murder in the First Degree and has received a life sentence *except only the first 35 years of that life sentence has to be served.*" (Tr. IV 51-52 (emphasis added); *see also* Tr. X 51.) Counsel for Mr. Jones has learned, however, that Jordan was released from prison in December 2014 after serving just fifteen (15) years of his life sentence. Additionally, a larceny charge against Jordan was dismissed. (Tr. VIII 191-92.) Meanwhile, King was not prosecuted in connection with this offense notwithstanding his admitted involvement. He furthermore received less than the statutorily mandated sentence for habitual offenders, like himself, of twenty (20) years imprisonment on a bogus check charge filed against him in August of 2001. (*See* Tr. VI 74-76, 82, 86-88); *see also* Okla. Stat. tit. 21, § 51.1.

[5] Additional relevant facts will be detailed and developed in Proposition One, below.

I. Introduction

On November 2, 2017, counsel for Mr. Jones learned from Victoria Coates,[6] one of the twelve jurors who convicted Mr. Jones and sentenced him to death in the above-captioned case, that at least one juror who sat in judgment of Mr. Jones harbored racial prejudice that influenced his verdict. According to V.A.:

> During the trial I was the juror who went to the judge with the comment from another juror about how it was a waste of time and 'they should just take the nigger out and shoot him behind the jail' although that juror was never removed and nothing further came from it[.]

(Ex. A.)

Numerous courts across the country have recognized, in various contexts, that an individual's use of racial slurs "constitutes direct evidence of discriminatory intent." *Kinnon v. Arcoub, Gopman & Assoc., Inc.*, 490 F.3d 886, 891 (11th Cir. 2007); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997) (explaining that racial slurs used "even in jest could be evidence of racial antipathy" (quoting *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990)); *Brown v. East Mississippi Elec.*

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[6] Victoria Coates was previously Victoria Armstrong, who served on Mr. Jones' capital jury in 2002. (*See* Tr. XII 95-96; *see also* Ex. B.) For the sake of clarity, and out of an abundance of caution, Ms. Coates will be referred to hereafter by her initials "V.A." All other jurors will likewise be referred to throughout this Application by their initials. Additionally, in compliance with Rule 2.6(E) of this Court's rules, counsel for Mr. Jones has, prior to this filing, contacted the clerk of this Court in order to advise that this document contains material—namely, juror information—that may be protected under the rule. *See* Rule 2.6(E), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2016); *see also* Okla. Stat. Ann. tit. 38, § 36. Mr. Jones has sought and received guidance from the clerk of this Court regarding how jurors' names appear throughout this Application, and concerning the filing of any exhibits which contain jurors' identifying information.

Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993) (finding that supervisor's "use of racial slurs constitutes direct evidence that racial animus was a motivating factor" in disciplinary decision and not merely "an innocent habit"). The United States Supreme Court has likewise held, unequivocally, that racial prejudice is "constitutionally impermissible" if not "totally irrelevant" in the criminal justice context, where a defendant's life and liberty hang in the balance. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 2747, 77 L. Ed. 2d 235 (1983); *see also Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 3000, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), the Supreme Court reaffirmed this elemental principle, holding that where trial courts are confronted with evidence that a juror "relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment *requires* ... the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869 (emphasis added). Under *Peña-Rodriguez*, then, Mr. Jones is, at minimum, constitutionally entitled to an evidentiary hearing on his claim that racial prejudice influenced a juror's decision to convict and sentence him to death.

Racial prejudice evidenced by "one or more jurors" not only violates the Sixth Amendment fair-trial guarantee, *Pena-Rodriguez*, 137 S. Ct. at 869, but it also renders unlawful—because repugnant to the Eighth Amendment—a jury's decision to condemn a defendant to die. The Supreme Court has unequivocally condemned racial prejudice playing *any* role in a sentencer's exercise of its discretion to impose capital punishment.

Stephens, 462 U.S. at 885, 103 S. Ct. at 2747; *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017) (explaining that "a basic premise of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are," and that "departure[s] from [this] basic principle" are "exacerbated" where "it concern[s] race"). That at least one juror who sat in judgment of Mr. Jones evidenced racial prejudice—"a familiar and recurring evil" throughout this nation's history—renders his conviction and death sentence unconstitutional under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution. *Peña-Rodriguez*, 137 S. Ct. at 868. This Court should therefore grant Mr. Jones relief from his unconstitutional conviction and sentence of death. Alternatively, as Mr. Jones has stated a colorable claim that his rights under the federal and state constitutions have been violated, this Court should grant his requests for discovery and an evidentiary hearing[7] in order to further factually develop and support this meritorious claim.

II. Mr. Jones satisfies the successor post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

Oklahoma's Uniform Post-Conviction Procedure Act specifies that this Court may not consider the merits of or grant relief based on a subsequent application for post-conviction relief unless:

> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or

[7] Mr. Jones is filing his Motion for Discovery and Motion for Evidentiary Hearing simultaneously herewith.

b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089(D)(8). In addition, Rule 9.7(G) of the Rules of the Oklahoma Court of Criminal Appeals allows this Court to entertain a subsequent application for post-conviction relief where it asserts claims "which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable." Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2016). Mr. Jones' present application for post-conviction relief satisfies these requirements.

First, Mr. Jones' present claim—that racial prejudice influenced the decision of at least one juror to convict him of capital murder and to sentence him to death—was not previously raised either on direct appeal or in Mr. Jones' original and second post-conviction proceedings. (Case No. D-2002-534, Appellant's Original Brief, 03/08/2004; Reply Brief of Appellant, 07/21/2004; Suppl. Brief of Appellant Following Remand, 05/12/2005; Case No. PCD-2002-630, Original Application for Post-Conviction Relief, 02/25/2005; Case No. PCD-2017-654, Second Application for Post-Conviction Relief, 06/23/2017.) Nor could it have been, for at the time of Mr. Jones' direct appeal and original

post-conviction proceedings, longstanding Oklahoma law squarely prohibited defendants from challenging the validity of a jury's verdict by inquiring into the deliberative process. *See* Okla. Stat. Ann. tit. 12, § 2606(B); *Wacoche v. State*, 1982 OK CR 55, 644 P.2d 568 (Okla. Crim. App. 1982); *Matthews v. State*, 2002 OK CR 16, ¶¶ 13-14, 45 P.3d 907, 914-15 (Okla. Crim. App. 2002); *Wood v. State*, 2007 OK CR 17, ¶ 42 n.29, 158 P.3d 467, 480 n.29 (Okla. Crim. App. 2007). Furthermore, the factual basis for Mr. Jones' present claim became available only on November 2, 2017—nearly five months after Mr. Jones filed his second application for post-conviction relief with this Court. (*See* Case No. PCD-2017-654, Second Application for Post-Conviction Relief, 06/23/2017.)

While, as explained above, the legal basis for Mr. Jones' present claim was long unavailable to Oklahoma defendants, in the recently-decided case of *Peña-Rodriguez v. Colorado*, 137 S. Ct. at 861, 863, the United States Supreme Court carved out a narrow constitutional exception to the "no-impeachment rule," 137 S. Ct. at 861, 863, holding that where a juror's statement "indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869. In so holding, *Peña-Rodriguez* created a new avenue through which Mr. Jones could challenge the constitutionality of his conviction and death sentence with juror testimony that racial prejudice infected the deliberative process.

Prior to *Peña-Rodriguez*, therefore, the legal and factual bases for this claim were unavailable. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(a), (b)(1); *Matthews*, 45 P. 3d at 915

(upholding trial court's decision to prevent defense counsel from questioning juror post-verdict regarding the deliberative process because "under Section 2606(B), parties may only question former jurors to determine if improper and prejudicial information was revealed to the jury or any outside influence was improperly brought to bear upon any juror," and may not question jurors about the "deliberative process"). Indeed, at the time of Mr. Jones' trial, lead prosecutor Sandra Elliott argued to the court concerning allegations of juror misconduct that, "[T]he Oklahoma statutes *specifically forbid* this Court or *anyone* inquiring of the juror as to the deliberations that they had or upon what they based their verdict," and maintained that "[T]he statutes in Oklahoma are still clear. We are not entitled to inquire of a juror anything about upon what they base their verdict, period." (Tr. XIII 70-71 (emphasis added).) The trial court agreed with Elliott's reading of Oklahoma law, and cautioned defense counsel, David McKenzie, regarding his questioning of jurors concerning allegations of misconduct as follows:

> [I] looked at Title 12, 2606 ... [a]nd after reading 2606, Paragraph B and then reading the notes that follow that, as well as in the pocket parts, it's my opinion, Mr. McKenzie, that your questions [to a juror, *see* Section IV, *infra*] were getting dangerously close to requesting information about the deliberations of the jurors. We just have – just must have to be very very cautious in doing our best *as lawyers* and as the Judge *to protect the integrity of this jury.*

(*Id.* at 72 (emphasis added).) Oklahoma law at the time of Mr. Jones' trial, and until *Peña-Rodriguez*, was thus clear: questioning jurors about the deliberative process, as well as juror testimony concerning deliberations, was off limits.

Counsel for Mr. Jones first learned on November 2, 2017 from juror V.A. that at least one juror referred to Mr. Jones as a "nigger" who deserved to die, in part, on that

basis. (Ex. A.) This application for post-conviction relief is being filed within sixty-days of November 2, 2017 in compliance with Rule 9.7(G)(3) of this Court's rules.

Second, and for the reasons outlined in greater detail, *infra*, the facts underlying Mr. Jones' present claim are sufficient to establish by clear and convincing evidence that racial prejudice tainted the fairness of his trial and capital-sentencing proceedings, but-for which he would neither have been convicted nor sentenced to death. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2).

III. Newly discovered evidence establishes that racial prejudice influenced the decision of at least one juror to convict Mr. Jones and sentence him to death.

In 2002, V.A., an Oklahoma County resident, served as a juror in *State of Oklahoma v. Julius Darius Jones*. (*See* Tr. XII 95-96; *see also* Exs. A, B.) On November 2, 2017, in response to a Facebook message sent to her by Rebecca Postyeni, an investigator with the Office of the Federal Public Defender for the District of Arizona,[8] requesting to meet in order to discuss Mr. Jones' case, V.A. sent Ms. Postyeni a Facebook message in which she stated the following:

> During the trial I was the juror who went to the judge with the comment from another juror about how it was a waste of time and 'they should just take the nigger out and shoot him behind the jail' although that juror was never removed and nothing further came from it[.]

(Ex. A.)

[8] The Office of the Federal Public Defender for the District of Arizona was appointed by the United States District Court for the Western District of Oklahoma to represent Mr. Jones in Case No. 5:07-cv-012900-D on August 1, 2016. (Dkt. No. 57.)

IV. Additional Relevant Facts

During voir dire, and before Mr. Jones' jury was empaneled, the trial court repeatedly asked members of the venire whether they could be fair and impartial, and whether they could "decide this case solely on the evidence that you hear inside this courtroom." (*See, e.g.*, Tr. IIA 14, 96 (trial court asking juror C.W. whether he could be impartial; *id.* at 57 (trial court telling prospective jurors that "the trial needs to be decided solely upon the evidence"); *id.* at 84 (trial court asking juror M.J. whether he could decide the case solely on the evidence); *id.* at 86 (trial court asking juror C.W. whether he could "listen to the evidence" in the case); *id.* at 94-95 (trial court asking juror M.S. whether he could be fair and impartial); *id.* at 96 (trial court asking juror A.X. whether he could be fair and impartial); *id.* at 97 (trial court asking juror J.B. whether he could be fair and impartial); *id.* at 166 (trial court asking juror W.W. whether he could be fair and impartial)).

In response to questions from both the court and defense counsel, each juror affirmed that they could render a fair and impartial verdict. (*See, e.g.*, Tr. IIA 14, 96 (juror C.W. affirming that "I will be as fair as I can be," and denying that he could not "be[] fair and impartial"); *id.* at 84 (juror M.J. stating that it would be "[n]o problem" for him to decide the case solely on evidence presented inside the courtroom); *id.* at 86 (juror C.W. affirming that he could "listen to the evidence in this case"); *id.* at 94-95 (juror M.S. denying that he could not be "fair and impartial"); *id.* at 96 (juror A.X. denying that he could not be "fair and impartial"); *id.* at 97 (juror J.B. denying that he could not be "fair and impartial"); *see also* Tr. III 138 (juror J.B. affirming that he could be "a fair and impartial juror"); *id.* at 172-73 (juror A.X. affirming that he could be "fair and impartial");

id. at 193 (juror G.W. affirming that she could be "fair and impartial"); *id.* 197-98 (juror J.G. affirming that he could be "fair and impartial")). As was the case in *Peña-Rodriguez*, at no point did any of the jurors empaneled in Mr. Jones' case express reservations about their ability to be fair or impartial based on racial, or other, prejudices. *See Peña-Rodriguez*, 137 S. Ct. at 861.

On February 27, 2002, prior to the close of evidence during the aggravation phase of Mr. Jones' trial, V.A. notified the trial court that juror J.B. had commented, in reference to Mr. Jones, that "they should place him in a box in the ground for what he has done." (Tr. XII 95-96.) The comment was made "[i]n the jury room" during "the first break" when jurors "went up the stairs." (*Id.* at 95-96.) V.A. described feeling bothered by J.B.'s comment as it evidenced that he was "not quite partial enough." (*Id.* at 96.) In response to questioning by the trial court, V.A. explained that when J.B.'s comment was made, "[t]here were a lot of people up there ... I know Mr. [M.J.] was." (*Id.* at 96.) She also recalled that jurors A.X., G. W., G. W., J.G., W.W., and C.W. were likely present. (*Id.* at 96-97.) "There were at least 8 to 10 of us up there," she said. (*Id.* at 96.)

In response to the trial court's question about whether "what you heard [has] affected you at all in your ability to deliberate this case fairly," V.A. replied, "I don't think so." (*Id.* at 98.) However she also stated that:

> I just don't believe [juror J.B.'s] comments were appropriate. I believe, you know, we are not supposed to be deliberating yet at this point and I just – I felt that may influence somebody or his opinion is not important right now.

(*Id.*) According to V.A., juror J.B.'s comment was made in the jury deliberation room as jurors were seated around a table:

> [W]e were just all sitting there. Everyone was – I mean, they get involved in, you know, individual conversations. It was just something [J.B.] said out loud. There were no comments to it and it was right before we came back down from break.

(*Id.* at 99.)

The following day, on February 28, 2002, the trial court asked each juror the following question, "[a]t any time during the sentencing phase of this trial have you overheard anyone express an opinion outside of the courtroom as to the appropriate penalty or punishment of this trial." (*See, e.g.*, Tr. XIII 30 (trial court posing question to juror M.N.); *id.* at 33 (trial court posing question to juror A.X.); *id.* at 35-36 (trial court posing question to juror M.J.); *id.* at 37 (trial court posing question to juror G.W.); *id.* at 39 (trial court posing question to juror J.G.); *id.* at 40 (trial court posing question to juror C.W.); *id.* at 41 (trial court posing question to juror M.S.); *id.* at 42 (trial court posing question to juror G.W.); *id.* at 44 (trial court posing question to juror W.W.); *id.* at 45 (trial court posing question to juror C.W.); *id.* at 46 (trial court posing question to alternate juror D.M.); *id.* at 48 (trial court posing question to alternate juror J.M.)). Each juror answered the trial court's question negatively. (*See id.* at 30, 33, 35-37, 39-42, 44-46, 48.) Juror J.B., when questioned about his comment by the trial court, claimed that he did not remember making the statement. (*Id.* at 54-55.) However J.B. acknowledged that he had "formed a partial – partial opinion" about what Mr. Jones' appropriate punishment should be, notwithstanding the fact that, as the court put it, not "all of the evidence is in." (*Id.* at 58.)

In spite of V.A.'s firm recollection that J.B. had remarked that, "They should put him in a box and put him in the ground after this is all over for what he's done" (Tr. XIII

75), the trial court opined that J.B. "could have been talking about Osama Bin Laden" (*id.* at 82). The court added further that, "I mean, with everything that's going on, [juror J.B.] could have been talking about Osama Bin Laden, he could have been talking about anything else," other than Mr. Jones. (*Id.*) Counsel for Mr. Jones, David McKenzie, asked the court to excuse juror J.B. for cause and to replace him with an alternate juror. (*Id.* at 83.) He explained that:

> [T]he prejudice to my client is inferred when somebody has already made up their mind. It's just like in voir dire with jurors we start out with, we have to make sure they are fair and impartial. And it's obvious this guy – I mean, he said in the second stage he has a partial opinion. He did not deny making that statement. He did not deny that it had anything to do with Mr. Jones.
>
> Out of an abundance [of caution] that this is a death penalty case, my client's life is on the line, out of an abundance of caution, even if you think that it may be conjecture, he has to be excused for cause.

(*Id.*) The trial court denied McKenzie's request to remove juror J.B. for cause, as well as his subsequent motion for a mistrial, instead informing him that, "I think that we are – without further proof, that we are reading into this statement." (*Id.* at 86, 87, 91.) "As I said earlier," the court stated, "[J.B.] could have been talking about Osama bin Laden or whoever the guy that they have been referring to as the American Tali Ban [sic] or any other number of items. We don't know who he was talking about." (*Id.* at 86-87.)

According to V.A., however, she specifically brought to Judge Bass' attention that another juror referred to Mr. Jones as a "nigger," considered the trial proceedings "all a waste of time," and who expressed the view that "they should just take the nigger out and shoot him behind the jail." (Ex. A.) "[T]hat juror was never removed," V.A. affirmed, "and nothing further came from it." (*Id.*)

V. Law & Argument

A. Mr. Jones was convicted and sentenced to death in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article II Sections 7, 19, and 20 of the Oklahoma Constitution.

Under the constitutions of the United States and the State of Oklahoma, a criminal defendant is guaranteed the right to an impartial jury. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."); Okla. Const. art. II, § 20 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury..."); *see also Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961) (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair and impartial jury as "a basic requirement of due process" (internal quotation marks omitted)). This Court has explained that a jury is "impartial" within the meaning of these constitutional guarantees where no juror "favor[s] a party or an individual because of the emotions of the human mind, heart, or affections." *Tegeler v. State*, 1168, 9 Okl. Cr. 138, 1913 OK CR 87, 130 P. 1164 (Okla. Crim. App. 1913) (internal citation and quotation marks omitted). "It means," in other words, "that, to be impartial, the party, his cause, or the issues involved in his case should not, *must not*, be prejudged." *Id.* (emphasis added) (internal citation and quotation marks omitted); *see also Stevens v. State*, 94 Okl. Cr. 216, 224, 232 P.2d 949, 958 (Okla. Crim. App. 1951) (explaining that "an impartial jury means a jury *not biased* in favor of one party more than another; indifferent; unprejudiced; disinterested" (emphasis added) (internal quotation marks omitted)); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961) ("In essence, the right to jury trial guarantees to the criminally

accused a fair trial by a panel of impartial, 'indifferent' jurors."); *Stouffer v. Duckworth*, 825 F.3d 1167 (10th Cir. 2016) (noting that included in the Sixth Amendment jury trial guarantee is the right to jury capable and willing to decide the case solely on the evidence before it). Impartiality, within the meaning of the Sixth and Fourteenth Amendments, requires that impaneled jurors "can lay aside any preconceived opinions" and "render a verdict based on the evidence presented in court." *Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006) (internal citation and quotation marks omitted).

In *Peña-Rodriguez*, the Supreme Court explained that a jury's impartiality is compromised, and "systemic injury to the administration of justice" results, where even a single juror's attitudes are infected with racial prejudice. 137 S. Ct. at 868-69. There, Miguel Angel Peña-Rodriguez, a Hispanic man, was convicted of unlawful sexual contact and harassment. *Id.* at 861, 863. Subsequent to jurors' discharge, counsel for Mr. Peña-Rodriguez questioned jurors and learned from two of them that, "during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness." *Id.* at 861. As counsel for Mr. Jones has done here, counsel for Mr. Peña-Rodriguez procured and proffered evidence from jurors wherein they described the racialized remarks made by a fellow juror. *Id.* at 861-62. The trial court reviewed the affidavits, acknowledged that they constituted evidence of "apparent bias" on the part of one juror, but denied Mr. Peña-Rodriguez's motion for a new trial. *Id.* at 862. The trial court reasoned that any inquiry into jury deliberations was explicitly precluded by

Colorado Rule of Evidence 606(b).[9] *Id.* at 862. The trial court's decision was affirmed by the Colorado Supreme Court on appeal, *id.* at 862, and the United States Supreme Court subsequently reversed that affirmation, *id.* at 871.

Justice Kennedy, delivering the opinion of the Court, explained that because racial prejudice is "a familiar and recurring evil" that "implicates unique historical, constitutional, and institutional concerns," *id.* at 868, it is incumbent upon courts "to consider the evidence of [a] juror's [racially prejudiced] statement and any resulting denial of the jury trial guarantee," *id.* at 869. The Court found that the allegations contained in the affidavits of two jurors indicated that another juror was influenced by "racial bias" as well as "a dangerous racial stereotype." *Id.* at 870. As a result, the Court concluded, the Sixth Amendment required that where allegations of racial bias are concerned, courts "must not wholly disregard its occurrence." *Id.* at 870.

Like the jurors in *Peña-Rodriguez* who attested to the racial prejudice evinced by another juror in Mr. Peña-Rodriguez's case, V.A. has provided evidence about the use of an anti-black racial slur by at least one juror who sat in judgment of Mr. Jones. (Ex. A.) The use of racial slurs are "evidence of racial antipathy," *Delph*, 130 F.3d at 356 (internal quotation and citation omitted), and can, in no way, ever be considered benign. The word

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[9] Colorado Rule of Evidence 606(b) is nearly identical to Oklahoma Rule of Evidence 2606(B), and both prohibit post-verdict questioning of jurors regarding the deliberative process. *Compare* Colo. R. Stat. Ann. § 606(b) (West 2017) ("Inquiry into the validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations…"), *with* Okla. Stat. Ann. tit. 12, § 2606(B) (West 2002) ("Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations…").

"nigger" is "a universally recognized opprobrium, stigmatizing African-Americans because of their race." *Brown v. East Miss. Elec. Power Ass'n.*, 989 F.2d 858, 861 (5th Cir. 1993). Indeed, as explained in Section I, *supra*, courts around the country recognize that an individual's use of racial slurs often belies "discriminatory intent," *Kinnon*, 490 F.3d at 891, and "racial animus," *Brown*, 989 F.2d at 858. Race-based antipathy harbored by even a single juror violates the Sixth Amendment's fair-trial guarantee owed to every criminal defendant, especially those, like Mr. Jones, for whom life and death hang in the balance. *Peña-Rodriguez*, 137 S. Ct. at 869.

While Mr. Jones contends that he is entitled to sentencing relief on the record before this Court, if this Court disagrees and determines that further factual development is necessary, Mr. Jones submits that under *Peña-Rodriguez* he is entitled to discovery and to an evidentiary hearing. This is because, like the petitioner in *Peña-Rodriguez*, he has set forth herein more than colorable allegations that his conviction and death sentence were rendered in violation of his state and federal rights.

B. Mr. Jones was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article II Sections 7 and 9 of the Oklahoma Constitution.

The United States Supreme Court has long recognized that race is primary among those factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Stephens*, 462 U.S. at 885, 103 S. Ct. at 2747; *see also Mitchell*, 443 U.S. at 555, 99 S. Ct. at 3000 ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice."). Indeed, the Supreme Court recently reaffirmed a "basic premise of our criminal justice system," which is that

"[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017). For "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice"). This Court has likewise recognized that race is an "impermissible classification" that ought not to motivate sentencing determinations. *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, 241 P.3d 214, 235 (Okla. Crim. App. 2010); *see also Williams v. State*, 1975 OK CR 171, 542 P.2d 554, 585 (Okla. Crim. App. 1975), *judgment vacated on other grounds by Williams v. Oklahoma*, 428 U.S. 907, 96 S. Ct. 3218, 49 L. Ed. 2d 1215 (1976) (Mem.) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment" (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (internal quotation marks omitted)).

Where capital punishment is concerned, the Supreme Court's decisions since *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), have delimited "a constitutionally permissible range of discretion in imposing the death penalty," *McCleskey v. Kemp*, 481 U.S. 279, 305, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), that is consistent with the Eighth Amendment guarantee against cruel and unusual punishment. First, the Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) ("*Furman* mandates that where discretion is afforded

a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited to as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner."). Second, the Court has prohibited states from limiting a sentencer's ability to consider "relevant facets of the character and record of the individual offender or the circumstances of the particular offense" that might warrant a sentence less than death. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

While, in all of these cases, the Supreme Court has upheld the propriety of a capital sentencer's discretion to impose a sentence of death under the appropriate circumstances, it has unequivocally condemned race playing *any* role in a sentencer's exercise of that discretion. *Stephens*, 462 U.S. at 885, 103 S. Ct. at 2747 (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck*, 137 S. Ct. at 778 (explaining that "a basic premise of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are," and that "departure[s] from [this] basic principle" are "exacerbated" where "it concern[s] race"); *Mitchell*, 443 U.S. at 555, 99 S. Ct. at 3000 ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital sentencing determinations are rendered "arbitrary and capricious"

in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500, 113 S. Ct. 892, 915, 122 L. Ed. 2d 260 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

As set forth in detail above, *see* Sections I, III, and IV, *supra*, the risk that racial prejudice impacted at least one juror's decision to condemn Mr. Jones to die is "constitutionally unacceptable." *Turner v. Murray*, 476 U.S. 28, 36 n.8, 106 S. Ct. 1683, 1688 n.8, 90 L. Ed. 2d 27 (1986); *see also McCleskey*, 481 U.S. at 322, 107 S. Ct. at 1783 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one"); *Caldwell v. Mississippi*, 472 U.S. 320, 343, 105 S. Ct. 2633, 2647, 86 L. Ed. 2d 231 (1985) (observing that a sentence of death cannot withstand constitutional muster whenever the circumstances under which it has been rendered "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999, 103 S. Ct. 3446, 3452, 77 L. Ed. 2d 1171 (1983), and *Eddings*, 455 U.S. at 118, 102 S. Ct. at 878 (1982) (O'Connor, J., concurring)).

At least as early as 1908—merely forty-three years after slavery's abolition in the United States—the Supreme Court recognized that "an appeal to race prejudice" through the use of the word "nigger" is "degrad[ing] to the administration of justice." *Battle v.*

United States, 209 U.S. 36, 38, 28 S. Ct. 422, 424, 52 L. Ed. 670 (1908); *see also Calhoun v. United States*, 568 U.S. 1206, 133 S. Ct. 1136, 1138, 185 L. Ed. 2d 385 (2013) (Mem.) (Sotomayor, J., & Breyer, J., dissenting from denial of certiorari) (describing federal prosecutor's use of the word "niggers" as "deeply disappointing" and "conduct [that] diminishes the dignity of our criminal justice system and undermines respect for the rule of law"); *id.* (discussing "nigger" as a term that "tap[s] a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation").

Recently, in *Tharpe v. Sellers*, 138 S. Ct. 53, 198 L. Ed. 2d 779 (2017) (Mem.), the United States Supreme Court stayed the execution of Keith Tharpe, an African-American prisoner on death row in Georgia, based, in part, on evidence similar to that which Mr. Jones has proffered here—that is, evidence that a juror in his case voted for the death penalty because, in that juror's view, Mr. Tharpe was a "nigger." (Ex. C.) Mr. Tharpe argued that the commitment to justice "rings hollow" where courts dismiss evidence that a juror has opted to sentence a person to die because he is black. (*Id.* at 14.)

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Indeed, the Court's decision in *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), supports Mr. Jones' right to an evidentiary hearing on his claim that racial prejudice factored into his jury's decision to convict and sentence him to death. In *Turner*, the Supreme Court vacated a prisoner's death sentence where the trial court refused his request to question prospective jurors on the issue of racial prejudice. The plurality recognized that

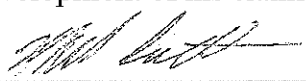
"in light of the complete finality of the death sentence," the Constitution requires courts to give allegations of racial prejudice in capital cases greater scrutiny. *See Turner*, 476 U.S. at 35, 106 S. Ct. at 1688. Although the defendant in *Turner*, who was black and was sentenced to die for killing a white victim, had not made specific allegations of racial prejudice, the plurality nonetheless vacated his death sentence. The Court reasoned that "the *risk* that racial prejudice may have infected petitioner's capital sentencing [was] unacceptable in light of the ease with which that risk could have been minimized." *Id.* (emphasis added).

Mr. Jones' case involves serious and specific allegations of racial animus: a juror stated during his trial that "they should just take the nigger out and shoot him behind the jail." (Ex. A.) This remark is reminiscent of the lynch-mob racism that characterized the Reconstruction period in United States history. Mr. Jones seeks an evidentiary hearing wherein the courts of Oklahoma can consider his most serious charges. At minimum, the Constitutions—of the United States and the State of Oklahoma—require as much.

While Mr. Jones contends that he is entitled to sentencing relief on the record before this Court, if this Court disagrees and determines that further factual development is necessary, Mr. Jones submits that he is entitled to discovery and to an evidentiary hearing. This is because he has set forth herein more than colorable allegations that his conviction and death sentence were rendered in violation of his state and federal rights.

CONCLUSION

Mr. Jones' conviction and sentence of death was obtained in violation of his state and federal constitutional rights. He asks that this Court exercise its power to correct this fundamental injustice and grant relief. Alternatively, Mr. Jones asks that this Court grant his requests for discovery and an evidentiary hearing in order to allow for the further factual development of his claim.



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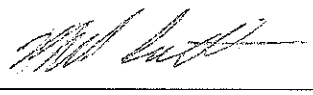
Verification of Counsel

I, Mark Barrett, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

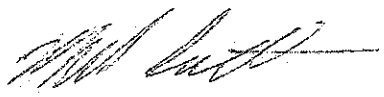


Mark Barrett

12/28/2017
Date

CERTIFICATE OF SERVICE

I certify that a copy of this Third Application for Post-Conviction Relief was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of this Court on the date that it was filed.



Mark Barrett

A-6

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JULIUS DARIUS JONES,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

PC Case No.: PCD 2017 1313

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
DEC 29 2017

CAPITAL POST-CONVICTION PROCEEDING

Prior Post Conviction
Case Nos.: PCD-2002-630, PCD-2017-654
Direct Appeal
Case No.: D-2002-534
Oklahoma County District Court
Case No: CF-1999-4373

PETITIONER JULIUS DARIUS JONES' MOTION FOR DISCOVERY

Petitioner Julius Darius Jones respectfully requests an order of discovery pursuant to Okla. Stat. tit., 22 § 1089(D)(3) and Rules 9.7(D)(2), (D)(4) of the Rules of the Oklahoma Court of Criminal Appeals. Mr. Jones is submitting this motion, as well as a Motion for an Evidentiary Hearing, contemporaneously with the filing of his Third Application for Post-Conviction Relief. All averments and supporting attachments presented in Mr. Jones' Application are hereby incorporated by reference.

Discovery is necessary because Mr. Jones has raised a more than colorable claim that new evidence renders his conviction and sentence of death unlawful under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19, and 20 of the Oklahoma Constitution. More particularly, Mr. Jones has alleged that new evidence demonstrates that at least one juror referred to Mr. Jones as

a "nigger," which illustrates that racial animus played a role in this juror's decision to convict and sentence him to death.

In support of this claim, Mr. Jones has included as Exhibit A to his Third Application for Post-Conviction Relief the Facebook message sent to a member of Mr. Jones' defense team by Victoria Coates,[1] who served as a juror in Mr. Jones' case, wherein she recounts that another juror stated that "they should just take the nigger out and shoot him behind the jail." (Case No. _____, Third Application for Post-Conviction Relief, 12/29/2017, Ex. A.)

This information is indeed troubling and, on its own, entitles Mr. Jones to relief. In order to further factually develop this claim, however, Mr. Jones asks that this Court grant his request to explore the ways in which racial animus influenced the men and women who sat on his jury, who convicted him, and who sentenced him to die. Specifically, Mr. Jones asks that this Court order the depositions of: (1) V.A., who served as a juror in Mr. Jones' case; (2) J.B., who served as a juror in Mr. Jones' case; (3) J.G., who served as a juror in

[1] Victoria Coates was previously Victoria Armstrong, who served on Mr. Jones' capital jury in 2002. (*See* Tr. XII 95-96; *see also* Case No. _____, Third Application for Post-Conviction Relief, 12/29/2017, Ex. B.) For the sake of clarity, and out of an abundance of caution, Ms. Coates will be referred to hereafter by her initials "V.A." All other jurors will likewise be referred to throughout this Motion by their initials. Additionally, in compliance with Rule 2.6(E) of this Court's rules, counsel for Mr. Jones has, prior to this filing, contacted the clerk of this Court in order to advise that this document contains material—namely, juror information—that may be protected under the rule. *See* Rule 2.6(E), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2016); *see also* Okla. Stat. Ann. tit. 38, § 36. Mr. Jones has sought and received guidance from the clerk of this Court regarding how jurors' names appear throughout this Motion, and concerning the filing of any exhibits which contain jurors' identifying information.

Mr. Jones' case; (4) M.J., who served as a juror in Mr. Jones' case; (5) M.N., who served as a juror in Mr. Jones' case; (6) M.S., who served as a juror in Mr. Jones' case; (7) G.W., who served as a juror in Mr. Jones' case; (8) C.W., who served as a juror in Mr. Jones' case; (9) C.W., who served as a juror in Mr. Jones' case; (10) G.W., who served as a juror in Mr. Jones' case; (11) W.W., who served as a juror in Mr. Jones' case; (12) A.X., who served as a juror in Mr. Jones' case; (13) J.M., who served as an alternate juror in Mr. Jones' case; (14) D.M., who served as an alternate juror in Mr. Jones' case; and (15) Jerry Bass, who served as the trial court judge in Mr. Jones' case.

Mr. Jones is aware of this Court's decision in *Bland v. State*, 1999 OK CR 45, ¶ 6, 991 P.2d 1039 (Okla. Crim. App. 1999), which held that during post-conviction proceedings, "the only discovery permitted is through the procedure established for an evidentiary hearing." Considering that, pursuant to this Court's Rules 9.7(D)(4) and (D)(5), an evidentiary hearing in the district court is the appropriate mechanism for Mr. Jones to factually develop his claim, discovery is necessary in order to prepare for any such evidentiary hearing on these matters.

This Court should order discovery in order to facilitate meaningful review of Mr. Jones' Third Application for Post-Conviction Relief. Okla. Stat. tit. 22, § 1089(D)(3). This Court should grant the requested discovery or remand Mr. Jones' case to the district court for an evidentiary hearing and discovery aimed at determining whether and to what degree racial prejudice impacted jurors' decision to convict and sentence him to death.

CERTIFICATE OF SERVICE

I certify that on the 28th day of December 2017, I was aware of and authorized for filing with the Clerk of this Court the original and ten copies of this Motion for Discovery, with one of the copies being for service on the Attorney General, counsel for Respondent, as required by this Court's Rule 1.9.

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VERIFICATION

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

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A-7

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PCD 2017 1313

JULIUS DARIUS JONES,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

PC Case No.:

CAPITAL POSTCONVICTION PROCEEDING

Prior Post Conviction
Case Nos.: PCD-2002-630, PCD-2017-654
Direct Appeal
Case No.: D-2002-534
Oklahoma County District Court
Case No: CF-1999-4373

PETITIONER JULIUS DARIUS JONES' MOTION FOR EVIDENTIARY HEARING

Petitioner Julius Darius Jones respectfully requests an evidentiary hearing on any controverted, previously unresolved issues of fact that may arise in connection with his Third Application for Post-Conviction Relief filed simultaneously with this motion. All averments and supporting attachments presented in Mr. Jones' Application are hereby incorporated by reference.

In his Third Application for Post-Conviction Relief, Mr. Jones raises one proposition which involves issues of fact. Specifically, he alleges that racial prejudice played a role in at least one juror's decision to convict and sentence him to death, in violation of the Oklahoma and the United States Constitutions. Mr. Jones could not have raised this proposition previously because the grounds upon which it relies became available for the first time on November 2, 2017, when another juror informed a member of Mr. Jones' defense team that another juror referred to Mr. Jones as a "nigger" prior to his trial's conclusion.

While 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. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(4)-(5). If this Court grants a hearing, in addition to the information presented in the exhibits and attachments to his application, Mr. Jones requests permission to bring forth other evidence as needed to further support the claims raised in his application.

CERTIFICATE OF SERVICE

I certify that on the 28th day of December 2017, I was aware of and authorized for filing with the Clerk of this Court the original and ten copies of this Motion for Evidentiary Hearing, with one of the copies being for service on the Attorney General, counsel for Respondent, as required by this Court's Rule 1.9.

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VERIFICATION

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

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A-8

No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

"In my experience, there are two types of black people: 1. Black folks and 2. Niggers . . . . Because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did. . . . After studying the Bible, I have wondered if black people even have souls." – Sworn testimony of Barney Gattie, a white juror who voted to impose Keith Tharpe's death sentence.

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

Petitioner is scheduled to die on September 26, 2017, despite evidence that racism played in pivotal role in his death sentence. No court has addressed this claim on the merits, even though it was first raised in post-conviction proceedings almost twenty years ago.

A few years after trial, a juror who had voted to impose death told Petitioner's state habeas attorneys that he had favored the death penalty because Petitioner was a "nigger" who had killed someone the juror considered "'good' black folk," and that his Bible study had led him to "wonder[] if black people even have souls." The state habeas court ruled these statements and other proof evincing the juror's racist beliefs and their impact on Petitioner's sentence inadmissible under Georgia's evidence rule barring jurors from impeaching their verdict, and found Petitioner's juror-bias claim procedurally defaulted. In federal habeas corpus proceedings, the district court adopted the state courts' procedural default ruling, a finding left undisturbed on appeal.

Last term, this Court decided two cases bearing on Petitioner's claim. In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), the Court held that a state's no-impeachment rule may not bar consideration of evidence "that racial animus was a significant motivating factor in [a] juror's vote to convict." In *Buck v. Davis*, 137 S. Ct. 759, 778 (2017), the Court recognized that the possibility that someone "may have been sentenced to death because of his race" was an "extraordinary circumstance" warranting relief from judgment under Fed.R.Civ.Proc. 60(b)(6). Invoking *Pena-Rodriguez* and *Buck*, Petitioner moved under Rule 60(b) to reopen the judgment in his case.

The district court denied the motion. It held that *Pena-Rodriguez* was a new rule of criminal procedure that could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), and that, regardless, the state court's conclusion that Petitioner had not shown prejudice sufficient to overcome any procedural default satisfied the standard set forth in *Pena-Rodriguez*, even though the state court in Petitioner's case did not have the benefit of this Court's guidance in that case and had not actually considered any of the evidence showing the juror's racial bias.

A panel of the Eleventh Circuit denied a certificate of appealability, finding (1) that Petitioner had not shown that the district court abused its discretion in denying the Rule 60(b) motion because the court "applied the correct legal standard and based its decision on findings of fact not clearly erroneous"; (2) that, assuming *Pena-Rodriguez* applied retroactively, Petitioner had not "made a substantial showing of the denial of a constitutional right" because he "failed to demonstrate that [the juror's] behavior 'had a substantial and injurious effect or influence in determining the jury's verdict'" or that reasonable jurists would find the district court's ruling debatable; and (3) that "[i]f [Petitioner] is correct that *Pena-Rodriguez* applies retroactively in post-conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the [state habeas court], he is now free to pursue the claim in state court." The federal courts' rulings give rise to the following important questions:

1. Could reasonable jurists disagree with the district court's rejection of Petitioner's Rule 60(b) motion and, accordingly, did the Eleventh Circuit err in denying a certificate of appealability?

2. Given Petitioner's credible evidence that a juror voted for the death penalty because he is a "nigger," did the Eleventh Circuit err in ruling that he failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2).

3. Did *Pena-Rodriguez* create a new constitutional claim and, if not, did the lower courts err in denying Petitioner's motion for relief from judgment under Rule 60(b)(6)?

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No. 17-

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Petitioner, Keith Tharpe, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above case on September 21, 2017. *See* Appendix A.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, entered September 21, 2017, denying Mr. Tharpe's Application for a Certificate of Appealability is not yet reported, but is attached hereto as Appendix A. The unpublished decision of the district court denying Mr. Tharpe's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), dated September 5, 2017, is appended as Appendix B. The Eleventh Circuit's published decision

affirming the district court's denial of habeas relief is attached hereto as Appendix C. The district court's prior decision in *Tharpe v. Humphrey*, Case No. 5:10-CV-433 (M.D.Ga.), denying habeas relief, dated March 6, 2014, is attached hereto as Appendix D. The district court's order finding Mr. Tharpe's juror-bias claim procedurally defaulted is attached as Appendix E hereto. The underlying state habeas court order in *Tharpe v. Hall*, Butts Co. Superior Court Case No. 93-V-144, denying habeas relief is unreported and attached hereto as Appendix F. The Georgia Supreme Court's order denying discretionary review of the state habeas court's decision is unreported and attached hereto as Appendix G.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Petitioner's application for a certificate of appealability was entered on September 21, 2017. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property without due process of law...." U.S. Const. amend. V.
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. amend. VI.
>
> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.
>
> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person

of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 provides in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Federal Rule of Civil Procedure 60 provides in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: … (6) any other reason that justifies relief.

STATEMENT OF THE CASE

A. The Trial.

Petitioner, Keith Tharpe, is currently under sentence of death in Georgia following a jury trial conducted in Jones County, Georgia, about three months after his arrest, in early January 1991.[1] The entirety of the guilt and penalty phases took place January 8-10, 1991. During voir dire, Mr. Tharpe's counsel raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the district attorney's use of peremptory strikes against five of eight qualified

[1] Mr. Tharpe was tried for offenses stemming from the September 25, 1990, murder of his sister-in-law Jackie Freeman and sexual assault of his estranged wife Migrisus Tharpe, while under the influence of drugs. *Tharpe v. State*, 262 Ga. 110, 110-11 (1992).

black venire members available for challenge, as well as the prosecutor's notorious history of race discrimination.[2] Dkt. No. 11-11 at 130-31. The trial court accepted the district attorney's race-neutral responses and the trial proceeded. Dkt. No. 11-11 at 145.

Prior to the *Batson* challenge, prospective juror Barney Gattie was questioned by the State and defense. Dkt. No. 11-3 at 85-99. Mr. Gattie testified that he had no preconceived notions about the case, that he did not know the victims, and that his only connection to any party was that Mr. Briley sometimes bought oysters at his seafood shop. Dkt. No. 11-3 at 95. Mr. Gattie was ultimately selected to serve on the jury. Dkt. No. 11-11 at 118-19. After convicting Mr. Tharpe, the jury heard evidence in aggravation and mitigation to inform their decision whether to sentence Mr. Tharpe to death or a parole-eligible life sentence. In aggravation, the State presented evidence that Mr. Tharpe had been convicted as a habitual traffic offender.[3] In mitigation, his attorneys presented brief testimony from a number of family members, including his wife Migrisus. The jury ultimately sentenced Mr. Tharpe to death. His convictions and sentence were affirmed by the Georgia Supreme Court on March 17, 1992. *Tharpe v. State*, 262 Ga. 110 (1992), cert. denied, *Tharpe v. Georgia*, 506 U.S. 942 (1992).

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[2] By the time of Mr. Tharpe's trial, Ocmulgee Circuit District Attorney Joseph Briley had already been found to have used peremptory strikes in a discriminatory manner under the stringent standard of *Swain v. Alabama*, 380 U.S. 202 (1965), which imposed a higher burden than *Batson*, specifically requiring a showing of the prosecuting attorney's history of discriminatory tactics. *See* Dkt. No. 12-6 at 57-61 (Brief of Appellant, *Tharpe v. State*); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991). Mr. Briley's history of discrimination included authoring a memo providing instruction to other attorneys about how to underrepresent African Americans and women on grand and traverse jury lists while still avoiding legal challenges. *See Amadeo v. Zant*, 486 U.S. 214, 217-18 (1988).

[3] *See Tharpe v. Head*, 272 Ga. 596 (2000).

B. State Habeas Proceedings

Mr. Tharpe filed his state habeas corpus petition on March 17, 1993; it was subsequently amended on December 31, 1997, and January 22, 1998. In May of 1998, Mr. Tharpe's state habeas counsel from the Georgia Resource Center conducted juror interviews. On May 16, 1998, attorneys Diana Holt and Laura-Hill Patton interviewed juror Barney Gattie at his home in Gray, Georgia. The visit lasted approximately one hour. Dkt. No. 15-16 at 23; Dkt. No. 77-6 at ¶ 2 (Affidavit of Laura Hill-Patton). Ms. Patton testified to her recollection of the interview:

> Mr. Gattie expressed his feelings about the case in general. He stated that there are two kinds of black people in the world – "regular black folks" and "niggers." Mr. Gattie noted that he understood that some people do not like the word "nigger" but that is just what they are, and he "tells it like he sees it." According to Mr. Gattie, if the victim in Mr. Tharpe's case had just been one of the niggers, he would not have cared about her death. But as it was, the victim was a woman from what Mr. Gattie considered to be one of the "good black families" in Gray. He explained that her husband was an EMT. Mr. Gattie stated that that sort of thing really made a difference to him when he was deciding whether to vote for a death sentence.

Id. This was consistent with attorney Diana Holt's recollection of the interview. Dkt. No. 15-16 at 19; Dkt. No. 77-7 at ¶ 7 (Affidavit of Diana Holt). Ms. Holt further recalled: "Mr. Gattie said that he was congratulated for a good job as a juror on this case by some folks in the community. He said that one of the victim's family members had even told him, 'Thanks for sending that nigger to the chair.'" Dkt. No. 15-16 at 20; Dkt. No. 77-7 at ¶ 11. The interview ended cordially with Mr. Gattie's wife offering the attorneys fried green tomatoes and inviting them to stay for dinner.[4] Dkt. No. 15-16 at 20-21; Dkt. No. 77-7 at ¶ 13.

[4] Both Ms. Holt and Ms. Patton are white women, as is Laura Berg, another lawyer from the Georgia Resource Center, who accompanied Ms. Holt on a later visit with Mr. Gattie.

On May 25, 1998, Ms. Holt returned to Mr. Gattie's house with another Resource Center attorney, Laura Berg, as well as a draft affidavit based on Mr. Gattie's statements during the initial interview. Mr. Gattie asked the attorneys about other jurors they had sought to interview. When Ms. Holt mentioned they were having difficulty finding one juror, Tracy Simmons, who had moved out of state, Mr. Gattie stated: "you mean the nigger who used to live over by Juliette, Georgia. Yeah, I know who you are talking about, that nigger worked at the Bibb Company Plant in Forsyth until it closed."[5] Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 14. Ms. Holt proceeded to ask Mr. Gattie to review the draft affidavit.

> I asked Mr. Gattie if I could read his statement to him, explaining that it was my practice to read witnesses their statements, and he agreed. He asked what I was going to do with it, and I told him I wouldn't do anything with it unless he approved it and confirmed the accuracy of it. He said, "well, go ahead. Let's here [sic] what you got there." I read the statement from beginning to end to him, including the preface declaring that Mr. Gattie was swearing to the following information. After each point, I looked at him and asked him if the statement was right. He nodded or said, "yes" after each point, except for one point related to the origin of integration. I corrected the statement on that point to reflect Mr. Gattie's actual words. He confirmed the accuracy of every word of the rest of the statement. He did not request any further changes to his statement. At the conclusion of my reading of Mr. Gattie's statement to him, I asked him if it was entirely accurate. He said it was. I also asked him if there were any changes he wanted to make to the statement. He said that there were not… I handed the statement to Mr. Gattie and asked if he wanted to read it. He said he didn't have his glasses and what I read was what he had said. After Ms. Berg swore Mr. Gattie, he signed the statement in Ms. Berg's presence, and she notarized it on the spot.

Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.[6] Ms. Holt's recollection corroborates Mr. Gattie's affidavit, sworn to and signed that day, which included his amendment striking the term

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[5] Tracy Simmons was one of the two African Americans who served on Mr. Tharpe's jury. *See* Dkt. No. 15-8 at 7.

[6] Ms. Berg's recollection is consistent with Ms. Holt's. *See* Dkt. No. 15-16 at 1-11; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg).

"interracial marriages" and replacing it with the handwritten word "integration," which he initialed. Dkt. No. 15-8 at 130; Dkt. No. 77-2 at ¶ 3 (Affidavit of Barney Gattie). The affidavit further summarized his racial views as he had described them to Ms. Holt and Ms. Hill-Patton during their initial interview:

> 3. I also knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones county a long time. The Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people: 1. Black folks and 2. Niggers. For example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference? As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. ~~Interracial~~ Integration marriages started in Genesis. I think they are wrong. For example, look at O.J Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.

Id.[7] The following day, on May 26, 1998, state habeas counsel filed Mr. Gattie's affidavit and faxed a copy to opposing counsel. Dkt. No. 77-9 (Petitioner's Notice to Rely on Affidavits, May 26, 1998). The very next day, Mr. Gattie signed a second affidavit, this time on behalf of the Respondent. It characterized his interaction with Mr. Tharpe's attorneys in a manner at odds with counsel's recollections of what occurred, suggesting that Mr. Gattie had not understood the purpose of their visit and had been intoxicated at the time he signed his prior affidavit. Dkt. No. 15-17 at 13-15; Dkt. No. 77-3 at ¶ 1; 3 (Affidavit of Barney Gattie dated May 27, 1998). While he testified that the word "nigger" was not used during deliberations and that, at the time he served on Mr. Tharpe's jury, he had not known Mr. Tharpe was on probation at the time of the

[7] Despite maintaining that he did not read the affidavit before signing it, Mr. Gattie admitted during his deposition testimony that he made and initialed the correction shown in this image. Dkt. No. 15-6, at 44-45; Dkt. No. 77-4 at 44-45.

crime and did not discuss an alleged prior shooting with other jurors, Mr. Gattie did not deny using the term "nigger" generally, nor did he disavow his belief that black people could be divided into two categories of "good black folks" and "niggers." *See id.* In addition to filing Mr. Gattie's counter-affidavit, Respondent also moved to exclude Mr. Tharpe's juror affidavits in their entirety as improper impeachment of the jury's verdict inadmissible under O.C.G.A. §§ 17-9-41 and 9-10-9. *See* Dkt. No. 13-17 at 4. Although the affidavits were admitted into the record at the May 28, 1998, evidentiary hearing, the state habeas court later held that they, along with other testimony, were inadmissible under Georgia's no-impeachment rule. *See* Dkt. No. 19-10 (Appendix F) at 99-101.

In the months that followed, counsel for Mr. Tharpe sought to depose all the jurors to determine the extent to which racial bias had infected his trial. Dkt. No. *** (Petitioner's Notice of Depositions, June 1, 1998). In turn, Respondent sought a protective order to prevent depositions. Dkt. No. 14-8 (June 2, 1998). Although the state habeas court initially granted the protective order (Dkt. No. 14-10), after a motions hearing on August 24, 1998, it agreed to allow the depositions in the court's presence so that it could rule on what questions about the jurors' racial views would be permitted. *See* Dkt. No. 15-2 at 1-2.

The depositions were conducted on October 1-2, 1998. *See* Dkt. Nos. 15-6 – 15-8. Eleven of the twelve jurors testified, and all denied that any racial bias was involved in the deliberations. As for Mr. Gattie, he again specifically denied only one statement contained in his initial affidavit – namely that he had disclosed to other jurors that Mr. Tharpe was on probation for a prior shooting. Dkt. No. 15-6 at 54-55; Dt. 77-4 at 54-55. Although he maintained that Mr. Tharpe's counsel did not properly identify themselves and that he was intoxicated at the time he signed his first affidavit, Mr. Gattie did not deny the accuracy of any other statements in his

initial affidavit and, indeed, testified that the only inaccurate statement in it concerned jury-room discussions of the alleged prior shooting.[8] Dkt. No.15-6 at 118-19; Dkt. No. 77-4 at 118-19.

At a subsequent evidentiary hearing held on December 11, 1998, Mr. Tharpe submitted affidavits from the attorneys who had interviewed Mr. Gattie initially (Laura-Hill Patton and Diana Holt) and who were present when his affidavit was executed (Diana Holt and Laura Berg). *See* Dkt. No. 15-16 at 10-13, 17-26; Dkt. Nos. 77-6, 77-7, and 77-8. These affidavits, which were admitted into evidence, reaffirmed Mr. Gattie's racial attitudes and contradicted his testimony regarding the circumstances under which the affidavit was obtained. The attorneys also testified that they had introduced themselves to Mr. Gattie as attorneys who were working on Mr. Tharpe's behalf. Dkt. No. 15-16 at 23; Dtk. No. 77-6 at ¶ 3 (Affidavit of Laura-Hill Patton); Dkt. No. 15-16 at 17-18; Dkt. No. 77-7 at ¶ 4 (Affidavit of Diana Holt). Contrary to Mr. Gattie's suggestion in his second affidavit and his deposition testimony that he was significantly intoxicated at the time he signed his first affidavit, "Mr. Gattie did not appear to be tired or alcohol-impaired at any time throughout our visit. He was alert and animated as Ms. Holt read him the affidavit and afterwards, as we chatted with him." Dkt. No. 15-16 at 12; Dkt. No. 77-8 at ¶ 8 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 21l Dkt. No. 77-7 at ¶ 15 (Affidavit of Diana Holt). The attorneys further testified that Mr. Gattie was well aware of the contents of the affidavit, which he had corrected and signed on May 25, 1998.

> Ms. Holt read the entire affidavit to Mr. Gattie in a clear, slow voice, stopping every couple of lines to ask Mr. Gattie to verify that what she had read was accurate. Every time Ms. Holt would stop for verification Mr. Gattie would tell her "that's right" or "I'm sticking to my story" or would reiterate the statement that Ms. Holt had just read.

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[8] Mr. Gattie nonetheless testified that some of the statements in the affidavits were "out of proportion." Dkt. No. 15-8 at 82; Dkt. No. 77-5 at 14.

Dkt. No. 15-16 at 10; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.

After these proceedings, Mr. Tharpe's state habeas case languished and several changes in attorneys on both sides occurred. On July 30, 2007, the court conducted an evidentiary hearing addressing Mr. Tharpe's intellectual disability claim pursuant to *Turpin v. Hill*, 269 Ga. 302 (1998). After submission of post-hearing briefing and proposed orders, the state habeas court issued a final order denying relief on all claims. Dkt. No. 19-10 (Appendix F) (Final Order). With regard to the juror-bias claim, the state court ruled that all juror testimony in both affidavits and depositions was inadmissible under Georgia law: "[T]he fact that some jurors exhibited certain prejudices, biases, misunderstandings as to the law, or other characteristics that are not conducive to neutral and competent fact-finding is not a basis for impeaching the jury's verdict." Dkt. No. 19-10 (Appendix F) at 99. The court explained:

> The Georgia Supreme Court has made clear that the affidavits, such as those submitted by Petitioner to this Court, are not admissible. In *Spencer v. State*, 260 Ga. 640 (1990), the Georgia Supreme Court held: "The general rule is that affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A § 17-9-41. **Exceptions are made to the rule in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations.** *See, e.g., Hall v. State*, 259 Ga. 412 (383 S.E. 2d 128) (1989) and cases cited therein. Compare FRE 606 (b). (Footnote omitted.) The affidavit here does not fit within these exceptions to the rule. Compare *Shillcutt v. Gagnon*, 827 F2d 1155 (II) (7th Cir. 1987). *See also Wright* & *Gold, Federal Practice and Procedure,* Ch. 7, § 6074 at pp. 431-32. ("Most authorities agree that **the rule precludes a juror from testifying that issues in the case were prejudged,** a juror was motivated by irrelevant or improper personal considerations, **or racial or ethnic prejudice** played a role in jury deliberations." (Footnotes omitted.)) . . . *Spencer*, 260 Ga. at 643.

Id. at 99-100 (emphasis in original). Based on this analysis, the court concluded: "[A]s the juror depositions and Petitioner's affidavits with regard to these claims are inadmissible, Petitioner has failed to prove, with any competent evidence, that there was any juror misconduct…." *Id.* at

101. The state habeas court further ruled that, regardless, the juror misconduct claims, including the claim that Juror Gattie's racial prejudice invalidated the death sentence, were defaulted for failure to raise them on direct appeal, and that Mr. Tharpe had not shown cause and prejudice to overcome the default. *Id.* at 102-04. The court specifically observed that Mr. Tharpe had suffered no prejudice as he "has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey*." Dkt. No. 19-10 (Appendix F) at 102 (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)). Based on these rulings, the court made no fact or credibility findings regarding the disputed facts in Mr. Gattie's and the attorneys' testimony.

C. Federal Habeas Proceedings

Mr. Tharpe filed his federal habeas petition on November 8, 2010, in which he raised a juror misconduct claim based, *inter alia*, on racial bias. Dkt. No. 1 at 16-17. He reasserted the claim in his amended petition. Dkt. No. 25 at 16-17. By Order dated August 18, 2011, the district court found the claim procedurally defaulted based on the state habeas court's analysis of the default in its Final Order. Dkt. No. 37 at 8-9 (Appendix E). Mr. Tharpe continued to pursue his other claims for relief that were not procedurally barred. The district court denied his petition on March 6, 2014, but issued a certificate of appealability ("COA") to address the claim that trial counsel provided ineffective representation in investigating and presenting mitigation evidence. Dkt. No. 65 (Appendix D). The Eleventh Circuit expanded the COA to include the question of Mr. Tharpe's intellectual disability. *Tharpe v. Warden*, Eleventh Circuit Case No. 14-12464, Order of July 30, 2014. The Eleventh Circuit affirmed this Court's denial of habeas relief on August 25, 2016. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016) (Appendix C).

On April 14, 2017, Mr. Tharpe filed a petition for writ of certiorari based on issues addressed in the Eleventh Circuit's opinion. That petition was denied on June 26, 2017. *Tharpe v. Warden*, 137 S. Ct. 2298 (2017).

While counsel were preparing to file Mr. Tharpe's petition for a writ of certiorari, this Court issued decisions in *Buck v. Davis*, 137 S. Ct. 759 (2017), and *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). Based on these two decisions and while the certiorari petition remained pending before this Court, Mr. Tharpe, on June 21, 2017, filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (6). Dkt. No. 77. Respondent, after receiving a requested extension of three weeks in which to respond, filed a response in opposition, Dkt. No. 89, and Mr. Tharpe filed a reply brief in support of his motion, Dkt. No. 93. On September 5, 2017, the district court denied relief, concluding that Mr. Tharpe's claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989), and alternatively was procedurally defaulted. Dkt. No. 95 (Appendix B). The court denied a certificate of appealability. *Id.* at 22-23.

The next day, the State of Georgia obtained a warrant for Mr. Tharpe's execution permitting Mr. Tharpe's execution between Tuesday, September 26, 2017, and Tuesday, October 3, 2017.

On September 8, 2017, Mr. Tharpe filed an Application for Certificate of Appealability ("COA") and a separate Motion for Stay of Execution was filed on September 13, 2017. On September 21, 2017, a panel of the Eleventh Circuit denied the COA application and stay motion. *See* Appendix A. The panel ruled that the district court had not abused its discretion in denying the 60(b) motion because it "applied the correct legal standard and based its decision on findings of fact not clearly erroneous. Appendix A at 7. It further held that a COA should not issue to review the ruling because Mr. Tharpe had not "made a substantial showing of the denial

of a constitutional right" because, "[a]s the Butts County Superior Court and the District Court found, Tharpe failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict'" or that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal citation omitted) and *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Finally, the panel opined that "[i]f Tharpe is correct that *Pena-Rodriguez* applies retroactively in post-conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the Butts County Superior Court, he is now free to pursue the claim in state court." *Id.* at 7-8. Judge Wilson concurred in the COA denial, noting that he would have granted COA in the case had he not concluded that the *Pena-Rodriguez* claim was not properly exhausted and accordingly that a stay should be granted and "the denial should be without prejudice so as to allow Tharpe a chance to re-file after it is properly litigated in Georgia state court." *Id.* at 9.[9]

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Mr. Tharpe's claim that one of his jurors was motivated to vote in favor of the death penalty on the basis of racial bias was raised in his First Amended Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia. *See* Dkt. No. 13-8 at 16. The state habeas court held that the evidence submitted in support of the claim was inadmissible under Georgia's law precluding jurors from impeaching their verdict and was otherwise procedurally defaulted. Dkt. No. 19-10 at 98-104. In federal habeas corpus proceedings, the district court

[9] Although Mr. Tharpe argues below that his juror-bias claim was exhausted and the appropriate subject of a motion for relief from judgment under Rule 60(b)(6), he has also raised the claim anew, on the basis of the change in the law occasioned by *Pena-Rodriguez*, in a successive petition filed in state court on September 22, 2017.

found the claim procedurally defaulted as well. Dkt. No. 37 (Appendix E) at 8-10. Following this Court's rulings in *Pena-Rodriguez* and *Buck*, Mr. Tharpe moved to reopen this claim pursuant to Fed.R.Civ.Proc. 60(b)(6) on the basis of the new decisional law rendering his previously defaulted juror-bias claim cognizable, but the district court denied the motion and the Eleventh Circuit denied a certificate of appealability.

REASONS WHY THE PETITION SHOULD BE GRANTED

This Court has reaffirmed time and again that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Its cases reflect the Court's commitment to eradicating racial discrimination in the justice system. *See, e.g.*, *Pena-Rodriguez*, 137 S. Ct. at 867-68 (discussing cases). That commitment rings hollow if the State of Georgia is permitted to kill Mr. Tharpe without *any* judicial scrutiny of his long-standing and long-ignored claim that Juror Barney Gattie voted to impose the death penalty because Mr. Tharpe is black. That claim – supported by credible evidence, in the form of both sworn affidavits and live testimony, including Mr. Gattie's sworn statement that he voted for the death penalty because Mr. Tharpe is a "nigger" who killed a "'good' black" person and his flagrant, repeated and unabashed use of the word "nigger," a term that "is a universally recognized opprobrium, stigmatizing African-Americans because of their race"[10] – must not be swept under the rug any longer. This Court's intervention is necessary to prevent a grotesque and shocking perversion of justice.

[10] *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993).

ARGUMENT

I. The Eleventh Circuit's Denial Of COA Was In Flagrant Disregard Of This Court's Instruction That A Court Of Appeals Should Limit Its Examination At The COA Stage To A Threshold Inquiry Into the Underlying Merit Of The Claim And Ask Only If The District Court's Decision Was Debatable.

28 U.S.C. § 2253(c) requires a certificate of appealability to be granted before a habeas petitioner may appeal from a final district court judgment denying relief.[11] A COA should issue where the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). When, as here, a COA seeks to address a district court's procedural ruling, the petitioner must show "that [the] procedural ruling barring relief is itself debatable among jurists of reason . . . ." *Buck*, 137 S. Ct. at 777. *See Slack, supra*. As this Court recently explained in *Buck*, the COA inquiry "is not coextensive with a merits analysis" and, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). Here, Mr. Tharpe clearly met that standard in showing that reasonable jurists could disagree with the district court's denial of his Rule 60(b) motion on the ground that *Pena-Rodriguez* did not apply and that, regardless, the

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[11] The Eleventh Circuit requires issuance of a COA "before a habeas petition may appeal the denial of a Rule 60(b) motion." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1265 (11th Cir. 2015). *See also Buck*, 137 S. Ct. at 780 (Fifth Circuit erred in denying a COA to address procedurally defaulted claim of racial bias in capital sentence raised in Rule 60(b) motion).

state habeas court's failure to consider the evidence presented of Juror Gattie's racist views and their impact on the death sentence, nonetheless complied with *Pena-Rodriguez*.

A. Mr. Tharpe Appropriately Sought to Reopen the Judgment Under Rule 60(b)(6).

On the basis of this Court's recent decisions in *Pena-Rodriguez* and *Buck*, Mr. Tharpe moved to reopen the district court judgment in his case under Fed.R.Civ.Proc. 60(b)(6). That rule "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances, including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6) "permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)."[12] *Id.*[13] While the Antiterrorism and Effective Death Penalty Act of 1996 has placed limits on Rule 60(b)'s application in federal habeas proceedings, it appropriately applies to cases like Mr. Tharpe's, which "attack[], not the substance of the federal court's resolution of a claim on the merits, but some defect in the

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[12] Grounds 1-5 permit judgment to be opened due to

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; [and] (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable . . . .

Fed.R.Civ.Proc. 60(b).

[13] "This clause is a broadly drafted umbrella provision which has been described as 'a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.'" *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (quoting 7 J. Lucas & J. Moore, Moore's Federal Practice para. 60.27[2] at 375 (2d ed. 1982)).

integrity of the federal habeas proceedings," *id.* at 532, in this case the preclusion of proof to support Mr. Tharpe's juror misconduct claim and the court's application of an overly burdensome prejudice standard to find the claim procedurally defaulted.

"Rule 60(b) vests wide discretion in the courts, but . . . relief under 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck*, 137 S. Ct. at 777 (quoting *Gonzalez*, 545 U.S. at 535). Such circumstances must be determined on the basis of "a wide range of factors [that] may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck*, 137 S. Ct. at 778 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988)).

In *Buck*, the Court held that the district court had abused its discretion in denying a habeas petitioner's Rule 60(b)(6) motion, given proof that "Buck may have been sentenced to death in part because of his race." *Buck*, 137 S. Ct. at 778. This type of error represented a "disturbing departure from a basic premise of our criminal justice system," which "punishes people for what they do, not who they are," a departure "exacerbated because it concerned race." *Id.* Buck's trial counsel had knowingly presented expert testimony at Buck's penalty phase that Buck was more likely to be a future danger because he was black. *Id.* at 768-69. Trial counsel's ineffectiveness in this regard, however, was not raised on direct appeal or in his initial state postconviction proceedings, and, in federal habeas proceedings, was held to be procedurally defaulted and the merits of the claim were not reached. *Id.* at 770-71.

This Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), recognized a previously unavailable basis to excuse the procedural default of Buck's ineffective assistance claim and he accordingly sought relief under Fed.R.Civ.Proc. 60(b) to reopen his claim that his death sentence was tainted by his trial counsel's ineffectiveness in

presenting racially discriminatory expert testimony. The district court denied relief, concluding that Buck had not shown "extraordinary circumstances" and that he had failed to demonstrate the merits of the underlying claim as the expert's introduction of race was "*de minimis*" because the expert had only linked race and future dangerousness twice. *Id.* at 772. The Fifth Circuit denied a certificate of appealability to address the claim. *Id.* at 773.

This Court disagreed with the rulings from both lower federal courts. With respect to the district court's refusal to reopen the case under Rule 60(b)(6), the Court initially concluded that Buck succeeded on the merits of his claim that trial counsel were ineffective in presenting expert testimony linking Buck's race to his future dangerousness, given the centrality of the future dangerousness finding, the stark impropriety of presenting such testimony, and the likelihood that expert testimony on the subject influenced the sentencing jury. *Buck*, 137 S. Ct. at 776-77. The Court further repudiated the district court's conclusion that the criteria for granting the Rule 60(b)(6) motion was not met because the case did not present "extraordinary circumstances." Rather, the Court observed:

> Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. As petitioner correctly puts it, "[i]t stretches credulity to characterize Mr. Buck's [ineffective assistance of counsel] claim as run-of-the-mill." Brief for Petitioner 57.
>
> This departure from basic principle was exacerbated because it concerned race.

Id. at 778. That such circumstances were "extraordinary" was "confirmed by what the State itself did in response to [the expert's testimony] in other cases," namely confessing error in five of the six cases the State had identified in which the expert had given such testimony. *Id.* at 778-79. Only Buck's capital sentence had been left untouched. *Id.* Given these circumstances, the

Court found, its recent decisions in *Martinez* and *Trevino* provided the mechanism for having Buck's ineffective-assistance claim finally determined on the merits.

B. Reasonable Jurists Could Debate Whether The District Court Properly Refused To Reopen The Case Because Mr. Tharpe Had Failed To Set Forth Sufficiently "Extraordinary" Circumstances.

Given this Court's strong condemnation of *the possibility* that Mr. Buck had been sentenced to death in part on the basis of his race, Mr. Tharpe clearly demonstrated that jurists of reason could debate the correctness of the district court's conclusion that Mr. Tharpe's juror-bias claim did not present similarly extraordinary circumstances. Although "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987), *Buck* clearly shows that that "something more" is presented here. First, the new law on which Mr. Tharpe relied not only, like *Buck*, provided a path for considering the merits of Mr. Tharpe's previously defaulted claim, but it also informed the merits review of that claim. More significantly, *Buck* shows that the subject matter of the claim – the likelihood that Mr. Tharpe was "sentenced to death in part because of his race" – is of exceptional importance, representing a "disturbing departure from a basic premise of our criminal justice system" heightened by the "odious" and "pernicious" taint of racial discrimination. *Buck*, 137 S.Ct. at 778. *See also Pena-Rodriguez*, 137 S. Ct. at 868; *cf. Liljeberg*, 486 U.S. at 864 (holding that relief under Rule 60(b) was appropriate to correct district court's failure to recuse itself based on circumstances creating the appearance of impropriety and noting that "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process").

Together, *Buck* and *Pena-Rodriguez* establish that reasonable jurists could disagree with the district court's decision to deny the Rule 60(b) motion on grounds that Mr. Tharpe's claim was not "extraordinary."[14] The Eleventh Circuit, however, fell into the same error made by the Fifth Circuit in *Buck*, "sidestep[ping] [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," a practice that "in essence decid[es] an appeal without jurisdiction." *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336-37). Here, the Eleventh Circuit essentially interposed a merits-based rationale for denying COA, accepting the notion that the district court could reasonably have dismissed Mr. Gattie's racist remarks and testimony that he voted to impose the death penalty because Mr. Tharpe was a "nigger" who had killed someone Mr. Gattie considered "'good' black folk," as an "offhand comment" that did not "justify setting aside the no-impeachment bar to allow further judicial inquiry." Appendix A at 5 (quoting *Pena-Rodriquez*,

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[14] Mr. Tharpe also showed that reasonable jurists could debate the district court's conclusion that *Pena-Rodriguez* was a new rule of criminal procedure whose retroactive application was barred by *Teague*. As Mr. Tharpe showed, *Teague* did not apply at all because *Pena-Rodriguez* is a substantive evidentiary rule governing the consideration of evidence after a verdict has been returned and not a criminal procedural rule "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Moreover, even if a rule of criminal procedure, it was not "new" because it was dictated by this Court's precedents securing a defendant's right to trial by an impartial jury and protecting against the pernicious effects of racism in the justice system. *See* COA Application at 18-24 (pdf pages 28-34); Reply Brief in Support of COA Application at 9-13 (pdf pages 15-19). *See also Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of certiorari)(observing that the very claim decided in *Pena-Rodriguez* would not be *Teague*-barred if visited in federal habeas corpus proceedings).

The Eleventh Circuit sidestepped this issue, "assum[ing] for purposes of this case that *Pena-Rodriguez* is retroactive and applies in this post-conviction proceeding." Appendix A at 7. The district court's retroactivity ruling is, however, an essential component of its ruling that the Rule 60(b) motion failed to present adequate grounds for the grant of COA. As reasonable jurists may differ on whether *Pena-Rodriguez* applies retroactively, the district court's ruling on this ground presents yet another reason that a COA was appropriate in this case.

137 S. Ct. at 869). *See also id*. at 7 (approving district court's analysis as "appl[ying] the correct legal standard and bas[ing] its decision on findings of fact not clearly erroneous").

Because the Eleventh Circuit misapplied the COA standard by adjudicating the merits and failed to recognize that Mr. Tharpe's claim of juror bias is sufficiently weighty "to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773, this Court should grant certiorari, vacate the Eleventh Circuit's judgment, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to grant a certificate of appealability to address the propriety of relief from judgment.

II. The Eleventh Circuit's Conclusion That Mr. Tharpe Failed to Make a Substantial Showing of the Denial of a Constitutional Right Is In Flagrant Defiance Of This Court's Unwavering Commitment To Eradicating Racial Discrimination in the Justice System.

The Eleventh Circuit concluded that Mr. Tharpe had not "made a substantial showing of the denial of a constitutional right" because he "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" Appendix A at 7 (quoting *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).[15] This statement is astonishing, given the abundant evidence Mr. Tharpe

[15] The panel's reliance on *Brecht*'s harmless-error standard came out of left field, as no court or party previously mentioned it in addressing Mr. Tharpe's claim. It is certainly questionable whether the *Brecht* standard applies to a claim that a death sentence was impermissibly imposed on the basis of the defendant's race. Such a claim is structural in nature and is of the type that "require[s] reversal because [it] cause[s] fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (including among this type of claim that of a biased decisionmaker) (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). Regardless, it is impossible to fathom how Mr. Tharpe's claim that Mr. Gattie voted to sentence him to death because he is a "nigger" would not satisfy the *Brecht* standard. *See, e.g.*, *Buck*, 137 S. Ct. at 778 (describing the prospect that someone was sentenced to death because of his race "a disturbing departure from a basic premise of our criminal justice system" which "was exacerbated because it concerned race"); *Zant v. Stephens*, 462 U.S. 862,

presented in state court that Barney Gattie was an unapologetic racist who stated, in sworn testimony, that he sentenced Mr. Tharpe to death *because* Mr. Tharpe was a "nigger."

Mr. Gattie's language cannot be dismissed as a mere "offhand comment indicating racial bias or hostility." *Pena-Rodriguez*, 137 S. Ct. at 869. To the contrary, Mr. Gattie's statements, which must be taken as accurate assessments of his actual thoughts, given that *no court has ever engaged in any factfinding* on the topic of what Mr. Gattie may have actually said or meant, go to the very heart of the issue of whether Mr. Tharpe was sentenced to death because of his race.

Neither the district court, nor the Eleventh Circuit, considered that Mr. Gattie's free use of the word "nigger" was "by its very nature an expression of prejudice on the part of the maker" which, due to social condemnation, may have been "cloaked" once he was appearing in court.[16] *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986).[17] Yet, ignoring Mr. Gattie's use

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885 (1983) (noting that a defendant's race would be a "constitutionally impermissible or totally irrelevant" factor in the capital sentencing process).

[16] In *Pena-Rodriguez*, this Court noted "The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot." 137 S. Ct. at 869. That same stigma, of course, could have an equally chilling effect on a juror's willingness to implicate himself as a racist in open court.

[17] In *Heller*, the Eleventh Circuit vacated a conviction where the trial court had engaged in only a superficial inquiry into allegations that several jurors had made anti-Semitic remarks in the jury room. The court rejected the government's efforts to minimize the racial and religious slurs as made "purely in a spirit of jest" having "no bearing on the jury's deliberations. *Heller*, 785 F.2d at 1527. As the Eleventh Circuit forcefully stated:

> *[A]nti-Semitic "humor" is by its very nature an expression of prejudice on the part of the maker.* Indeed, in a society in which anti-Semitism is condemned, those harboring such thoughts often attempt to mask them by cloaking them in a "teasing" garb. A wolf in sheep's clothing is, despite clever disguise, still a wolf. Those who made the anti-Semitic "jokes" at trial and those who reacted to them

of language ignores the historical significance of his words. "Over the years, *nigger* has become the best known of the American language's many racial insults, evolving into the paradigmatic slur." Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* 22 (Vintage Books ed. 2003). Juror Gattie's free use of the word, particularly coupled with his expressly racist views about integration, intermarriage, and souls, accordingly provided clear evidence of his entrenched racial bias, irrespective of Mr. Gattie's later claim that he used the word "nigger" to describe lazy, no-good white people as well as black people.

"It is beyond question that the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry.'" *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (ellipsis in original) (quoting Merriam-Webster's Collegiate Dictionary 784 (10th ed. 1993)). As numerous courts have recognized, "using the highly offensive racial slur 'nigger,' . . . constitutes direct evidence of discriminatory intent." *Kinnon v. Arcoub, Gopman & Assoc.*, 490 F.3d 886, 891 (11th Cir. 2007).[18]

> with "gales of laughter" displayed the sort of bigotry that clearly denied the defendant Heller the fair and impartial jury that the Constitution mandates.

Id. (emphasis added). The same holds true here.

[18] *See also, e.g., Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1229-30 (10th Cir. 2015) (citing cases "offer[ing] helpful commentary on the potentially strong polluting power of this [] time-worn word, 'nigger'"); *Umani v. Mich. Dep't of Corr.*, 432 Fed. Appx. 453, 459 (6th Cir. 2011) ("The use of the word 'niggers' is a racial slur 'irrespective of its common usage and without regard for the race of those who use it.'") (quoting *NLRB v. Foundry Div. of Alcon Indus.*, 260 F.3d 631, 635 (6th Cir. 2001)); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997) ("[U]se of the word [nigger] even in jest could be evidence of racial

A juror's use of the word "nigger" is no less indicative of his or her racial bias. In *Bennett v. Stirling*, the district court granted habeas relief on a juror misconduct claim, finding that a juror's testimony that he "thought Petitioner was guilty 'because he was just a dumb nigger' [was] highly probative evidence establishing that the juror viewed black people as inferior to white people, and that he did not properly consider the evidence presented at trial." *Bennett v. Stirling*, 170 F. Supp. 3d 851, 870-71 (D.S.C. 2016), *aff'd on other grounds*, 842 F.3d 319 (4th Cir. 2016).[19] As the district court observed, "[I]t is difficult to imagine how the Juror could have stated his bias and its impact on Petitioner's sentencing more clearly. Moreover, if this blatant statement of racial hostility does not amount to evidence of constitutionally impermissible racial bias, it is hard to imagine what evidence could meet that standard." *Id.* *See also United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (observing with respect to juror misconduct claim that "[w]e have considerable difficulty accepting the government's

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antipathy.") (quoting *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990)); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of *an unambiguously racial epithet such as 'nigger'* by a supervisor in the presence of his subordinates.") (internal citation omitted) (emphasis added); *Brown*, 989 F.2d at 861 (finding that supervisor's "use of racial slurs [such as the word 'nigger'] constitutes direct evidence that racial animus was a motivating factor in the contested disciplinary decision," and noting that "[u]nlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term 'nigger' is a universally recognized opprobrium, stigmatizing African-Americans because of their race"); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 514-515 (6th Cir. 1991) (supervisor's "use of the word 'niggers' cannot be characterized as harmless or casual. . . [T]he use of the racially derogatory word in juxtaposition with [the supervisor's] statement that he wanted to get rid of two of the three black employees employed at the school, if true, is evidence of racial animus").

[19] On appeal, the Fourth Circuit affirmed the district court's alternate ground for relief – that the prosecutor's racially charged closing argument violated due process. *See Bennett*, 842 F.3d at 325-28. That ruling "makes it unnecessary to consider Bennett's claim that the seating of a racially biased juror violated his right to an impartial jury." *Id.* at 328 n.*.

assumption that, at this time in our history, people who use the word 'nigger' are not racially biased").

Irrespective of Juror Gattie's efforts to backpedal from his initial sworn affidavit, his claim that he was not a racist because he used the word "nigger" to describe both black and white people rings hollow, given the word's well-established history and meaning, and other indications (such as his negative expressions about integration and skepticism that black people have souls) that his view of the world in general and Mr. Tharpe in particular was twisted by racial discrimination.[20] Despite his later assertion that he voted for death based solely on the evidence, his views on race – which he never disavowed – demonstrate that racial animus was inextricably tied to his decision-making in this case.

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[20] In *Bennett*, the district court discredited the juror's self-serving denial of being a racist:

> Federal courts do not "redetermine credibility of witnesses whose demeanor has been observed by the state trial court," *Marshall v. Lonberger*, 459 U.S. 422, 434 . . . (1983), but that does mean that federal courts always must find it reasonable for state courts to credit a witness's testimony to the exclusion of the entire record. The record in this case contradicts the Juror's denial of racial bias so thoroughly that no court could reasonably credit his denial. The Juror's statement that he believed Petitioner to be "just a dumb nigger" cannot be reconciled with his testimony that he did not view black people as inferior to white people. It is unreasonable to find that a juror who states that a black defendant is guilty "because he was just a dumb nigger" in fact had no racial bias regarding that person simply because he later proffers a bald denial of bias. Such denials are properly accorded little weight. *See, e.g.*, *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 . . . (1984) (Brennan, J., concurring in the judgment) (observing that "the bias of a juror will rarely be admitted by the juror himself"); *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) ("It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism."); (Dkt. No. 107 at 32:3-16 (Respondents agreeing that people generally do not admit to being racists)).

Bennett, 170 F. Supp. 3d at 871.

The underlying merits of Mr. Tharpe's case are disturbing and set forth a more than colorable claim that his death sentence was the impermissible product of racial bias. This claim deserved encouragement to proceed further and the Eleventh Circuit accordingly should have issued a COA. Mr. Tharpe respectfully submits that this Court should grant certiorari, vacate the Eleventh Circuit's judgment, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to grant a certificate of appealability to address the Mr. Tharpe's claim that he should be granted relief from judgment.

III. The Eleventh Circuit's Determination That *Pena-Rodriguez* Created A New Claim That Mr. Tharpe Should Have Exhausted In State Court Is Inexplicable And Provides No Basis For The Court To Punt This Issue.

This Court's decision in *Pena-Rodriguez* did not create any new ground for vacating a verdict. Rather, the decision removed an impediment to a court's consideration of evidence showing that a jury verdict (or sentence) was the product of the racial bias of one or more jurors. Mr. Tharpe's claim that his death sentence was the unconstitutional, invalid result of Mr. Gattie's racist beliefs and invidious discrimination was first raised close to twenty years ago and *Pena-Rodriguez* did not transform that claim into something new and different.

Pena-Rodriguez (together with *Buck*) provided firm ground for Mr. Tharpe to seek relief from judgment under Rule 60(b)(6). It undermined the district court's original reliance on the state habeas court's procedural default of the juror bias claim in two distinct and important ways. The state habeas court had ruled inadmissible the entirety of Mr. Tharpe's evidence proving Juror Gattie's bias and its impact on Mr. Tharpe's death sentence, and further ruled that Mr. Tharpe had not shown prejudice sufficient to excuse any default because he "failed to show that any alleged racial bias of Mr. Gattie's *was the basis for sentencing* the Petitioner, as required by the ruling in *McCleskey*." Dkt. No. 19-10 (Appendix F) at 102 (emphasis added). Both of these

rulings were wrong under *Pena-Rodriguez*. First, *Pena-Rodriguez* establishes that the extensive evidence proving Juror Gattie's racist views and their direct impact on his decision to sentence Mr. Tharpe to death should have been admitted into evidence, despite Georgia's evidentiary rule precluding the presentation of juror testimony to impeach a verdict."[21] Second, the case establishes that the state court applied an incorrect and overly burdensome test to show harm from Mr. Gattie's presence on Mr. Tharpe's jury.

In *Pena-Rodriguez*, a non-capital sexual assault case, the defendant had sought to present affidavits obtained shortly after trial from two jurors who described a number of biased statements a third juror had made about Mexicans and the likelihood that the defendant was guilty based on his Mexican background.[22] *Pena-Rodriguez*, 137 S. Ct. at 861-62. The state trial

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[21] The state habeas court relied on the Georgia Supreme Court's decision in *Spencer v. State*, 260 Ga. 630, 643-44 (1990), which refused to create an exception to the no-impeachment rule for evidence of a juror's racial discrimination. *See* Dkt. No. 19-10 (Appendix F) at 99-100. There, the Georgia Supreme Court affirmed the trial court's exclusion of evidence of capital sentencing juror's racial bias, observing that "[t]he rule of juror exclusion . . . is sufficiently race-neutral that further protection is not required, and the evidence in the present case did not reach a level that would justify disregarding the rule. Other than the lone affidavit, Spencer offered no evidence that racial bias materially affected the jury's decision to convict him and to impose a death sentence." *Id.* at 644. *See Spencer*, 500 U.S. at 960-61 (Kennedy, J., concurring) (concurring in the denial of certiorari because of the belief that the issue would not be barred in federal habeas proceedings under *Teague*, and observing that "Spencer, a black man . . . convicted and sentenced to death by a jury made up of six whites and six blacks" had been precluded from presenting a juror affidavit alleging that "other jurors uttered racial slurs concerning petitioner during deliberations" and "that petitioner's race was an important factor in the decision of certain jurors to convict petitioner and sentence him to death"). The case did not reach federal habeas proceedings as Spencer was later found ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). *See Retardation Issue in Capital Cases*, The Augusta Chronicle, Mar. 15, 1999, available at http://chronicle.augusta.com/ stories/1999/03/15/met_256216. shtml#.WUFVlmjyu70) (last viewed September 22, 2017).

[22] Specifically, the jurors testified in their affidavits that "Juror H.C." had expressed his belief in the defendant's guilt "because in [the juror's] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," and other comments indicating the juror's conclusion that the defendant was guilty because he was Mexican and discounting the defendant's alibi because it was

court had ruled the evidence inadmissible under Colorado's evidence rule excluding jurors from impeaching their verdict and a divided state supreme court had affirmed. *Id.* at 862. This Court reversed.

This Court held that, in light of the preeminent importance of eradicating racial discrimination from our justice system, the near-ubiquitous evidentiary rule preventing jurors from impeaching their verdicts could not be applied to exclude probative evidence showing that racial bias affected a verdict. Rather, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Pena-Rodriguez*, 117 S. Ct. at 869. As this Court explained, "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubts on the fairness and impartiality of the jury's deliberations and resulting verdict [by] tend[ing] to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.*

Under *Pena-Rodriguez*, the affidavits and live testimony establishing Barney Gattie's entrenched racist views were admissible to prove that Mr. Tharpe's death sentence was the unreliable and unfair product of invidious discrimination and accordingly invalid under the Fifth, Sixth, Eighth and Fourteenth Amendments. The evidence, showing *inter alia* Juror Gattie's free use of the word "nigger," explaining how he divided African-Americans into "niggers" and "good black folks," and that he knew right away that he would vote to impose the death penalty

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presented by a witness the biased juror incorrectly dismissed as "an illegal." *Pena-Rodriguez*, 137 S. Ct. at 862.

in this case because Mr. Tharpe was a "nigger" while his victim was in the "good-black-folks" category tended to show that "racial animus was a significant motivating factor in the juror's vote to convict." *Pena-Rodriguez*, 137 S. Ct. at 869.

That test, clearly satisfied here, further demonstrates that the state habeas court applied an incorrect and overly burdensome standard in finding that Mr. Tharpe had not shown any prejudice to excuse his purported procedural default because he "failed to show that any alleged racial bias of Mr. Gattie's was *the basis* for sentencing the Petitioner." Dkt. No. 19-10 (Appendix F) at 102 (emphasis added). But *Pena-Rodriguez*'s clarification that the state court's prejudice analysis was wrong hardly establishes that *Pena-Rodriguez* created a "new" claim that, per the Eleventh Circuit, Mr. Tharpe should first have exhausted in state court. That conclusion is mystifying, given that Mr. Tharpe has been raising the same claim – that Juror Gattie's racism invalidates his death sentence – for close to twenty years.[23]

Pena-Rodriguez removed the impediment to consideration of the evidence Mr. Tharpe presented to support this claim. This Court must grant certiorari to ensure that some federal court gives it meaningful consideration on the merits.

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[23] Mr. Tharpe has argued that *Pena-Rodriguez* is not *Teague* barred because (1) it is not a rule of criminal procedure, (2) the evidentiary rule it modified itself is substantive in nature, and (3) regardless, the result was dictated by this Court's precedents securing the right to trial by an impartial jury and combatting the pernicious effects of racism in the justice system. *See* COA Application at 18-24 (pdf pages 28-34); Reply Brief in Support of COA Application at 9-13 (pdf pages 15-19). Should this Court construe *Pena-Rodriguez* to have set forth a new claim, however, it falls to this Court to declare the decision retroactive. *See* 28 U.S.C. § 2244(d)(1)(C). Given the decision's self-described place in this Court's long history of anti-discrimination decisions arising from the Court's "duty to confront racial animus in the criminal justice system," *Pena-Rodriguez*, 137 S. Ct. at 867-68, Mr. Tharpe respectfully submits this Court should declare the case fully retroactive.

CONCLUSION

"The jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."'" *Pena-Rodriguez*, 137 S. Ct. at 868 (quoting *McCleskey*, 481 U.S. at 310 (internal citation omitted). This Court must grant the Petition for Writ of Certiorari in order to ensure that the fundamental protection the jury is intended to confer is not grotesquely perverted by allowing the State to proceeed with Mr. Tharpe's execution without ever having afforded him merits review of his disturbing claim, supported by credible evidence, that he was sentenced to death because in one juror's eyes he is a "nigger" who should be executed because of his race.

This 23rd day of September, 2017.

Respectfully submitted,

Brian S. Kammer (Ga. 406322)
Marcia A. Widder (Ga. 643407)
Lynn M. Pearson (Ga. 311108)
Georgia Resource Center
303 Elizabeth Street, NE
Atlanta, Georgia 30307
(404) 222-9202

COUNSEL FOR PETITIONER

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent as follows:

Sabrina Graham
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334-1300
sgraham@law.ga.gov

This 23rd day of September, 2017.

Attorney

A-9

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-10

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TREMANE WOOD,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2017-653
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

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

Before the Court is Petitioner Tremane Wood's third application for post-conviction relief and related motions for discovery and an evidentiary hearing. A jury convicted Wood in 2004 in the District Court of Oklahoma County, Case No. CF-2002-46, of the robbery and first degree murder of Ronnie Wipf and sentenced him to death.[1] Since then Wood has challenged his Judgment and Sentence on direct appeal[2] and in collateral proceedings in this Court.[3] All of

[1] Wood's jury convicted him of Count 1-First Degree Felony Murder in violation of 21 O.S.2001, § 701.7(B), Count 2-Robbery with Firearms, After Former Conviction of a Felony in violation of 21 O.S.2001, § 801, and Count 3-Conspiracy to Commit a Felony, After Former Conviction of a Felony in violation of 21 O.S.2001, § 421. The jury recommended the death penalty on Count 1 after finding that Wood knowingly created a great risk of death to more than one person, that the murder was especially heinous, atrocious, or cruel, and that Wood posed a continuing threat to society. *See* 21 O.S.2001, §§ 701.12(2), (4) and (7). The jury fixed his punishment on Counts 2 and 3 at life imprisonment and he was sentenced accordingly.

[2] This Court affirmed Wood's Judgment and Sentence in *Wood v. State,* 2007 OK CR 17, 158 P.3d 467. The United States Supreme Court denied certiorari in *Wood v. Oklahoma,* 552 U.S. 999, 128 S.Ct. 507, 169 L.Ed.2d 355 (2007).

[3] This Court denied Wood's original and second applications for post-conviction relief in unpublished opinions. *See Wood v. State,* Case No. PCD-2005-143(Okl.Cr., June 30, 2010) (unpublished); *Wood v. State,* Case No. PCD-2011-590(Okl.Cr., Sept. 30, 2011) (unpublished).

Wood's previous challenges before this Court have proved unsuccessful. Wood presently has a habeas corpus appeal pending in federal court.[4]

Wood 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. Wood 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.*[5] In his related motions, Wood requests court-ordered discovery and an evidentiary hearing to explore "whether and to what degree race—both of Wood and that of his victim—impacted" various decision makers in his case. He seeks 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; the race,

[4] The United States District Court denied a petition for writ of habeas corpus in *Wood v. Trammell,* No. CIV-10-0829-HE, 2015 WL 6621397 (W.D.Okla. 2015). Wood's appeal of the denial of his writ of habeas corpus is pending in the United States Court of Appeals for the Tenth Circuit. *See Wood v. Royal,* No. 16-6001.

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

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 Wood 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 Wood's claim is procedurally barred. Wood's third application for post-conviction relief and related motions for discovery and evidentiary hearing are therefore **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT ON THIS 28th **DAY OF** August, **2017.**

GARY L. LUMPKIN, PRESIDING JUDGE

DAVID B. LEWIS, VICE-PRESIDING JUDGE

ROBERT L. HUDSON, JUDGE

ATTEST

John D. Hadden

Clerk

A-11

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PCD 2017 654

JULIUS DARIUS JONES,	)	PC Case No.:
	)	
Petitioner,	)	**CAPITAL POST CONVICTION**
	)	**PROCEEDING**
vs.	)	Prior Post Conviction
	)	No.: PCD-2002-630
THE STATE OF OKLAHOMA,	)	Direct Appeal No.: D-2002-534
	)	District Court of Oklahoma County
Respondent.	)	Case No.: CF-2009-4373

SECOND APPLICATION FOR POST-CONVICTION RELIEF

DEATH PENALTY CASE

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 23 2017
MICHAEL S. RICHIE
CLERK

Mark H. Barrett
Mark Barrett Law Offices
415 West Gray Street
Norman, Oklahoma 73069
405.364.8367 (telephone)
barrettlaw@sbcglobal.net
ATTORNEY FOR PETITIONER

JULIUS DARIUS JONES
June 23, 2017

PART A: PROCEDURAL HISTORY

Petitioner, Julius Darius Jones, through undersigned counsel, hereby submits his second application for post-conviction relief under Okla. Stat. tit. 22, § 1089. Pursuant to Rule 9.7(A)(3) of the Rules of the Oklahoma Court of Criminal Appeals, a copy of Julius's original application for post-conviction relief is attached hereto as Attachment 1. The appendix of attachments to the original application have not been attached hereto, but they are available should this Court find them necessary for its review of Julius's application. The sentence from which relief is sought is:

Death by Lethal Injection

1. Court in which sentence was rendered:

   A. District Court of Oklahoma County, State of Oklahoma

   B. Case No. CF-1999-4373

2. Date of sentence: April 19, 2002

3. Terms of sentence:

   Count I: Death
   Count II: Fifteen years
   Count III: Twenty-five years

4. Name of Presiding Judge: The Honorable Jerry D. Bass

5. Petitioner currently in custody at the Oklahoma State Penitentiary, H-Unit, McAlester, Oklahoma.

6. Does Petitioner have criminal matters pending in other courts? No.

   A. If so, where? Not Applicable

   B. List charges: Not Applicable

7. Does Petitioner have sentences (capital or non-capital) to be served in other states/jurisdictions? No

A. If so, where? Not Applicable

B. List convictions and sentences: Not Applicable

I. CAPITAL OFFENSE INFORMATION

8. Petitioner was convicted of the following crime(s), for which a sentence of death was imposed:

A. Murder in the First Degree

B. Aggravating factors alleged and found (if more than one murder conviction, list aggravators by conviction):

a. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

b. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

C. Mitigating factors listed in jury instructions:

a. Julius did not premeditate the death of Paul Howell.

b. Julius did not bear a grudge against Mr. Howell.

c. Julius did not intend for Mr. Howell to die.

d. Julius was not the sole perpetrator in this shooting. There was another person involved, Christopher Jordan.

e. Julius was 19 years old on the night of the shooting.

f. Julius has a family that loves and cares for him, and his life has value and meaning to them.

g. Julius has a little boy and wants to be a father to his son even if it is limited to the confines of prison.

h. Julius loves and cares for his family and has maintained close contact with his parents, brother and sister since his incarceration.

i. Due to Julius's belief in the goodness of all people, he fostered friendships with everyone, regardless of whether or not they were affiliated with gangs.

j. Julius has never been a gang member.

k. Although Julius has prior felony convictions, none of these convictions are for violent offenses.

l. According to Julius's family and former teachers, he was a good boy who did well in school and sports. He was tender and compassionate with others. [H]e (sic) used to be employed by Le Petite Academy, a day care, where the children fondly referred to him as "Daddy Julius."

m. Julius has strong religious convictions and tries to better himself by being a devout Christian.

n. While Julius was in high school, he was the president of the O-Club, which is a club for those students who letter in a particular sport.

o. While Julius was in high school, he was a member of the National Honor Society, the National African Boys Club, the Fellowship of Christian Athletes and the Presidential Leadership Club.

p. While Julius was in high school, he was the team co-captain of his football, baseball, and track teams.

q. Julius graduated from John Marshall High School with a grade point average of 3.68. His class ranking was 12 out of 143 students.

r. Julius's teachers looked to him as a leader and a person to step up and take charge.

s. Julius was one of the students named as one of the "Who's Who of American High School Students."

t. Julius attributes his success in high school and in sports to his perfectionist personality.

u. Since Julius has been incarcerated, he has become more patient and dependent on the Lord.

v. Julius received an academic scholarship to the University of Oklahoma.

w. Julius was a student of the University of Oklahoma when he was incarcerated for this offense.

x. Julius has been able to conform to the rules of conduct while incarcerated.

y. Julius is of sufficient intelligence and has a strong work ethic to enable him to be a productive member of society in prison and enable him to give something back to society.

z. Julius has expressed sorrow in the fact that Mr. Howell has dies (sic) as a result of the shooting.

aa. Julius has brain damage.

bb. Julius has friends who love him and his life has meaning to them.

cc. Julius does not use drugs or consume alcohol.

9. Was Victim Impact Evidence introduced at trial? Yes.

10. Check whether the finding of guilty was made:

After a plea of guilty ( ) After plea of not guilty (X)

11. If found guilty after plea of not guilty, check whether the finding was made by:

A. A jury (X) A judge without a jury ( )

B. Was the sentence determined by (X) a jury, or ( ) the trial judge.

II. NON-CAPITAL OFFENSE INFORMATION

12. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).

A. Count II: Possession of a Firearm After Former Conviction;

Fifteen years.

B. Count III: Conspiracy to Commit a Felony;

Twenty-five years.

13. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X)

14. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ( )

III. CASE INFORMATION

15. Name and address of lawyer in trial court:

David Troy McKenzie
204 N. Robinson Ave., Ste. 3030,
Oklahoma City, OK 73102

16. Names and addresses of all co-counsel in the trial court:

Malcolm Maurice Savage
200 N. Harvey, Ste 810
Oklahoma City, OK 73102

Robin Michelle McPhail
320 Robert S. Kerr, #611
Oklahoma City, OK 73102

17. Was lead counsel appointed by the court?

Yes (X) No ( )

18. Was the conviction appealed? Yes (X) No ( )

A. To what court or courts? Oklahoma Court of Criminal Appeals

19. Date Brief in Chief filed: March 8, 2004

20. Date Response filed: July 2, 2004

21. Date Reply Brief filed: July 21, 2004

22. Date of Oral Argument (if set): January 11, 2004

23. Date of Petition for Rehearing (if appeal has been decided): February 16, 2006

24. Has this case been remanded to the District Court for an evidentiary hearing on direct appeal?

Yes (X) No ( )

25. If so, what were the grounds for remand? Ineffective assistance of trial counsel for failing to present an alibi defense.

26. Is this petition filed subsequent to supplemental briefing after remand?

Yes (X) No ( )

27. Name and address of lawyer for appeal?

Wendell Blair Sutton
1512 S.E. 12th St.
Moore, OK 73160-8342

Carolyn Merritt, Assistant Public Defender
611 County Office Building
Oklahoma City, OK 73102

28. Was an opinion written by the appellate court?

Yes (X) No ( )

A. If "yes," give citations if published: Jones v. State, 128 P.3d 521 (Okla. Crim. App. 2006)

B. If not published, give appellate case no.: Not Applicable

29. Was further review sought?

Yes (X) No ( )

Petition for writ of certiorari to the United States Supreme Court.
Denied: *Jones v. Oklahoma*, 549 U.S. 963 (Mem.) (2006).

(First) Application for Post-Conviction Relief, filed Feb. 25, 2005.
Denied: *Jones v. State*, Case No. PCD-2002-630, Unpublished Order (Okla. Crim. App. Nov. 5, 2007).

Petition for a Writ of Habeas Corpus, *Julius Jones v. Anita Trammell*, United States District Court for the Western District of Oklahoma.
Denied: *Jones v. Trammell*, No. CIV-07-1290-D, 2013 WL 2257106 (W.D. Okla. May 22, 2013).

Appeal to the United States Court of Appeals for the Tenth Circuit.
Denied: *Jones v. Warrior*, 805 F.3d 1213 (10th Cir. 2015).

Petition for writ of certiorari to the United States Supreme Court.
Denied: *Jones v. Duckworth*, 137 S. Ct. 109 (Mem.) (2016).

Issues raised in First Post-Conviction Application:

Proposition I: Julius received ineffective assistance of appellate and trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.

Proposition II: The cumulative impact of errors identified on direct appeal and in post-conviction proceedings rendered the proceeding resulting in the death sentence arbitrary, capricious, and unreliable. The death sentence in this case constitutes cruel and unusual punishment and a denial of due process of law and must be reversed or modified to life imprisonment without parole.

Issues raised in Habeas Petition:

Ground I: Failure to effectively cross-examine Christopher Jordan, and failure to present available evidence to show that Christopher Jordan was the actual shooter, and Ladell King his accomplice, deprived Julius of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

Ground II: Trial counsel was ineffective in contravening Julius's Sixth Amendment rights, in failing to seek a *Franks v. Delaware* hearing and/or to object on the basis of this case to suppress admission of a handgun and other items found in the residence of Julius's parents.

Ground III: Prosecutorial misconduct deprived Julius of his right to Due Process of law under the Eighth and Fourteenth Amendments to the federal constitution.

Ground IV: Removal of juror for-cause without defense opportunity to further question this juror deprived Julius of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution.

Ground V: Denial of Julius's right to be present at all critical stages of the proceedings against him deprived Julius of his rights under the Sixth and Fourteenth Amendments to the federal constitution.

Ground VI: Julius was deprived effective assistance of appellate counsel through failure to investigate and interview jurors, failure to determine the existence of additional Christopher Jordan confessions, and failure to argue existence of structural errors in the Oklahoma capital punishment system. Julius is entitled to relief under the Sixth, Eighth, and Fourteenth Amendments to the federal constitution.

Ground VII: Julius is entitled to the issuance of the writ of habeas corpus because the trial court unconstitutionally refused to deliver an instruction defining life without parole.

Ground VIII: The continuing threat aggravator is unconstitutional because it has become a catchall, therefore Oklahoma does not have a means of narrowing the field of homicides to determine which ones are appropriate for the death penalty. Julius's death sentence and the Oklahoma death penalty are unconstitutional.

PART B: GROUNDS FOR RELIEF

1. Has a motion for discovery been filed with this application?

   Yes (X) No ( )

2. Has a Motion for Evidentiary Hearing been filed with this application? Yes.

3. Have other motions been filed with this application or prior to the filing of the application? No.

   If yes, specify what motions have been filed:

   Not Applicable.

4. List propositions raised (list all sub-propositions).

   A. **PROPOSITION I: 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.**

PART C: FACTS

I. Preliminary Matters

References to the record will be made as follows:

1. The Original Record is referred to as (OR __ __ using the volume number in roman numerals and the page number).

2. Transcripts of the Preliminary Hearing will be referred to as (PH Tr. __ __ using the volume number in roman numerals and the page number).

3. Transcripts of the jury trial will be referred to in this application as (Tr. __ __ using the transcript volume number in roman numerals and the page number).

4. Motion Hearings will be referred to in this application as (M. Tr. Date ___) setting out the date of the hearing and the page number).

II. Pertinent Facts

A. The Crime

At approximately 9:30 p.m. on Wednesday, July 28, 1999, Paul Howell was shot in Edmond, Oklahoma. (*See* Tr. IV 135.) Mr. Howell's adult sister, Megan Tobey, as well as his two young daughters were with him at the time. (Tr. IV 97-102, 122-23, 135.) They had just pulled into the driveway of the home belonging to Mr. Howell's parents, and were driving Mr. Howell's 1997 Suburban. (Tr. IV 102, 104-05.) Mr. Howell turned off the car's engine and opened his door. (*Id.*) Ms. Tobey, meanwhile, gathered her belongings and instructed her nieces to do the same. (Tr. IV 104.) She opened the passenger-side door and stepped out of the vehicle when she heard a gunshot. (*Id.*) She also heard someone asking for the vehicle's keys. (*Id.*) According to Ms. Tobey, she "took a fast glance back" and saw a black man who she described as wearing jeans, a white t-shirt, a black stocking cap, and a red bandana over his face. (Tr. IV 104, 108, 116-19.) Importantly, Ms. Tobey also described the man as having half an inch of hair sticking out from underneath the stocking cap.[1] (*Id.*; PH I 22.) He stood in the doorway of the driver's side of the vehicle, was bent over the steering wheel, and held keys in his left

[1] Julius had very short and closely cropped hair on July 19, 1999, the week before Mr. Howell's death, and on July 31, 1999 at the time of his arrest for the Edmond shooting. (*Jones v. Sirmons*, No. 5:07-CV-01290-D (W.D. Okla.), Dkt. 22-1 to 22-11, Appendix Attachments at 22-4, 11/03/2008; Tr. V 205-07, Exs. 97-100; *see also* Tr. IX 28-29.) Julius's hair was thus not long enough to fit Ms. Tobey's description of the man who shot and killed her brother. However Julius's co-defendant, Christopher Jordan, fit Ms. Tobey's description of the shooter. At the time of the Edmond shooting and his arrest, Jordan's hair was substantially longer than Julius's and he wore it in corn rows. (*See* State Tr. Ex. 99.)

hand, Ms. Tobey recalled. (Tr. IV 104, 108, 116-19.) Ms. Tobey rushed her nieces towards the house, and heard the gunman yell "stop," along with another gunshot. (Tr. IV 104-06.) Mr. Howell died at approximately 1:45 a.m. the following morning. (Tr. IV 158-60, 212.)

B. The Aftermath

Police recovered Mr. Howell's Suburban, which the gunman had stolen, two days later in the early-morning hours of Friday, July 30, 1999. (Tr. IV 222-24, 242; Tr. V 94.) Not long thereafter, Sergeant Tony Fike, with the Edmond Police Department, received information about the crime from Kermit Lottie, a convicted felon (*see* Tr. X 54) and longtime informant for the Oklahoma City Police. (*See* 08/03/1999 Police Interview of Kermit Lottie.) Lottie owned and operated an auto body shop just blocks from where Mr. Howell's suburban was recovered by the police. (Tr. V 43-44, 46-48, 50, 54, 66, 82-83 87.) Lottie testified that Ladell King approached him on July 29, 1999 wanting to sell him a vehicle that matched the description of the one stolen in Edmond during the shooting that resulted in Mr. Howell's death. (Tr. V 50-52, 75-77, 80-84, 94.) Lottie also testified that King had the keys to the Suburban and represented to him that it came from a mall in Edmond. (Tr. V 92-93.) Sergeant Fike knew King prior to the Edmond shooting due to the fact that King was one of his informants. (01/25/2001 Letter to U.S. Attorney from Police Sergeant re Sentencing.) Like Lottie, King was a convicted felon and self-described "car thug." (PH I 130-35, 221; Tr. V at 209.) In fact, King even admitted to stealing cars and selling them to Lottie in 1992. (*Id.*)

King directed the police to Julius as the perpetrator of the Edmond shooting and

car robbery. (08/03/1999 Police Interview of Ladell King.) He testified that Julius arrived to his apartment on the evening of July 28, 1999 after 9:30 p.m. driving a Suburban and wearing jogging pants.[2] (Tr. V 144-46, 157-62, 164-65, 202.) Jordan had arrived alone at the Renaissance Apartments approximately twenty-minutes earlier, King further testified.[3] (Tr. V 139-42; *see also* Tr. V 144-46, 164-65, 202.) King also claimed to have heard Julius admit to shooting Mr. Howell. (Tr. V 187-96; *see also* Tr. V 197-99, 200.) King's friend and neighbor told the police that he had seen Julius at the Renaissance Apartments with King and next to a Suburban on the night of July 28, 1999. (08/10/1999 Police Interview of Gordon Owens.) However, Owens was unable to identify Julius when asked to do so in court. (Tr. V 268-70.)

Owens also testified that on the afternoon of Friday, July 30, 1999, he saw Jordan and Julius at the Renaissance Apartments looking for King. (Tr. V 272-73.) Owens claimed that Julius told him that he had left his house out of a window. (Tr. V 273.) According to King's then-girlfriend, Vickson McDonald, Julius told her on the afternoon of July 30, 1999 that he had avoided the police by leaving his parents' home out of a second story window. (Tr. VII 148.)

Police arrested Christopher Jordan, Julius's co-defendant, on the evening of July 30, 1999. (Tr. VII 186-87, 241-44, 248.) Like King, Jordan claimed that Julius had

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[2] Significantly, the only eyewitness to the shooting, Ms. Tobey, described the shooter as wearing jeans. (Tr. IV 104, 108, 116-19); s*ee also* Section II(A), *supra*.

[3] Contrariwise, Jordan testified that after Julius shot Mr. Howell and stole his Suburban, he followed Julius back to King's residence at the Renaissance Apartments. (*See* Tr. VIII 165.)

perpetrated Mr. Howell's murder.[4] (Tr. VIII 164-65, 167-70.) Julius was subsequently arrested on the morning of July 31, 1999 (Tr. VII 193-98) and charged with capital murder.[5]

Julius continues to maintain his innocence.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

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.

I. Introduction

On April 25, 2017, the Oklahoma Death Penalty Review Commission—a bipartisan group of eleven prominent Oklahomans from varied backgrounds—released a

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[4] Both Jordan and King benefitted from their testimony against Julius. Jordan pled guilty to first-degree murder (Count 1) and conspiracy to commit a felony (Count 3), and received a life sentence with all but the first thirty (30) years suspended. (Tr. VIII 94; OR 1659; *see also* Tr. X 117.) In other words, the terms of Jordan's plea required him to serve thirty (30) years of his life sentence before becoming eligible for parole. Julius's jury was told by prosecutor Sandra Elliott that, "Mr. Jordan has already entered a plea of guilty to the crime of Murder in the First Degree and has received a life sentence *except only the first 35 years of that life sentence has to be served.*" (Tr. IV 51-52 (emphasis added); *see also* Tr. X 51.) Counsel for Julius has learned, however, that Jordan was inexplicably released from prison in December 2014 after serving just fifteen (15) years of his life sentence. Additionally, a larceny charge against Jordan was dismissed. (Tr. VIII 191-92.) Meanwhile, King was not prosecuted in connection with this offense notwithstanding his admitted involvement. He furthermore received less than the statutorily mandated sentence for habitual offenders, like himself, of twenty (20) years imprisonment on a bogus check charge filed against him in August of 2001. (*See* Tr. VI 74-76, 82, 86-88); *see also* Okla. Stat. tit. 21, § 51.1.

[5] Additional relevant facts will be detailed and developed in Proposition One, below.

report entitled, "The Report of the Oklahoma Death Penalty Commission" (hereafter, "the Report"), that detailed the results of its in-depth study of all aspects of Oklahoma's death penalty system. (Attachment 3.) In the Report, Commissioners identified "volum[inous]" and "serious[]" flaws in Oklahoma's system of capital punishment—flaws that they concluded pose a significant and unacceptable risk that innocent Oklahomans are presently facing execution. *Id.*; *see also* Okla. Death Penalty Review Comm'n, The Report of the Okla. Death Penalty Review Comm'n, The Constitution Project, vii-viii (Apr. 25, 2017), http://okdeathpenaltyreview.org/the-report/.

Appended to the Report was a new, independent study of the way in which race plays a decisive role in who lives and who dies in Oklahoma for homicides committed between 1990 and 2012.[6] (Report at 211, 214.) The study, entitled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," examines "the possibility that the race of the defendant and/or victim affects who ends up on death row." (*Id.* at 212.) Among the study's chief findings was the fact that "[h]omicides with white victims are the most likely to result in a death sentence." (*Id.* at 217.) This new study illustrates that, in Oklahoma, criminal defendants like Julius who are accused and convicted of killing white victims are nearly *two times* more likely to receive a sentence of death than if the victim is nonwhite. For homicides involving only male victims, a death sentence is approximately *three times* more likely in cases involving male victims when that victim is white. *Id.* at 220. That Julius faced a greater risk of execution by the mere happenstance that the victim who he was accused and convicted of killing was white

[6] This study is attached hereto as Attachment 5.

offends the constitutions of the United States and the State of Oklahoma. U.S. Const. amends VI, VIII, XIV; Okla. Const. art. II, §§ 7, 9, 19, 20; *see also Furman v. Georgia*, 408 U.S. 238, 310, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring) (stating that the "selection of [a] few to be sentenced to die" on the "basis of race" is "constitutionally impermissible").

The invidious role that race played both in prosecutors' decision to seek the death penalty against Julius in the first instance, and in his jury's decision to impose that ultimate sanction, renders Julius's sentence of death unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution. This Court should therefore grant Julius relief from his unconstitutional sentence. Alternatively, as Julius has stated a more than colorable claim that his rights under the federal and state constitutions have been violated, this Court should grant Julius's requests for discovery and an evidentiary hearing[7] to further factually develop and support this claim.

II. Julius satisfies the successor post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

Oklahoma's Uniform Post-Conviction Procedure Act specifies that this Court "may not consider the merits of or grant relief" based on a subsequent application for post-conviction relief unless:

> (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented

[7] Julius is filing his Motion for Discovery and Motion for Evidentiary Hearing simultaneously herewith.

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

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Rule 9.7(G) of the Rules of the Oklahoma Court of Criminal Appeals, meanwhile, allows this Court to entertain a subsequent application for post-conviction relief where it asserts claims "which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable." Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2016). Julius's present application for post-conviction relief satisfies these requirements.

First, Julius's claim—that the race of the victim who he was accused and convicted of killing operated, on its own, to increase the likelihood that he would receive a sentence of death—was not previously raised either on direct appeal or in Julius's initial post-conviction proceeding. (Original Brief of Appellant, 03/08/2004; Reply Brief of Appellant, 07/21/2004; Suppl. Brief of Appellant Following Remand, 05/12/2005; Original Application for Post-Conviction Relief, 02/25/2005.) Nor could it have been. As explained above, the factual basis for this claim became available only on April 25, 2017 with the publication of the Report and the accompanying study, which provides new and compelling evidence that race indeed plays an invidious role in death-determinations

throughout Oklahoma.[8]

The study's authors, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp (alternatively, the "researchers" or the "authors"), make the novelty of their undertaking clear. They explain that of the "race studies that had been published or released after 1990" which examined the impact of a criminal defendant's and a crime victim's race on death penalty decisions, "none of these post-1990 studies focused on Oklahoma." (Report at 213-14.) Rather, the "only [ ] credible study" prior to this one that explored racial disparities in Oklahoma subsequent to the Supreme Court's decision in *Furman*, examined data from just a four-year time-period—August 1976 through December 1980—rendering them nearly forty years old. (*Id.* at 214.) Subsequent to this, "a second study of death sentencing in Oklahoma was published" in 2016. (*Id.*) The 2016 study "attempted to look at death sentencing in Oklahoma in a sample of 3,395 homicide cases over a 38-year time span, 1973-2010." (*Id.*) Pierce, Radelet and Sharp explain, however, that "some of the data presented by the authors in that paper is incorrect, so the paper is not useful."[9] (*Id.*) Thus, the present study is the first comprehensive and methodologically sound examination of the impact that race has upon death sentences in

[8] The study that appears in the Report is only a draft report. (Report at 211 n.1.) The final version will be published in the fall of 2017 in a Northwestern University law journal. (*Id.*)

[9] "For example, in Appendix B we are told that 8 percent of the white-white homicides contained 'capital' or 'first-degree' (as opposed to 'second-degree' murder charges) (137/1,696), compared to 53 percent of the black-black cases (348/659). We are also told that the data set includes 1,030 cases 'charged capital' in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma." (Report at 214) (internal citation omitted.)

Oklahoma for homicides that occurred from 1990 through 2012.[10]

Moreover, even the raw data—the number of homicide cases and death sentences in Oklahoma—that the authors utilized were not previously available or known. They note that "there is no state agency, organization or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the 'Death Row Data Set.'" (Report at 216.) The authors go on to detail the arduous and time-consuming task that they undertook in order to marshal the necessary data. (*Id.*)

As a result, the factual basis for Julius's present claim was unavailable and undiscoverable through the exercise of due diligence prior to April 25, 2017. Furthermore, Julius is filing this application in compliance with the sixty-day time limitation imposed under Rule 9.7(G)(3) of this Court's Rules.

Second, the facts underlying Julius's present claim are sufficient to establish that but for the fact that the victim who Julius was accused and convicted of killing was white, he stood a far greater chance of having his life spared. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2). Put differently, the Pierce, Radelet and Sharp study establishes by clear and convincing evidence that, but for the victim's race, Julius would not have been sentenced to death.

[10] For a full discussion of the methodology employed by Pierce, Radelet, and Sharp in the present study, see pages 215-17 of the Report.

III. Newly discovered evidence establishes that Julius faced a greater risk of execution by the mere fact that the victim who he was accused and convicted of killing was white.

The central question that researchers Pierce, Radelet, and Sharp set out to answer is whether race—either of homicide defendants and/or victims—"affects who ends up on death row" in Oklahoma. (Report at 212.) In order to answer this question, they studied all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012.[11] (*Id.*) They then compared these cases to the subset of cases that resulted in the death penalty being imposed.[12] (*Id.*) Importantly, the data set used by researchers included, in addition to the race of the victim, information on "the number of homicide victims in each case" as well as "what additional felonies, if any, occurred at the same time as the homicide." (*Id.* at 216.) Pierce, Radelet and Sharp explain that "[t]hese variables are key" to the study's analysis and conclusions. (*Id.*)

Researchers found that 3.06 percent of homicides with known suspects that occurred in Oklahoma between 1990 and 2012 resulted in the imposition of a death sentence. (*Id.* at 217.) Most troublingly, they also found that "[h]omicides with white victims *are the most likely* to result in a death sentence" in Oklahoma. (*Id.*) To be more specific: researchers found that 3.92 percent of homicides with white victims resulted in death sentences compared to just 1.88 percent of homicides that involved nonwhite

[11] The authors explain that "[u]sing 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns." (Report at 215.) Throughout this 23-year period, Oklahoma recorded "some 5,090 homicides, for an annual average of 221." (*Id.*)

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

victims. (*Id.*) In other words, a criminal defendant in Oklahoma is over *two times* more likely to receive a sentence of death if the victim he is accused of killing is white than if the victim is nonwhite.[13]

In addition to this, researchers found that of those homicides with exclusively male victims, 2.26 percent of cases with white male victims resulted in death sentences compared to just .77 percent of cases with black male victims. (*Id.* at 219-20.) That is, a defendant, like Julius, accused of killing a white male victim in Oklahoma is nearly *three times* more likely to receive a death sentence than if his victim were a black male. (*Id.*) When looking at the combined effect of both a homicide suspect's and victim's races and ethnicities, researchers also discovered the following:

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

(*Id.* at 219.) In other words, nonwhites, like Julius,[14] are nearly *three times* more likely to receive a sentence of death where the victim who they are accused of killing is white than if the victim is nonwhite. Similarly, in comparing those cases with white victims, nonwhite defendants like Julius are nearly *twice* as likely to receive the death penalty as are white defendants.

Even where researchers controlled for aggravating factors such as "the presence of

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

[14] Julius is African-American.

additional felony circumstances and the presence of multiple victims," they found that cases like Julius's, which involve a white male victim, "are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims." (*Id.* at 221-22.)

If the imposition of a death sentence is indeed supposed to reflect a "community's outrage" at the crime that a defendant stands accused of committing, *Furman*, 408 U.S. at 303 (Brennan, J., concurring), this study demonstrates that communities in Oklahoma—a majority-white state[15]—are significantly more outraged when white lives are lost than when nonwhite lives are forfeited. This is precisely the kind of race-based discrepancy in meting out death that is repugnant both to modern societal mores and to the constitutions of the United States and the State of Oklahoma. U.S. Const. amends. VI, VIII, XIV; Okla. Const. art. II, § 7, 9, 19, 20; *see also McCleskey v. Kemp*, 481 U.S. 279, 366, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (Stevens, J., dissenting) (noting that racial disparity in capital sentencing is "constitutionally intolerable"). In light of this, Julius's death sentence cannot stand.

IV. Additional Relevant Facts

A. Media Coverage

Julius's case was extensively covered in the local media throughout the time leading up to his capital murder trial in 2002. Indeed, counsel argued in a pre-trial motion for change of venue that "[t]he minds of the inhabitants of Oklahoma County, Oklahoma

[15] "Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population." (Report at 212.)

are prejudiced against this Defendant and [residents] possess such fixed opinions as to the guilt of the defendant that a fair and impartial trial cannot be conducted herein." (OR I 0991.) More particularly, they explained that:

> The alleged crime and Defendant have been subjected to continuous, extensive, sensational and prejudicial pretrial publicity by radio, television, and newspaper coverage ... the effect of the publicity was to inflame and prejudice the community against this Defendant and his case. The publicity involved herein has been so extensive as to enter the consciousness of the overwhelming majority of prospective jurors of this county and to cause a fixed opinion to be reached as to the guilt of this Defendant.

(Id.) Attached to the defense motion were fifty-two affidavits of Oklahoma County residents demonstrating that community attitudes had been unduly prejudiced against Julius, which would deprive him of a fair trial.[16] (*Id.*) Their motion was subsequently denied. (M. Tr. 02/04/2002 56.)

Even before charges had been formally filed against Julius, then-District Attorney Bob Macy announced to the media that he would seek the death penalty against Julius. Bobby Ross Jr., Ed Godfrey, Melissa Nelson, & Jessica Carter, DA to Seek Death in Edmond Slaying Suspect Innocent, Father Protests, NewsOK, Aug. 3, 1999, http://newsok.com/article/2662577; *see also* Ed Godfrey, Murder Counts Filed in Edmond Shooting Case, NewsOK, Aug. 5, 1999, http://newsok.com/article/2662780.

[16] Trial counsel's concern about prospective jurors developing a fixed opinion against Julius prior to his trial commencing would be later proven correct. During the penalty phase of Julius's trial, Juror Armstrong informed the trial court that "[i]n the jury room on the first break earlier when I went up the stairs there was [another juror,] Mr. Brown[,] who made a comment that they should place him in a box in the ground for what he has done. And I just felt that that was a little bit quick and not quite impartial enough." (Tr. XII 95-96, 106.) Juror Armstrong stated definitively that she heard Mr. Brown make this statement prior to the conclusion of the penalty phase. (Tr. XIII 76.) The trial court denied trial counsel's request to remove Juror Brown for cause. (Tr. XIII 77, 83-91.)

Macy told the press that Julius deserved the death penalty because the crime that he allegedly perpetrated occurred "in what should be a *safe neighborhood*" and "happened for the worst of reasons, *to get money to go buy drugs*." (Attachment 4.) (emphasis added.) Bob Macy's remarks were not without highly racialized meaning. As anthropologist Rich Benjamin explains in his book, Searching for Whitopia:

> [T]o many Americans, a place's whiteness implies other qualities that are desirable. Americans associate a homogenous white neighborhood with higher property values, friendliness, orderliness, hospitability, cleanliness, *safety*, and comfort. *These seemingly race-neutral qualities are subconsciously inseparable from race and class in many whites' minds.* Race is often used as a proxy for those neighborhood traits.

Rich Benjamin, Searching for Whitopia: An Improbable Journey to the Heart of White America, 185 (2009) (emphasis added.) Bob Macy's extrajudicial statements thus reminded the public of the victim's white identity and perpetuated the idea that Julius, a black youth who was barely nineteen years old at the time, deserved to die because the crime that he allegedly committed had occurred in a white neighborhood. Edmond City Councilman Steve Knox reinforced this very same idea, telling the media that Edmond was "an all-American neighborhood." Bobby Ross Jr. & Melissa Nelson, Clues Sought in Edmond Killing, NewsOK, July 30, 1999, http://newsok.com/article/2662085.

Likewise, Bob Macy's reference to "drugs" as Julius's alleged motive—notwithstanding the fact that no evidence whatsoever supported this allegation—appealed to vicious racial stereotypes associating black people with drug use. Professor and author Michelle Alexander explains in her book, The New Jim Crow, that:

> A survey was conducted in 1995 asking the following question: "Would you close your eyes for a second, envision a drug user, and describe that

> person to me?" The startling results were published in the *Journal of Alcohol and Drug Education*. Ninety-five percent of respondents pictured a black drug user, while only 5 percent imagined other racial groups. These results contrast sharply with the reality of drug crime in America. African Americans constituted only 15 percent of current drug users in 1995, and they constitute roughly the same percentage today.

Michelle Alexander, The New Jim Crow 106 (2012); *see also* Betty Watson Burston, Dionne Jones, & Pat Robertson-Saunders, Drug Use and African Americans: Myth Versus Reality, 40 J. of Alcohol & Drug Abuse 19 (1995).

In the wake of Bob Macy's extrajudicial remarks, the print media echoed his call for the death penalty for Julius, reporting that, "[t]o his credit, District Attorney Bob Macy has already decided to seek the death penalty, which this crime certainly deserves." Editorial, Searching for Restraint, Daily Oklahoman, Aug. 5, 1999; *see also* Rule 3.11 Motion to Supplement Direct Appeal Record, Ex. 1.

B. The State's Theory at Trial

The State's theory at Julius's capital murder trial was that he shot and killed Mr. Howell in the course of stealing his 1997 GMC Suburban. (Tr. IV 29, 39-40.) Critical to the State's case against Julius was the testimony of two self-interested witnesses, namely: Julius's co-defendant, Christopher Jordan, and Ladell King. Both of these men were connected to the victim's stolen vehicle in the days following the shooting and who benefitted from their testimony against Julius. (*See, e.g.*, Tr. V 50-52, 75-77, 80-84, 92-94, 167-72; *see also* Section IV(B), *supra*.)

Importantly, no physical evidence connected Julius to the scene of the shooting,

the stolen Suburban, or the alleged murder weapon.[17] (Tr. IV 66.) During a search of the home belonging to Julius's parents, police located a red bandana and a .25 caliber handgun in the attic of an upstairs bedroom. They also located a .25 caliber magazine underneath the doorbell chime inside the home. (Tr. II 258-61, 266, 268; Tr. VII 206,

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[17] FBI analyst Kathleen Lundy testified that the two projectiles retrieved from Mr. Howell and the Suburban, two of the .25 caliber automatic cartridges taken from the magazine found in the residence belonging to Julius's parents, and eleven of the thirty .25 caliber cartridges that were located in the center console of Julius's 1987 Black Buick Regal—in the same location as a white bandana that the State stipulated contained Mr. Jordan's DNA and excluded Julius's—originated from the same source of lead at Remington. (Tr. VIII 28-36; Tr. IX 214-15.) Not only has bullet lead analysis been thoroughly discredited as scientifically unreliable, *see, e.g.*, William A. Tobin, Comparative Bullet Lead Analysis: A Case Study in Flawed Forensics, The Champion, July 2004), http://www.iowainnocence.org/files /july_champion_p12-22.pdf, but Ms. Lundy herself has been discredited as well. Roughly fourteen months after Julius was sentenced to death on April 19, 2002, Ms. Lundy pled guilty to a misdemeanor count of false swearing in connection with her expert testimony on bullet lead composition in a case out of Kentucky nearly one month before Julius's capital trial. (Rule 3.11 Motion to Supplement Direct Appeal Record, Exs. 31, 32.)

Terrence Higgs, a firearms examiner for the Oklahoma State Bureau of Investigation, testified with absolute certainty (i.e. that "[t]here is no doubt") that the .25 caliber handgun located in the attic of Julius's parents' home fired the projectiles recovered from Mr. Howell and the dashboard of the Suburban. (Tr. IX 175-85, 191-96.) The Report of the Oklahoma Death Penalty Commission explains that:

> For many forensic science disciplines, it has been common—and in fact encouraged—for analysts to testify to 100% certainty and a corresponding 0% risk of error regarding who or what is the source of an evidentiary print or marking. ... Exaggerated expert testimony of this sort is problematic not only because it is unscientific and lacks empirical support, but because it forecloses inquiry by the legal decision maker into matters related to the reliability and accuracy of a forensic scientist's conclusions.

(Report at 30) (internal quotation marks and citations omitted.) A report published by the National Academy of Sciences in 2009 has also called toolmarks analysis into question as a highly subjective forensic field lacking any scientific basis. National Academy of Sciences, Strengthening Forensic Science in the United States 42, 150-55 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

211-12, 245, 254-55, 267, 278, 271-73, 277; Tr. VIII 230-49; Tr. IX 195-96.)

While these items constituted circumstantial evidence that Julius was involved in the death of Mr. Howell, his trial lawyers pursued the theory that Jordan was, in fact, Mr. Howell's killer (Tr. IV 61; Tr. X 100-02, 111, 114, 116, 119), and had planted this evidence in the home belonging to Julius's parents in an effort to frame Julius for his crime (Tr. IV 63; Tr. X 112, 114-15, 117, 119). In fact, Jordan had spent the night at the home of Julius's parents the day after the shooting, on July 29, 1999, and just one day prior to his arrest and inculpation of Julius in Mr. Howell's death. (*See* Tr. IV 63; *Jones v. Sirmons*, No. 5:07-cv-01290-D (W.D. Okla.), Dkt. 22-1 to 22-11, Appendix Attachments at 22-10, 11/03/2008.)

To reiterate what has already been said elsewhere, Julius continues to maintain his innocence.

C. The Invidious Presence of Race

Judge Ray Elliott, who presided over and rejected Julius's motion to suppress evidence illegally seized from his parents' home (OR I 0238-39), displayed troubling attitudes towards people of color which came to light in 2011. According to the affidavit of Michael S. Johnson, Judge Elliott was overheard referring to Mexicans as "nothing but filthy animals" who "deserve to all be taken south of the border with a shotgun to their heads" and "if they needed volunteers [to do so] that he would be the first in line." Nolan Clay, Attorney's affidavit expands on claims of unfairness against judge in Ersland case, NewsOK (Jan. 7, 2011), http://newsok.com/article/3530111; *see also* Nolan Clay, Judge in OKC pharmacist's case to announce ruling Monday, NewsOK (Dec. 8, 2010),

http://newsok.com/article/3521788 (noting that Judge Elliott's former clerk, Isla Box, testified that "the judge also said … [i]f they needed somebody to hold a shotgun to their heads to get them back across the border, he'd be the first to volunteer," and that Judge Elliott "has made other derogatory statements about Hispanics"). Judge Elliott admitted that he used the racial epithet "wetbacks" to refer to Mexicans. *Id.*; *see also* American Bar Association Journal, Okla. Judge Admits 'Wetback' Comment, But Denies Calling Workers 'Filthy Animals' (Jan. 7 2011).

While Judge Elliot made these remarks in 2011, a number of years after Julius was sentenced to death, they are nonetheless troubling. Indeed, Judge Elliott's comments raise concerns both as to his attitude towards people of color at the time that he issued the decisive ruling against Julius (Order Granting Motion to Supplement Record 05/14/2003 with 09/08/2000 Motion to Suppress Hearing Transcript), and his impartiality as a judge in cases, like Julius's, in which racial issues are implicated.

Prosecutor Sandra Elliott, Judge Ray Elliott's wife, opened Julius's capital murder trial by explicitly calling the jury's attention to Mr. Howell's physical appearance, describing him as "tall, handsome, athletic." (Tr. IV 31.) Prosecutor Elliott informed jurors that, in addition to being physically attractive, the victim in this case "owned his own insurance agency in Edmond." (*Id.*) While prosecutor Elliott's opening remarks, understood superficially, appeared to simply recount information pertaining to the case at hand, a closer examination of the context in which these words were delivered, and the carefully-selected audience upon whose ears these words fell, lays bare the racialized meaning with which prosecutor Elliott's remarks were imbued. Not unknown either to

prosecutors or to jurors—nearly all of whom were white[18]—at the outset of Julius's capital trial was the fact that the victim in this case was also white.[19] And by pointing out to jurors the seemingly irrelevant detail that the victim was "handsome," prosecutor Elliott effectively reminded them that Julius—a nineteen year old black kid on trial for his life—stood accused of killing a white man.

For Julius's jurors, prosecutor Elliott's statement that the victim "owned his own insurance agency in Edmond" would have also been pregnant with racialized meaning. Indeed, this remark focused the jury's attention not only the victim's affluence but also underscored his whiteness. Located on the northern border of Oklahoma City, Edmond was an affluent and predominantly white suburb at the time. *See* Bobby Ross Jr. & Melissa Nelson, Clues Sought in Edmond Killing, NewsOK, July 30, 1999, http://newsok.com/article/2662085; *see also* Okla. Historical Soc'y, Edmond, http://www.okhistory.org/publications/enc/entry.php?entry=ED002 (last visited June 19, 2017). The city's reputation—for wealth and whiteness—would have been well known to Oklahoma County residents at the time, including to the jurors who sat in judgment of Julius.

Not only did prosecutors subtly put the victim's race at the forefront of jurors' minds, but they also took every opportunity to racialize Julius by subtly appealing to the deeply entrenched and stereotypical association between blackness and dangerousness.

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[18] Only one African American served on Julius's jury. An alternate juror was Hispanic. *See* Rule 3.11 Motion to Supplement Direct Appeal Record, Ex. 7 ¶ 31.

[19] For a discussion of the extensive media coverage surrounding Julius's case prior to his trial, see Section IV(C), *supra*.

See Brief for the Nat'l Black Law Students Ass'n as Amicus Curiae in Support of Petitioner, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), at 2 ("[P]resented with a criminal defendant, even well-meaning people fall prey to the stereotype that, whether for reason of biology or culture, Black people are inherently violent and dangerous."). For example, in urging jurors to sentence Julius to death, prosecutors argued that Julius was a "continuing threat"[20] because he was "out prowling the streets" engaging in criminality. (Tr. XV 143.) This is despite the fact that at the time of his prosecution in this case, Julius had *no prior violent felony convictions*. The Oxford English Dictionary defines "prowl" as follows:

> verb. (of a person *or animal*) move about restlessly and stealthily, especially in search of prey.

Oxford English Dictionary, https://en.oxforddictionaries.com/definition/prowl (emphasis added). The prosecutor's language thus explicitly reflected and reinforced "the monstrous specter that is never far from the surface: the violent Black brute, the single most fearful, dehumanizing, and cruel stereotype Black people have had to endure." *Brief for the Nat'l Black Law Students Ass'n as Amicus Curiae in Support of Petitioner*, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), at 4. In so doing, prosecutors urged jurors to sentence Julius to death based, in part, on an appeal to a vicious and degrading racial stereotype.

[20] The "continuing threat" aggravating circumstance was one of just two aggravators used by prosecutors to seek the death penalty against Julius. *See supra*, at 3. Jurors ultimately found that Julius was, in fact, a continuing threat to society and sentenced him to death in part on that basis.

V. Law & Argument

A. Julius was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article II Sections 7 and 9 of the Oklahoma Constitution.

The United States Supreme Court has long recognized that race is among the factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *see also Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice."). Indeed, the Supreme Court recently reaffirmed a "basic premise of our criminal justice system," which is that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017). For "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice"). This Court has likewise recognized that race is an "impermissible classification" that ought not to motivate sentencing determinations. *See Cuesta-Rodriguez v. State*, 241 P.3d 214, 235, 2010 OK CR 23 (Okla. Crim. App. 2010); *see also Williams v. State*, 542 P.2d 554, 585, 1975 OK CR 171 (Okla. Crim. App. 1975) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense … it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment" (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed.

1655 (1942) (internal quotation marks omitted)).

In *McCleskey v. Kemp*, the Supreme Court entertained an Eighth and Fourteenth Amendment challenge to a sentence of death that was brought by Warren McCleskey—an African-American prisoner on death row in Georgia at the time. 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). The central question before the Court was "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." *Id.* at 282-83.

In support of his constitutional challenges, Mr. McCleskey put before the Court a statistical study (hereafter "the Baldus study") that demonstrated a stark disparity in the imposition of death sentences in Georgia "based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. The Baldus study indicated that "defendants charged with killing white persons received the death penalty in 11% of the cases," however "defendants charged with killing blacks received the death penalty in only 1% of the cases." *Id.* Taking into account the races of both the defendant and victim, the study also demonstrated that "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* The Baldus study also determined that "prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black

victims; and 19% of the cases involving white defendants and black victims." *Id.* at 287. In sum, "the Baldus study indicate[d] that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty." *Id.*

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

The Supreme Court articulated the standard that would guide its analysis of McCleskey's Fourteenth Amendment claim as follows: "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *Id.* (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S. Ct. 643, 646, 17 L. Ed. 2d 599 (1967)). "Thus, to prevail under the Equal Protection Clause," the Court explained, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* (emphasis in original). The Court rejected McCleskey's argument that the Baldus study, standing alone, "compel[ed] an inference that his sentence rest[ed] on purposeful discrimination." *Id.* at 293.

The Court also rejected McCleskey's argument that "the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment." *Id.* at 299. In the Court's view, the statistics that McCleskey put forward

"[a]t most … indicate[] a discrepancy that appears to correlate with race." *Id.* at 312. And rather than creating a constitutionally significant risk of racial bias influencing Georgia's capital sentencing scheme, this race-based discrepancy in sentencing is "an inevitable part of our criminal justice system," the Court pronounced. *Id.* at 312.

In the thirty years since *McCleskey* was decided, it has become clear that racial disparities are not simply "an inevitable part" of the United States' criminal justice system. Rather, these disparities persist so long as we as a society are willing to condone them. Jurisdictions around the country have rejected the "inevitability of racism" line of thinking stemming from *McCleskey* and, over the past three decades, have taken steps to confront and root-out the influence of race on criminal justice system outcomes. Take, for example, Multnomah County, Oregon and Minnesota's Fourth Judicial District. Both of these jurisdictions have reduced racial disparities in their criminal justice system by documenting and tracking racial biases that are inherent in the risk assessment instruments that are used for criminal justice decision-making. According to a 2015 Sentencing Project report entitled, "Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System," Multnomah County developed and implemented new risk assessment technology that led to a "greater than 50% reduction in the number of youth detained and a near complete elimination of racial disparity in the proportion of delinquency referrals resulting in detention."[21] The Sentencing Project, Eliminating

[21] In order to weed out inherent racial biases in risk assessment instruments ("RAIs"), officials in Multnomah County "examined each element of their RAI through the lens of race and eliminated known sources of bias, such as references to 'gang affiliation' since youth of color were disproportionately characterized as gang affiliates often simply due

Racial Inequity in the Criminal Justice System 20 (2014), http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/. A similar review of risk assessment instruments was undertaken in Minnesota's Fourth Judicial District. "Three of the nine indicators in the instrument were found to be correlated with race, but were not significant predictors of pretrial offending or failure to appear in court." As a result, "these factors were removed from the instrument." *Id.*

Meanwhile, in the Seattle suburb of Kent, Washington, the police department launched in 2015 an anti-bias training program for police officers called, "Fair and Impartial Policing." Martin Caste, Police Officers Debate Effectiveness of Anti-Bias Training, NPR, Apr. 6, 2015, http://www.npr.org/2015/04/06/397891177/police-officers-debate-effectiveness-of-anti-bias-training. The program is geared towards "teach[ing] police officers to recognize their own implicit biases" in an effort to reduce the impact of race alone in law enforcement decision making. *Id.*

The efforts underway in Oregon, Minnesota, and Washington are just a few examples of the admirable steps that numerous jurisdictions across the county are taking to finally confront and eradicate the invidious influence of race on criminal justice system outcomes. It is time for the judiciary to follow suit by recognizing that the constitutions of the United States and the State of Oklahoma cannot tolerate, or treat as "inevitable," racial disparities—or *any* risk of racial bias—in the imposition of "the most awesome act

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to where they lived." The Sentencing Project, Eliminating Racial Inequity in the Criminal Justice System at 20.

that a State can perform"—that is, the deliberate taking of another life. *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting).[22]

Even under *McCleskey*, Julius is entitled to relief for several reasons. First, several states have, in the years since *McCleskey*, invalidated death sentences under state law based upon statistical evidence of racial discrimination in their systems of capital punishment. In 2012, for example, a North Carolina court commuted the death sentence of Marcus Robinson to life without parole based on statistical evidence of racial bias in jury selection in North Carolina over a twenty-year period. Cassy Stubbs, A Case for Statistics and a Victory for Justice, HuffPost, Apr. 20, 2012, http://www.huffingtonpost.com/cassy-stubbs/a-case-for-statisticsand_b_1440529.html?ref=politics#comments. Meanwhile, judges in Kentucky may determine whether race has influenced a decision to seek the death penalty. Ky. Rev. Stat. tit. L, Ky. Penal Code § 532.300. And at least one state court has explicitly rejected *McCleskey*'s notion that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system," *McCleskey*, 481 U.S. at 312, instead holding that "our history and traditions would *never* countenance racial disparity in capital sentencing." *State v. Marshall*, 130 N.J. 109, 207, 613 A.2d 1059 (N.J. 1992), *cert. denied*, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993) (emphasis added). The New Jersey Supreme Court made the following observation:

New Jersey would not tolerate a system that condones disparate treatment

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

> for black and white defendants or a system that would debase the value of a black victim's life. Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing.

Marshall, 130 N.J. 109 at 214.

Like the Supreme Court of New Jersey, this Court retains the power to set aside Julius's sentence of death under the Oklahoma Constitution based upon the new evidence that Julius has put forward which demonstrates that he was predisposed to receive a sentence of death merely because the victim who he was accused of killing was white. This is true notwithstanding the Supreme Court's decision in *McCleskey*, which rejected statistical evidence of racial disparities in death sentencing alone as sufficient to establish a violation of the Eighth and Fourteenth Amendments to the United States Constitution. *McCleskey*, however, said nothing about states' authority to consider, and to treat as dispositive, such evidence when evaluating race-based challenges to death determinations raised pursuant to their state constitutional guarantees.

McCleskey is no obstacle to the sentencing relief that Julius now seeks for an additional reason. Unlike the petitioner in *McCleskey* who relied on statistical evidence of racial disparities in Georgia's capital sentencing system *alone* to establish a violation of his rights under the Eighth and Fourteenth Amendments, Julius is relying not just upon the new statistical study demonstrating how race dictates capital sentencing outcomes in Oklahoma. Rather, in addition to this new statistical evidence, Julius is also relying upon the ways in which "the decisionmakers in *his* case"—from prosecutors, judges, and police officers, to the jurors who ultimately sentenced him to die—"acted with

discriminatory purpose." *McCleskey*, 481 U.S. at 293. Indeed, Julius has set out in great detail above how race both infected and "cast[] a large shadow," *Id.* at 321-22 (Brennan, J., dissenting), over his case from the very earliest stages—even prior to his arrest—and continued to do so throughout his trial and sentencing proceedings. *See* Section IV(C) and (E), *supra*.

The Supreme Court's decisions since *Furman* have delimited "a constitutionally permissible range of discretion in imposing the death penalty," *McCleskey*, 481 U.S. at 305, that is consistent with the Eighth Amendment guarantee against cruel and unusual punishment. First, the Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited to as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner."). Second, the Court has prohibited states from limiting a sentencer's ability to consider "relevant facets of the character and record of the individual offender or the circumstances of the particular offense" that might warrant a sentence less than death. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

While, in all of these cases, the Supreme Court has upheld the propriety of a capital sentencer's discretion to impose a sentence of death under the appropriate circumstances, it has unequivocally condemned race playing any role in a sentencer's exercise of this discretion. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017) (explaining that "a basic premise of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are," and that "departure[s] from [this] basic principle" are "exacerbated" where "it concern[s] race"); *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 1993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital sentencing determinations are rendered "arbitrary and capricious" in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influence by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

As set forth in great detail above, *see* Sections III and IV, *supra*, the risk that racial considerations impacted both prosecutors' decision to seek the death penalty against Julius in the first instance and jurors' decision to condemn Julius to die is "constitutionally unacceptable." *Turner*, 476 U.S. at 36 n.8; *see also McCleskey*, 481 U.S.

at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one"); *Caldwell v. Mississippi*, 472 U.S. 320, 343, 105 S. Ct. 2633, 2647, 86 L. Ed. 2d 231 (1985) (observing that a sentence of death cannot withstand constitutional muster whenever the circumstances under which it has been rendered "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999, 103 S. Ct. 3446, 3452, 77 L. Ed. 2d 1171 (1983)). While Julius contends that he is entitled to sentencing relief on the record before this Court, if this Court disagrees and determines that further factual development is necessary, Julius submits that he is entitled to discovery and an evidentiary hearing. This is because has set forth herein more than colorable allegations that his sentence of death violates his state and federal rights.

B. Julius was sentenced to death in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 19, and 20 of the Oklahoma Constitution.

Julius's race and that of the man who he stood accused of killing infected his capital prosecution from the very earliest stages and unconstitutionally compromised the partiality of the nearly all-white jury that ultimately sentenced him to death. *See* Sections III and IV, *supra*. Under the constitutions of the United States and the State of Oklahoma, a criminal defendant is guaranteed the right to an impartial jury. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…"); Okla. Const. art. 2, § 20 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury…"); *see also*

Irvin v. Dowd, 366 U.S. 717, 722 (1961) (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair and impartial jury as "a basic requirement of due process" (internal quotation marks omitted)).

A jury is "impartial" within the meaning of these constitutional guarantees where it does "not favor[] a party or an individual because of the emotions of the human mind, heart, or affections." *Tegeler v. State*, 130 P. 1164, 1168, 9 Okl. Cr. 138, 1913 OK CR 87 (Okla. Crim. App. 1913). In other words, "an impartial jury means a jury not biased in favor of one party more than another; indifferent; unprejudiced; disinterested." *Stevens v. State*, 232 P.2d 949, 958, 94 Ok. Cr. 216 (Okla. Crim. App. 1951) (internal quotation marks omitted); *see also Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

The United States Supreme Court has emphasized that special care is required to guard against racial bias among jurors. "Racial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (internal quotation marks omitted). "Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Id.* This Court has similarly recognized that "concerns regarding the risk of racial prejudice infecting a capital sentencing proceeding" are especially and uniquely important in ensuring the right to an impartial jury. *Frederick v. State*, No. D-2015-15, 2017 OK 12, ¶ 27, ___ P.3d ___ (Okla. Crim. App. May 25, 2017).

In *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d (1986), the United States Supreme Court vacated a defendant's death sentence because the trial court prevented that defendant from asking prospective jurors during voir dire whether the fact that the defendant was black and the victim was white would affect their ability to be impartial. The Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36-37.

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

While the Court in *Turner* expressed the hope that the individual questioning of jurors during voir dire could help to eliminate the risk of racial bias influencing trial and sentencing outcomes, the new study that Julius has put forward demonstrates that racial

bias continues to play a statistically significant role in shaping capital-sentencing outcomes in Oklahoma. That is, the study demonstrates that capital juries in Oklahoma impose death sentences far more often on nonwhite defendants, like Julius, who are accused of killing white males.

Indeed, since the Court's decision in *Turner*, the limitations of individual voir dire as an effective tool for weeding out racial bias has been well documented. According to scholar William J. Bowers, et al.:

> "Asking prospective jurors about their racial attitudes was supposed to provide the tools necessary to rid juries of people whose decisions are likely to be influenced by race of the defendant or victim. But the tools are not working. . . . [W]hatever attempts may have been made thanks to *Turner*, the risk of racial bias remains all too manifest.

William J. Bowers et. al., Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White, 53 DePaul L. Rev. 1497, 1532-33 (2004) (hereinafter "Crossing Racial Boundaries"). A recent study demonstrated flaws within the voir dire process in capital cases that, in fact, *increase* the risk of racially biased jurors making in onto a jury. According to this study, "the death qualification process results in jurors who are more racially biased, both implicitly and explicitly." Justin D. Levinson et al., Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States, 89 N.Y.U. L. Rev. 513, 568 (2014) (hereinafter "Devaluing Death"). In addition to this, efforts to explicitly question jurors on their racial attitudes and potential biases are not only unsuccessful, but they may have the adverse effect of reinforcing those same biases. *Pena-Rodriguez v. Colorado*, 137 S. Ct. at 869; *see also* Crossing Racial Boundaries, 53

DePaul L. Rev. at 1533 ("People are generally reluctant to admit that they hold racist attitudes or opinions or even to acknowledge this to themselves. Researchers find that racially prejudiced people will consciously attempt to avoid appearing to be racially biased.").

Thus, available evidence illustrates that death qualification—which occurs in every capital case—"actually exacerbate[s]" *implicit* racial biases "by the exclusion of less biased Americans through the death qualification process." Devaluing Death, 89 N.Y.U.L. Rev. at 564. Significantly, "jurors who were death-qualified displayed higher levels of bias related to implicit racial worth"—in other words, these jurors valued the lives of white people more than those of black people. *Id.* at 559. In short, the capital-jury selection process does more to ensure that racially biased jurors end up on capital juries than to guard against this outcome.

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

Here, the "rather large disparities in the odds of the death sentence" in Oklahoma

for those accused of killing a white person, surpasses the constitutionally acceptable tipping point. (Report at 222.) Where Julius's jury was *two times* more likely to sentence him to death based on the race of his victim *alone*, and *three times* more likely to do so simply because Julius is also black[23] (*Id.* at 219), his right to that impartial jury guaranteed to all criminal defendants, particularly those on trial for their life, has been transgressed. *Turner*, 476 U.S. at 35 (explaining that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence[,]" and "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" (internal quotations omitted)). Furthermore, the record evidence that at least one juror in Julius's case expressed the view that he deserved to be put "in a box in the ground" (Tr. XII 95-96, 106; Tr. XIII 76), even before the close of evidence during the penalty phase further indicates that biases tangibly tainted the fairness of Julius's trial and sentencing proceeding. *Turner*, 476 U.S. at 41 (Marshall, J., concurring in judgment and dissenting in part) ("[T]he opportunity for racial bias to taint the jury process is not 'uniquely' present at a sentencing hearing, but is equally a factor at the guilt phase of a bifurcated capital trial.").

A defendant "is . . . entitled to be tried before a jury whose minds are open on every issue and not embedded with any pre-conceived opinions." *West v. State*, 443 P.2d 131, 133, 1968 OK CR 112 (Okla. Crim. App. 1968), *overruled on other grounds by*

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

McKay v. City of Tulsa, 763 P.2d 703, 1988 OK CR 238 (Okla. Crim. App. 1988). Julius was denied this most elemental right, rendering his sentence of death a violation of the United States and Oklahoma Constitutions.

CONCLUSION

Mr. Jones's sentence of death was obtained in violation of his state and federal constitutional rights. He asks that this Court exercise its power to correct this fundamental injustice and grant sentencing relief. Alternatively, Mr. Jones asks this Court grant his request for discovery and an evidentiary hearing in order to allow for the further factual development of his claims.

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VERIFICATION OF COUNSEL

I, Mark Barrett, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

MARK BARRETT June 18, 2017

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.

MARK BARRETT

Attachment 1

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

Julius Darius Jones, ***Petitioner,*** ***-vs-*** **State of Oklahoma,** ***Respondent.***	**Oklahoma Co. District Court** **Case No. CF-99-4373** **Court of Criminal Appeals** **Direct Appeal Case No.** **D-2002-534** **Post Conviction Case No.** **PCD-2002-630**

COURT OF CRIMINAL APPEALS FORM 13.11A

ORIGINAL APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

Petitioner, Julius Darius Jones, through undersigned counsel, submits his application for post-conviction relief under Section 1089 of Title 22. This is the first time an application for post-conviction relief has been filed.

1. **Court in which sentence was rendered:**

   (a) Oklahoma County District Court.

   (b) Case Number: CF-99-4373.

   (c) Court of Criminal Appeals: Direct Appeal Case No. D-2002-534.

2. **Date of sentence:** April 19, 2002.

3. **Terms of sentence:** Count 1. Death.

Count 2. Fifteen years.

Count 3. Twenty-five years.

4. **Name of Presiding Judge:** Honorable Jerry Bass.

5. **Is Petitioner currently in custody?** Yes.

Where? Oklahoma State Penitentiary, H-Unit, McAlester, Oklahoma

Does Petitioner have criminal matters pending in other courts? Yes.

If so, where? Oklahoma County District Court.

List charges:

CF-1999-4373 Count 4. Robbery with firearms, in violation of 21 O.S. 801.

Count 5. Possession of a firearm, in violation of 21 O.S. 1289.8.

CF-1999-5144 Count 1. Robbery with firearms AFCF, in violation of 21 O.S. 801.

Count 2. Possession of a firearm AFCF, in violation of 21 O.S. 1283.

Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions? No.

I. CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of death was imposed:**

(a) First Degree Murder, in violation of 21 O.S. § 701.7 (C).

Aggravating factors alleged:

a. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

b. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating factors found:

a. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

b. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 11 to the jury which listed mitigating circumstances. (OR. Vol.VIII, at 1421-1425). The mitigation evidence submitted to the jury was as follows:

INSTRUCTION NUMBER 11

Evidence has been introduced as to the following mitigating circumstances:

1. Julius Darius Jones did not premeditate the death of Paul Howell.

2. Julius Darius Jones did not bear a grudge against Paul Howell.

3. Julius Darius Jones did not intend for Paul Howell to die.

4. Julius Darius Jones was not the sole perpetrator in this shooting. There was another person involved, Christopher Jordan.

5. Julius Darius Jones was 19 years old the night of the shooting.

6. Julius Darius Jones has a family that loves and cares for him and his life has value and meaning to them.

7. Julius Darius Jones has a little boy. Julius Darius Jones wants to be a father to his son even if it is limited to the confines of prison.

8. Julius Darius Jones loves and cares for his family and has maintained close contact with his parents, brother and sister since his incarceration.

9. Due to Julius Darius Jones' belief in the goodness of all people, he fostered friendships with everyone, regardless of whether or not they were affiliated with gangs.

10. Julius Darius Jones has never been a gang member.

11. Although Julius Darius Jones has prior felony convictions, none of these convictions are for violent offenses.

12. According to Julius Darius Jones's family and former teachers, he was a good boy who did well in school and sports. He was tender and compassionate with others. [H]e (sic) used to be employed by La Petite Academy, a day care, where the children fondly referred to him as "Daddy Julius."

13. Julius Darius Jones has strong religious convictions and tries to better himself by being a devout Christian.

14. While Julius Darius Jones was in high school he was the president of the O-Club, which is a club for those students who letter in a particular sport.

15. While Julius Darius Jones was in high school he was a member of the National Honors Society, member of the National African Boys Club, a member of the Fellowship of Christian Athletes and a member of the Presidential Leadership Club.

16. While Julius Darius Jones was in high school he was the team co-captain of his football, baseball, and track teams.

17. Julius Darius Jones graduated from John Marshall High School with a grade point average of 3.68. His class ranking was 12 out of 143 students.

18. Julius Darius Jones' teachers looked to him as a leader and a person to step up and take charge.

19. Julius Darius Jones was one of the students named as one of the "Who's Who of

American High School Students."

20. Julius Darius Jones attributes his success in high school and in sports to his perfectionist personality.

21. Since Julius Darius Jones has been incarcerated, he has become more patient and dependant on the Lord.

22. Julius Darius Jones received an academic scholarship to the University of Oklahoma.

23. Julius Darius Jones was a student of the University of Oklahoma when he was incarcerated for this offense.

24. Julius Darius Jones has been able to conform to the rules of conduct while incarcerated.

25. Julius Darius Jones is of sufficient intelligence and has a strong work ethic to enable him to be a productive member of society in prison and enable him to give something back to society.

26. Julius Darius Jones has expressed sorrow in the fact that Paul Howell has dies (sic) as a result of the shooting.

27. Julius Darius Jones has brain damage.

28. Julius Darius Jones has friends who love him and his life has meaning to them.

29. Julius Darius Jones does not use drugs or consume alcohol.

Was Victim Impact Evidence introduced at trial? Yes (X) No ( ).

7. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X).

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) or A judge without a jury ( ).

9. Was the sentence determined by (X) a jury, or ( ) the trial judge?

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).

a. Count 2: Possession of a Firearm After Former Conviction – Fifteen years.

b. Count 3: Conspiracy to Commit a Felony – Twenty-Five years.

11. Check whether the finding of guilty was made:

After plea of guilty ( ) After a plea of not guilty (X).

12. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X), or A judge without a jury ( ).

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

David Troy McKenzie
204 N. Robinson Ave., Ste. 3030
Oklahoma City, OK 73102

Names and addresses of all co-counsel in the trial court:

Malcolm Maurice Savage
200 N. Harvey, Ste 810
Oklahoma City, OK 73102

Robin Michelle McPhail
320 Robert S. Kerr, # 611
Oklahoma City, OK 73102

14. Was lead counsel appointed by the court? Yes (X) No ( ).

15. Was the conviction appealed? Yes(X) No( ).

To what court or courts? Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: March 8, 2004.

Date Response filed: July 2, 2004.

Date Reply Brief filed: July 21, 2004.

Date of Oral Argument: January 11, 2004.

Date of Petition for Rehearing (if appeal has been decided): N/A

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes (X) No ( ).

Date of Remand: February 22, 2005

If so, what were the grounds for remand?
Ineffective assistance of trial counsel for failing to present an alibi defense.

Is this petition filed subsequent to supplemental briefing after remand? Yes ( ) No (X).

16. **Name and address of lawyers for appeal?**

Wendell Blair Sutton
1512 S.E. 12th St.
Moore, OK 73160-8342

Carolyn Merritt
Assistant Public Defender
611 County Office Building
Oklahoma City, OK 73102

17. **Was an opinion written by the appellate court? Yes( ) No (X).**

If "yes," give citations if published:

If not published, give appellate case no.:

18. Was further review sought? Yes ( ) No(X).

If "Yes," state when relief was sought, the court in which relief was sought, the nature of the claims(s) and the results (include citations to any reported opinions).

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes (X) No ( ).

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ( ).

21. Have other motions been filed with this application or prior to the filing of this application? Yes (X) No ( ).

If yes, specify what motions have been filed:

Petitioner's Verified Application for Extension of Time to File Original Application for Post-Conviction Relief and Related Motions filed on October 15, 2004.

Petitioner's Verified Application that Post-Conviction Proceedings Be Held in Abeyance or in the Alternative an Extension of Time to File Original Application for Post-Conviction Relief and Related Motions filed on November 15, 2004.

Amended Verified Application that Post-Conviction Proceedings Be Held in Abeyance or in the Alternative an Extension of Time to File Original Application for Post-Conviction Relief and Related Motions filed on November 18, 2004.

Third Verified Application that Post-Conviction Proceedings Be Held in Abeyance or in the Alternative an Extension to File Original Application for Post-Conviction and Related Motions or Request Show Cause Hearing filed on December 17, 2004.

Emergency Motion to Hold Post-Conviction Proceedings in Abeyance filed on February 23, 2005.

22. List propositions raised (list all sub-propositions).

PROPOSITION ONE

PETITIONER, MR. JONES, RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION TWO

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST- CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW AND MUST BE REVERSED OR MODIFIED TO LIFE IMPRISONMENT OR LIFE WITHOUT PAROLE.

PART C: FACTS

STATEMENT OF THE FACTS OF THE CASE, INCLUDING REFERENCE TO SUPPORTING DOCUMENTATION, RECORD, AND APPENDICES

1.
CITATIONS TO THE RECORD

Pursuant to Rule 9.7(D)(1)(a) of the Rules of the Court of Criminal Appeals, effective January 1, 1998. The record and transcripts in this case will be referred to using the following abbreviations:

Application: the instant Original Application for Post-Conviction Relief

OR: the Original Record in Case No. CF-99-4373.

PH: the transcripts of the preliminary hearing held December 3, 1999, January 12,

2000, February 11, 2000.

TR: the fifteen volumes of transcripts of the jury trial held February 11, 2002 through March 4, 2002.

MH: the transcripts of the motion hearings held July 6, 2000; August 11, and 16, 2000; September 8, 2000; November 21, 2000; December 15, 2000; December 18, 2000; February 28, 2001; February 28, 2001; March 8, 2001; March 16, 2001; March 19, 2001; February 4, 2002; and March 12, 2002.

SH: the transcript of the motion and sentencing hearing held April 19, 2002.

Any additional record in this post-conviction proceeding, not otherwise mentioned above, also consists of the "record on appeal" as defined by Rule 1.13 (f), and the same shall be considered to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application For Post-Conviction Relief* will indicate the exhibit number, followed by the notation "Appendix," e.g., "Exh. 1, Appendix." Citations to briefs filed on direct appeal will be referenced by party, "Aplt." or "Aple," by identification of the brief in chief or reply, and page number, e.g., "Aplt. Brf., at 22," "Aple. Brf., at 15," "Aplt. Rpl. Brf., at 40." Citations to the Rule 3.11 Motion to Supplement Direct Appeal Record with Attached Exhibits and/or for an Evidentiary Hearing will be "Rule 3.11 Motion, at 1" or "Rule 3.11 Motion, Exh. 7." All citations will be separated from the regular text of the brief by parentheses.

2.

PROCEDURAL HISTORY

On August 4, 1999, Julius Darius Jones was first charged with First-degree Murder in violation of 21 O.S. § 701.7 by Information in the District Court of Oklahoma County, Case No. CF-99-4373. On August 12, 1999, in a bill of particulars, the State further alleged that the murders had the following statutory aggravating circumstances: (1) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; and (2) at the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mr. Jones pled not guilty to the charges and requested a jury trial. Mr. Jones was tried by a jury before the Hon. Jerry Bass in Oklahoma County District Court. The jury returned a verdict finding Mr. Jones guilty of First Degree Murder. After the sentencing stage of the trial, the jury returned a verdict finding the existence of the two aggravating circumstances alleged by the State and imposed the death sentence for the First Degree Murder. The District Court pronounced formal judgment and sentence on the verdicts on April 19, 2002.

Counsel appointed to represent Mr. Jones timely appealed the judgments and sentences in **Jones v. State**, Case No. D-2002-534. That proceeding is fully briefed as of the filing of this Application, the reply brief of Appellant being filed on July 21, 2004. The oral argument was held on January 11, 2005.

Pursuant to 22 O.S. § 1089 and Rule 9.7 of the Court of Criminal Appeals Rules, Mr. Jones timely files this original verified application for post-conviction relief.

3.

FACTS RELATING TO THE OFFENSE, TRIAL, AND APPEAL

On or about July 28, 1999, Paul Howell was shot in the head with a .22 Raven as he was getting out of his Chevrolet Suburban in his parents's driveway in Edmond, Oklahoma. Megan Tobey, Mr. Howell's sister and Mr. Howell's two daughters were in the Suburban when Mr. Howell was shot. The Suburban was stolen after the shooting. Ms. Tobey described the shooter as having about a half inch of hair sticking out from the sides between the shooter's ears and the stocking cap he was wearing. (PH. Vol. 1 at 22; Tr. Vol. 4 at 117). When Mr. Jones's co-defendant, Christopher Jordan, was arrested on July 30, 1999, his hair was in corn rows. Mr. Jones's hair, however, was closely cropped and very short before and at time of his arrest, not enough to be seen as a half inch long underneath a stocking cap. (Tr. Vol. 9 at 28-29; State's Exhibits 97, 98, 99, 100).

On or about August 4, 1999, Christopher Jordan and Julius Jones were charged with Murder in the First Degree. Although Mr. Jones was associating with Mr. Jordan during the summer of 1999 and had some associations with Mr. Ladell King, association is not a crime. Mr. Jones and Mr. Jordan somewhat shared a car – an orange 1972 Cutlass. In that car at some point in time in the summer, Analiese Presley, Mr. Jones's girlfriend, testified she saw a gun in the car. (Tr. Vol. 9 at 20-28, 51). Also, Mr. Jordan had stayed at the Jones's house

before and thus had access to the attic in the Jones's residence. The only link Mr. Jones has to the actual shooting of Mr. Howell is the word of Mr. Jordan.

In addition, there is physical evidence to link Mr. Jordan. In the Buick Regal that Mr. Jones had taken to a transmission shop, bullets and a bandanna were found in the car. The hair in the bandanna, according the results of DNA testing, was found to be consistent with Mr. Jordan and not Mr. Jones. (MH 2/4/02, at 46; Tr. Vol. 9 at 214-215).[1]

The State's theory was wrong. Christopher Jordan was the shooter, not Julius Jones.[2] Not only was the State's theory of the case wrong, but the trial was structurally unsound, trial counsel for Mr. Jones were ineffective, and appellate counsel was ineffective. Mr. Jones's trial counsel were woefully inexperienced in capital litigation. (Tr.Vol. 1 at 15, lines 19-22)(Aplt's Rule 3.11 Motion, Exh. 7). Part of Mr. Jones's trial team was experienced in felony jury trials, but not capital jury trials, and as this Court is well aware, capital trials are vastly different from any other types of criminal trials. (Tr. Vol. 1 at 15)(Rule 3.11 Motion, Exhs. 2,7,8,9).

Mr. Jones's trial was doomed well before the beginning of the trial. Trial counsel failed to investigate Mr. Jones's alibi defense. (Aplt. Brf at 39-44; Rule 3.11 Motion, Exhs.

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1 Before the hair found in the bandanna was tested, Mr. Jordan had the opportunity to stipulate that the hair was not his. He refused. (State v. Christopher Jordan, MH 3/19/01, at 17).

2 Counsel does concede that Christopher Jordan and Julius Jones were charged with felony murder rather than malice murder; and, therefore Mr. Jones does not have to be the shooter to be convicted of felony murder. However, his conviction is suspect at best as will be shown in this application.

2,7,8,9). In addition, trial counsel knew about Mr. Emmanuel Littlejohn's statement that Mr. Jordan was bragging about being the shooter, but he, Jordan, was not going to get the death penalty because he was lying and telling the authorities that Mr. Jones was the shooter. Mr. Littlejohn did not testify at the trial. (Aplt. Brf at 45-46; Rule 3.11 Motion, Exhs. 7 and 13). Trial counsel did suggest to the jury that Mr. Jordan was the shooter, but both trial and appellate counsel failed to investigate whether other people in Mr. Jordan's cell pod had witnessed Mr. Jordan's bragging. (Tr. Vol. 4 at 61; Tr. Vol. 10 at 100-102, 111, 114, 116, and 119).

Mr. Christopher Berry, also a client of Mr. David McKenzie, Mr. Jones's lead trial counsel, was housed in the same cell pod with Mr. Jordan in the Oklahoma County Jail. Mr. Berry witnessed Mr. Jordan's bragging. (Exh. 1 and 2, Appendix). Mr. McKenzie could have easily asked his clients what was going on in the Oklahoma County Jail and could have easily corroborated Mr. Littlejohn's assertions.

Trial counsel and appellate counsel failed to investigate Mr. Jones's friends – his peers. Mr. James Lawson was one of Mr. Jones's best friends. Mr. Lawson could have testified about Mr. Jones and his character. (Exh. 3, Appendix).

In addition, appellate counsel failed to investigate the jurors that served on Mr. Jones's jury. Mr. Christopher Whitmire, one of the jurors empaneled to give verdicts in Mr. Jones's case perjured himself in Court. During voir dire, Mr. Whitmire was asked if he had ever been involved in court proceedings. Mr. Whitmire answered that he only had traffic

offenses. (Tr.Vol.2A at 96, line 14-15). However, Mr. Whitmire has two felony convictions. (Exh. 6, 7; Appendix).

Furthermore, on two separate occasions, the State was ordered by the Court to inform the Court and defense counsel if any prospective jurors had criminal records. (MH 2/4/02 at 17-20; Tr.Vol. 1 at 33-35). However, the State did not obey the Court's order. Regardless if the State knew about Mr. Whitmire's convictions or not, the State did not tell the Court or defense counsel. Because Mr. Whitmire lied in Court, defense counsel had no reason to believe that Mr. Whitmire was a convicted felon. After the prospective juror panel was passed for cause, the State did ask for potential jurors to be excused, because they lied about their criminal records. (Tr. Vol. 3 at 208, 210).

Additional relevant facts will be detailed and developed in the following Propositions.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

PETITIONER, MR. JONES, RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

APPELLATE COUNSEL INEFFECTIVE

In order for a convicted capital defendant in Oklahoma to prevail pursuant to 22 O.S. § 1089(C):

> The only issues that may be raised in an application for post-conviction relief are those that:
>
> 1. Were not and could not have been raised in a direct appeal; and
> 2. Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.
>
> ***

Pursuant to 22 O.S. §1089(D)(4)(b)

> For purposes of this subsection, a ground could not have been previously raised if:
>
> (2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.

"All claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court." Therefore,

> The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **Smith v. Robbins**, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following **Smith v. Murray**, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally

deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. **Id.** at 285, 120 S.Ct. 746 (applying *Strickland*).**Cargle v. Mullin,** 317 F.3d 1196,1202 (10th Cir. 2003). [3]

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[I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," **Neill v. Gibson**, 278 F.3d 1044, 1057 (10th Cir.2001) (quotation omitted), *cert. denied,* 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance. [FN4] *See, 1203 e.g.,* **Smith**, 528 U.S. at 288, 120 S.Ct. 746; **Banks v. Reynolds**, 54 F.3d 1508, 1515-16 (10th Cir.1995); **Mayo v. Henderson**, 13 F.3d 528, 533 (2d Cir.1994). **Cargle v. Mullin,** 317 F.3d 1196, 1202 -1203 (10th Cir. 2003).

Mr. Jones's appellate counsel was ineffective because appellate counsel failed to raise meritorious claims. Mr. Jones's conviction and sentenced should be reversed.

FAILURE TO INVESTIGATE AND INTERVIEW JURORS

Appellate counsel failed to investigate and interview Mr. Jones's jurors. If appellate counsel had investigated, then evidence of an unknown (to the defense) convicted felon on the jury should have been submitted in the direct appeal brief. Failure to raise this claim in

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[3] According to 22 O.S §1089(A), in an Capital Post-Conviction Application, there are many instances in which the post-conviction application is filed before the Capital Direct Appeal is still pending. Unless counsel can predict the future, arguing ineffective assistance of counsel is rather difficult when the direct appeal is still being reviewed or when issues have been remanded to the district court in the direct appeal stage.

the brief in chief of the direct appeal stage shows that appellate counsel's performance was deficient. (Aplt. Brf.). Although the factual basis for such a claim was available to appellate counsel, it was not reasonably or comprehensively pursued. Thus, it is appropriate for post-conviction review.

In capital cases, it is not uncommon for appellate counsel to interview and investigate jurors. There are numerous reasons appellate counsel conducts juror interviews and investigations: to learn if there prejudicial information included in the deliberations acquired outside of the trial, to learn if the trial attorneys were ineffective, or if any of the jurors lied during the voir dire process or any other misconduct by members of the jury. *See* **Glossip v. State**, 2001 OK CR 21, 29 P.3d 597, **Hawkins v. State**, 46 P.3d 139, 2002 OK CR 12, **Harris v. State**, 2004 OK CR 1, 84 P.3d 731, **McElmurry, v. State**, 2002 OK CR 40, 60 P.3d 4, **Crider v. State ex rel. Dist. Court of Oklahoma County**, 2001 OK CR 10, 29 P.3d 577, 579, **Neill v. State**,1997 OK CR 41, 943 P.2d 145. In Mr. Jones's case, appellate counsel failed to interview and investigate members of the jury. As such, appellate counsel was ineffective.

CRIMINAL RECORDS OF JURORS

In preparation for Mr. Jones's post-conviction application, counsel directed an investigation into the individual jurors. In the course of the investigation counsel learned that one of the jurors, Mr. Christopher Warren Whitmire, committed perjury during voir dire. Mr. Whitmire and the other prospective jurors took an oath before the names of the

prospective jurors were called into the jury box and before voir dire began. The Court Clerk administered the oath to all prospective jurors. (Tr. Vol. 1 at 60). Thirty names were called to fill the jury box, and eventually thirty prospective jurors were passed for cause. (Tr. Vol. 2B at 124and Tr. Vol. 3 at 202). Later, twelve jurors and two alternate jurors were seated for the trial of State v. Julius Darius Jones. (Tr. Vol. 3 at 213-214; Tr. Vol. 4 at 21; O.R. 1345-1348).

During voir dire, the Court explicitly inquired:

> Now, Ladies and Gentleman, listen to this question very closely. Have any of your ever been in a court of law, under any circumstances? Under any circumstances have your ever appeared in a court of law either as a witness, a plaintiff or as a defendant? As a witness, a plaintiff or as a defendant. (Tr. Vol. 2A at 91, lines 8-15).

Mr. Whitmire's answer was misleading at best:

PROSPECTIVE JUROR WHITMIRE: Traffic-related offenses.

THE COURT: Anything other things?

PROSPECTIVE JUROR WHITMIRE: (Shakes head). (Tr. Vol. 2A at 96, line 14-15). However, Mr. Whitmire has had numerous dealings with both civil and criminal court proceedings. In 1986, there was a civil case in Oklahoma County in which Mr. Whitmire was the defendant.[4] (Exh. 8, Appendix). Mr. Whitmire also filed for bankruptcy in 1989.[5] (Exh. 9, Appendix). Mr. Whitmire in 1983 was charged and convicted of misdemeanor

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[4] Oklahoma County, CS-1986-2281

[5] United States Bankruptcy Western District Case Number 89-00524-LN.

driving under the influence.[6] (Exh. 10, Appendix). In 1984, Mr. Whitmire was charged and convicted for felony driving under the influence.[7] (Exh. 6, Appendix). Also, in 1986, Mr. Whitmire was charged and convicted with felony driving under the influence in Oklahoma County.[8] (Exh. 7, Appendix). In 1993, Mr. Whitmire was again charged with felony driving under the influence in Oklahoma County; however, the charge was reduced to a misdemeanor.[9] (Exh. 11, Appendix). And in 1999, Mr. Whitmire was the defendant in two emergency protective order cases.[10] (Exh. 12 and 13, Appendix). Although felony convictions for driving under the influence are violations of the motor vehicle statutes, these are not mere traffic offenses such as speeding tickets as Mr. Whitmire led the Court to believe. He had felony convictions and even spent time in the Department of Corrections custody. (Exh. 14, Appendix). His omissions of his felony convictions as well as his many other dealings with the judicial system were lies. He committed perjury in Oklahoma County District Court.

In addition, the Court inquired into prospective jurors's employment. In response to the inquiry Mr. Whitmire answered:

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6 Oklahoma County, CM-1983-2359

7 Oklahoma County, CF-1984-4267.

8 Oklahoma County, CRF-1986-962

9 Oklahoma County, CF-1993-1057.

10 Oklahoma County, PO-1999-2340 and PO-1999-2341.

PROSPECTIVE JUROR WHITMITE: I work as a physical therapist. I'm married, two kids. My wife is a cook. In my spare time I am a black belt in juditzu. (sic) (Tr. Vol. 2A at 114, lines 4-7).

Again, Mr. Whitmire answer was misleading at best. Mr. Whitmire was not a physical therapist; he was a physical therapist assistant. (Exh. 15, Appendix). Being a physical therapist assistant is subordinate to a physical therapist. A physical therapist assistant works under the physical therapist license. Being a physical therapist assistant is analogous to being a paralegal or an investigator for an attorney. A person who holds himself out to be a physical therapist and yet is only an assistant is in violation of Oklahoma licensing rules.[11] (59 O.S. § 887.1 et seq.).

It is clear from the record that the trial court did not want any dishonest prospective jurors sitting on the jury and rendering decisions in court. After a different prospective juror lied to the Court, Judge Bass told the attorneys for both sides, "[i]f the juror can't be honest with the Court, that he would not be a qualified juror." (Tr. Vol. 1 at 168, lines 12-14). His dismissal as a juror was based "solely on his honesty with the Court. And if he is not honest with the Court, then how can this Court have any confidence on his ability to sit as a juror." (Tr. Vol. 1 at 169, lines 17-20). Clearly, Mr.Whitmire was not honest with the Court, with

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[11] Mr. Whitmire has a history of half-truths. In 1993 when Mr. Whitmire was applying for his license to be a physical therapy assistant, he sent a notarized letter to the Oklahoma Board of Medical Licensure and Supervision that was received on November 30, 1993. In the letter he admits that he had some driving under influence charges in the mid-1980s. (Exh. 15, page 5, Appendix). He neglected to inform the Board that he had a 1993 pending felony driving under the influence case in Oklahoma County, CF-1993-1057. (Exh. 11, Appendix).

counsel for the State, nor counsel for the defense. How can any Court have any confidence in Mr. Whitmire's ability to render a verdict of the magnitude of guilt of murder with a sentence of death when the juror obviously has no integrity? He lied about his previous felony convictions, his civil case, his bankruptcy case, and the protective order cases.

Curiously, the State used peremptory strikes, not strikes for cause on three jurors whom the State said had criminal records. The State did not inform the Court or defense counsel that there were individuals with criminal records on the jury panel that was passed for cause. Incidentally, all but one of these prospective jurors were of minority races.[12]

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[12] The State used a peremptory strike on prospective juror Christy Tillett, a young black female. (Tr. Vol. 3 at 204, 207).

The State used a peremptory strike on prospective juror Rose-Maire Salyor Wingate who according to the State was not honest about her involvement in the judicial system. Although Ms. Wingate was not of a minority race, she had a deferred sentence for falsely obtaining unemployment compensation. (Tr. Vol. 3 at 208).(Exh. 16, Appendix).

The State also used a peremptory strike on Ms. Shalonda Young, who was a black female, had a deferred sentence for bogus checks which she failed to notify the Court. Her maiden name was Rice. (Tr. Vol. 3 at 208). (Exh. 17, Appendix).

Mr. Austin Bolfrey, a black man, was struck by the State because he had an actual physical control drinking misdemeanor conviction. (Tr.Vol. 3 at 210). (Exh. 18, Appendix).

Ms. Vanessa Polk, an African-American prospective alternate juror, was struck by the State as well. (Tr. Vol. 4 at 19-21).

See Rule 3.11 Motion, Exh 7 ¶ 31. "Mr. Woodward was the only African-American trial juror. Mr. Morales, was Hispanic. There were not other obvious minority jurors on the trial jury."

Trial counsel did raise Batson challenges to the dismissal of these minority jurors and also asked for a mistrial; however the Court overruled them. (Tr. Vol. 3 at 204, 206-208, 210-211; Tr. Vol. 4 at 19-20).

In pre-trial motions, trial counsel for Mr. Jones filed a Motion for Production of Jury List. (O.R. 433-434). The State responded requesting the Court to overrule the motion. On February 4, 2002, the District Court heard oral arguments on the motions. The defense asked for the investigation the State had done on the prospective jurors because the State has access to law enforcement databases. The defense argued that the State had an unfair advantage in voir dire. However, the State argued that the information was work product. (M H 2/4/02 at 17-20). The District Court ordered the State to tell the defense who were the prospective jurors that had "felonies, deferred sentences, or convictions." (MH 2/4/02 at 19-20). On the first day of the trial, February 11, 2002, before voir dire began, the Court reminded the State of the order of informing defense counsel and the Court that if any prospective jurors had experience with the criminal justice system, then the State was to notify defense counsel and the Court. (Tr. Vol. 1 at 33-34). The State even said they would follow the Court's ruling. (Tr. Vol. 1 at 35).

But, the State failed to notify the Court and defense counsel about Mr. Christopher Whitmire's criminal record and felony convictions from Oklahoma County as well as passed the other prospective jurors with criminal records for cause. Mr. Whitmire had felony

convictions and should not have been allowed to sit on Mr. Jones's jury. There are three possible reasons the State disobeyed Judge Bass's order. One, either the State was negligent in following the Court's order; or two, the State failed to conduct a criminal records check on Mr. Whitmire, but did records checks on others; or three, the State knew about Mr. Whitmire's two felony convictions and failed to point out Mr. Whitmire's lies to the Court. Whatever the reason, it does not excuse the fact that the State was ordered to tell the Court and defense counsel if any prospective juror had a criminal record. Mr. Whitmire had two felony convictions out of Oklahoma County and he lied to the Court.

"The purpose of *voir dire* is to determine whether there are grounds to challenge prospective jurors, for either actual or implied bias, and to permit the intelligent exercise of peremptory challenges." **Dodd v. State,** 2004 OK CR 31, 100 P.3d 1017, 1029. And though the Court, the State, and trial counsel inquired each prospective juror, trial counsel could not effectively attempt to exercise the defense's peremptory challenges when the State failed to inform counsel which prospective jurors had criminal records.

This Court has held "[g]enerally, when a defendant fails to challenge a prospective juror for cause, he waives any subsequent claim regarding the fitness of that panelist to serve on the jury. **Wood v. State**, 1998 OK CR 19, ¶¶ 30, 959 P.2d 1, 9." **Harris v. State**, 2004 OK CR 1,84 P.3d 731, 741. However, counsel cannot be reasonably held to waive a claim based on unfitness of a particular prospective juror to serve on a jury, when counsel as well as the Court were unaware of Mr. Whitmire's misrepresentations. The State of Oklahoma

was ordered two times to tell defense counsel and the Court whether any prospective juror had a criminal record; and yet, the Court and defense counsel were left wholly ignorant of Mr. Whitmire's lies.

The State knowingly passed the panel of prospective jurors for cause when there were prospective jurors who were not truthful about their criminal records. The State did use peremptory strikes on jurors who were dishonest with the Court and defense counsel. Only after the panel was passed for cause did defense counsel know that some of the panelists were lying about their criminal records. Neither the Court nor the defense counsel were informed that there were panelists with criminal records. Allowing dishonest prospective jurors who failed to abide by the oath they took before voir dire to be passed for cause and then ultimately allowing a convicted felon who committed perjury to sit in judgment of Mr. Jones is a fraud upon the District Court, a fraud upon defense counsel, a fraud upon Mr. Jones, and ultimately, a fraud upon the judicial system.

Since before Oklahoma became a State, a prospective juror who lied in voir dire, was committing perjury.

> In order to more certainly determine who the proper men were to sit as jurors in the case, it became necessary for the court to exercise the power of compelling the jurors to truthfully answer questions touching their interest in the result of the cause ..... and that the giving of false testimony in his examination touching his qualifications to sit as a juror is an indictable offense, under the law. **Finch v. U.S.** 33 P. 638, 641 (Okla.Terr. 1893).
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> [T]he giving of false testimony of a juror, examined on his voir dire, is perjury. 1 Thompson, Trials, §§ 115; **Finch v. United States**, 1 Okl. 396, 33 Pac. 638; **Commonweath v. Stockley**, 10 Leigh (Va.) 678; **State v. Howard**, 63 Ind. 502;

State v. Wall, 9 Yerg. (Tenn.) 347; **Hilliard v. State**, 14 Lea (Tenn.) 648; **Ex parte De Martini**, 47 Cal. App. 228, 190 Pac. 468. **People v. Rendigs** 123 Misc. 32, 36, 205 N.Y.S. 133, 136 (N.Y.Gen.Sess.1924).

Oklahoma caselaw holds that prospective juror Whitmire's untruthfulness requires Mr. Jones to receive a new trial. In **Gann v. State**, this Court looked at other jurisdictions and held

> Inasmuch as the juror here stood mute when he should have spoken, he practiced a deception on the court and the defendant, and the deception was as to a matter reflecting on his credibility. (Internal quotations omitted.).
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> ...a new trial must be granted where a prospective juror did not answer correctly the material questions propounded by the court in qualifying the jury and where such juror was accepted on the jury which tried the case. *A new trial must be granted under such circumstances irrespective of whether the concealment was deliberate or unintentional*. 1964 OK CR 122, 397 P.2d 686, 692. (Internal quotations omitted.)(Emphasis added).[13]

In **Jackson v. State**, a prospective juror under oath truthfully told the Court that he was a convicted felon. He was excused for cause over the objection of the defense. On appeal, appellate counsel argued that the prospective juror's civil rights had been restored. Therefore, he was eligible to serve as a juror and not eligible to be struck for cause based on his felony conviction. This Court held

> in Oklahoma, 22 O.S.1991, §§ 658, states that a person who has been convicted of a felony is subject to being excused for cause, with no mention of the status of his

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[13] *See* **Proudfoot v. Dan's Marine Service, Inc.** 210 W.Va. 498, 503, 558 S.E.2d 298, 303-304 (W.Va., 2001) (held a showing of wrong or injustice to the defendant should not apply if a juror concealed his convicted felon status during voir dire).

> civil rights. The decision to excuse a prospective juror for cause rests within the sound discretion of the trial judge, whose decision will not be overturned unless an abuse of discretion is shown. **Spears v. State**, 1995 OK CR 36, ¶¶ 9, 900 P.2d 431, 437, *cert. denied,* 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527. **Jackson v. State**, 1998 OK CR 39, 964 P.2d 875, 884 (1998).

The juror in Jackson "was subject to being challenged for cause pursuant to section 658." **Id.**

Direct appeal counsel, failed to comprehensively investigate the jury that convicted and sentenced Mr. Jones. Reversible error was committed because of Mr. Whitmire's perjury. Mr. Jones is entitled to a new trial.

FAILURE TO CONDUCT JUROR INTERVIEWS

Mr. Jones's direct appeal counsel failed to conduct comprehensive juror interviews as well. As stated earlier, Mr. Jones was denied the effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 7 and 20 of the Oklahoma Constitution because Mr. Jones's jurors were not interviewed. Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." **Strickland v. Washington**, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In Oklahoma, this Court held "defense representatives are entitled to contact jurors as part of the investigation of possible appellate issues." **Crider v. State ex rel. Dist. Court of Oklahoma County**, 2001 OK CR 10, 29 P.3d 577, 579 (2001). The Oklahoma County Public Defender's Office sent out questionnaires to the jurors who had served on Mr.

Jones's jury. Unfortunately, very few jurors were contacted for a personal interview either by phone or in person. Appellate counsel's failure to contact the jurors represents deficient performance. Capital Post-Conviction counsel obtained affidavits from two jurors from Mr. Jones's case as further evidence of ineffective assistance of counsel. (Exhs. 4 and 5, Appendix).

APPELLATE AND TRIAL COUNSEL INEFFECTIVE

Appellate counsel and trial counsel were ineffective in violation of Mr. Jones's Sixth Amendment right to counsel. They failed to conduct a thorough investigation for Mr. Jones's defense. Both appellate counsel and trial counsel did investigation; however, it should have been more thorough.

As direct appeal counsel raised in the Appellate Brief in Chief and Rule 3.11 Motion to Supplement Direct Appeal Record with Attached Exhibits and/or for an Evidentiary Hearing, Mr. Emmanuel Littlejohn gave an affidavit stating that Mr. Christopher Jordan, Mr. Jones's co-defendant, was telling those he celled with in the Oklahoma County jail that he, Mr. Jordan, was the shooter of Mr. Howell, but that even though Mr. Jones wasn't there, Mr. Jones was going to get the death penalty. (Rule 3.11 Motion, Exh. 13). And though trial counsel chose not to use Mr. Littlejohn, trial counsel failed to investigate whether there was merit in Mr. Littlejohn's claims. (Rule 3.11 Motion, Exh. 7). Thus, trial counsel failed to search for and interview possible defense witnesses. Trial counsel's failure is especially egregious because trial counsel failed to present a defense for Mr. Jones at trial. (Exhs 4, 5;

Appendix).

In addition, appellate counsel failed to investigate whether others heard Mr. Jordan's confessions in the jail. Mr. Christopher Berry was housed in the Oklahoma County Jail at the same time Mr. Jordan and Mr. Jones were in the jail. Mr. Jordan was in the same cell pod as Mr. Berry. Mr. Berry personally heard Mr. Jordan tell another jail resident that he, Mr. Jordan, was the shooter and not Mr. Jones. (Exh. 1 and 2, Appendix). Mr. Berry's statements corroborate Mr. Littlejohn's statements. According to Mr. Littlejohn and Mr. Berry, Mr. Jones was not the triggerman. Mr. Jordan was the triggerman. Although Mr. Littlejohn and Mr. Berry are convicted felons, their testimony might have created doubt in a juror's mind. The State used testimony from convicted felons Mr. Kermit Lottie and Mr. Ladell King; therefore, the testimony of Mr. Littlejohn and Mr. Berry would not have been unreasonable.

Mr. Jones's case was prejudiced because the trial team did not further investigate Mr. Littlejohn's statements. Mr. David McKenzie, Mr. Jones's lead attorney, was also Mr. Christopher Berry's attorney. Counsel could have easily asked Mr. Littlejohn who else heard Mr. Jordan's confessions. Counsel could have easily asked Mr. Berry if he heard anything interesting in the jail. Mr. McKenzie had access to other people in the Oklahoma County jail, but he failed to ask whether what Mr. Littlejohn was saying could be true. Rather than corroborate what Mr. Littlejohn said, counsel chose to discount it. (Rule 3.11 Motion, Exh. 7). Both trial counsel and appellate counsel failed to investigate this further.

Trial counsel and appellate counsel both failed to interview Mr. Jones's friends and peers. One potential defense witness was Mr. James Lawson, II, also known as Jimmy Lawson. Mr. Lawson is one Mr. Jones's best friends. He was not interviewed by trial or appellate counsel. Mr. Lawson could have given the jury mitigation evidence about Mr. Jones. The two of them have been friends most of their lives. They went to school together. They played sports together. They also share deep religious beliefs. (Exh. 3, Appendix). The jury in Mr. Jones's case was not provided with any favorable evidence from any of Mr. Jones's peers. Mr. Lawson could have provided that information.

Although this Court has held that "'[t]he fact that a defense attorney could have investigated an issue more thoroughly does not, in and of itself, constitute ineffective assistance." **Fontenot v. State**, 1994 OK CR 42, ¶ 61-62, 881 P.2d 69, 86." **Bernay v. State**,1999 OK CR 46, 989 P.2d 998, 1015. Such is not the case for Mr. Jones's trial. Failure of trial and appellate counsel to investigate jurors, to interview jurors, to not put on the best defense for Mr. Jones is prejudicial and not case strategy.

It cannot be said to be reasonable trial strategy in forgoing investigating and ultimately not putting on witnesses that might create reasonable doubt or any residual doubt. Trial counsel and appellate counsel failed to corroborate known evidence that might have lessened Mr. Jones's culpability in the minds of the jurors. Trial counsel and appellate counsel or their respective representatives did not interview Mr. Lawson to form an opinion as to what kind of witness Mr. Lawson might be or whether his information concerning Mr.

Jones would be helpful to Mr. Jones's case. Concerning Mr. Berry, although trial counsel knew Mr. Berry and had spoken to Mr. Berry, trial counsel failed to inquire into Mr. Berry's knowledge of Mr. Jones's case. Neither trial counsel nor appellate counsel could form an opinion as to the potential evidence and the potential witnesses.

In **Riley v. Payne,** 352 F.3d 1313, 1318 (9th Cir. 2003), one of the issues was failing to investigate witnesses for trial. The Court held

> Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. **Strickland**, at 691, 104 S.Ct. 2052. We have held that a lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. **Avila v. Galaza**, 297 F.3d 911, 919 (9th Cir.2002) (quoting **Hart v. Gomez**, 174 F.3d 1067, 1070 (9th Cir.1999)); *see also* **Lord v. Wood,** 184 F.3d 1083, 1096 (9th Cir.1999) (counsel's performance was deficient where counsel failed to interview three witnesses who had material evidence as to their client's innocence). Of course, counsel need not interview every possible witness to have performed proficiently. **LaGrand v. Stewart,** 133 F.3d 1253, 1274 (9th Cir.1998) (concluding there was no prejudice where trial counsel had personally interviewed the one eyewitness and read investigative reports and transcripts of interviews with all other witnesses). However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor-factors we are not in a position to second-guess. **Lord**, 184 F.3d at 1095 n. 8 (parenthetical in original). **Riley v. Payne**, 352 F.3d 1313, 1318 (9th Cir. 2003). (Internal quotations omitted). (Emphasis added).

Both trial counsel and appellate counsel mention that the hair in the white bandanna recovered from the Buick Regal owned by Mr. Jones, was Mr. Jordan's and not Mr.

Jones's.[14] But, combine that fact with at least two people saying that Mr. Jordan was claiming that he was the shooter, doubt is created concerning who was the shooter. And because Mr. Jordan had access to Mr. Jones's parents's house, it is entirely possible that Mr. Jordan could have been the one who hid the gun in the attic.

This Court has repeatedly held that "'[t]he credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary.'" **McDonald v. State**, 674 P.2d 1154, 1155 (Okl.Cr.1984) *citing* **Smith v. State**, 594 P.2d 784 (Okl.Cr.1979) *quoting from* **Caudill v. State**, 532 P.2d 63 (Okl.Cr.1975)." **Bland v. State**, 2000 OK CR 11, 4 P.3d 702, 714.

Both trial counsel and appellate counsel were ineffective. Appellate counsel was ineffective for not investigating jurors, interviewing jurors, and further investigating and corroborating the claim that Mr. Jordan was the shooter and not Mr. Jones. Trial counsel were ineffective for failing to put on a defense.

STATE INDUCED INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Jones received ineffective assistance of trial counsel. Mr. Jones's attorneys were not experienced capital litigators. (Aplt. Brf at 39-53)(Rule 3.11 Motion; Exhs. 2, 7, 8, 9).

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[14] (State v. Christopher Jordan, MH 3/19/01 at 17)(MH 2/4/02, at 46)(Aplt. Brf at 6, ftn. 11)(Tr. 8 at 28-36; Tr. 9 at 214-215; SH at 32B).

Mr. Jones's appellate counsel raised several issues of ineffectiveness concerning trial counsel, but appellate counsel failed to argue that the ineffective assistance of counsel was state induced.

Mr. Jones's trial counsel were assistant public defenders. Mr. David McKenzie was the lead attorney at trial. Mr. McKenzie was second chair counsel for a while, but he became lead attorney when Mr. Barry Albert, the initial lead attorney, was suffering from some health problems. The experienced attorneys in capital trial litigation of the Oklahoma County Public Defenders Office had several cases themselves and could not add another capital case to their caseload, resulting in representation for Mr. Jones below the American Bar Association Guidelines. Mr. Robert A. Ravitz, the Oklahoma County Public Defender, could not contract out of the public defender's office for experienced capital trial lawyers and could not hire additional capital trial lawyers. (Exh. 19, Appendix). Therefore, Mr. Jones received inexperienced and ultimately ineffective counsel because of government and monetary restraints in violation of Mr. Jones's Sixth Amendment right to counsel and in violation of Mr. Jones's Fourteenth Amendment right of due process.

> [T]the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." **McMann v. Richardson**, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). *Government violates the right to effective assistance when it interferes* in certain ways with the ability of counsel to make independent decisions *about how to conduct the defense*. *See*, e.g., **Geders v. United States**, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); **Herring v. New York**, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); 2064 **Brooks v. Tennessee**, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); **Ferguson v. Georgia**, 365 U.S.

> 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," **Cuyler v. Sullivan**, 446 U.S., at 344, 100 S.Ct., at 1716. Id., at 345-350, 100 S.Ct., at 1716- 1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). **Strickland v. Washington,** 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 - 2064, 80 L.Ed.2d 674 (1984). (Emphasis added).
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> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. *See* **United States v. Cronic**, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. **Strickland v. Washington** 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984).

When defense counsel is prevented by State action from assisting an accused during critical stages of the case, fundamental constitutional error has occurred and no showing of prejudice is required. The State induced the ineffective assistance of counsel and then profited from its actions with a death sentence. The adversarial process broke down to the point that the trial cannot be relied on as having produced a just result.

Mr. Jones's trial counsel were inexperienced capital litigators. Because the Oklahoma County Public Defender's Office could not provide any other counsel due to monetary and case loads constraints, government action interfered with Mr. Jones's right to effective assistance of counsel in violation of the Sixth Amendment. Mr. David McKenzie, Mr. Jones's lead attorney, informed the public defender's office of his inexperience at capital litigation and his concerns, but he remained as lead counsel for Mr. Jones. In

addition, Mr. McKenzie informed the Court that Mr. Jones's case was his first death penalty case. (Tr. Vol. 1 at 15, lines 19-25). (Rule 3.11 Motion; Exhs. 7). The State profited from the defense team's inexperience and the adversarial process was non-existent.

The Public Defender's Office's inability to provide experienced capital lawyers was not the only example of state induced ineffective assistance of trial counsel in Mr. Jones's case. As stated earlier, the State was ordered two separate times to provide defense counsel their list of prospective jurors with criminal records. Even after the State said it would obey the Court's order, the State failed to give trial counsel that information. Only when the State was exercising their peremptory challenges was it made known to the Court and to defense counsel that a few of the jurors that were passed for cause by both the defense and the State had criminal records. Because state action precluded trial counsel's ability to make an informed decision on choosing jurors for Mr. Jones's trial, counsel was ineffective due to state action.

In addition, appellate counsel raised the **Brady**[15] violation issue concerning the State's failure to inform defense counsel until the end of the State's first stage case in trial that the cigarettes found in the stolen Suburban were not from any perpetrator, but rather a friend of Mr. Howell's. (Aplt. Brf. at 38). Appellate counsel did not argue that state action was interfering with the effective assistance of counsel for Mr. Jones. Trial counsel's

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15 *See* **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct 1194. 10 L.Ed.2d 215 (1963), **United States v. Bagley**,473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d. 481 (1985), **Kyles v. Whitley**,514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

ineffectiveness was state induced. Mr. Jones is entitled to effective assistance of counsel. Mr. Jones is entitled to a new trial.

APPELLATE COUNSEL FAILED TO ARGUE STRUCTURAL ERROR IN MR. JONES'S TRIAL

In addition to the ineffectiveness of trial and ultimately appellate counsel discussed above, appellate counsel failed to argue that Mr. Jones's entire trial proceeding, from the time he was charged until sentence was pronounced, was structurally defective and constitutionally deficient. Structural error is a "defect affecting the *framework* within which the trial proceeds, rather than simply an error in the trial process itself." **Arizona v. Fulminante**, 499 U.S. 279, 11 S.Ct. 1246, 113 L.Ed.2d 302 (1991). (Emphasis added). Structural errors "infect the entire trial process." **Brecht v. Abramson,** 507 U.S 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Whatever "[t]ranscends criminal process is structural error. " **Johnson v. United States**, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) "[T]hese errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence...and *no criminal punishment may be regarded as fundamentally fair*.'" **Neder v. United States,** 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999), *quoting* **Rose v. Clark,** 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (emphasis added). Structural errors are never harmless and require reversal of conviction. **Arizona v. Fulminante,** 499 U.S. 249, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

The Supreme Court has identified additional specific structural constitutional errors.

Some examples of structural error include unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, and the denial of the right to a public trial, the deprivation of the right to counsel, the lack of an impartial trial judge, and erroneous reasonable doubt instructions to a jury. **Fulminante,** 111 S.Ct. at 1265. *See* **Johnson v. United States**, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)." These lists are by no means exhaustive, but rather illustrative.[16]

Structural error is constitutional error not subject to harmless error analysis.

> In order for constitutional error to be deemed harmless, the Court must find beyond a reasonable doubt, that it did not contribute to the verdict. **Chapman v. California**, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The standard for constitutional violations is well-known: reversal is in order unless the State can show the error was harmless beyond a reasonable doubt. **Arizona v. Fulminante**, 499 U.S. 279, 295, 111 S.Ct. 1246, 1258, 113 L.Ed.2d 302 (1991); **Bartell v. State**, 1994 OK CR 59, ¶¶ 11, 881 P.2d 92, 95-97; **Simpson**, 1994 OK CR 40 at ¶¶ 34, 876 P.2d at 701, *citing* **Chapman v. California**, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The burden thus is on the State--the beneficiary of the error--to prove beyond a reasonable doubt that the error is harmless. **Van White v. State,** 1999 OK CR 10, 990 P.2d 253, 265.

Appellate counsel's neglect of the structural errors of Mr. Jones's case is deficient performance. Structural error raises questions of constitutional magnitude. Constitutional questions must *always* be raised in capital cases. Any capital lawyer who is not at all times cognizant enough of the federal system to raise claims that could be meritorious in either state court or federal courts is ineffective when such a claim is not raised in this Court. Such

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[16] There are other errors that are structural. For instance, the denial of the full number of peremptory challenges allowed by state law amounted to a structural error that affected the entire trial. This error, under the facts of this case, cannot be said to be harmless. **Marrero v. State**, 2001 OK CR 12, 29 P.3d 580, 582.

a claim runs the risk of later being deemed waived and procedurally barred. The factual basis for a claim of structural error was available to appellate counsel but was not adequately pursued. Thus, it is ineffective assistance of appellate counsel and appropriate for post-conviction review.

CAPITAL TRIAL SCHEME IS STRUCTURALLY DEFECTIVE

Oklahoma's capital trial scheme is structurally defective because the procedure for capital cases in Oklahoma is arbitrary and capricious. The District Attorney alone decides whether a defendant charged with murder in the first degree case is going to be subject to the death penalty. The District Attorney charges either malice murder or felony murder, and then at some time prior to trial, even after preliminary hearing, the District Attorney files a Bill of Particulars listing the aggravating circumstances. There is no judicial review of probable cause of aggravators in a capital case. The decision to seek the death penalty is completely up to the State. [17] The arbitrary and capricious infliction of capital punishment violates the prohibition against cruel and unusual punishment found in the Eighth Amendment and violates the guarantee of due process found in the Fourteenth Amendment. **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

PROBABLE CAUSE DETERMINATION ON AGGRAVATION

Appellate counsel and trial counsel failed to argue that it is structural error not to have

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[17] If the death penalty as it is charged in Oklahoma County was not arbitrary and capricious, the State would not need an order from a court prohibiting defense counsel from comparing facts of other non-death penalty cases in capital jury trials. (Tr. Vol. 1 at 16).

a probable cause determination by a magistrate on aggravators alleged by the State. In Oklahoma, every felony case is subjected to a magistrate determination of probable cause that the crime charged by the State was committed and that there is probable cause to believe the defendant committed said crime. Okla. Const. Art. II, § 17. In a capital case in Oklahoma, a magistrate must still determine whether the crime of first degree murder was committed and if there is probable cause to determine that the defendant charged committed the murder. 22 O.S. §258. However, in order for the punishment for murder in the first degree to be enhanced to the death penalty, no judicial finding of probable cause of an aggravator is required. In the Bill of Particulars, the State merely alleges the aggravation, gives notice to the defense that a sentence of death will be sought against the defendant, and specifies what aggravators the State is alleging without specifying the evidence warranting the alleged aggravators.[18]

Because "death is different"[19] and because death is the ultimate penalty, a probable cause determination of the alleged aggravators should be required. The omission of a probable cause determination of aggravation is a structural defect in Oklahoma's capital trial process. Pursuant to **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556

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[18] Defense counsel filed two Motions to Make Bill of Particulars More Definite and Certain (O.R. 90-91 and 359-360).

[19] **Gregg v. Georgia**, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

(2002), aggravating circumstances are elements of the offense of capital murder. As elements of a crime, aggravating circumstances are subject to the same notice and charging requirements as required by state law consistent with constitutional notice and due process guarantees, as well as Fourth Amendment protections against arrests and confinement without probable cause.

Because aggravating circumstance are elements of the offense of capital murder, due process requires each element of the specific offense charged be stated plainly. A magistrate should determine whether there is probable cause to support the aggravators because the aggravators are elements. "[A]n accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason, 1 J. Bishop, Criminal Procedure §§ 87, p. 55 (2d ed. 1872)." **Blakely v. Washington**, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004). (Internal quotations omitted). Oklahoma law forbids the prosecution of a felony by Information without having had a preliminary examination before an examining magistrate. Okla. Const. Art. II § 17. Thus, prosecution of murder in the first degree with aggravation should also have a preliminary hearing. In addition, a bindover order from an examining magistrate after finding probable cause upon preliminary examination of evidence adversarially tested by defense counsel is the only way in which the district courts are vested with jurisdiction in felony cases charged by Information, and yet, the same is not true for murder in the first degree with aggravation. **Harper v. District Court of Oklahoma**

County, 1971 OK CR 182, 484 P.2d 891, 892; **State v. Weese**, 1981 OK CR 19, 625 P.2d 118. Such procedural protections serve to provide notice to the defendant of what he must be prepared to defend against at trial, as well as to provide a check on prosecutorial discretion in filing charges. *See* **United States v. Cotton**, 535 U.S. 625, 122 S.Ct. 1781, 1786-87, 152 L.Ed.2d 860 (2002).

Oklahoma death penalty procedures violate the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution protection against unreasonable detentions and guarantees of notice and due process, because they do not require a preliminary hearing for aggravating circumstances or properly confer jurisdiction upon the district court with respect to aggravating circumstances. Oklahoma's death penalty trial and sentencing procedures have never required that the evidence in support of aggravating circumstances be subject to adversarial testing by a preliminary examination by a magistrate or that district court jurisdiction over aggravating circumstance be dependent upon a bindover upon preliminary examination or finding of probable cause. *See* **Nuckols v. State**, 1984 OK CR 92, 690 P.2d 463, 469, **Wilson v. State**, 1988 OK CR 111, 756 P.2d 1240, **Newsted v. State**, 1986 OK CR 82, 720 P.2d 734, 738-9, **Brewer v. State**,1982 OK CR 128,650 P.2d 54, 61; 21 O.S. §§ 701.10, 701.12. No pre-trial hearing concerning the validity of the alleged aggravating circumstances in Mr. Jones's case was held. The United States Supreme Court made it clear in its recent cases of **Jones v. United States**, 526 U. S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348,

147 L. Ed. 2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and **Blakely v. Washington**, _U.S. _124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) that aggravating circumstances must be subjected to the same procedural requirements of any element in any charge. Therefore, concerning aggravation, the defendant should have the formality of notice, a preliminary examination by magistrate, submission of the all of the elements of fact to the jury, and the burden of proof beyond a reasonable doubt on all factual determinations. Pursuant to Oklahoma law, juries are allowed to sentence a defendant to death without the aggravators being adversarially tested by a magistrate and in which the aggravators never properly become the part of district court jurisdiction and renders Oklahoma procedure as arbitrary and capricious. **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The omission of a probable cause determination of aggravation is a violation of the due process rights of the defendant, in this case, Mr. Jones, and therefore, the error is not harmless. Mr. Jones should be granted a new trial with constitutionally adherent trial scheme.

DIFFERENT JURIES FOR GUILT STAGE AND PUNISHMENT STAGE

Appellate counsel and trial counsel failed to argue that it is structural error not to have a different jury decide guilt/innocence and punishment. In Oklahoma, the same twelve jurors that sit, listen, and decide whether the defendant is guilty or not guilty of murder in the first degree, also decide whether the defendant lives or dies at the hand of the

government. Because of this prospective jurors are asked in voir dire about their feelings and thoughts are concerning the death penalty. Before there is any evidence conveyed to the jury from either the State or the defense, prospective jurors know the defendant is possibly subject to being executed. This procedure speaks of the proverbial "putting the cart before the horse." In cases in which there is a question of guilt of innocence, jury might be pre-disposed to find guilt because the majority of voir dire is spent on death qualifying a jury.

In **Witherspoon v. Illinois**, 391 U.S. 510, 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (1968), the Supreme Court held that a prospective juror in a capital case could be excluded for cause if the juror is unwilling "to *consider* all of the penalties provided by state law." The Supreme Court did not decide "whether the Court might someday find that the Constitution required two separate juries in capital cases: one to determine guilt or innocence, and one to determine punishment. Under this bifurcated proceeding, the first jury may contain jurors who could not vote for the death penalty, although the second jury may not. The Court stated that for it to consider such a proceeding there would have to be a showing that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. **Witherspoon**, at 518, 88 S.Ct. at 1775." **Keeten v. Garrison**, 742 F.2d 129, 130 -131 (C.A.N.C.,1984). (Internal quotations omitted).

In 2004, in **U.S. v. Green,** 343 F.Supp.2d 23, 26 (D.Mass.,2004), the court held that "the government has no entitlement to a death-qualified *guilt/innocence* jury, or for that

matter, to a unitary jury hearing both phases. It only has a right to death-qualify the jury that will determine *punishment. See* **Witherspoon v. Illinois**, 391 U.S. 510, 520, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)." Therefore, having the same jury sit and render verdicts for both stages is not constitutionally required and it risks having a jurors sit with a "fixed, preconceived opinion of the accused's guilt" constituting a denial of due process. **Irvin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

Allowing jurors with a fixed notion of guilt to sit in judgment of guilt is a denial of due process, logic demands that the same be true of allowing jurors with a fixed notion of punishment to sit in judgment during the second stage of a death penalty trial. Oklahoma's trial scheme allows jurors with a "fixed, preconceived notion" of punishment to sit in judgment during the punishment stage of capital trials. Proof of this "fixed, preconceived notion" occurring in Mr. Jones's case was when Juror Victoria Armstrong asked to speak with Judge Bass and informed the Court that she had overheard a juror, Juror Brown, voicing his opinion on a sentence for Mr. Jones before the sentencing stage of the trial had concluded. (Tr. Vol. 12 at 95-104; Tr. Vol. 13 at 20-91). Although the Court did hold an in camera hearing with each individual juror to investigate the possibility of Juror Armstrong's claims, harm was done and could not be cured. Oklahoma's sentencing procedure is structurally unsound.

Clearly, then, Mr. Jones is the victim of a structurally unsound sentencing procedure. Although structural errors are never subject to harmless error analysis, **Neder**, *supra,* **Cage**

v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). **Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), Mr. Jones is still able to demonstrate prejudice, because he did not receive the benefit of a totally impartial jury during second stage.

PROSECUTORIAL MISCONDUCT IN MR. JONES'S CASE

Appellate counsel raised the issue of prosecutorial misconduct[20]; however, it was not raised as structural error. Each instance of misconduct grew upon the other until there was no way to cure it (even if the trial court had wanted to) without granting a mistrial. This becomes structural error and appellate counsel was ineffective for not raising the issue that substantial prosecutorial misconduct becomes incurable, is not harmless, and thus results in structural error.

In addition to the Brief in Chief of Mr. Jones's direct appeal and the allegations of prosecutorial misconduct, another example of prosecutorial misconduct occurred. Another example occurred when Mr. Christopher Whitmire was allowed to stay on the jury. Because Mr. Whitmire was a twice convicted felon, the State violated the Court's order as discussed earlier. (M.H. 2/4/02 at 20) (Tr. Vol. 1 at 33-34). Whether the State knowingly or unknowingly failed to notify the Court of Mr. Whitmire's criminal record, the State was ordered to disclose to the Court and to defense counsel if any prospective juror had criminal

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[20] Proposition XI of the Brief of the Appellant argues several, not just a few, but several instances of prosecutorial misconduct. (Aplt. Brf., Proposition XI, at 62-68). Petitioner, Mr. Jones, hereby incorporates Proposition XI of the Brief in Chief of Appellant for instances of prosecutorial misconduct.

records. Thus, the State's evasive performance of the Court's order to inform the Court and defense counsel of any prospective jurors with criminal records is another example of prosecutorial misconduct.

Failure of defense counsel to object to these instances of prosecutorial misconduct demonstrates that the prosecution ran roughshod over defense counsel thereby destroying a meaningful adversarial process. Failure of defense counsel to object also demonstrates that there was ineffective assistance of trial counsel during both the first and second stages of the trial.

Current pronouncements do not rule out the existence of other structural constitutional defects. The hallmark of a structural constitutional error is a "structural defect affecting the *framework* within which the trial proceeds, rather than simply an error in the trial process itself." **Fulminante,** 111 S.Ct. at 1265. (emphasis added). If prosecutorial misconduct were sporadic, unintentional and inadvertent, that behavior might be properly evaluated totally within the context of the individual trial, and thereby subject to harmless error analysis under **Chapman.** *See, e.g.*, **Donnelly v. DeChristoforo,** 461 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). However, misconduct on the part of the assistant district attorney throughout an individual trial and allowed by the trial court regardless of whether or not the defense objects is a structural defect and should not be subject to harmless error analysis. (Aplt. Brf.).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Although Mr. Jones was not deprived of counsel altogether, he was deprived of experienced capital counsel, which serves as a deprivation of counsel and thereby constitutes structural error. A "violation of right to counsel can never be harmless." **Holloway v. Arkansas**, 435 U.S. 475, 489, 98S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978). According to the **Fulminante** opinion, in creating harmless error analysis, **Chapman v. State of California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) recognized that total deprivation of the right to counsel at trial could never be harmless error. **Fulminante,** 111 S.Ct. at 1264-65.

As demonstrated earlier, Mr. Jones's trial team was inexperienced in capital trials, failed to adversarially test the State's case; and thus was ineffective. The affidavits from some of the jurors in the Appendix of this application show just how ineffective the trial team was. Had the defense attorneys put on a defense and effectively cross-examine the State's witnesses, the outcome of the trial would have been different. Prejudice must be presumed and the error is not harmless.

MISCONDUCT OF JURORS IN MR. JONES'S CASE

Appellate counsel failed to argue that the known alleged misconduct of a juror and the unknown misconduct of a juror created structural error in Mr. Jones's case. As stated earlier, Juror Christopher Whitmire committed perjury during voir dire. His participation in the trial renders his verdict suspect. As such, his perjury is further evidence of the structural error present in Mr. Jones's trial.

Although counsel argues that having the same jury decide guilt and innocence is structurally defective, structural error occurred in Mr. Jones's case because a juror supposedly expressed his decision before all of the evidence had been presented in second stage.– "[A] trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process." **Irvin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639, 6L.Ed.2d 751 (1961).

Also, as stated earlier, Juror Brown was alleged to have expressed an opinion on the appropriate sentence for Mr. Jones before the close of evidence of the second stage. (Tr. Vol. 12 at 95-104; Tr. Vol. 13 at 20-91). Throughout the trial, the Court admonished the jury not to discuss the case with anyone. Unfortunately, even though Juror Brown did not point blank admit to his misconduct, the damage had been done and it could not be cured. It was not harmless error. Clearly, any discussion, thought, or opinion rendered prematurely was juror misconduct. It was and is structural error, it infected the trial, and mistrial should have been declared. Thus, Mr. Jones should receive a new trial.

AGGRAVATORS SHOULD OUTWEIGH MITIGATORS BEYOND A REASONABLE DOUBT

The trial court failed to instruct the jury that a critical factor in the sentencing stage had to be found beyond a reasonable doubt deprived Mr. Jones of a fair sentencing determination in violation of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution resulting in structural error.

In Oklahoma a person, who has been convicted of capital murder, has their sentence

determined by a jury, unless the right to a jury trial is waived. 21 O.S. 2001 § 701.10. In order for a death sentence to be imposed, a jury must make three findings of fact: 1) the person must be found guilty of first degree murder beyond a reasonable doubt; 2) at least one aggravating circumstance must be found beyond a reasonable doubt; and 3) the aggravating circumstance or circumstances must outweigh the mitigating evidence presented at trial. 21 O.S. 2001 § 701.11.

Juries in Oklahoma are instructed, as well as the jury in Mr. Jones's case, that the only fact in the second stage that must be found beyond a reasonable doubt is whether the State has proved an aggravating circumstance. The jury in this case was given the following instructions concerning its sentencing authority:

> Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.
>
> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole. (Instruction Number 7; O.R. 1415)..
>
> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances

outweigh the finding of one or more mitigating circumstances. [21]

(Instruction Number 12, O.R. 1426).

The jury was informed it had two critical facts to determine: 1) whether one or more of the aggravating circumstances exist beyond a reasonable doubt, and 2) if one or more aggravating circumstances were found to exist, whether those outweighed the mitigating circumstances. The jury was instructed that only the first fact had to be found "beyond a reasonable doubt." The failure to inform the jury that the second critical fact had to be likewise found "beyond a reasonable doubt" renders the resulting death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. *See* **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). "As **Apprendi** held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." **Blakely v. Washington**, U.S. ,124 S.Ct. 2531, 2543, 159 L.Ed.2d 403 (2004). Therefore, the fact that the aggravators outweigh mitigators must be proved beyond a reasonable doubt.

In **Jones v. United States**, 526 U. S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), the Supreme Court held "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

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[21] Trial counsel filed an objection to the language of the uniform jury instruction. (O.R. 43-446, 450-453.).

indictment, submitted to a jury, and proven beyond a reasonable doubt." **Id.**, 526 U.S. at 243, n. 6. 119 S. Ct. at 1224 n.6. In **Apprendi**, the Supreme Court held "[t]he Fourteenth Amendment commands the same answer [as **Jones v. U.S.**] in this case involving a state statute." **Id.**, 530 U.S. at 476, 120 S.Ct. at 2355.

In **Ring**, the Supreme Court affirmed **Jones** and **Apprendi** and made the Constitutional principles enunciated within applicable to capital cases. **Ring**, 536 U.S. at 607, 122 S. Ct. at 2442 ("We see no reason to differentiate capital cases from all others in this regard."). In so holding, the Court reaffirmed, again, the principle that

> [i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no mater how the State labels it - must be found by a jury beyond a reasonable doubt.

Id., 536 U.S. at 602, 122 S. Ct. at 2439. Justice Scalia, in his concurring opinion, stated:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.

Id., 536 U.S. at 610, 122 S. Ct. at 2444.

Because of the nature of Oklahoma's capital sentencing scheme, **Jones**, **Apprendi**, and **Ring**, require the capital jury be instructed it must find the aggravating circumstances outweigh any mitigating circumstances *beyond a reasonable doubt* before it may impose the

punishment of death.[22] The trial court's failure to instruct the jury in this manner violated Mr. Jones's state and federal constitutional rights. Because the jury's critical factual determination of whether the aggravating circumstances outweigh any mitigating circumstances is just such a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63. The trial court's Instructions No. 7 and 12, which failed to define properly the required burden of proof, run afoul of the Sixth and Fourteenth Amendments.

In Oklahoma, after a jury finds all the elements of first degree murder beyond a reasonable doubt, the maximum punishment a defendant is exposed to upon a guilty verdict is life imprisonment without parole. The minimum punishment is life imprisonment. This is made clear in the text of 21 O.S. § 701.11, which provides in part:

> Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence

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22 The United States Supreme Court reiterated its holding in **Ring** in **Sattazahn v. Pennsylvania,** 537 U.S. 101,123 S.Ct. 732, 739, 154 L.Ed.2d 588 (2003),

> [W]e held that aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a *greater offense. Id.,* at ----, 122 S.Ct. at 2443 (emphasis added). That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of murder plus one or more aggravating circumstances: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.,* at , 122 S.Ct. at 2442-2443. (Internal quotations omitted).

of imprisonment for life without parole or imprisonment for life.

The jury's finding the elements of first degree murder have been proved beyond a reasonable doubt does not authorize a death sentence at all. Under Oklahoma law, the death sentence is expressly forbidden unless the jury makes two further, unanimous findings: 1) one or more aggravating factors; and 2) the aggravating factors outweigh all mitigating factors.

The instructions given to the jury in this case bear witness to the actual way in which sentencing authority is conferred in capital cases. After the finding of guilt, the jury is instructed it must find one or more aggravating factors before it is authorized to consider, not impose, increasing the penalty to death. As the trial court instructed the jury in Instruction 7: "Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death..." (O.R. at 1415).

Instruction 12 further circumscribes the sentencing authority of the jury, prohibiting a sentence of death unless the jury makes the further finding: "If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt..., the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances." (O.R. at 1426). The cases of this Court have also read the statutes to this effect. In **Paxton v. State**, 1993 OK CR 59, 867 P.2d 1309, 1323, the Court stated, "only

when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed."

The reasoning of **Jones**, **Apprendi**, and **Ring** demonstrate the trial court's instructions failed to comport with the Sixth Amendment's requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63; also **Ring**, 536 U.S. 602, 122 S. Ct. at 2439. The trial court's instructions did require the jury to find the alleged aggravating circumstances only upon proof beyond a reasonable doubt. Yet the jury was not instructed the weighing determination, the most critical factual inquiry and the one which actually authorizes the jury to return a verdict of death, must also be proved to its satisfaction beyond a reasonable doubt.

This omission is plain error of constitutional magnitude. Like other errors denying a defendant's right to an instruction concerning the finding of the essential elements of an offense beyond a reasonable doubt, the error infects the very structure in which the capital sentencing proceeds, and can never be harmless. **Cage v. Louisiana**, 498 U.S. 39, 111 S.Ct. 328, 112 L. Ed. 2d 339 (1990); **Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993). The jury's decision whether the aggravating circumstances outweigh mitigating circumstances is clearly a finding of "fact" for purposes of the Constitutional rule announced in **Ring**. In the closing instruction, the jurors were told:

> In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the State and the defendant during guilt and the sentencing phase of this proceeding.

(Instruction Number 15; O.R. at 1433).

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> You determine *the facts*. The importance and worth of the evidence is for you to decide.

(Instruction Number 15; O.R. at 1433). (emphasis added)

The failure to instruct the jury properly concerning the rigorous burden of proof therefore renders the death sentence imposed against Mr. Jones unconstitutional. The trial court's error in its instructions resulted in a sentence which violates Mr. Jones's Sixth and Fourteenth Amendment rights recognized by the Supreme Court in **Ring**, and further violates his right to due process of law and a fair and reliable capital sentencing proceeding in violation of the Eighth Amendment.

Counsel for Mr. Jones respectfully submits the death sentence imposed against Mr. Jones is unconstitutional. At the very least, this Court should vacate the death sentence and remand for a new sentencing with appropriate constitutional instructions, or in the alternative modify Mr. Jones's sentence to life imprisonment. Mr. Jones's trial was structurally defective and as such, Mr. Jones should be granted relief.

CONCLUSION

Serious constitutional errors occurred in Mr. Jones's trial, thereby undermining

confidence in the reliability of the sentence of death. The specific errors in the present case are an integral part of the structural and systemic errors built in to the manner in which Oklahoma seeks and imposes a sentence of death. The state process is infected with constitutional error. But for the constitutional errors enumerated in this brief, Mr. Jones would in all probability have a sentence other than death. Structural error mandates reversal of the conviction.

Because ultimately these are claims of ineffective assistance of appellate counsel, these claims could not have been raised on direct appeal. Mr. Jones thus deserves relief from his death sentence in the form of a new sentencing proceeding or a modification of his death sentence to life with the possibility of parole or life without the possibility of parole.

Mr. Jones's trial counsel and appellate counsel were ineffective. A twice convicted felon was allowed to render verdicts. Trial counsel was inexperienced and ineffective throughout Mr. Jones's case. Trial counsel failed to investigate possible defenses for Mr. Jones. Because appellate counsel failed to raise the issues discussed above, appellate counsel was ineffective. Mr. Jones's sentence should be vacated, his conviction reversed, and a new trial should be ordered. At the very least, Mr. Jones is entitled to modification of the death sentence to a sentence of life or life without parole.

PROPOSITION TWO

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST- CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW AND MUST BE REVERSED OR MODIFIED TO LIFE IMPRISONMENT OR LIFE WITHOUT PAROLE.

In **United States v. Rivera**, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. **Rivera,** 900 F. 2d at 1469. *See* **Walker v. Engle**, 703 F.2d 959, 963 (6th Cir. 1983). A valid death sentence must be free of any passion, prejudice or arbitrary factors that taint the reliability of the outcome. The decision to impose a death sentence must reflect a reasoned moral judgment as to the defendant's actions and character in light of the offense and the defendant's background. **Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Failure to adhere to these constitutional mandates at every stage of the capital sentencing and review process creates a risk that a death sentence will be based on considerations that are constitutionally impermissible and totally irrelevant to the offender and the crime. In order to maintain the integrity of the criminal justice system and public confidence in the reliability of its results, it is of vital importance that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977),

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct at 2991, 49 L.Ed.2d 944 (1977).

According to the Tenth Circuit,

> Cumulative error analysis is an extension of harmless error, *see* **Rivera**, 900 F.2d at 1469, and [the court should] conduct the same inquiry as for individual error, *id.* at 1470, focusing on the underlying fairness of the trial, *id.* at 1469 (quoting *Van Arsdall*, 475 U.S. at 681); *see also* **United States v. Wood**, 207 F.3d 1222, 1237 (10th Cir.2000). [T]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Hooper*, 314 F.3d at 1178; (quoting **Duckett v. Mullin**, 306 F.3d 982, 992 (10th Cir.2002), *petition for cert. filed*, (U.S. Feb. 25, 2003) (No. 02-9257); *see also* **Rivera**, 900 F.2d at 1469. As in assessing the harmlessness of individual errors, therefore, this court evaluate[s] whether cumulative errors were harmless by determining whether a criminal defendant's substantial rights were affected. **Moore v. Reynolds**, 153 F.3d 1086, 1113 (10th Cir.1998). A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Unless an aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. **Rivera**, 900 F.2d at 1470; *see* **Duckett**, 306 F.3d at 992; **Willingham**, 296 F.3d at 935. **Darks v. Mullin**, 323 F.3d 1001, 1018 (10th Cir. 2003) (Internal quotations omitted).

See also **United States v. Toles**, 297 F.3d 959, 972, 1207 (10th Cir. 2002) (quotation omitted); *see* **United States v. Rivera**, 900 F.2d 1462, 1470 (10th Cir.1990) (en banc), *see* **Cargle v. Mullin,** 317 F.3d 1196, 1206 -1207 (10th Cir. 2003).

Also, in **Cargle v. Mullin**,317 F.3d 1196, at 1200, the Court held

> that prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated among such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment. Finally, we conclude that prejudice from guilt-phase error may be cumulated with prejudice from penalty-phase error.

The Tenth Circuit reiterated this holding of **Cargle v. Mullin** in **Darks v. Mullin,** 323 F.3d 1001, 1018 (10th Cir., 2003), "In assessing cumulative error, only first stage errors are relevant to the conviction, but all errors are relevant to the sentence." Therefore, even though each instance of error alone would not require reversal, some or all errors combined may warrant reversal.

The ineffectiveness of trial and appellate counsel and the errors enumerated by appellate counsel and post-conviction counsel, denied Mr. Jones substantial statutory and constitutional rights. His death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article 2, §§ 7, 9, and 20 of the Oklahoma Constitution.

Mr. Jones should therefore be granted a new trial, or in the alternative, his death sentence should be modified to life imprisonment or life imprisonment without parole.

PRAYER FOR RELIEF

Wherefore, Mr. Jones respectfully requests that this Court enter an order vacating the conviction and death sentence and remand for a new trial or new sentencing. In the

alternative, Mr. Jones respectfully requests this Court to impose a sentence of life imprisonment or life imprisonment without parole, or remand this case for a full and fair evidentiary hearing on the issues presented.[23]

Respectfully submitted,

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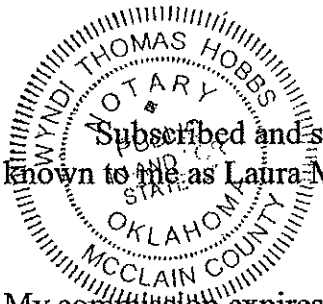
[23] Mr. Jones's Appendix to the Original Post-Conviction Application, Emergency Motion for an Abeyance, Motion Reserving the Right to Supplement the Original Post-Conviction Application and the Motion for Evidentiary Hearing, and all attachments thereto, filed in this case contemporaneously with this original application, is hereby incorporated by reference as if fully set forth.

VERIFICATION OF COUNSEL FOR PETITIONER

Laura M. Arledge, after being duly sworn, states that she is the duly appointed counsel of the Petitioner, Julius Darius Jones; that she has read the foregoing application for post-conviction relief, its argument and authorities; and the statements of fact contained therein, and the documents appended to this application, are true and correct to the best of her knowledge and belief.

Laura M. Arledge, OBA #15462



Subscribed and sworn before me on this 25th day of February, 2005, by the person known to me as Laura M. Arledge.

Notary Public

My commission expires: 7-2-05

My commission number: 01011011

CERTIFICATE OF SERVICE

By my signature below, I certify that a copy of the foregoing was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of the Court of Criminal Appeals this 25th day of February, 2005.

Laura M. Arledge, OBA #15462
Capital Post-Conviction Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
(405) 801-2770
Attorney for Julius Darius Jones

Attachment 2

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JULIUS DARIUS JONES,	)	
	)	
Petitioner,	)	**Case No.** _____
	)	
vs.	)	
	)	**Oklahoma County**
STATE OF OKLAHOMA,	)	**Case CF-1999-4373**
	)	
Respondent.		

AFFIDAVIT IN FORMA PAUPERIS

I, Julius D. Jones state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20TH day of June, 2017 at McAlester, Pittsburgh, OK
(City, County, State)

KIM A. MARKS NOTARY #04006555 EXP. 07/20/20 PUBLIC STATE OF OKLAHOMA

Julius D. Jones
Signature

Mr. Julius D. Jones
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary #04006555
Exp 07-20-2020

AFFIDAVIT IN FORMA PAUPERIS

I, JULIUS D. JONES, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20TH day of June, 2017 at MCALESTER, PITTSBURG, OK.
(City, County, State)

KIM A. MARKS NOTARY PUBLIC STATE OF OKLAHOMA # 04006555 EXP. 07/20/20

Signature

MR. JULIUS D. JONES
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp 07-20-2020

2170/5025

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG 26 1999
PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

STATE OF OKLAHOMA,

vs. Case No. CF-99-4373

JULIUS DARIUS JONES

Defendant.)

INMATE APPLICATION FOR APPOINTED COUNSEL AND ORDER

NAME: JULIUS DARIUS JONES ; SSN: 446/88/5262 ; DOB: 07/25/80

I have been in jail for 26 days. Before my arrest, I was working (YES) (NO)

I live at 12304 GREYSTONE TER. I am married (YES) (NO)

My spouse works at N/A. I am 19 years old

INFORMATION ON ASSETS AND REPRESENTATION

DO YOU OR YOUR SPOUSE HAVE ANY OF THE FOLLOWING:

1. Bank or Credit Union accounts? (YES) (NO) Local Federal Bank $20
2. Stocks, bonds, retirement accounts? (YES) (NO)
3. A House or land? (YES) (NO)
4. Car, truck, van, motorcycle? (YES) (NO)
5. Charge, credit or store cards? (YES) (NO)
6. Money owed to you? (YES) (NO)
7. Furniture? (YES) (NO); Appliances? (YES) (NO) Tools, Computers? (YES) (NO)

HAVE YOU OR YOUR SPOUSE RECENTLY:

8. Sold anything? (YES) (NO); 9. Filed Bankruptcy? (YES) (NO)
10. Sued someone? (YES) (NO); 11. Been sued by someone? (YES) (NO)

IF YOU OR YOUR SPOUSE CURRENTLY RECEIVE ANY OF THE FOLLOWING, HOW MUCH?

12. AFDC? NO; 13. FOOD STAMPS? NO; 14. SOCIAL SECURITY? NO
15. VA BENEFITS? NO; 16. SECTION 8/HOUSING AUTHORITY HELP? NO

17. HAS A LAWYER BEEN HIRED TO REPRESENT YOU IN THIS CASE? (YES) (NO)
18. HAVE YOU ANY FRIENDS/RELATIVES WILLING AND ABLE TO HELP YOU? (YES) (NO)
19. HAVE YOU BEEN ABLE TO CALL ANY LAWYERS ABOUT THIS CASE? (YES) (NO)

JUDGE'S NOTES TO ABOVE QUESTIONS: ( )_____

( )_____

( )_____

( )_____

( )_____

( )_____

I SWEAR OR AFFIRM THAT:

1. All the above information is true and correct to the best of my knowledge;
2. I can not afford a lawyer or pay for transcripts or any other costs;
3. I know I can be charged with perjury if I lied answering questions above;
4. I know I will have to pay an attorney's fee if appointed a lawyer;
5. I am unable to pay the $15.00 application fee and request it be waived.

_____ John D. Jones

WITNESS/INTERPRETER DEFENDANT

Subscribed and sworn to before me this 25 day of Aug, 199 9

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JUN 22 2017

RICK WARREN COURT CLERK Oklahoma County

_____

JUDGE OF THE DISTRICT COURT

ORDER

~~THE COURT FINDS:~~ Based on the foregoing sworn application for appointed counsel and in-court interview, that the defendant (IS) (~~IS NOT~~) indigent and (~~IS~~) (IS NOT) ABLE TO PAY THE $15.00 application fee.

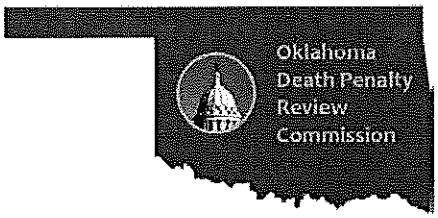
THE COURT ORDERS THAT: The defendant (BE) (~~NOT BE~~) represented by the Public Defender of Oklahoma County or Appointed Counsel in the above styled case until further order of this Court.

THE COURT FURTHER ORDERS THAT: The $15.00 application fee (BE) (~~NOT BE~~) waived for good cause shown above.

DONE this 25 day of Aug, 199 9 _____

JUDGE OF THE DISTRICT COURT

Attachment 3



FOR IMMEDIATE RELEASE

MEDIA CONTACT
Brenda Barwick, APR
(405) 516-9686
brenda@jones.pr

INDEPENDENT BIPARTISAN COMMISSION RECOMMENDS EXTENDING CURRENT MORATORIUM ON THE DEATH PENALTY

Oklahoma City (April 25, 2017) — The Oklahoma Death Penalty Review Commission, a bipartisan group of eleven prominent Oklahomans, unanimously recommends extending the current moratorium on the death penalty in its final report. For nearly a year-and-a-half, the Commission studied all aspects of Oklahoma's death penalty system, from arrest to execution, and today announced its recommendations at a news conference held in the Oklahoma State Capitol.

"The Commission did not come to this decision lightly," said Commission Co-Chair former Governor Brad Henry, of Henry-Adams Companies, LLC. "Due to the volume and seriousness of the flaws in Oklahoma's capital punishment system, Commission members recommend that the moratorium on executions be extended until significant reforms are accomplished."

The bipartisan Commission, comprising five women and six men, represents urban and rural communities, as well as prosecutors, defense attorneys, individuals who have served in each of the three branches of government, law school professors and deans, victims' advocates and Native American advocates. In the course of their work, Commissioners gathered data from state and local government agencies, reviewed scholarly articles, commissioned further research, conducted interviews and heard presentations from those with direct knowledge of how the system operates. Commissioners met with a number of stakeholders who have been directly involved in death penalty cases, including law enforcement, prosecutors, defense attorneys, judges, families of murder victims and those wrongfully convicted.

Gov. Henry added, "Many of the findings of the Commission's investigation were disturbing and led members to question whether the death penalty can be administered in a way that ensures no innocent person is put to death."

Commission members agree that, at a minimum, those who are sentenced to death should receive this sentence only after a fair and impartial process that ensures they deserve the ultimate penalty of death.

(MORE)

To help ensure a fair and impartial process, the Commission's in-depth, 300+ page report includes over 40 recommendations to address systemic problems in key areas, including forensics, innocence protection, the execution process, and the roles of the prosecution, defense counsel, jury and judiciary.

"Our hope is for this report to foster an informed discussion among all Oklahomans about whether the death penalty can be implemented in a way that eliminates the unacceptable risk of executing the innocent, as well as the unacceptable risks of inconsistent, discriminatory and inhumane application of the death penalty," said Gov. Henry.

Joining Gov. Henry as co-chairs are Reta Strubhar, a former judge on the Oklahoma Court of Criminal Appeals (1993-2004) and former Assistant District Attorney of Canadian County (1982-1984); and Andy Lester, of the Spencer Fane law firm and a former U.S. Magistrate Judge for the Western District of Oklahoma who served on President Ronald Reagan's Transition team for the Equal Employment Opportunity Commission (1980-1981).

Members of the Commission are Robert H. Alexander, Jr., of The Law Office of Robert H. Alexander, Jr.; Howard Barnett, President of OSU-Tulsa; Andrew Coats, Dean Emeritus of OU College of Law; Valerie Couch, Dean of Oklahoma City University School of Law; Maria Kolar, Assistant Professor of OU College of Law; Christy Sheppard, a victims' advocate; Kris Steele, Director of The Education and Employment Ministry (TEEM) and former Speaker of the House; and Gena Timberman, founder of The Luksi Group.

To uphold Oklahoma values and aspirations of innocence protection, procedural fairness and justice, Commission members encourage the Oklahoma legislature, executive branch and judiciary to take actions to address systemic flaws in the death penalty system.

The Oklahoma Death Penalty Review Commission came together shortly after the state imposed a moratorium on the execution of condemned inmates while a grand jury investigated disturbing problems involving recent executions, including departures from the execution protocols of the Department of Corrections.

To download a free copy of the Oklahoma Death Penalty Review Commission report, visit okdeathpenaltyreview.org. For more information about the Commission, visit Facebook at okdeathpenaltyreview and on Twitter @OklaDPReview.

The Constitution Project (TCP) assisted the Commission's work with staff and researchers. TCP is a Washington, D.C., bipartisan, nonprofit organization that fosters consensus-based solutions to the most difficult constitutional challenges of our time.

###

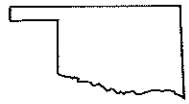
Attachment 4

DEATH. THAT'S THE PENALTY THAT WILL BE SOUGHT BY DISTRICT ATTORNEY BOB MACY FOR THE YOUNG SUSPECT IN THE MURDER OF AN EDMOND INSURANCE EXECUTIVE.

EYEWITNESS NEWS FIVE WAS THE FIRST TO TELL YOU ABOUT THE FILING OF THE CHARGES LATE YESTERDAY AFTERNOON. 19 YEAR OLD JULIUS JONES FACING A PRIMARY CHARGE OF MURDER IN THE FIRST WITH A REQUEST FOR THE DEATH PENALTY.

Its an awful crime. It happened in what should be a safe neighborhood. It happened for the worst of reasons, to get moeny to go buy drugs. Killed a totally innocent person. Put three other lives at risk... it was a crime that richly deserves the death penalty.
ALONG WITH JONES.... 20 YEAR OLD CHRISTOPHER O'NEAL IS ALSO FACING A FIRST DEGREE MURDER CHARGE BUT WITHOUT THE REQUEST FOR THE DEATH PENALTY. O'NEAL IS BELIEVED TO HAVE DRIVEN THE GET-AWAY CAR.
--CHARGES FOR A THIRD SUSPECT, DEMOND COLEMAN, WHO IS BELIEVED TO HAVE HELPED JULIUS JONES AVOID POLICE, ARE EXPECTED TO BE FILED TODAY.

Attachment 5



Appendix IA[1]

Race and Death Sentencing for Oklahoma Homicides, 1990-2012[2]

I. Introduction

In the first 15 years of the 21st century, we have seen several indicators that the use of the death penalty is in sharp decline in the United States. According to the Death Penalty Information Center, between 1996 and 2000 an annual average of 275 new prisoners arrived on America's death rows, but by 2015 this figure had precipitously decreased to 49.[3] The average number of executions per year has fallen nearly fifty percent since the last five years of the twentieth century, from 74 between 1996 and 2000 to 376 in the years 2011-2015.[4] In just the past 10 years, seven states have abolished the death penalty,[5] the Delaware Supreme Court invalidated that state's statute in August 2016,[6] and four more states –Washington, Oregon, Colorado and Pennsylvania – have seen their governors impose moratoria on executions. A September 2016 poll by the Pew Research Center found that slightly less than half of Americans (49 percent) supported the death penalty,[7] the lowest level of support in more than 40 years. A 2015 poll by Quinnipiac indicates that more Americans (48%) now prefer a sentence of Life Imprisonment without Parole (which is available in all death penalty jurisdictions) to a death sentence (43%).[8] Even in Oklahoma, a November 2015 poll found that the majority of the population (52 percent) would prefer a sentence of life plus restitution rather than the alternative of the death penalty.[9] A second poll taken in July 2016 found that 53 percent of the "likely voters" in the state would prefer life

[1] This report is an early draft of an independent study (current through November 1, 2016), submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. The final study will be published by the Northwestern University School of Law in the fall of 2017. *See* Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides, 1990-2012*, 107 Nw. U. J. Crim. L. & Criminology. The Commission is grateful to the authors for providing this study for its consideration during its review of Oklahoma's death penalty. **Please note: the Commission did not edit this draft report and any errors should be attributed the authors. Moreover, the views reflected by the authors do not necessarily reflect those of the Commission.** This study is included in the Commission's report as a reference for Appendix I.

[2] This report was authored by Glenn L. Pierce, Michael L. Radelet, and Susan Sharp. Radelet is a Professor of Sociology, University of Colorado-Boulder; Pierce is a Principal Research Scientist, School of Criminology & Criminal Justice, Northeastern University, Boston; Sharp is the David Ross Boyd Professor/Presidential Professor Emerita, Department of Sociology, University of Oklahoma. The three authors are listed alphabetically; each made equal contributions to this project. The authors wish to thank Melissa S. Jones and Amy D. Miller for their assistance in helping to build the Oklahoma death row data set.

[3] *Death Sentences in the United States From 1977 by State and by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[4] *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year.

[5] New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).

[6] Eric Eckholm, *Ruling by Delaware Justices Could Deal Capital Punishment in the State a Final Blow*, NEW YORK TIMES, Aug. 2, 2016, at A11.

[7] Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades* (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/.

[8] *Quinnipiac University Poll Release Detail*, http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=2229 (June 1, 2015).

[9] *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative (Nov. 19, 2015); *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative (Nov. 19, 2015); Graham Lee Brewer, *New Poll Shows Over Half of Oklahomans Support Life Sentences Over the Death Penalty*, NEWSOK, http://newsok.com/article/5461486.

sentences without parole and mandatory restitution instead of the death penalty.[10] These results document a changing climate around death penalty debates: apparently more Americans now prefer long prison terms rather than the death penalty.

One reason for the decline in support for and the use of the death penalty is growing concerns that the penalty is not reserved for "the worst of the worst." In a nationwide Gallup Poll taken in October 2015, 41 percent of the respondents expressed the belief that the death penalty was being applied unfairly, and a 2009 Gallup Poll found that 59 percent of the respondents believed that an innocent person had been executed in the preceding five years.[11] This concern is undoubtedly on the minds of many Oklahomans, since ten inmates have been released from its death row since 1972 because of doubts about guilt.[12]

In this article, we examine another question that is related to the contention that the death penalty is reserved for the worst of the worst: the possibility that the race of the defendant and/or victim affects who ends up on death row. To do so, we will study all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012, and compare those cases with the subset that resulted in the imposition of a death sentence.

Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population.[13] Racial and ethnic minorities are over-represented among those on death row, which housed 46 men and one woman as of July 1, 2016 (23 white, 20 black, 3 Native American, 2 Latino).[14] Between 1972 and October 31, 2016, Oklahoma conducted 112 executions (with the first occurring in 1990), which ranks second among U.S. states behind Texas and gives Oklahoma the highest per capita execution rate in the U.S.[15]

Of the 112 executed inmates, 67 were white (60 percent), 35 black, 6 Native American, 2 Asian, 1 Latino, and 1 whose race was classified as "Other."[16] The races of the homicide victims in the death penalty cases are also predominately white, with 83 of the 112 executed inmates convicted of killing at least one white victim (74.1 percent), 19 at least one black victim, 7 at least one Asian victim, 5 at least one Latino victim, 1 at least one Native American victim, and 1 who killed two people whose races are classified as "Other" (both the assailant and his two victims were Iraqi).[17]

[10] Silas Allen, *Majority of Oklahomans Support Replacing Death Penalty with Life Sentences, Poll Shows*, THE OKLAHOMAN, Aug. 6, 2016, http://newsok.com/majority-of-oklahomans-support-replacing-death-penalty-with-life-sentences-poll-shows/article/5512693.

[11] *Gallup Poll Topic: Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx.

[12] These former death row inmates include Charles Ray Giddens (released in 1981), Clifford Bowen (1986), Richard Jones (1987), Greg Wilhoit (1995), Adolph Munson (1995), Robert Miller (1998), Ronald Williamson (1999), Curtis McCarty (2007), Yancy Douglas (2009), and Paris Powell (2009). *See* Death Penalty Information Center, *List of Exonerees Since 1973*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty.

[13] https://suburbanstats.org/population/how-many-people-live-in-oklahoma

[14] DEATH ROW USA, Summer 2016, http://www.naacpldf.org/files/publications/DRUSA_Summer_2016.pdf (current as of July 1, 2016).

[15] http://www.deathpenaltyinfo.org/state-execution-rates. Among the executed are two juveniles (one of whom was just 16 at the time of his crime), three women, and seven inmates who dropped their appeals and asked to be executed. *See also Executions Statistics* available from the Oklahoma Department of Corrections, https://www.ok.gov/doc/Offenders/Death_Row/. There have also been four death sentences commuted to prison terms by Oklahoma governors since 1972: Phillip Smith (2001), Osvaldo Torres (2004), Kevin Young (2008), and Richard Smith (2010). *See* Michael L. Radelet, *Commutations in Capital Cases on Humanitarian Grounds*, available at http://www.deathpenaltyinfo.org/clemency#List.

[16] This does not include Timothy McVeigh, executed under federal authority in June 2001 for murdering 168 people in the explosion of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995.

[17] These tallies were calculated from data provided by Death Penalty Information Center, *Searchable Execution Database*, available at http://www.deathpenaltyinfo.org/views-executions. Because four executed inmates were convicted of killing multiple victims who had different races, one execution can fit two or more of these criteria, giving us a total for these calculations of 116.

II. Previous Research

Concerns about the impact of the defendant's and/or victim's race on death penalty decisions have a long history in the U.S. Soon after the 1976 decision in Gregg v. Georgia that breathed new life into death penalty statutes,[18] researchers led by the late University of Iowa legal scholar David Baldus began to study the possible relationships, with the most comprehensive study by Baldus and his team focusing on Georgia.[19] Those race studies conducted prior to 1990 were reviewed by the U.S. government's General Accounting Office in 1990, which produced a report concluding that in 82 percent of the 28 studies reviewed, "race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."[20]

In 2003, Baldus and George Woodworth in effect updated and expanded the GAO Report, reviewing 18 race studies that had been published or released after 1990.[21] Their conclusions are worthy of a lengthy quote:

> Overall, their results indicate that the patterns documented in the GAO study persist. Specifically, on the issue of race-of-victim discrimination, there is a consistent pattern of white-victim disparities across the systems for which we have data. However, they are not apparent in all jurisdictions nor at all stages of the charging and sentencing processes in which they do occur. On the issue of race-of-defendant discrimination in the system, with few exceptions the pre-1990 pattern of minimal minority-defendant disparities persists, although in some states black defendants in white-victim cases are at higher risk of being charged capitally and sentenced to death than are all other cases with different defendant/victim racial combinations.[22]

Overall, Baldus and Woodworth concluded that the studies displayed four clear patterns: 1) with few exceptions, the defendant's race is not a significant correlate of death sentencing, 2) primarily because of prosecutorial charging decisions, those who kill whites are significantly more likely than those who kill blacks to be sentenced to death, 3) black defendants with white victims are especially likely to be treated more punitively, and 4) counties with large numbers of cases with black defendants or white victims show especially strong impacts on black defendants or on those with white victims.[23]

Professor Baldus passed away in 2011, but one of his students, Catherine Grosso, has taken the reigns and assembled a team that has continued Baldus's work. Among their publications is one that recently updated the Baldus literature review.[24] Published in 2014, the researchers had by then identified 36 studies that had been completed after the 1990 GAO Report. Their review identified four patterns:

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[18] Gregg v. Georgia, 428 U.S. 153 (1976).

[19] DAVID C. BALDUS, GEORGE G. WOODWORTH, & CHARLES A. PULASKI, JR. EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

[20] *See* GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD.90-57 (1990), at 5.

[21] David C. Baldus & George Woodworth, G., *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIMINAL LAW BULLETIN 194 (2003).

[22] *Id.*, at 202.

[23] *Id.*, at 214-15.

[24] Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, 3rd ed. (J. R. Acker, R. M. Bohm, & C. S. Lanier, eds. 2014), 525-76.

- Four of the studies did not discover any race effects.
- Four found independent effects of the race of the defendant (that is, effects that remained after statistically controlling for other relevant variables).
- Twenty-four studies in 15 jurisdictions found significant race-of-victim effects.
- Nine found that black defendants with white victims were more harshly treated than other homicide defendants.[25]

Unfortunately, none of these post-1990 studies focused on Oklahoma, and only one credible study has explored the possibility of racial disparities in Oklahoma in the post-*Furman* years.[26] In that study, first published in *Stanford Law Review*,[27] Samuel Gross and Robert Mauro studied all homicides and death sentences in Oklahoma during the 53-month period, August 1976 through December 1980.[28] Thus, these data are almost forty years old. Included were 43 death sentences imposed in 898 cases.[29] Initially the researchers found that death sentences were imposed in 16.7 percent of the cases in which a black was suspected of killing a white (B-W), 6.6 percent of the cases where a white was suspected of killing a white (W-W), and 1.3 percent of the black on black (B-B) cases.[30]

If the homicide was accompanied by other felony circumstances, no cases with black victims resulted in a death sentence, compared to 30.6 percent of the white victim cases. If the victim and defendant were strangers, 21.8 percent of the white Victim cases resulted in a death sentence, compared to 3.4 percent of such cases with black victims.[31]

In 2016 a second study of death sentencing in Oklahoma was published.[32] The paper attempted to look at death sentencing in Oklahoma in a sample of 3,395 homicide cases over a 38-year time span, 1973-2010. Unfortunately, some of the data presented by the authors in that paper is incorrect, so the paper is not useful. For example, in Appendix B we are told that 8 percent of the white-white homicides contained "capital" or "first-degree" (as opposed to "second-degree" murder charges) (137/1,696), compared to 53 percent of the black-black cases (348/659).[33] We are also told that the data set includes 1,030 cases "charged capital" in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma.[34]

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[25] *Id.*, at 558-59. Because some of the studies reached more than one of these conclusions, the sum of these findings (41) is greater than the total number of studies (36).

[26] SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 88-94 (1989).

[27] Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27 (1984).

[28] GROSS & MAURO, *supra* note 26, at 233.

[29] *Id.*, at 235.

[30] *Id.*

[31] *Id.*, at 236.

[32] David P. Keys & John F. Galliher, *Nothing Succeeds Like Failure: Race, Decisionmaking, and Proportionality in Oklahoma Homicide Trials, 1973-2010*, in RAGE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V. KEMP 123 (David P. Keys & R. J. Maratea eds. 2016). We mention this study only to show our awareness of it and to alert future students of the death penalty in Oklahoma that its data is fundamentally flawed, from which no conclusions are possible.

[33] *Id.*, at 142.

[34] Email exchange available with the author (Radelet).

III. Methodology

We examined all cases in which the death penalty was imposed for Oklahoma homicides that occurred between January 1, 1990, and December 31, 2012. Using 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns. We ended with cases in 2012 because we found only one death penalty case for a 2013 murder, and any homicides that occurred in 2013 or later might still be awaiting final disposition. During those 23 years, the state recorded some 5,090 homicides, for an annual average of 221.[35]

A. Homicide Data Set

To begin, we assembled a data set on all Oklahoma homicides with an identified perpetrator over a 23 year period from 1990 to 2012.[36] We obtained these data from the FBI's "Supplemental Homicide Reports," or SHRs. Supplemental Homicide Reports are compiled from data supplied by local law enforcement agencies throughout the United States, who report data on homicides to a central state agency, which in turn reports them to the FBI in Washington for inclusion in its Uniform Crime Reports.[37] While the Reports do not list the suspects' or victims' names (and only the month and year of the offense – not the specific date), they do include the following information: the month, year, and county of the homicide; the age, gender, race,[38] and ethnicity of the suspects and victims; the number of victims; the victim-suspect relationship; weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).[39] Local law enforcement agencies usually report these data long before the defendant has been convicted, so offender data are for "suspects," not convicted offenders.[40]

The SHRs include information on all murders and non-negligent manslaughters, but they do not differentiate between the two types of homicides. They define murders and non-negligent manslaughters as "the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded."[41]

In addition, the SHRs have a separate classification for justifiable homicides, which are defined as "(1) the killing of a felon by a law enforcement officer in the line of duty; or (2) the killing of a felon, during the commission of a felony, by a private citizen."[42] Because the data come from police agencies, not all the identified suspects are eventually convicted of the homicide.

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[35] Oklahoma Crime Rates 1960-2013, available at http://www.disastercenter.com/crime/okcrimn.htm.

[36] This is similar to the methodology used in other studies that Pierce and Radelet have conducted using information from the Supplemental Homicide Reports. *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LOUISIANA LAW REVIEW 647 (2011); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1 (2005); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA LAW REVIEW 1 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 NORTH CAROLINA LAW REVIEW 2119 (2011). The methodology was developed and first used by GROSS & MAURO, *supra* note 26, at 35-42.

[37] *See* http://www.bjs.gov/content/pub/pdf/ntmh.pdf (last visited August 1, 2016). We have used SHR data in other research projects, and an earlier version of this paragraph was included in Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1, 15 (2005).

[38] The racial designations used in the UCR are defined as follows: (1) white. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East. (2) black. A person having origins in any of the black racial groups of Africa. (3) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition. (4) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent. (5) Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa. (6) Unknown). Federal Bureau of Investigation, UNIFORM CRIME REPORTING HANDBOOK 97, 106 (2004).

[39] *See id.*, NAT'L ARCHIVE OF CRIM. JUSTICE DATA.

[40] *Id.*

[41] *See* FEDERAL BUREAU OF INVESTIGATION, *Uniform Crime Reporting Statistics, UCR Offense Definitions*, http://www.ucrdatatool.gov/offenses.cfm (last visited August 1, 2016).

[42] *Id.*

For our project, a total of 4,813 homicide suspects were identified from Oklahoma SHR's for homicides committed during the period 1990 through 2012. Only those SHR cases that recorded the gender of the homicide suspect were included in the sample, effectively eliminating those cases in which no suspect was identified. In other words, for SHR homicide cases where no suspect gender information was recorded, we assumed that the police had not been able to identify a suspect for that particular homicide incident, rendering sentencing decisions irrelevant.

Finally, we constructed one new SHR case and added it to our data when we found a death penalty case with no corresponding case in the existing SHR data. To better pinpoint the race differences, we also dropped 82 cases in which there were multiple victims who were not all the same races, and an additional 64 cases where either the victim or offender was Asian. This resulted in a reduction of 146 homicide cases (three percent of the original sample of 4,813 homicide cases) and one addition, resulting in a final sample size of 4,668 cases.

In addition to the race of the victim, the SHR data include information on the number of homicide victims in each case, and on what additional felonies, if any, occurred at the same time as the homicide. These variables are key to the analysis reported below.

B. Death Row Data Set

Unfortunately, there is no state agency, organization, or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the "Death Row Data Set."

To do this, we used data compiled by the NAACP Legal Defense and Educational Fund, Inc., and issued in a (usually) quarterly publication called "Death Row USA."[43] This highly-respected source lists (by state) the name, race and gender of every person on America's death rows. Unfortunately, it contains no other information about the defendant (e.g., age), victim (e.g., name, age, race), or crime (e.g., date, location, or circumstances).

Copies of most back issues of Death Row USA are available online,[44] and other issues are available in hard copy in many law libraries, including the University of Colorado's. From these sources we made copies of all the Oklahoma inmates listed in the 83 issues of Death Row USA published in the years 1990-2012. From those we identified the *additions* to the lists, since the additions would give us a preliminary list of those sentenced to death for homicides committed on or after January 1, 1990. We were not interested in the names of inmates who were on death row in the first issue we examined since all of those inmates were convicted of murders from the 1970s or 1980s. We were only interested in the additions, and then only those sent to death row for murders committed on or after January 1, 1990.

With that list, we conducted internet searches for information about the crime – specific date, county of offense, name of victim/s (and age, sex, and race), and the like. All those whose crimes occurred in the 1980s or after December 31, 2012 were deleted. We also used a web site maintained by the Oklahoma Department of Corrections to confirm the inmate's race and gender, as well as the county of conviction and the inmate's date of birth.[45] Because this source provides only the date of the conviction, not the date of the offense, information on the date of offense had to be obtained from other sources (primarily newspaper articles and published appellate decisions in the case).

In the end, we identified 153 death sentences imposed against 151 offenders for homicides committed 1990-2012. Two men, Karl Myers and Darrin Pickens, had two separate death sentences imposed in two separate trials for two separate homicides, so each defendant is counted twice.

[43] DEATH ROW USA, http://www.naacpldf.org/death-row-usa.

[44] *See id.*

[45] OKLAHOMA DEP'T OF CORRECTIONS, *Offender Look-Up* Database, https://okoffender.doc.ok.gov/.

On multiple victim homicides, we counted the homicides with at least one female victim as homicides with female victims.

IV. Results

A. Frequencies and Cross-Tabulations

Table 1 displays descriptive statistics from our data. There are a total of 4,668 homicides included, of which 2,060 (44.1 percent) involved both white suspects and white victims, and 1,266 (27.1 percent) involved black suspects and black victims. There are 427 cases with a black suspect and white victim (9.1 percent), and 143 cases with a white suspect and a black victim (3.1 percent).

Table 1: Oklahoma Homicides by Suspect's and Victim's Race/Ethnicity

	Race/Ethnicity of Victim				
	White Only	Black Only	Hisp. Only	Nat. Am. Only	TOTAL
White Suspect	2060	143	38	99	2340
Black Suspect	427	1266	42	30	1765
Hispanic Suspect	65	21	133	8	227
Nat. Am. Suspect	151	15	12	158	336
TOTAL	2703	1445	225	295	4668

Table 2 shows that overall, 143 (3.06 percent) of the homicides with known suspects resulted in a death sentence. Homicides with white victims are the most likely to result in a death sentence. Here 106/2703 resulted in death (3.92 percent), whereas 37/1965 of the homicides with nonwhite victims resulted in death (1.88 percent).[46]

Table 2: Oklahoma Homicides and Death Sentences by Race of Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	2703	106	3.92
Black Victim	1445	27	1.87
Hispanic Victim	225	6	2.67
Native American Victim	295	4	1.36
TOTAL	4668	143	3.06

Table 3 looks at only those homicides with male victims. There are a sufficient number of cases to make conclusions only for cases with either white or black victims.[47] Of the white male victim cases 2.26 result in a death sentence, but only .77 of the black male cases result in a death sentence. Thus, homicides with white male victims are 2.94 times more likely to result in death than cases with black male victims (2.26 divided by .77).

Table 4 shows that homicides with at least one female victim are 4.6 times more likely to result in a death sentence (7.21 percent) than the homicides with no female victims shown in Table 3 (1.57 percent). There are 1,235 cases in the data with at least one female victim, and again we focus on differences between cases with white victims and black victims, and do not look at the other race/ethnicity categories that have low sample counts. The data show only small differences in death sentencing rates among cases with at least one female victim between white (7.57 percent) and black (6.67 percent) victims. Clearly, race makes less of a difference when women are killed than when men are killed.

Table 5 examines the percentage of cases that resulted in a death sentence by the race of the defendant. There is virtually no difference in the probability of a death sentence by race of defendant, with 3.2 percent of the white offenders sentenced to death and 3 percent of the nonwhite defendants.

[46] These 37 suspects were implicated in 27 cases with black victims, 6 with Hispanic victims, and 4 with Native American victims. The 1,965 victims included 1,445 cases with black (only) victims, 225 with Hispanic victim only, and 295 with Native American victim only.

[47] That is, there are so few cases with black, Hispanic, or Native American victims that small fluctuations in the number of death sentences will result in large proportional differences.

Table 3: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with No Female Victims

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	1857	42	2.26
Black Victim	1175	9	0.77
Hispanic Victim	189	1	0.53
Native American Victim	212	2	0.94
TOTAL	3433	56	1.57

Table 4: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with At Least One Female Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	846	64	7.57
Black Victim	270	18	6.67
Hispanic Victim	36	5	13.89
Native American Victim	83	2	2.41
TOTAL	1235	89	7.21

Table 5: Death Sentences by Race of Defendant

		White	Nonwhite	Total
	No	2266	2259	4523
		.968	.970	
Death Penalty Imposed				
	Yes	74	69	143
		.032	.030	
	Total	2340	2328	4668

Chi Square 1.55; 1 df; NS

Table 6: Death Sentences by Race of Victim

		White	Nonwhite	Total
	No	2597	1928	4525
		.961	.981	
Death Penalty Imposed				
	Yes	106	37	143
		.039	.019	
	Total	2703	1965	4668

Chi Square 15.92; 1 df; p<.001

However, there is much more to this story. Table 6 looks at the percentages of death penalty cases by the race of the victim. Here we see that 1.9 percent of those who were suspected of killing nonwhites were ultimately sentenced to death (37 divided by 1965), whereas 3.9 percent (106 divided by 2703) of those suspected of killing whites ended up on death row. The probability of a death sentence is therefore 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites.

Table 7 combines both suspect's and victim's races/ethnicities.[48] The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences was 1.9 and 1.8 percent death sentence respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence, compared to 5.8 percent of the nonwhites suspected of killing white victims. The gender of the victim also makes a very large difference in who ends up on death row. As Table 8 shows, 1.6 percent of the defendants suspected of killing males (no female victims) were sentenced to death, compared to 7.2 percent of those who were suspected of killing one or more women.

Table 7: Death Sentences by Races of Defendant and Victim

Defendant-Victim Race/Ethnicity

(W= White; NW=Nonwhite)

	NW-W	W-W	NW-NW	W-NW	Total
No	606	1991	1653	275	4525
	.942	.967	.981	.982	.969
Death Penalty Imposed					
Yes	37	69	32	5	143
	.058	.033	.019	.018	.031
Total	643	2060	1685	280	4668

Chi Square 25.48; 3 df; p<.001

Table 9 (on next page) shows the likelihood of a death sentence by the race and gender of the victim. Among those suspected of killing white males, 2.3 percent are sentenced to death, whereas among those suspected of killing nonwhite males, only .8 percent are sent to death row. On the other hand, 7.6 percent of those suspected of killing white females are sentenced to death, as are 6.4 percent of those suspected of killing nonwhite females.

Finally, Table 10 (on next page) displays the percent of death penalty cases broken down by the presence of zero, one, or two "additional legally relevant factors." The factors we included are 1) whether the homicide event also included additional felonies, and 2) whether there were multiple victims. All cases had 0, 1, or 2 of these factors present. Table 10 shows what would be expected: 1.7 percent of the cases with no additional legally relevant factors ended with a death sentence, 6.2 percent of the

Table 8: Death Sentences by Gender of Victim (V=Victim)

		No Female V	1+ Female V	Total
	No	3378	1146	4535
		.984	.928	.969
Death Penalty Imposed				
	Yes	54	89	143
		.016	.072	.031
	Total	3433	1235	4668

Chi Square 97.07; 1 df; p<.001

[48] When the analysis examines the potential effect of more than one independent variable the likelihood of a death sentence, we combine the separate racial/ethnic minority categories (i.e., black, Hispanic, and Native American) into a single minority category. Each of these minority subgroups are recognized as groups that are subject to subject to discrimination.

Table 9: Death Sentences by Race/Gender of Victim

(W= white; NW=Nonwhite)

		W-F	W-M	NW-F	NW-M	Total
	No	782	1815	364	1564	4525
		.924	.977	.936	.992	.969
Death Penalty Imposed						
	Yes	64	42	25	12	143
		.076	.023	.064	.008	.031
	Total	846	1857	389	1576	4668

Chi Square 104.69; 3 df; p<.001

Table 10: Death Sentences by Number of Additional Legally Relevant Factors (ALRF)

		No ALRF	1 ALRF	2ALRF	Total
	No	3510	978	37	4525
		.983	.938	.698	.969
Death Penalty Imposed					
	Yes	62	65	16	143
		.017	.062	.302	.031
	Total	3852	1043	53	4668

Chi Square 187.9; 2 df; p<.001

cases with one factor, and 30.2 percent of the cases with two factors.

We now turn our attention to pinpointing the effects of each of our predictor variables.

B. Multiple Logistic Regression Analysis

Table 11 presents the results from a statistical technique called logistic regression.[49] This is the statistical technique of choice used to predict a dependent variable that has two categories, such as whether or not a death

[49] In logistic regression, the dependent variable is predicted with a series of independent variables, such as gender, income, etc. The model predicts the dependent variable with a series of independent variables, and the unique predictive utility of each independent variable can be ascertained. As we have explained elsewhere:

> Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, y=P / 1-P and; (1) $\ln(y) = \hat{a}_{e,} X\hat{a} + {}_{IS}$ where $\hat{a}_{0}$ is an intercept, $\hat{a}_{i}$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ${}_{IS}$ is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.

Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 59 (2002).

sentence is imposed.[50]

Table 11 shows that there are five variables in our model that are associated with who is sentenced to death in Oklahoma: 1) having a white female victim, 2) having a white male victim, 3) having a female victim from a minority race of ethnicity, 4) having one additional legally relevant factor (a homicide event with more than one victims OR one in which there were additional felony circumstances present, and 5) having two additional legally relevant factors present (a homicide event with more than one victims AND one in which there were additional felony circumstances present. The reference category for the latter two variables is "no additional factors." We also included a variable measuring the race of the defendant (white vs. minority), but that factor was not statistically significant.

Table 11: Logistic Regression Analysis of Victim's Race/Gender and Number of Additional Legally Relevant Factors on the Imposition of a Death Sentence (n=4668)

	β	Sig.	Exp β
Independent Variables			
White Female Victim	2.261	.000	9.592
White Male Victim	1.171	.001	3.225
Minority Female Victim	2.161	.000	8.678
One additional aggravator*	1.235	.000	3.439
Two additional aggravators**	2.553	.000	12.847
Defendant's Race (white vs. minority)	.284	.164	1.328
Constant	5.799	.000	.003

*Either multiple victim homicide or homicide with additional felony circumstances

**Both multiple victim homicide and homicide with additional felony circumstances

It is no surprise that having one or both legally relevant factors increases the odds of a death sentence dramatically. Let's focus on the column labeled Exp β. The Exp β for "one additional aggravator" is 3.439 (rounded to 3.4), which is also the odds ratio. Thus, after controlling for all the other variables in the model, the odds of receiving a death sentence are 3.4 times higher in cases with one additional legally relevant factor (compared to cases with no additional legally relevant factors). When the two additional legally relevant factors are both present, the Exp β tells us that the odds of a death sentence are 12.847 (12.8) times higher than cases where no additional factors are present. This is what would be expected – clearly those cases are highly aggravated.

More interesting are the effects of race and gender. Here the excluded category (the comparison group) includes cases with male victims, minority races (black, Hispanic, or Native American). The Exp β in Table 11 shows that the odds of a death sentence for those with white female victims are 9.59 time higher than in cases with minority male victims. The odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence with minority male victims. Finally, the odds of a death sentence for those with minority female victims are 8.68 times higher than the odds of a death sentence with minority male victims. And all these race/gender effects are net of our two control variables (multiple murder victims and the presence of additional felony circumstances), and all are statistically significant.

[50] Logistic regression is a statistical method to predict the value of one variable with a series of other variables. The technique is regularly used in studies of race and death sentencing. See, e.g., David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Equal Justice And The Death Penalty* 78 n.55 (1990) (explaining how logistic regression models can be used to calculate the odds of a death sentence); Gross & Mauro, *supra* note 15, at 248–52 (using a logistic regression model to help predict the probability of a death sentence); Raymond Paternoster et al., JUSTICE BY GEOGRAPHY AND RACE: THE ADMINISTRATION OF THE DEATH PENALTY IN MARYLAND, 1978–1999, 4 MARGINS 1, 51–44 (2004) (using logistic regression to address the relationship between victim and offender race).

V. Conclusion

The data show that death sentencing in Oklahoma is not related to the race of the defendant. However, there are rather large disparities in the odds of a death sentence that correlate with the gender and the race/ethnicity of the victim. Controlling for other factors — the presence of additional felony circumstances and the presence of multiple victims — cases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JULIUS DARIUS JONES, Petitioner, vs. THE STATE OF OKLAHOMA, Respondent.	)	PC Case No.: **Capital Post Conviction Proceeding** PCD 2017 654 Prior Post Conviction Case No.: PCD-2002-630 Direct Appeal Case No.: D-2002-534 Oklahoma County District Court Case No: CF-2009-4373

PETITIONER JULIUS DARIUS JONES'S MOTION FOR DISCOVERY

Petitioner Julius Darius Jones respectfully requests an order of discovery pursuant to Okla. Stat. tit., 22 § 1089(D)(3) and Rules 9.7(D)(2), (D)(4) of the Rules of the Oklahoma Court of Criminal Appeals. Julius is submitting this motion, as well as a Motion for Evidentiary Development, contemporaneously with the filing of his Second Application for Post-Conviction Relief. All averments and supporting attachments presented in Julius's Application are hereby incorporated by reference.

Discovery is necessary because Julius has raised a more than colorable claim that new evidence renders his sentence of death unlawful under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19, and 20 of the Oklahoma Constitution. More particularly, Julius has alleged that a new study of Oklahoma's capital sentencing system establishes that the race of the victim who he was accused and convicted of killing operated, by itself, to increase the likelihood that he would receive a sentence of death.

In support of this claim, Julius has put forward a new study that accompanied the recent Report of the Oklahoma Death Penalty Commission (hereinafter "the Report"). Okla. Death Penalty Review Comm'n, The Report of the Okla. Death Penalty Review Comm'n, The Constitution Project, 2xx-xx (Apr. 25, 2017), http://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf. That study ultimately concluded that race plays a decisive role in who receives the death penalty in Oklahoma. (*See* Report at 211, 214.)

The data provided by the authors of this new study is compelling and, Julius submits, entitles him to relief. However, Julius seeks to further factually develop this claim by exploring the ways in which race influenced various decision makers in his case. This Court should therefore order the depositions of: (1) Sandra Elliott, who was the lead prosecutor at Julius's trial and the wife of Judge Ray Elliott, who presided over Julius's motion to suppress evidence illegally obtained from his parents' residence; (2) Suzanne Lavenue, who was also one of the prosecutors at Julius's trial; (3) Wes Lane, who was the Oklahoma County District Attorney after Bob Macy, and who served in this capacity at the time that Julius's case went to trial; (4) Judge Ray Elliott, who presided over Julius's suppression hearing; and (5) the jurors who served on Julius's jury.

In addition to this, this Court should order records deposition or subpoena duces tecum of: (1) any and all policies and procedures of the Oklahoma County District Attorney's Office concerning standards and practices for seeking the death penalty, including any and all that may have existed between 1999 and 2002; (2) pertinent data on the race and gender of the victims and the defendants in all homicide cases prosecuted by

the Oklahoma County District Attorney's Office from 1990 to 2012, including: (a) the homicide cases prosecuted in Oklahoma County from 1990 to 2012; (b) the list of first-degree murder cases prosecuted in Oklahoma County from 1990 to 2012; (c) the list of cases prosecuted in Oklahoma County from 1990 to 2012 in which the death penalty was sought at any time in the proceedings; (d) the race, gender, and name of each victim for all cases listed in the responses to (a), (b), and (c); (e) the race, gender, and name of each defendant for all cases listed in (a), (b), and (c); and (f) the ultimate sentence for each defendant in all cases listed in (a), (b), and (c).

Julius is aware of this Court's decision in *Bland v. State*, 1999 OK CR 45, ¶ 6, 991 P.2d 1039 (Okla. Crim. App. 1999), which held that during post-conviction proceedings, "the only discovery permitted is through the procedure established for an evidentiary hearing." Considering that, pursuant to this Court's Rules 9.7(D)(4) and (D)(5), an evidentiary hearing in the district court is the appropriate mechanism for Julius to factually develop his claim, discovery is necessary in order to prepare for any such evidentiary hearing on these matters.

This Court should order discovery in order to facilitate meaningful review of Julius's Second Application for Post-Conviction Relief. Okla. Stat. tit. 22, § 1089(D)(3). This Court should grant the requested discovery or remand Julius's case to the district court for an evidentiary hearing and discovery aimed at determining whether and to what degree race—both of Julius and that of his victim—impacted prosecutors' decision to seek the death penalty against Julius in the first instances, and jurors' subsequent imposition of that ultimate sanction.

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.

MARK BARRETT

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JULIUS DARIUS JONES, Petitioner, vs. THE STATE OF OKLAHOMA, Respondent.	PC Case No.: PCD 2017 654 **Capital Post Conviction Proceeding** Prior Post Conviction Case No.: PCD-2002-630 Direct Appeal Case No.: D-2002-534 Oklahoma County District Court Case No: CF-2009-4373

PETITIONER JULIUS DARIUS JONES MOTION FOR EVIDENTIARY HEARING

Petitioner Julius Darius Jones respectfully requests an evidentiary hearing on any controverted, previously unresolved issues of fact that may arise in connection with his Second Application for Post-Conviction Relief filed simultaneously with this motion. All averments and supporting attachments presented in Julius's Application are hereby incorporated by reference.

In his Second Application for Post-Conviction Relief, Julius raises one proposition, which involves issues of fact; specifically, he alleges that race played a decisive role in determining his sentence of death, in violation of the Oklahoma and the United States Constitutions. Julius could not have raised this proposition previously because the grounds upon which it relies 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. That study, appended to the Report of the Oklahoma Death Penalty Commission, comprehensively examined the role that race played in death sentences rendered in Oklahoma capital cases from 1990 to 2012. *See* Okla. Death Penalty Review

Comm'n, The Report of the Okla. Death Penalty Review Comm'n, Appendix IA, 211-22 (Apr.25,2017), http://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf. No reliable study of this nature has been conducted in Oklahoma in almost four decades. *Id.* at 214.

While 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. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(4)-(5). If this Court grants a hearing, in addition to the information presented in the attachments to his application, Julius requests permission to bring forth other evidence as needed to further support the proposition raised in his application.

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.

MARK BARRETT

A-12

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD	)	
	)	PC Case No.: PCD 2017 653
Petitioner,	)	
	)	**CAPITAL POST CONVICTION**
vs.	)	**PROCEEDING**
	)	Second Post Conviction No.: PCD-2011-590
THE STATE OF OKLAHOMA	)	First Post Conviction No.: PCD-2005-143
	)	Direct Appeal No.: D-2004-550; D-2005-171
Respondent.	)	Oklahoma County
	)	U.S. Court of Appeals Case No: 16-6001

THIRD APPLICATION FOR POST CONVICTION RELIEF
- DEATH PENALTY

DEATH PENALTY CASE

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TREMANE WOOD

June 23, 2017

PART A: PROCEDURAL HISTORY

Petitioner, Tremane[1] Wood, appearing specially through undersigned counsel, submits his third application for post conviction relief under Section 1089 of Title 22. Pursuant to Rule 9.7(A)(3) of the Rules of the Oklahoma Court of Appeals, Title 22, Ch. 18, App., a copy of the amended (first) application for post conviction relief filed April 25, 2007, is appended to this third application as Attachment 1, and the second application for post conviction relief is appended to this third application as Attachment 2. The addendum and appendix of exhibits have not been attached, but are available should the Court find them necessary for its review of this application. The sentence(s) from which relief is sought are:

Count I – Death; Count II – Life; Count III - Life

1. (a) Court in which sentences were rendered: Oklahoma County District Court

   (b) Case Number: CF-2002-46 Oklahoma County

2. Date of original sentence: April 2, 2004

3. Terms of sentences:

   Murder in the First Degree - Death

   Robbery with Firearms - Life

   Conspiracy to Commit a Felony - Life

4. Name of Presiding Judge: Honorable Ray C. Elliott.

5. Petitioner is currently in custody at Oklahoma State Penitentiary, H-Unit.

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[1] In many places in the state-court record Tremane Wood's first name is incorrectly spelled as "Termane."

Does Petitioner have criminal matters pending in other courts? Yes (X)* No ()

*Tremane has a habeas corpus petition pending in United States Court of Appeals for the Tenth Circuit under *Tremane Wood v. Terry Royal*, Case No. 16-6001. This is actually a civil or quasi-civil matter but Tremane mentions it here for the sake of completeness. More information is provided in the procedural history.

I. CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime for which a sentence of death was imposed: Murder in the First Degree

Aggravating factors alleged and found:

a. The defendant knowingly created a risk of death to more than one person;

b. The murder was especially heinous, atrocious, or cruel;

c. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

a. The defendant is only 24 years old.

b. The defendant's parents were divorced at a young age.

c. The defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.

d. The defendant has a son, Brendon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

e. The defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

f. The defendant had no father figure during his childhood, and little support from his natural father.

g. The defendant's mother was absent during most of his childhood and was faced with substitute parenting.

h. The defendant has a moderately severe mental health disorder.

i. The defendant can live in a structured prison environment without hurting anyone.

j. The defendant's previous felony conviction was non-violent. This is his first violent conviction.

k. With increased age, the defendant could become a positive influence on others, even in prison.

l. The defendant has been employed in the past.

m. The defendant has had prior drug dependencies.

n. The defendant spent time in foster care.

o. The defendant took directions from older brother, Zjaiton Wood.

p. The defendant is of educational potential.

q. The defendant is of average intelligence.

Was Victim Impact Evidence introduced at trial? Yes (X) No ( )

7. Check whether the finding of guilty was made:

After plea of guilty () After plea of not guilty (X)

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ( )

9. Was the sentence determined by (X) a jury, or ( ) the trial judge.

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed:

Robbery with Firearms – Life

Conspiracy to Commit a Felony – Life

11. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X)

12. If found guilty after plea of not guilty, check whether the finding was made by:

A jury(X) A judge without a jury ( )

III. CASE INFORMATION

13. Name of lawyers in trial court:

Johnny Albert
3001 NW Classen Blvd.
Oklahoma City, OK 73106

Lance Phillips
7 South Mickey Mantle Dr. Suite 377
Oklahoma City, OK 73104

14. Was lead counsel appointed by the court? Yes (X) No ( )

15. Was the conviction appealed? Yes (X) No ( )

To what court or courts? Oklahoma Court of Criminal Appeals, Case Nos. D-2004-550 (dismissed Apr. 4, 2005 as untimely but granting permission to file a new appeal out of time) and D-2005-171.

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument (if set): November 28, 2006

Date of Petition for Rehearing: May 21, 2007

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes (X) No ( )

If so, what were the grounds for the remand?

Ineffective assistance of trial counsel for (1) Failure to Investigate, Develop and Present Mitigation Evidence; and (2) Failure to Properly Impeach State's Witness Brandy Warden.

Is this petition filed subsequent to supplemental briefing after remand? Yes (X) No ( )

16. Name and address of lawyers for appeal:

Perry Hudson
1315 N. Shartel Ave.
Oklahoma City, OK 73103

Jason Spanich
805 Northwest 8
Oklahoma City, OK 73106

17. Was an opinion written by the appellate court? Yes (X) No( )

Wood v. State, 158 P.3d 467 (Okla. Crim. App. 2007).

18. Was further review sought? Yes (X) No( )

Petition for writ of certiorari to the United States Supreme Court:
Denied: *Wood v. Oklahoma*, 552 U.S. 999 (Mem.) (2007).

Amended (First) Application for Post Conviction Relief, filed April 25, 2007.
Denied: *Wood v. State*, Case No. PCD-2005-143, Unpublished Order (Okla. Crim. App. June 30, 2010).

Second Application for Post Conviction Relief, filed July 6, 2011.
Denied: *Wood v. State*, Case No. PCD-2011-590, Unpublished Order (Okla. Crim. App. Sept. 30, 2011).

Petition for a Writ of Habeas Corpus, *Tremane Wood v. Anita Trammell*, Case No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma.

Denied by district court in unpublished opinion on Oct. 30, 2015. However, that decision has been appealed and that appeal is currently pending in United States Court of Appeals for the Tenth Circuit, *Tremane Wood v. Terry Royal*, Case No. 16-6001.

Issues raised in first post conviction application:

Proposition I:	Trial Court Erred by Excluding Testimony from Expert Witness
Proposition II:	Newly Discovered Evidence and New Law Renders Mr. Wood's Conviction and Sentence Suspect and Unreliable
Proposition III:	Petitioner Received Ineffective Assistance of Appellate and Trial Counsel in Violation of the Sixth, Eighth, and Fourteenth Amendments, and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution
Proposition IV:	Prosecutorial Misconduct Resulted in Unfair Proceedings
Proposition V:	Error Occurred When Jurors Moved Vehicles after Being Sworn
Proposition VI:	The Cumulative Impact of Errors Identified on Direct Appeal and Post-Conviction Proceedings Rendered the Proceeding Resulting in the Death Sentence Arbitrary, Capricious, and Unreliable

Issues raised in second post conviction application:

Proposition One:	The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury
Proposition Two:	Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair
Proposition Three:	Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings

Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Proposition Six: Tremane's Due Process Rights Were Violated by the State Withholding Exculpatory Evidence

Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief

Issues raised in Habeas Petition:

Claim One: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Counsel During the Penalty Phase of his Capital Murder Trial Because Counsel Failed to Investigate and Present Mitigating Evidence

Claim Two: Prosecutorial Misconduct During his Trial Deprived Tremane of his Due Process Rights

Claim Three: Tremane Was Denied His Fourteenth Amendment Right to Counsel During His Direct Appeal Proceedings

Claim Four: Because of Errors Regarding the Aggravating Factors in Tremane's case, His Death Sentence Is in Violation of His Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

Claim Five: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury

Claim Six: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

Claim Seven: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of His Due Process Rights and Rendered his State Court Proceedings Unfair

Claim Eight: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Rights to Counsel During His Post-Conviction Proceedings

Claim Nine: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Claim Ten: Tremane's Due Process Rights Were Violated by the State Withholding Exculpatory Evidence

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes (X) No ()

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ()

21. Have other motions been filed with this application or prior to the filing of this application? Yes () No (X)

22. List propositions raised

Proposition One: Newly discovered evidence establishes that the race of the victim combined with the race of Tremane Wood himself, greatly affected the likelihood that Wood would be sentenced to death in violation of Article II Sections 7, 9, 19 and 20 of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

PART C: FACTS

Preliminary Matters

References to the record will be made as follows:

1. The original trial record is referred to as (O.R.1 __ using the page number).

2. Transcripts of the jury trial will be referred to in this application as (Tr. ___ at ___ using the date of the transcript and the page number).

Procedural History

Tremane Wood, along with his older brother Zjaiton ("Jake") Wood, Jake's girlfriend Lanita Bateman, and Tremane's former girlfriend and mother of his child, Brandy Warden, were all charged with first-degree felony murder for the death of Ronnie Wipf that occurred around 3:30 a.m. on January 1, 2002. (O.R.1 79, 614-16.) Tremane

was also charged with one count of robbery with firearms and one count of conspiracy to commit felony (robbery). (*Id.*) A bill of particulars was filed alleging four aggravating circumstances: (1) that during the murder, the defendant knowingly created a great risk of death to more than one person; (2) that the murder was especially heinous, atrocious, or cruel; (3) that the murder was committed for purposes of preventing lawful arrest or prosecution; and (4) there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (*Id.* at 72.)

The jury found Tremane Wood guilty of all charges. (Tr. 4/2/04 at 214-15.) The jury found only three aggravating circumstances, rejecting the circumstance that the murder was committed for purposes of preventing lawful arrest or prosecution; the jury recommended life sentences on the non-capital counts and the death penalty on the capital count. (Tr. 4/5/04 at 163-64.) Wood was formally sentenced on May 7, 2004.

He appealed his conviction and sentences, which was denied. *Wood v. State*, No. D-2005-171 (Okla. Crim. Ct. App. Apr. 30, 2007).

Wood's first Application for Post Conviction Relief was filed on December 26, 2006. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. Ct. App. June 30, 2010).

Wood's Second Application for Post Conviction Relief was filed on July 6, 2011. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, Case No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011).

Wood's Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) was filed in the United States District Court for the Western District of Oklahoma on June 30, 2011. *Wood*

v. Trammell, No. 5:10-civ-0829-HE (W.D. Okla.). That petition was denied on October 30, 2015. Wood's appeal from that denial is currently pending in the United States Court of Appeals for the Tenth Circuit. *Wood v. Royal*, No. 16-6001 (10th Cir.).

Wood now pursues this Third Application for Post Conviction Relief.

The Record in this Proceeding

The record in this proceeding consists of the trial court and direct appeal record, the record in Wood's First and Second Applications for Post Conviction Relief and the Attachments submitted with this Application. An Appendix is filed contemporaneously with this Application containing:

1. Copy of Wood's Amended (first) Post Conviction Application, [Attachment 1].

2. Copy of Wood's Second Post Conviction Application, [Attachment 2].

3. Wood's documentation of In Forma Pauperis status, [Attachment 3].

4. Copy of Appendix IA: Race and Death Sentencing for Oklahoma Homicides, 1990-2012 (from the Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n* (Apr. 25, 2017), http://okdeathpenaltyreview.org/the-report/) [Attachment 4].

Factual Summary

On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser, two young white men from Montana, were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 3/31/04 at 14-15, 102, 120-21, 264; Tr. 4/2/04 at 147.) While at the Bricktown Brewery the men met and socialized with Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany

these men back to a motel, (*id.* at 120-24), which they did after talking to Tremane and Jake, (Tr. 4/1/04 at 146-47).

Once inside the room, the four agreed on $210.00 in exchange for sex. (Tr. 3/31/04 at 125-27.) Lanita pretended to call her mother, but actually called Jake. (Tr. 3/31/04 at 129.)

Jake and Tremane came to the motel room, and Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165-66.) Lanita and Brandy ran out of the room, and Jake and Tremane ran in. (Tr. 4/1/04 at 168.)

Jake approached Arnold with the gun; Tremane approached Ronnie with the knife, and Ronnie put up a fight. (Tr. 3/31/04 at 133-35.) Jake left Arnold to go assist Tremane who had been struggling with Ronnie. (*Id.* at 135.) After Tremane demanded more money from Arnold, he returned to the struggle and Arnold fled the room. (*Id.* at 139.) Ronnie died from a single stab wound to the chest. (Tr. 04/02/04 at 11-12, 18.) Arnold was unable to identify who stabbed Ronnie. (Tr. 3/31/04 at 172.)

At trial, Jake testified during the first stage of trial that he and another man named "Alex" committed this crime. (Tr. 04/02/04 at 89, 91-95.) Jake testified he initially had the gun when he and Alex entered the motel room. (*Id.* at 94.) Jake explained that when he saw that the victim was getting the best of Alex, he went over and punched Ronnie in his head and body. (*Id.* at 94.) Jake grabbed the knife and stabbed Ronnie in the chest. (*Id.* at 94.) At the conclusion of the first stage, the jury found Tremane guilty on all counts. (*Id.* at 214-15.)

In the second stage, the State incorporated all the evidence from the first stage. In addition, evidence of a pizza place robbery committed by Tremane, Jake, Lanita, and Brandy, earlier on December 31, 2001, was also presented. (Tr. 04/05/04 at 17-18, 24-26.)

The defense called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand to testify to mitigating evidence. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 163-64.)

Facts Supporting Third Application for Post Conviction Relief

The relevant facts supporting Wood's postconviction claims are adduced in the individual propositions raised and in the attachments to the Application referenced in those propositions.

PART D: PROPOSITIONS—ARGUMENTS & AUTHORITIES

Proposition One: Newly discovered evidence establishes that the race of the victim combined with the race of Tremane Wood himself, greatly affected the likelihood that Wood would be sentenced to death in violation of Article II Sections 7, 9, 19 and 20 of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

I. Introduction

On April 25, 2017, the Oklahoma Death Penalty Review Commission—a bipartisan group of eleven prominent Oklahomans from varied backgrounds—released a report entitled, "The Report of the Oklahoma Death Penalty Commission" (the Report). In the Report, Commissioners identified "volum[inous]" and "serious[]" flaws in Oklahoma's system of capital punishment—flaws that they concluded pose a significant

and unacceptable risk that innocent Oklahomans are presently facing execution. Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n*, vii-viii (Apr. 25, 2017), http://okdeathpenaltyreview.org/the-report/.

Appended to the Report is an independent and novel study entitled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," (the Study).[1] (Attachment 4.) The Study demonstrates the way in which race plays a decisive role in who is sentenced to death in Oklahoma for homicides committed between 1990 and 2012. The comprehensive Study examines "the possibility that the race of the defendant and/or victim affects who ends up on death row." (*Id.* at 212.)

Among the Study's chief findings was the fact that "[h]omicides with white victims are the most likely to result in a death sentence." (*Id.* at 217.) This new Study illustrates that, in Oklahoma, criminal defendants like Wood who are accused and convicted of killing white victims are nearly *two times* more likely to receive a sentence of death than if the victim is nonwhite. For homicides involving only male victims, a death sentence is approximately *three times* more likely in cases where the victim is white. *Id.* at 220.

That Wood faced a greater risk of execution because of the race of the victim offends the constitutions of the United States and the State of Oklahoma. U.S. Const. amends VI, VIII, XIV; Okla. Const. art. II, §§ 7, 9, 19, 20; *see also Furman v. Georgia*, 408 U.S. 238, 310, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring)

[1] This study is attached hereto as Attachment 4. When citing the Attachment, the page numbers referenced are those printed on the bottom of the pages, which range from 211 to 222.

(stating that the "selection of [a] few to be sentenced to die" on the "basis of race" is "constitutionally impermissible").

The invidious role that race played both in prosecutors' decision to seek the death penalty against Wood in the first instance, and in his jury's decision to impose that ultimate sanction, renders Wood's sentence of death unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution. This Court should therefore grant Wood relief from his unconstitutional sentence. Alternatively, as Wood has stated a more than colorable claim that his rights under the federal and state constitutions have been violated, this Court should grant Wood's requests for discovery and an evidentiary hearing[2] to further factually develop and support this claim.

II. Wood satisfies the successor post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

Oklahoma's Uniform Post-Conviction Procedure Act specifies that this Court "may not consider the merits of or grant relief" based on a subsequent application for post-conviction relief unless:

> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

[2] Wood is filing his Motion for Discovery and Motion for Evidentiary Hearing simultaneously herewith.

> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Rule 9.7(G)(1) of the Rules of the Oklahoma Court of Criminal Appeals, meanwhile, allows this Court to entertain a subsequent application for post-conviction relief where it asserts claims "which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable." Rule 9.7(G)(1), *Rules of the Okla. Court of Crim. App.*, Title 22, Ch. 18, App. Wood's present application for post-conviction relief satisfies these requirements.

First, Wood's claim—that the race of the victim who he was accused and convicted of killing operated to increase the likelihood that he would receive a sentence of death—was not previously raised either on direct appeal or in Wood's initial post-conviction proceeding. Nor could it have been. As explained above, the factual basis for this claim became available only on April 25, 2017, with the preliminary publication of the Study, which provides new and compelling evidence that race indeed plays an invidious role in death-determinations throughout Oklahoma.[3]

The Study's authors, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp (alternatively, the researchers" or the authors), make the novelty of their undertaking clear. They explain that of the "race studies that had been published or released after 1990" that

[3] The study that appears in the Report is only a draft. (Att. 4 at 211 n.1.) The final version will be published in the fall of 2017 in a Northwestern University law journal. (*Id.*)

examined the impact of a criminal defendant's and a crime victim's race on death penalty decisions, "none of these post-1990 studies focused on Oklahoma." (Att. 4 at 213-14.) Rather, the "only [ ] credible study" prior to this one that explored racial disparities in Oklahoma subsequent to the Supreme Court's decision in *Furman*, examined data from just a four-year time-period—August 1976 through December 1980—rendering them nearly forty years old. (*Id.* at 214.) Subsequent to this, "a second study of death sentencing in Oklahoma was published" in 2016. (*Id.*) The 2016 study "attempted to look at death sentencing in Oklahoma in a sample of 3,395 homicide cases over a 38-year time span, 1973-2010." (*Id.*) Pierce, Radelet and Sharp explain, however, that "some of the data presented by the authors in that paper [are] incorrect, so the paper is not useful."[4] (*Id.*) Thus, the present Study is the first methodologically sound examination of the impact that race has upon death sentences in Oklahoma for homicides that occurred from 1990 through 2012.[5]

Moreover, even the raw data—the number of homicide cases, the race and gender of victims and defendants in those cases, and whether those cases resulted in death sentences in Oklahoma—that the authors utilized were not previously available or known.

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[4] "For example, in Appendix B we are told that 8 percent of the white-white homicides contained 'capital' or 'first-degree' (as opposed to 'second-degree' murder charges) (137/1,696), compared to 53 percent of the black-black cases (348/659). We are also told that the data set includes 1,030 cases 'charged capital' in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma." (Att. 4 at 214 (footnotes omitted).)

[5] For a full discussion of the methodology employed by Pierce, Radelet, and Sharp in the present study, see pages 215-17 of Attachment 4.

They note that "there is no state agency, organization or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the 'Death Row Data Set.'" (Att. 4 at 216.) The authors go on to detail the arduous and time-consuming task that they undertook in order to marshal the necessary data. (*Id.*) As a result, the factual basis for Wood's present claim was unavailable and undiscoverable through the exercise of due diligence prior to April 25, 2017.

Second, as explained in detail in Section III below, the facts underlying Wood's present claim are sufficient to establish that but for the unconstitutional consideration of race, he stood a far greater chance of having his life spared. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2). Put differently, the Pierce, Radelet, and Sharp Study establishes by clear and convincing evidence that, but for the victim's race, Wood would not have been sentenced to death.

Wood has therefore met all the requirements to have this Court consider his successor post-conviction application and grant relief.

III. Newly discovered evidence establishes that Wood faced a greater risk of execution by the mere fact that the victim who he was accused and convicted of killing was white.

The central question that researchers Pierce, Radelet, and Sharp set out to answer is whether race—either of homicide defendants and/or victims—"affects who ends up on death row" in Oklahoma. (Att. 4 at 212.) In order to answer this question, they studied all

homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012.[6] (*Id.*) They then compared these cases to the subset of cases that resulted in the death penalty being imposed.[7] (*Id.*) Importantly, the data set used by researchers included, in addition to the race and gender of the victim, information on "the number of homicide victims in each case" as well as "what additional felonies, if any, occurred at the same time as the homicide." (*Id.* at 216.) Pierce, Radelet, and Sharp explain that "[t]hese variables are key" to the Study's analysis and conclusions. (*Id.*)

Researchers found that, overall, 3.06 percent of homicides with known suspects, which occurred in Oklahoma between 1990 and 2012, resulted in the imposition of a death sentence. (*Id.* at 217.) Most troublingly, they also found that "[h]omicides with white victims *are the most likely* to result in a death sentence" in Oklahoma. (*Id.*) To be more specific: researchers found that 3.92 percent of homicides with white victims resulted in death sentences compared to just 1.88 percent of homicides that involved nonwhite victims. (*Id.*) In other words, a criminal defendant in Oklahoma is over *two times* more likely to receive a sentence of death if the victim he is accused of killing is white than if the victim is nonwhite.[8]

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[6] The authors explain that "[u]sing 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns." (Att. 4 at 215.) Throughout this 23-year period, Oklahoma recorded "some 5,090 homicides, for an annual average of 221." (*Id.*)

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

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

In addition to this, researchers found that of those homicides with exclusively male victims, 2.26 percent of cases with white male victims resulted in death sentences compared to just 0.77 percent of cases with black male victims. (*Id.* at 219-20.) That is, a defendant, like Wood, accused of killing a white male victim in Oklahoma is nearly *three times* more likely to receive a death sentence than if his victim were a black male. (*Id.*)

When looking at the combined effect of both a homicide suspect's and victim's races and ethnicities, researchers also discovered the following. The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences were 1.9 and 1.8 percent, respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence compared to 5.8 percent of the nonwhites suspected of killing white victims. (*Id.* at 219.) In other words, nonwhites, like Wood,[9] are nearly *three times* more likely to receive a sentence of death where the victim is white than if the victim is nonwhite. Moreover, in comparing cases with white victims, nonwhite defendants like Wood are nearly *twice* as likely to receive the death penalty as are white defendants. Wood's own race, when considered in conjunction with the victim's, is a significant factor in why he received the death penalty.

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

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[9] Tremane Wood and his brother were referred to at trial as black men with mixed-race heritage; his mother is white and his father was black. (Tr. 4/1/04 at 115; Tr. 4/5/04 at 90.)

221-22.) The researchers concluded that, when other variables were controlled, "[t]he odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence a minority male victims." (*Id.* at 221.) They found that increase in odds was nearly the same as the 3.44 times increased likelihood in a death sentence that occurred in cases that involved the existence of a circumstance *legally permissible* for the jury to consider: either multiple homicide victims or an additional felony circumstance. (*Id.*)

If the imposition of a death sentence is indeed supposed to reflect a "community's outrage" at the crime that a defendant stands accused of committing, *Furman*, 408 U.S. at 303 (Brennan, J., concurring), this Study demonstrates that communities in Oklahoma—a majority-white state[10]—are significantly more outraged when white lives are lost than when nonwhite lives are forfeited. This is precisely the kind of race-based discrepancy in meting out death that is repugnant to the Constitutions of the United States and the State of Oklahoma. U.S. Const. amends. VI, VIII, XIV; Okla. Const. art. II, § 7, 9, 19, 20; *see also McCleskey v. Kemp*, 481 U.S. 279, 366, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (Stevens, J., dissenting) (noting that racial disparity in capital sentencing is "constitutionally intolerable"). In light of this, Wood's death sentence cannot stand.

IV. Additional Relevant Facts

The race of the victims and the interracial nature of the crime was never far from the surface in Wood's case. The prosecutors and the Court repeatedly emphasized that the

[10] "Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population." (Att. 4 at 212.)

man killed, Ronnie Wipf, and his friend and lead witness, Arnold Kleinsasser, (who were both white) were two young men from rural Montana. (*See, e.g.*, Tr. 3/29/04 at 38; Tr. 3/31/04 at 102, 105.) The Court during voir dire repeatedly told prospective jurors that Wipf and Kleinssasser were "young men from Montana," (*see, e.g.*, Tr. 3/29/04 at 38; Tr. 3/30/04 at 7, 90; Tr. 3/31/04 at 20, 54, 61), even referring to them more than once as "the Montana boys," (Tr. 3/29/04 at 152; Tr. 3/30/04 at 26).

The prosecutor (a white man) also raised the specter of race when at least twice during the proceedings when a witness presented with an accent different than his, he told the jurors that he spoke only "red neck." (Tr. 3/31/2004 at 120; Tr. 4/2/04 at 152 ("I don't understand anything but red neck.").) In contrast, the State asserted in closing arguments a witness staying at the motel must have overheard Wood and his brother at the motel because that witness heard "black voices." (Tr. 4/2/04 at 151, 164.)

In describing Wipf and Kleinsasser the prosecutors often highlighted their rural Montana background and their background as Hutterites. (*See, e.g.*, Tr. 3/31/04 at 102, 105; Tr. 4/2/04 at 147.) At one point the prosecutor said that Kleinsasser was just "a rural kid from Montana . . . . Don't judge him too harshly." (Tr. 4/2/04 at 148.)

In addition, Judge Ray Elliott, who presided over Wood's trial (OR1 756-57), displayed troubling attitudes towards people of color, which came to light in 2011. According to the affidavit of Michael S. Johnson, Judge Elliott was overheard referring to Mexicans as "nothing but filthy animals" who "deserve to all be taken south of the border with a shotgun to their heads" and "if they needed volunteers [to do so] that he would be the first in line." Nolan Clay, *Attorney's affidavit expands on claims of unfairness against*

judge in Ersland case, NewsOK (Jan. 7, 2011), http://newsok.com/article/3530111; *see also* Nolan Clay, *Judge in OKC pharmacist's case to announce ruling Monday*, NewsOK (Dec. 8, 2010), http://newsok.com/article/3521788 (noting that Judge Elliott's former clerk, Isla Box, testified that "the judge also said … [i]f they needed somebody to hold a shotgun to their heads to get them back across the border, he'd be the first to volunteer," and that Judge Elliott "has made other derogatory statements about Hispanics"). Judge Elliott admitted that he used the racial epithet "wetbacks" to refer to Mexicans. *Id.*; *see also* American Bar Association Journal, *Okla. Judge Admits 'Wetback' Comment, But Denies Calling Workers 'Filthy Animals'* (Jan. 7, 2011).

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

Significantly, when the jury was polled after announcing the death sentence for the count of murder and asked if those were the verdicts, the jury foreperson, a black woman, said, "Yeah, besides the one. I didn't - - but everybody else did and so I - -" (Tr. 4/5/04 at 165.) When asked to repeat herself, she said: "I signed the one for death because everybody was waiting on me. I didn't want everyone to be here." (*Id.*) Judge Elliot, then said, "My question is are those your verdicts? . . . Because if they are not, I will send you back up. And you will keep going. Are those your verdicts?" (*Id.*) In response to the court, the jury foreperson said yes. (*Id.*)

All these circumstances demonstrate how racial dynamics loomed over this interracial case and infected the proceedings.

V. Law & Argument

A. Wood was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article II Sections 7 and 9 of the Oklahoma Constitution.

The United States Supreme Court has long recognized that race is among the factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *see also Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice."). Indeed, the Supreme Court recently reaffirmed a "basic premise of our criminal justice system," which is that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017). For "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice"). This Court has likewise recognized that race is an "impermissible classification" that ought not to motivate sentencing determinations. *See Cuesta-Rodriguez v. State*, 241 P.3d 214, 235, 2010 OK CR 23 (Okla. Crim. App. 2010); *see also Williams v. State*, 542 P.2d 554, 585, 1975 OK CR 171 (Okla. Crim. App. 1975) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense … it has made as invidious a discrimination as if it had selected a

particular race or nationality for oppressive treatment" (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (internal quotation marks omitted)).

In *McCleskey v. Kemp*, the Supreme Court entertained an Eighth and Fourteenth Amendment challenge to a sentence of death that was brought by Warren McCleskey—a black prisoner on death row in Georgia at the time. 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). The central question before the Court was "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." *Id.* at 282-83.

In support of his constitutional challenges, Mr. McCleskey put before the Court a statistical study (the Baldus study) that demonstrated a stark disparity in the imposition of death sentences in Georgia "based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. The Baldus study indicated that "defendants charged with killing white persons received the death penalty in 11% of the cases," however "defendants charged with killing blacks received the death penalty in only 1% of the cases." *Id.* Taking into account the races of both the defendant and victim, the study also demonstrated that "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* The Baldus study also determined that "prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white

victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." *Id.* at 287. In sum, "the Baldus study indicate[d] that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty." *Id.*

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

The Supreme Court articulated the standard that would guide its analysis of McCleskey's Fourteenth Amendment claim as follows: "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *Id.* (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S. Ct. 643, 646, 17 L. Ed. 2d 599 (1967)). "Thus, to prevail under the Equal Protection Clause," the Court explained, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* (emphasis in original). The Court rejected McCleskey's argument that the Baldus study, standing alone, "compel[ed] an inference that his sentence rest[ed] on purposeful discrimination." *Id.* at 293.

The Court also rejected McCleskey's argument that "the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment." *Id.* at 299. In

the Court's view, the statistics that McCleskey put forward "[a]t most ... indicate[] a discrepancy that appears to correlate with race." *Id.* at 312. And rather than creating a constitutionally significant risk of racial bias influencing Georgia's capital-sentencing scheme, this race-based discrepancy in sentencing is "an inevitable part of our criminal justice system," the Court pronounced. *Id.* at 312.

In the thirty years since *McCleskey* was decided, it has become clear that racial disparities are not simply "an inevitable part" of the United States' criminal justice system. Rather, these disparities persist so long as we as a society are willing to condone them. Jurisdictions around the country have rejected the "inevitability of racism" line of thinking stemming from *McCleskey* and, over the past three decades, have taken steps to confront and root-out the influence of race on criminal justice system outcomes.

Take, for example, Multnomah County, Oregon and Minnesota's Fourth Judicial District. Both of these jurisdictions have reduced racial disparities in their criminal justice system by documenting and tracking racial biases that are inherent in the risk assessment instruments that are used for criminal justice decision-making. According to a 2015 Sentencing Project report entitled, "Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System," Multnomah County developed and implemented new risk assessment technology that led to a "greater than 50% reduction in the number of youth detained and a near complete elimination of racial disparity in the proportion of delinquency referrals resulting in detention."[11] The Sentencing Project, *Eliminating Racial*

[11] In order to weed out inherent racial biases in risk assessment instruments ("RAIs"), officials in Multnomah County "examined each element of their RAI through the lens of

Inequity in the Criminal Justice System 20 (2014), http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/. A similar review of risk assessment instruments was undertaken in Minnesota's Fourth Judicial District. "Three of the nine indicators in the instrument were found to be correlated with race, but were not significant predictors of pretrial offending or failure to appear in court." As a result, "these factors were removed from the instrument." *Id.*

Meanwhile, in the Seattle suburb of Kent, Washington, the police department launched in 2015 an anti-bias training program for police officers called, "Fair and Impartial Policing." Martin Caste, *Police Officers Debate Effectiveness of Anti-Bias Training*, NPR, Apr. 6, 2015, http://www.npr.org/2015/04/06/397891177/police-officers-debate-effectiveness-of-anti-bias-training. The program is geared towards "teach[ing] police officers to recognize their own implicit biases" in an effort to reduce the impact of race alone in law enforcement decisionmaking. *Id.*

The efforts underway in Oregon, Minnesota, and Washington are just a few examples of the admirable steps that numerous jurisdictions across the county are taking to finally confront and eradicate the invidious influence of race on criminal justice system outcomes. It is time for the judiciary follow suit by recognizing that the constitutions of the United States and the State of Oklahoma cannot tolerate, or treat as "inevitable," racial

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race and eliminated known sources of bias, such as references to 'gang affiliation' since youth of color were disproportionately characterized as gang affiliates often simply due to where they lived." The Sentencing Project, *Eliminating Racial Inequity in the Criminal Justice System* at 20.

disparities—or *any* risk of racial bias—in the imposition of "the most awesome act that a State can perform"—that is, the deliberate taking of another life. *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting). *McCleskey* must therefore be overruled. Indeed, even Justice Powell, who provided the decisive vote against Mr. McCleskey and authored the majority opinion, has since recognized that his vote, and the reasoning that informed it, was wrong. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.: A Biography* 451 (1994).

But even if *McCleskey* is not overruled, it still does not preclude the relief that Wood now seeks for several reasons. First, several states have, in the years since *McCleskey*, invalidated death sentences under state law based upon statistical evidence of racial discrimination in their systems of capital punishment. In 2012, for example, a North Carolina court commuted the death sentence of Marcus Robinson to life without parole based on statistical evidence of racial bias in jury selection in North Carolina over a twenty-year period. Cassy Stubbs, *A Case for Statistics and a Victory for Justice, HuffPost*, Apr. 20, 2012, http://www.huffingtonpost.com/cassy-stubbs/a-case-for-statistics-and_b_1440529.html?ref=politics#comments. Meanwhile, judges in Kentucky may determine whether race has influenced a decision to seek the death penalty. Ky. Rev. Stat. tit. L, Ky. Penal Code § 532.300. And at least one state court has explicitly rejected *McCleskey*'s notion that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system," *McCleskey*, 481 U.S. at 312, instead holding that "our history and traditions would *never* countenance racial disparity in capital sentencing." *State v. Marshall*, 130 N.J. 109, 207, 613 A.2d 1059 (N.J. 1992), *cert. denied*, 507 U.S. 929, 113

S. Ct. 1306, 122 L. Ed. 2d 694 (1993) (emphasis added). The New Jersey Supreme Court made the following observation:

> New Jersey would not tolerate a system that condones disparate treatment for black and white defendants or a system that would debase the value of a black victim's life. Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing.

Marshall, 130 N.J. 109 at 214.

Like the Supreme Court of New Jersey, this Court retains the power to set aside Wood's sentence of death under the Oklahoma Constitution based upon the new evidence that Wood has put forward which demonstrates that he was predisposed to receive a sentence of death merely because the victim who he was accused of killing was white. This is true notwithstanding the Supreme Court's decision in *McCleskey*, which rejected statistical evidence of racial disparities in death sentencing alone as sufficient to establish a violation of the Eighth and Fourteenth Amendments to the United States Constitution. *McCleskey*, however, said nothing about states' authority to consider, and to treat as dispositive, such evidence when evaluating race-based challenges to death determinations raised pursuant to their state constitutional guarantees.

McCleskey is no obstacle to the sentencing relief that Wood now seeks for an additional reason. Unlike the petitioner in *McCleskey* who relied on statistical evidence of racial disparities in Georgia's capital-sentencing system *alone* to establish a violation of his rights under the Eighth and Fourteenth Amendments, Wood is relying not just upon the new statistical Study demonstrating how race dictates capital sentencing outcomes in

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

The Supreme Court's decisions since *Furman* have delimited "a constitutionally permissible range of discretion in imposing the death penalty," *McCleskey*, 481 U.S. at 305, that is consistent with the Eighth Amendment guarantee against cruel and unusual punishment. First, the Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited to as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner."). Second, the Court has prohibited states from limiting a sentencer's ability to consider "relevant facets of the character and record of the individual offender or the circumstances of the particular offense" that might warrant a sentence less than death. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). While, in all of these

cases, the Supreme Court has upheld the propriety of a capital sentencer's discretion to impose a sentence of death under the appropriate circumstances, it has unequivocally condemned race playing any role in a sentencer's exercise of this discretion. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017) (explaining that "a basic premise of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are," and that "departure[s] from [this] basic principle" are "exacerbated" where "it concern[s] race"); *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 1993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital-sentencing determinations are rendered "arbitrary and capricious" in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influence by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

As set forth above, the risk that racial considerations impacted Wood's ultimate sentence of death is "constitutionally unacceptable." *Turner*, 476 U.S. at 36 n.8; *see also McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather

than the proven fact of one"); *Caldwell v. Mississippi*, 472 U.S. 320, 343, 105 S. Ct. 2633, 2647, 86 L. Ed. 2d 231 (1985) (observing that a sentence of death cannot withstand constitutional muster whenever the circumstances under which it has been rendered "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999, 103 S. Ct. 3446, 3452, 77 L. Ed. 2d 1171 (1983)). While Wood contends that he is entitled to sentencing relief on the record before this Court, if this Court disagrees and determines that further factual development is necessary, Wood submits that he is entitled to discovery and an evidentiary hearing. This is because has set forth herein more than colorable allegations that his sentence of death violates his state and federal rights.

B. Wood was sentenced to death in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 19, and 20 of the Oklahoma Constitution.

The right to an impartial jury is a fundamental guarantee of both the Oklahoma Constitution and the United States Constitution. Okla. Const. art. II, § 20 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury . . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."); *see also Irvin*, 366 U.S. at 722, 81 S. Ct. at 1642 (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair, impartial jury as "a basic requirement of due process" (internal quotation marks omitted)).

"'Impartial,' as applied to a jury, means not favoring a party or an individual because of the emotions of the human mind, heart, or affections." *Tegeler v. State*, 1913 OK CR 87, 9 Okla. Crim. 138, 130 P. 1164, 1168 (Okla. Crim. App. 1913). Put another way, "an impartial jury means a jury not biased in favor of one party more than another; indifferent; unprejudiced; disinterested." *Stevens v. State*, 94 Okla. Crim. 216, 224, 232 P.2d 949, 958 (Okla. Crim. App. 1951) (internal quotation marks omitted); *see also Irvin*, 366 U.S. at 722, 81 S. Ct. at 1642 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

The United States Supreme Court has emphasized that, when it comes to jurors, racial bias must be especially guarded against. "Racial bias[is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (internal quotation marks omitted). "Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Id.* This Court has similarly recognized that "concerns regarding the risk of racial prejudice infecting a capital sentencing proceeding" are especially and uniquely important in ensuring the right to an impartial jury. *Frederick v. State*, No. D-2015-15, 2017 OK CR 12, ¶ 27, ___ P.3d ___ (Okla. Crim. App. May 25, 2017).

In *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), the United States Supreme Court vacated a defendant's death sentence because the trial court prevented that defendant from asking prospective jurors in voir dire whether the fact that the defendant was black and the victim was white would affect their ability to be

impartial. The Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36-37, 106 S. Ct. at 1688.

In reaching that conclusion, four justices further recognized that, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id.* at 35, 106 S. Ct. at 1687 (plurality opinion of White, J., joined by Blackmun, Stevens, and O'Connor, JJ.). Moreover, "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Id.* Justice Brennan similarly concluded that "[t]he reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent." *Id.* at 39, 106 S. Ct. at 1690 (Brennan, J., concurring in part and dissenting in part) (explaining that he would go further than the majority and vacate the conviction as well).

The Court in *Turner* hoped that questioning the jurors during voir dire about racial bias would serve to eliminate it from juries. But unfortunately, the Study by Pierce, Radelet, and Sharp demonstrates that there is significant racial bias in Oklahoma capital juries in cases involving nonwhite defendants and white victims that voir dire has failed to eradicate. "Asking prospective jurors about their racial attitudes was supposed to provide the tools necessary to rid juries of people whose decisions are likely to be influenced by race of the defendant or victim. But the tools are not working. . . . [W]hatever attempts

may have been made thanks to *Turner*, the risk of racial bias remains all too manifest." William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DePaul L. Rev. 1497, 1532-33 (2004) [hereinafter *Crossing Racial Boundaries*].

Voir dire in a capital case may be inherently flawed because of the death-qualification process in which jurors are questioned about their willingness to sentence a convicted defendant to death. A recent study demonstrated that the "death qualification process results in jurors who are more racially biased, both implicitly and explicitly." Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 568 (2014) [hereinafter *Devaluing Death*].

In addition, despite the hope of *Turner*, because of the stigma of admitting racial prejudice, attempts to question jurors on *explicit* racial biases, not only do not work, they likely strengthen the biases. *Peña-Rodriguez*, 137 S. Ct. at 869; *see also Crossing Racial Boundaries*, 53 DePaul L. Rev. at 1533 ("People are generally reluctant to admit that they hold racist attitudes or opinions or even to acknowledge this to themselves. Researchers find that racially prejudiced people will consciously attempt to avoid appearing to be racially biased.").

Thus, death qualification in itself "actually exacerbate[s]" *implicit* racial biases "by the exclusion of less biased Americans through the death qualification process." *Devaluing Death*, 89 N.Y.U. L. Rev. at 564. Significantly, "jurors who were death-qualified displayed higher levels of bias related to implicit racial worth," i.e., they valued

the lives of white people more than that of black people. *Id.* at 559. In short, the capital-jury selection process does more to ensure biased jurors than guard against them.

Other aspects of jury selection that attempt to minimize explicit racial bias may also exacerbate implicit bias, such as the *Batson*-challenge process. U.S. District Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 150 (2010) ("[P]resent methods of addressing bias in the legal system—particularly in jury selection—which are directed primarily at explicit bias, may only worsen implicit bias.").

But regardless of the reason, the demonstrated increased likelihood of being sentenced to death on the basis of victim's race, raises the question posed by the plurality in *Turner*: "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence, the only question is at what point that risk becomes constitutionally unacceptable." 476 U.S. at 36 n.8, 106 S. Ct. at 1688 n.8 (plurality opinion) (Justice Marshall's opinion, joined by Justice Brennan, concurring in part and dissenting in part, agreed that with the plurality's assessment of the "plain risk" of racial prejudice in any interracial crime involving violence).

Here, "rather large disparities in the odds of the death sentence" in Oklahoma for those convicted of killing a white person as opposed to a victim of any other race, surpasses that tipping point. (Att. 4 at 222.) Where any jury judging Tremane Wood is two times more likely to sentence him to death just because of the race of the victim, he has not been sentenced by an impartial jury. Moreover, when the gender of the white victim is

male or the race of the defendant accused of killing the white victim is nonwhite, an Oklahoma jury is approximately three times more likely to be sentence a defendant to death—having nearly the same effect as legitimate aggravating factors. Oklahoma juries are therefore not impartial in issuing the death penalty.

A defendant "is . . . entitled to be tried before a jury whose minds are open on every issue and not embedded with any pre-conceived opinions." *West v. State*, 1968 OK CR 112, 443 P.2d 131, 133 (Okla. Crim. App. 1968), *overruled on other grounds by McKay v. City of Tulsa*, 1988 OK CR 238, 763 P.2d 703 (Okla. Crim. App. 1988). Wood has not been afforded that right. The process of selecting capital jurors has failed to provide him with jurors able to cast aside their implicit or explicit racial biases. Accordingly, his sentence violates his right to an impartial jury under the Oklahoma and United States Constitutions.

CONCLUSION

Mr. Wood's sentence of death was obtained in violation of his state and federal constitutional rights. He asks that this Court exercise its power to correct this fundamental injustice and grant sentencing relief. Alternatively, Mr. Wood asks this Court grant his request for discovery and an evidentiary hearing in order to allow for the further factual development of his claims.

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VERIFICATION OF COUNSEL

I, Mark Barrett, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

MARK BARRETT June 18, 2017

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.

MARK BARRETT

Attachment 1

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

Termane Wood,	**Oklahoma Co. District Court Case No. CF-02-46**
Petitioner,	**Court of Criminal Appeals Direct Appeal Case No. D-05-171**
-vs-	
State of Oklahoma,	
Respondent.	**Post Conviction Case No. PCD-05-143**

COURT OF CRIMINAL APPEALS FORM 13.11A

AMENDED APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

Submitted By,

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Attorney for Termane Wood

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

Termane Wood,	**Oklahoma Co. District Court Case No. CF-02-46**
Petitioner,	
-vs-	**Court of Criminal Appeals Direct Appeal Case No. D-05-171**
State of Oklahoma,	
Respondent.	**Post Conviction Case No. PCD-05-143**

COURT OF CRIMINAL APPEALS FORM 13.11A

AMENDED APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

Petitioner, Termane Wood, through undersigned counsel, submits his application for post-conviction relief under Section 1089 of Title 22. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death

Pursuant to Rule 9.7A (3)(d), 22 O.S. Ch. 18, App., a copy of the Judgment and Sentences and Death Warrant entered by the District Court are filed herewith and attached to this Application as Exhibits 1-2, *Appendices of Exhibits to Original Application For Post-Conviction Relief.*

1. Court in which sentence was rendered:

(a) Oklahoma County District Court.

(b) Case Number: CF-02-46.

(c) Court of Criminal Appeals: Direct Appeal Case No. D-05-171.

2. **Date of sentence:** May 7, 2004.

3. **Terms of sentence:** Death.

4. **Name of Presiding Judge:** Honorable Ray C. Elliott.

5. **Is Petitioner currently in custody?** Yes.

Where? Oklahoma State Penitentiary, H-unit.

Does Petitioner have criminal matters pending in other courts? No.

If so, where?

List charges:

Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions? No.

If so, where?

List convictions and sentences:

I. CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of death was imposed:**

(a) First Degree Murder, in violation of 21 O.S. § 701.7 (C).

Aggravating factors alleged:

(a) The State alleged:

1. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

2. The murder was especially heinous, atrocious, or cruel;

3. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and

4. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

(O.R. 72).

Aggravating factors found:

(a) The jury found three of the aggravating circumstances alleged by the State in the Bill of Particulars, to-wit:

1. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

2. The murder was especially heinous, atrocious, or cruel;

3. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

(O.R. Vol. IV 617).

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 54 to the jury which "lists" mitigating circumstances. (O.R. Vol. IV at 634). The mitigation evidence submitted to the jury was as follows:

Evidence has been introduced as to the following mitigating circumstances:

1. The Defendant is only 24 years old.

2. The Defendant's parents were divorced at a young age.

3. The Defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.

4. The Defendant has a son, Bredon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him.

5. The Defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

6. The Defendant has no father figure during his childhood, and little support from his natural father.

7. The Defendant's mother was absent during most of his childhood and was faced with substitute parenting.

8. The Defendant has a moderately severe mental health disorder.

9. The Defendant can live in a structured prison environment without hurting anyone.

10. The Defendant's previous felony conviction was non-violent. This is his first violent conviction.

11. With increased age, the Defendant could become a positive influence on others,

even in prison.

12. The Defendant has been employed in the past.

13. The Defendant has prior drug dependencies.

14. The Defendant spent time in foster care.

15. The Defendant took directions from older brother Zjaiton Wood.

16. The Defendant is of educational potential.

17. The Defendant is of average intelligence.

In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well.

Was Victim Impact Evidence introduced at trial? Yes ( ) No (X).

7. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X).

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) or A judge without a jury ( ).

9. Was the sentence determined by (X) a jury, or ( ) the trial judge?

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).

Robbery with Firearms: Mr. Wood received a Life sentence.

Conspiracy to Commit Felony: Mr. Wood received a Life sentence.

11. Check whether the finding of guilty was made:
After plea of guilty ( ) After a plea of not guilty (X).

12. If found guilty after plea of not guilty, check whether the finding was made by:
A jury (X), or A judge without a jury ( ).

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

John Albert (currently suspended from practice)
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

Names and addresses of all co-counsel in the trial court:

Lance Phillips
1 North Hudson Suite 700
Oklahoma City, OK 73102
(405) 235-5944

14. Was lead counsel appointed by the court? Yes (X) No ( ).

15. Was the conviction appealed? Yes(X) No( ).

To what court or courts? Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: June 28, 2005.

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument: November 28, 2006.

Date of Petition for Rehearing (if appeal has been decided): N/A

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes (X) No ().

If so, what were the grounds for remand?

1) Whether the evidence identified in the Application for Evidentiary Hearing was reasonably available to trial counsel in preparation for trial;

2) What, if any, of the records contained in the exhibits were reviewed by trial counsel, or the defense expert;

3) What effect any evidence that was available but not used might have had on trial proceedings;

4) Whether trial counsel's failure to investigate and/or use the evidence was sound trial strategy; and

5) Whether the failure to use the evidence undermines confidence in the outcome of the trial.

Is this petition filed subsequent to supplemental briefing after remand?

Yes (X) No ( ) Not applicable ( ).

16. **Name and address of lawyers for appeal?**

Perry Hudson
435 North Walker, Suite 102
Oklahoma City, OK 73102
(405) 557-7800

Jason Spanich
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 236-0115

17. **Was an opinion written by the appellate court? Yes( ) No ( ) Not applicable (X).**

If "yes," give citations if published: If not published, give appellate case no.:

18. **Was further review sought? Yes ( ) No ( ) Not Applicable (X).**

PART B: GROUNDS FOR RELIEF

19. **Has a Motion for Discovery been filed with this application? Yes (X) No ( ) filed on December 26, 2006.**

20. **Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ( ) filed on December 26, 2006.**

21. **Have other motions been filed with this application or prior to the filing of this application? Yes (X) No ( ).**

If yes, specify what motions have been filed:

Appellant's Request to File Enclosed Motion Ex Parte and Under Seal filed on February 17, 2005.

Appellant's Motion to Hold Proceedings in Abeyance or in the Alternative for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case filed on November 9, 2005.

Appellant's Motion to Continue to Hold Proceedings in Abeyance, or, in the Alternative, for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case. Appellant's Notice to Court filed on July 27, 2006.

Entry of Appearance and Motion to Allow the Capital Post-Conviction Division of OIDS to Withdraw from Further Representation filed on September 7, 2006.

Appellant's Application for an Extension of Time to File Post-Conviction Application filed on October 26, 2006.

Petitioner's Application for Extension of Time to File Post-Conviction Application filed on November 22, 2006.

Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records filed on December 26, 2006.

Motion to File Oversized Brief filed on December 26, 2006.

Motion for Discovery filed on December 26, 2006.

Motion for Evidentiary Hearing filed on December 26, 2006.

Objection to Petitioner's Motion to File Oversized Application filed on December 28, 2006.

Response to Objection to Petitioner's Motion to File Oversized Application filed on January 3, 2007.

Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application.

22. List propositions raised (list all sub-propositions).

PROPOSITION I
TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

PROPOSITION II
NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

A. Hearing was held regarding whether trial counsel should be held in contempt of court.

B. Trial counsel has been suspended from the practice of law.

C. Supplemental report of Dr. Kate Allen.

D. New Rule of Law.

E. Conclusion.

PROPOSITION III
PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

A. Appellate counsel failed to supplement record with impeachment evidence.

PART C: FACTS

STATEMENT OF THE FACTS OF THE CASE, INCLUDING REFERENCE TO SUPPORTING DOCUMENTATION, RECORD, AND APPENDICES

1.
CITATIONS TO THE RECORD

Pursuant to Rule 9.7(D)(1)(a) of the *Rules of the Court of Criminal Appeals*, effective January 1, 1998, the record and transcripts in this case will be referred to using the following abbreviations:

Application:	the instant Original Application for Post-Conviction Relief
O.R.:	the four (4) volumes of Original Record in Oklahoma County District Court Case No. CF-02-46, and two (2) volumes from the remanded evidentiary hearing.
PH:	the three (3) volumes of transcripts of the preliminary hearing held on July 25, 2002, July 26, 2002 and August 14, 2002.
Date Tr.:	the six (6) volumes of transcripts of the jury trial held on March 29 through April 5, 2004.
Date Z.Wood Tr.:	the volumes of transcripts of the jury trial of co-defendant Zjaiton Wood, held February 22, 2005 and February 23, 2005.[1]
Vol. I-III:	the three (3) volumes of transcripts for the remanded evidentiary hearing held February 23, February 27, and March 2, 2006.
Findings:	District Court's Findings of Fact and Conclusions of Law filed on April 6, 2006 regarding the remanded evidentiary hearing.
Supplemental Brief:	Supplemental Brief of Appellant filed after the remanded evidentiary hearing on May 1, 2006.

Any additional record in this post-conviction proceeding, not otherwise mentioned above, also consists of the "record on appeal" as defined by Rule 1.13 (f), and the same shall be considered to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application For Post-Conviction Relief* will be cited as "Ex." followed by the number, such as "Ex. 1." All citations will be separated from the regular text of the brief by

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[1] Counsel for Mr. Wood has filed a Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records. Petitioner's Co-defendant is Zjaiton Wood, Case No. F-2005-246.

parentheses.

2.
PROCEDURAL HISTORY

Termane Laitron Wood[2] was charged by Amended Information in the District Court of Oklahoma County, Case No. CF-02-46, of First-degree Murder in violation of 21 O.S. § 701.7; one count of Robbery with Firearms; and one count of Conspiracy to Commit a Felony To-Wit: Robbery with a Dangerous Weapon. [3] (O.R. 538-39) A Bill of Particulars was filed alleging the existence of four aggravating circumstances: 1) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; 2) the murder was especially heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. 72).

Mr. Wood was represented by John Albert and Lance Phillips. He was tried before a jury from March 29 through April 5, 2004. The Honorable Ray C. Elliott presided over the trial. Assistant District Attorneys Fern Smith and George Burnett prosecuted the case for the State. On April 2, 2004, the jury convicted Mr. Wood on all three (3) charges. After the sentencing stage of the trial, on April 5, 2004, the jury found the existence of three of the four aggravating circumstances and assessed his punishment as death on the murder charge.[4] He was also sentenced to life on the

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2 To maintain consistency for the court, Petitioner will be referred to as Termane; however, his first name is actually Tremane.

3 Termane Wood was charged with three other co-defendants in Case No. CF-2002-46. Co-defendant Lanita Bateman went to jury trial and was convicted on all three counts. She was sentenced to life on the murder count, 101 years on the robbery count, and 10 years on the conspiracy to commit a felony. Co-defendant Zjaiton Wood was tried after Tremane Wood. He was found guilty on all three counts and was sentenced to life without the possibility of parole on the murder count, and sentenced to sixty years on each of the remaining counts. Co-defendant Brandy Warden turned State's evidence and testified against each of her co-defendants. She entered a plea and was sentenced to 45 years on accessory after the fact to murder in the first degree, and 10 years on the conspiracy count. The State dismissed the robbery charge. Upon Ms. Warden's one year review, her sentence was modified from 45 years to 35 years.

4 The aggravating circumstances found were that during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; the murder was especially heinous, atrocious, or cruel; and at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. Vol. IV 617).

robbery charge and life on the conspiracy charge. (O.R. 614-18, 621-22) The District Court pronounced formal judgment and sentence on the verdicts on May 7, 2004.

Mr. Wood appealed the judgments and sentences in *Wood v. State,* Case No. D-2005-171. The appellant's brief in chief and Application for Evidentiary Hearing on Sixth Amendment Claim was filed June 28, 2005. The appellee's brief was filed July 22, 2005, Appellant's reply brief was filed on August 11, 2005.

This Court on November 16, 2005 issued an Order remanding Appellant's case to the district court for an evidentiary hearing regarding Appellant's claim of ineffective assistance of counsel. This remanded evidentiary hearing was held before the district court on February 23, February 27, and March 2, 2006. The District Court issued its Findings of Fact and Conclusions of Law on April 6, 2006. On April 26, 2006, the State filed its Supplemental Brief. On May 1, 2006, Appellant filed his Supplemental Brief of Appellant with this Court. As of the date of the filing of this application, this Court has not issued an opinion in this case.

Mr. Wood's application for post conviction relief was originally due to be filed in this court on July 28, 2006. However, on July 27, 2006, Mr. Wood by and through counsel Vicki Ruth Adams Werneke, Chief of the Capital Post Conviction Division of the Oklahoma Indigent Defense System, filed a Notice advising that Kevin Pate- assigned counsel for Mr. Wood had resigned. Due to Mr. Pate's resignation, counsel advised this Court that Mr. Wood's application for post conviction relief could not be filed by July 28, 2006, and requested an extension of time.

On August 7, 2006, this Court granted Appellant's request for an extension of time. This Court extended the time for filing until October 27, 2006. On September 7, 2006, the undersigned counsel entered her appearance in this case and requested this Court to allow the Capital Post Conviction Division of the Oklahoma Indigent Defense System be allowed to withdrawal from Petitioner's representation. On September 22, 2006, this Court granted the undersigned's motion allowing the Capital Post Conviction Division of the Oklahoma Indigent Defense System to withdraw from Petitioner's representation. The undersigned requested, and was granted two (2)

thirty (30) day extensions of time in which file his application. Said Application was due to be filed on December 25, 2006.

Pursuant to 22 O.S.Supp.1996 § 1089 and Rule 9.7 of the Court of Criminal Appeals Rules, 22 O.S.Supp.1997 Ch. 18., Mr. Wood, by and through his appointed counsel, timely filed this Original Verified Application for Post-Conviction Relief on December 26, 2006. Petitioner on this date also filed a Motion to File Oversized Brief, Motion for Discovery,Motion for Evidentiary Hearing and Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records.

The State, on December 28, 2006, filed an Objection to Petitioner's Motion to File Oversized Application. Petitioner filed a Response to Objection to Petitioner's Motion to File Oversized Application on January 3, 2007. This Court entered an Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application on March 14, 2007. This order provided Petitioner had 45 days from the date the order was entered to comply with page limitations. Petitioner, by and through his appointed counsel, timely files his Amended Verified Application for Post-Conviction Relief.

3.

FACTS RELATING TO THE OFFENSE

The State's theory of the case was that four individuals, Brandy Warden, Lanita Bateman Termane Wood, and his brother Zjaiton (Jake) Wood set out on a crime spree December 31, 2000, which resulted in the death of Ronnie Wipf. The State argued Tremane Wood was guilty of felony murder. The State's star witness was Brandy Warden, who had turned State's evidence and testified against her three co-defendant's. The State's other key witness was victim Arnold Kleinsasser.

On December 31, 2000, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (03/31/04 Tr. 118) While at the Bricktown Brewery the men met and began to socialize with two women, Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back

to a motel. (03/31/04 Tr. 120-24)

Since the men were not from Oklahoma, Brandy Warden drove their vehicle to a motel of the women's choice, the Ramada Inn. (03/31/04 Tr. 124) Although the men wanted separate rooms, the women wanted only one room. (03/31/04 Tr. 126) Although Mr. Kleinsasser paid for the room, the room was also listed under Ms. Warden's name because he was under twenty-one years of age. (03/31/04 Tr. 125-26)

Once inside the room, the women demanded $210.00 from the men for sex. (03/31/04 Tr. 125-27) Since the men did not have that much money on them, Brandy Warden drove Mr. Kleinsasser to an ATM to get the cash. (03/31/04 Tr. 127) When they returned to the room, the money exchanged hands, and the women excused themselves to the restroom. (03/31/04 Tr. 127) Not long after the girls had entered the restroom, someone started pounding on the motel room's door and yelled, "Brandy, are you in there? Brandy are you ready to go home?" (03/31/04 Tr. 130)

Although the women tried to exit the room, Mr. Wipf prevented them from leaving and refused to answer the door. (03/31/04 Tr. 129) Mr. Wipf demanded that the women return their money and told Mr. Kelinsasser to call the police. (03/31/04 Tr. 131) However, before he could call the police, Ms. Bateman picked up the phone and proceeded to act as if she were calling the police. (03/31/04 Tr. 118) Eventually, Mr. Wipf decided to let the girls out and opened the door. However, as soon as he did, two masked men entered the room as the two women exited. (03/31/04 Tr. 131-32)

The two men that entered the room were wearing ski masks, long black trench coats, and black leather gloves. One man was described as a black man, bigger than the other, about 5 feet 11 inches tall, weighing approximately 220 pounds, with a small caliber handgun. Other man was described as a white man, approximately 5 feet 11 inches tall, weighing about 190 to 200 lbs, and carrying a knife. (03/31/04 Tr. 131-34) Mr. Kleinsasser testified that the smaller of the two men appeared to be white. (03/31/04 Tr. 171, 173)

Mr. Kleinsasser testified that the man with the gun immediately approached him and demanded his money, which he gave him from his wallet. (03/31/04 Tr. 131, 133, 134) After taking

the money, this man then left him to go and assist the smaller man who had been struggling with Mr. Wipf since they had entered the room. (03/31/04 Tr. 135) Mr. Kleinsasser testified that he heard one of the men say "just shoot the bastard" and a shot was fired. (03/31/04 Tr. 138) Shortly thereafter he was approached by the smaller man with the knife who demanded money from him as well. After Mr. Kleinsasser informed the smaller man that he had already given the other man all his money, the smaller man went back to assist the larger man with Mr. Wipf. (03/31/04 Tr. 139) Once the smaller man turned his back, Mr. Kleinsasser made his escape from the motel room. (03/31/04 Tr. 139-40) Mr. Kleinsasser learned of his friend's death the next morning at approximately 6:00 a.m. when he returned to the motel. (03/31/04 Tr. 144) Mr. Kleinsasser was unable to testify as to which guy stabbed Mr. Wipf. (03/31/04 Tr. 172)

Chief Medical Examiner Fred Jordan testified Mr. Wipf had not been shot, but had died from a single stab wound to his chest, which he classified as a homicide. (04/02/04 Tr. 11-12, 18) He opined that this single stab wound had caused Mr. Wipf to lose a large amount of blood into his right chest cavity. (04/02/04 Tr. 11-12) Dr. Jordan also testified he observed several fresh bruises and scraps along with a number of superficial knife wounds, which appeared to be defensive wounds, on Mr. Wipf's body. (04/02/04 Tr. 14-16)

The State, through the testimony of co-defendant Ms. Warden, was able to piece together the sequence of events that occurred December 31, 2000. Ms. Warden stated that earlier that day she, Lanita Batemen, and Tremane and Zjaition Wood, had gone to Wal-Mart where she purchased ski masks and gloves. (04/01/04 Tr. 138) Ms. Warden also testified that she and Ms. Batemen knew that they were setting the two men up when they left the Bricktown Brewery. (04/01/04 Tr. 188) Ms. Warden admitted she provided identification for the motel room and that she took Mr. Kleinsasser to the ATM for the money they demanded, and that he gave her this money when they returned to the room. (04/01/04 Tr. 154-63)

Ms. Warden testified she heard Zjaiton Wood yelling at the door. (04/01/04 Tr. 166) She also testified that as she and Lanita Bateman ran out of the motel room, she observed that the smaller of

the two men had a knife, while the larger man had the gun. (04/01/04 Tr. 178) The women waited in the car until the men returned. (04/01/04 Tr. 169) Ms. Warden testified Termane Wood was the smaller of the two men, and Zjaiton Wood was the larger of the two men. (04/01/04 Tr. 134-35)

At trial, the Defendant denied any involvement. Defendant's brother Zjaiton Wood testified during the first stage of trial that he and another man named "Alex" committed this crime. (04/02/04 Tr. 89, 91-95) Zjaiton Wood testified he initially had the gun when he and Alex entered the motel room. (04/02/04 Tr. 94) Zjaiton explained that when he saw that the victim was getting the best of Alex and he went over and started punching the victim in his head and body. (04/02/04 Tr. 94) Zjaiton testified that he grabbed the knife, "I grabbed the victim by the head and I stabbed him in the chest and told him I was God.... Just to let him know, you know, he was dealing with a force to be reckoned with." (04/02/04 Tr. 94) At the conclusion of first stage, the jury found Tremane Wood guilty on all counts. (04/02/04 Tr. 214-15)

In second stage, the State incorporated all the evidence from first stage, and recalled their star witness Brandy Warden to the stand to testify. Ms. Warden testified about the armed robbery of La Franca's Pizza that had occurred at approximately 10:00 p.m. on December 31, 2000. Again, she alleged the four had been involved and that Termane Wood used a knife while Zjaiton Wood used a handgun. (04/05/04 Tr. 17-18)

The State also called Keramat Taghizadeh, the owner of the La Franca's Pizza, who had been robbed that night. He testified that he was robbed by two men. He stated that the larger man had a gun, and that the smaller man had a knife. He testified that the larger man hit him in the head with the gun after he tried to set off the alarm. (04/05/04 Tr. 24-26)

In second stage, the Defendant called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand. Their testimony, or lack thereof, is discussed in greater detail in the following Propositions. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (04/05/04 Tr. 163-64)

Additional relevant facts will be detailed and developed in the following Propositions.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION I
TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

During the remanded evidentiary hearing (hereinafter "hearing"), defense counsel attempted to elicit expert testimony from Dr. Kate Allen. Despite her qualifications,[1] the State objected under *Daubert*[2] and expressed "I don't think that a social worker should be allowed to testify in any psychological considerations or conclusions." (*Id.* at 203) Counsel responded Dr. Allen's testimony was "prototypical mitigation evidence. This is the type of mitigation evidence that should always be presented, if available, in a capital case." (*Id.* at 208) The trial court sustained the State's objection and refused to allow Dr. Allen to testify.[3] (*Id.* at 219)

Okla.Stat.tit. 12, § 2702, provides an expert witness may testify in the form of an opinion or otherwise, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education." An expert witness has been defined by this Court as one who has scientific knowledge acquired by study or practice, or both and are ordinarily persons who have experience and knowledge into matters which are not generally known. *See Kennedy v. State*, 1982 OK CR 11, 640 P.2d 971, 977.

In *Salazar v. State*, 1996 OK CR 25, 919 P.2d 1120, this Court was confronted with this very issue. In *Salazar*, this Court determined a social worker qualified as an expert witness under 12 O.S.

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[1] Dr. Allen has a bachelor's degree in psychology/sociology from Texas Christian University, a master's degree in clinical social work from the University of Texas, and a doctoral degree of philosophy in family sociology from American University in Washington D.C. She has practiced in the field of sociology for 35 years and has treated or worked with hundreds of people. She has been a clinical social worker and a professor. She is currently a consultant in civil and criminal trials as an expert witness. (*Id.* at 199- 200) She can make a psychiatric diagnosis through her training, experience, and her degrees; however she cannot prescribe medication or give psychometric testing. (*Id.* at 212-13) She has testified in 6 other states as to her diagnoses and she has never been prevented from testifying as an expert because she was not qualified. (*Id.* at 213-14) Dr. Allen has personally evaluated 800 clients for neurological or psychological issues, and she personally evaluated Mr. Wood. (*Id.* at 214) Dr. Allen testified that as a clinical social worker she can still make Axis I DSM IV diagnoses as to psychological and psychiatry issues. (*Id.* at 215-16)

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

[3] Dr. Allen's report was admitted as Def. Ex. 8 at the hearing, and has been attached as Ex. 3.

§ 2702, and could provide testimony during the second stage proceeding in a capital case. In *Salazar*, the social worker provided testimony she had "specialized knowledge which she acquired through formal education," and "she had developed skills through training and working in the field." *Id.* at ¶ 32 The Court also found it relevant "she was able to describe how she arrived at her opinions and that the method she used was consistent with others in her field." *Id.* The Court also noted the social worker had been recognized as an expert in another court, and " it is a factor to be considered in determining if the party offering the witness has met the foundational requirements of having the witness declared an expert." *Salazar* at ¶ 32, n.15. The Court determined she "was qualified to render relevant expert opinions within her field of expertise and that the trial erred by not permitting her to testify." *Id.* at ¶ 33.

Clearly Dr. Allen qualified as an expert witness. Because her testimony was not admitted, the trial court and subsequently this Court, was left with volumes of new records without an explanation as to its relevance or impact. Sadly, this Court remanded this case for a hearing on whether this new evidence would have impacted the trial proceedings, and, to this day, that question remains unanswered. The trial court's failure to allow Dr. Allen to testify deprived Petitioner of his due process rights to rebut the State's evidence and to present mitigating evidence in his own behalf, in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. *Skipper*, 476 U.S. 1, at 4-5, 106 S.Ct. 1669, at 1671, 90 L.Ed.2d. 1 (1986); *Barefoot v. Estelle*, 463 U.S. 880, 896-97, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983). Petitioner was also deprived of a fair and reliable sentencing proceeding guaranteed him under the 6th, 8th, and 14th Amendments. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). It cannot be faithfully said that this error was harmless beyond a reasonable doubt and his death sentence must be vacated. *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690, 701; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

PROPOSITION II
NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

Petitioner has uncovered newly discovered evidence which renders his conviction unreliable. This evidence was not or could not have been raised in his direct appeal. Since this evidence supports the conclusion the outcome would have been different, Petitioner respectfully requests his convictions and sentences be reversed and his case remanded to district court for a new trial.

A. Hearing was held regarding whether trial counsel should be held in contempt of court.

On March 9, 2006, shortly after trial counsel testified as a witness at the evidentiary hearing regarding his professional performance, a contempt hearing was held in Oklahoma County District Court addressing Mr. Albert's conduct on March 1, 2006. (Ex. 4-A, at 3, 5,7) Despite the lack of a transcript from the March 1st hearing, one can ascertain Mr. Albert initially failed to appear before the court, and then when he did appear, he was not ready to proceed on the behalf of 3 clients. (*Id.* at 14) The court noted, "In one of those cases Mr. Colston is charged with murder in the first degree. He's been in jail three years and he has not seen Mr. Albert in at least a year and a half to two years and hasn't had the opportunity to go to trial." (*Id.* at 40)

The court described Mr. Albert as disheveled and disoriented. Mr. Albert admitted he had "some problems in his life," and "I need help." (*Id.* at 7, 18, 19) He represented he " would report here on Monday morning ready to go to inpatient treatment." (*Id.* at 7) However, he failed to report to the court and to go to a treatment facility. (*Id.* at 5, 7, 9, 24) Despite the fact he expressed, "I have not had a beer, anything in seven days. I know that's just seven days, but that is - - that's how it starts," his failure to follow through with the inpatient treatment resulted in a contempt proceeding being held later that afternoon. (*Id.* at 6) Mr. Albert was held without bond. (*Id.* at 39, 41-42, 53, 63) Unfortunately, the subsequent hearing held that afternoon was filed under seal.[4]

The evidence adduced at this contempt proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006. At his contempt hearing Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore,

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[4] Petitioner requested an evidentiary hearing and filed a Motion for Discovery to be provided a copy of Volume Two of the sealed transcript in Mr. Wilson's case, Oklahoma County Case. No. CF-2004-6139 (Ex. 4-B-docket sheet).

the evidence reveals a concern by a district court as to his representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information is critical in determining whether Mr. Albert rendered effective assistance of counsel in Petitioner's case.

B. Trial counsel has been suspended from the practice of law.

According to Ex. 5, which is a sworn affidavit provided by General Counsel with the Oklahoma Bar Association, trial counsel Mr. John Albert has been suspended indefinitely from the practice of law. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred close to two months after he testified at the evidentiary hearing and a little over a month after his contempt hearing. Additionally, this Court on April 6, 2007, remanded another death penalty case, *Keary Lamar Littlejohn vs. State of Oklahoma*, D-2005-237, for an evidentiary hearing regarding Mr. Albert's performance as trial counsel.

C. Supplemental report of Dr. Kate Allen.

As mentioned in Proposition I, the trial court erroneously prevented Dr. Kate Allen from testifying at Petitioner's hearing. Petitioner subsequently requested Dr. Allen to review additional records and the transcript testimony of the witnesses from the hearing and issue a supplemental report which is attached as Ex. 6.

For this Court's convenience, Petitioner has pulled from Dr. Allen's Supplemental Report new evidence from the following heading:

> **The Defendant's Parents Failed:** Mr. Gross, additionally, failed Tremane in his role as a *father*. .. he continues to avoid taking any responsibility for the malignant domestic violence he predicated on the family, for not financially supporting his children (often choosing not to work), and for not being available to the defendant on *any* basis as a father (all three men consistently attest to having been emotionally and physically abandoned by their father.)
>
> **Presence and Significance of Domestic Violence**: The issue of authentic presence of domestic violence has been raised... What the court documents reveal is that extreme domestic violence shaped at least the first 10 years of Tremane Wood's life... These documents are evidence of authentic, severe and ongoing violence against Ms. Wood during the early and middle childhood of the defendant, far before his legal troubles began...
>
> **Domestic Violence Lethality Checklist**: Of the 14 known indicators of domestic

> violence likely to end up in death, Tremane Wood's parents, at that time, met...eleven.
>
> **Personality Strengths**: Toward the end of our interview, Tremane expressed sorrow about what had happened to the young men who had been victimized, stating that they were completely innocent.....He felt shame and humility that the parents [of the victim] adamantly opposed the death penalty, a penalty chosen for him by the trial jury. He expressed it directly, as he lowered his head and looked down at the floor, unable to continue talking.

Clearly, the evidence presented in Dr. Allen's report should be presented to a jury for their consideration as mitigation. Especially the fact Petitioner is remorseful, which is a powerful mitigating circumstance. Additionally, since Dr. Allen was not allowed to testify at the hearing her opinions were not considered by the trial court when it issued its Findings of Fact and Conclusions of Law (hereinafter "Findings") and undermines its reliability.

D. New Rule of Law.

The Oklahoma Legislature enacted a truth in sentencing law which forbids someone convicted of murder with a life with parole sentence from being paroled unless 85% of his sentence had been served. 21 O.S. § 13.1. Concerning that statute, this Court recently held that

> for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our traditional prohibition of mentioning parole at trial.... [T]he 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained by a judge, and which is relevant and helpful information for the jury to consider.

Anderson v. State, 2006 OK CR 6, 130 P.3d 273, 278. The trial court should have instructed Mr. Wood's jurors a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and Mr. Wood if found guilty of murder in the first degree would have to serve at a minimum of 85% of that forty-five years. *Id.* at 283

E. Conclusion.

The granting of a new trial based on newly discovered evidence is a matter of discretion within the court and should be exercised if there is a reasonable probability that if such evidence had been introduced, a different result in the trial would have been reached. *Griffin v. State*, 1972 OK

CR 224, 501 P.2d 223, 224. "[B]efore a new trial on the ground of newly discovered evidence may be granted, the allegedly newly discovered evidence must be more than merely impeaching or cumulative. It must also be material to the issues involved and must be such as would probably produce an acquittal. *U.S. v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991). The facts and law presented above is either newly discovered evidence or a new rule of law warranting a new trial.

PROPOSITION III

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF 6th, 8th, AND 14th AMENDMENTS, AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

Pursuant to 22 O.S. § 1089(C)(1)&(2), the only issues that may be raised in a capital post-conviction application are those that "were not and could not have been raised in a direct appeal; and "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." Pursuant to 22 O.S.§1089(D)(4)(b), the Court of Criminal Appeals shall review the post-conviction application to determine whether a ground could not have been previously raised if:

(1) it is a claim of ineffective assistance of trial counsel involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal, or
(2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.

"All claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court." *See* 22 O.S.§1089(D)(4)(b).

The Supreme Court has determined an ineffective assistance of counsel claim has two components: a defendant must show that trial counsel's performance was deficient, and the deficiency prejudiced the defense. *Strickland*, 466 U.S. 668 at 687, 104 S.Ct. 2052 at 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, a petitioner must demonstrate trial counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2052. The Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* In *Williams v. Taylor*, 529 U.S. 362, 120

S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court reiterated counsel has an obligation to "conduct a thorough investigation." *Id.* at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). *See also Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)(holding even though the defendant and his family had suggested to defense counsel no mitigating evidence existed, counsel was still bound to obtain and review material the prosecution would rely upon in aggravation.)

In order for counsel's inadequate performance to constitute a 6th Amendment violation, the defendant must show counsel's failures prejudiced his defense. *Id.* 466 U.S. at 692, 104 S.Ct. 2052. In *Strickland*, the Court held to establish prejudice a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

In addressing appellate ineffective assistance of counsel, the Tenth Circuit in *Cargle v. Mullin,* 317 F.3d 1196,1202 (10th Cir. 2003) held,

> [t]he proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following *Smith v. Murray,* 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. *Id.* at 285, 120 S.Ct. 746 (applying *Strickland*).... [I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," *Neill v. Gibson,* 278 F.3d 1044, 1057 (10th Cir.2001) (quotation omitted), *cert. denied,* 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance. [FN4] *See, 1203 e.g., Smith,* 528 U.S. at 288, 120 S.Ct. 746; *Banks v. Reynolds,* 54 F.3d 1508, 1515-16 (10th Cir.1995); *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.1994).

Id. at 1202 -1203 (10th Cir. 2003). Petitioner submits due to the "expedited" review afforded under

22 O.S. §1089(A), there are many instances, such as this, wherein the post-conviction application is filed while the Capital Direct Appeal is still pending. Under these circumstances arguing ineffective assistance of counsel is rather difficult when the direct appeal is still being reviewed and/or when issues have been remanded to the district court on direct appeal. Despite this procedural hurdle, Petitioner submits his appellate counsel were wholly ineffective because they failed to raise several meritorious claims. The following sub-propositions are all examples of ineffective assistance of counsel, either by trial counsel, appellate counsel, or both. Capital post-conviction counsel respectfully requests Mr. Wood's convictions and sentences be reversed, and his case remanded for new trial, or new sentencing,[5] or a new direct appeal.[6]

A. Appellate counsel failed to supplement record with impeachment evidence.

1. Trial counsel has been suspended from the practice of law.

Appellate counsel failed to supplement the direct appeal filed in Mr. Wood's case with relevant documentary evidence from the Oklahoma Bar Association that trial counsel Mr. Albert has been suspended indefinitely from the practice of law. *See* Ex. 5. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred almost two months after he testified at Petitioner's hearing. Clearly, this is relevant information this Court should consider before issuing its opinion on direct appeal. Additionally, this Court, at Petitioner's oral argument, commented Mr. Albert was an experienced attorney and seemed unaware of his suspension and appellate counsel should have informed the Court at that time.

2. Transcript from contempt hearing.

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[5] This Court in *Garrison v. State*, reversed and remanded for a new sentencing due to "the waiver of these issues by appellate counsel." 2004 OK CR 35, 103 P.3d 590, 620.

[6] *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *See, e.g., Mayo v. Henderson*, 13 F.3d 528, 537 (2d Cir.), *cert. denied*, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994); *Claudio v. Scully*, 982 F.2d 798, 806 (2d Cir.1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993); *Fagan v. Washington*, 942 F.2d 1155, 1156 (7th Cir.1991); *Barry v. Brower*, 864 F.2d 294, 300-01 (3d Cir.1988); *Matire v. Wainwright*, 811 F.2d 1430, 1439 (11th Cir.1987); *Grady v. Artuz*, 931 F.Supp. 1048, 1053-54 (S.D.N.Y.1996); *Laffosse v. Walters*, 585 F.Supp. 1209, 1214 (S.D.N.Y.1984); and *Mason v. Hanks*, 97 F.3d 887, 892 (7th Cir. 1996).

As discussed in Proposition II(A), on March 9, 2006, a contempt hearing was held in an Oklahoma County District Court regarding Mr. Albert. The evidence adduced at this proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006, as to whether he provided effective assistance of counsel at trial. During his contempt hearing, Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore, the evidence reveals a concern by a district court as to Mr. Albert's representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information would have assisted this Court in determining whether Mr. Albert rendered effective assistance of counsel in Mr. Wood's case. Appellate counsel should have supplemented his direct appeal with this evidence for this Court's consideration.

B. Appellate counsel provided ineffective assistance of counsel at evidentiary hearing.

1. Failed to clarify the number of cases that had resulted in a sentence of death.

At the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases with only 3 cases resulting in a sentence of death.[7] (Vol. II Tr. 260) Although counsel requested the court to take judicial notice of a handwritten list of 8 cases wherein Mr. Albert was listed as counsel and a death sentence had been returned, the trial court denied this request.[8] (02/03/06 Tr. 409-12) Petitioner submits it was error for appellate counsel not to supplement the record documentation verifying Mr. Albert was counsel of record in the following 7 cases out of Oklahoma County- *State of Oklahoma vs. James Fisher*, CF-83-137; *State of Oklahoma vs. James Lawrence Mitchell*, CF-2000-4712; *State of Oklahoma vs. Ronald Clinton Lott*, CF-87-963; *State of Oklahoma vs. Terry Lyn Short*, CF-95-216; *State of Oklahoma vs. Richard Stephen Fairchild*, CF-93-7103; *State of Oklahoma vs. Keary Littlejohn*, CF- 2002-2384; and one case out of Stephens County- *State of Oklahoma vs. Johnny Black*, CF-99-1. (*See* Exs. 14(A-H))

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[7] The State argued the list was inaccurate and assured the court Mr. Albert had not been counsel on 2 of the 8 cases. This representation by the State was inaccurate and misleading and is addressed in Proposition IV (F).

[8] Although appellate counsel requested their investigator to bring back relevant documentation as to this inaccuracy, which she did, this evidence was never presented to the trial court. (*See* affidavit of investigator- Ex. 13)

2. Failed to utilize trial transcripts to cross-examine counsel.

At the evidentiary hearing, trial counsel testified he would have called a number of other mitigating witnesses had Petitioner allowed him to do so. He recalled, "I remember putting on the mother. She got very emotional. Okay? And we were going to put other people on. And I remember he said that he didn't want to do it to family anymore." (Vol. II Tr. 245) Mr. Albert stated he acquiesced to his client's wishes. The trial court then inquired directly of Mr. Albert, "after the testimony of Linda Wood, Mr. Tremane's mother, are you saying that your client said, no more, that's enough? Is that..." Mr. Albert interrupts, with "Family...I don't blame him, yes." (*Id.* at 288)

However, after reviewing counsel's second stage opening, it is apparent he never intended to call anyone else because he stated to the jury they would only hear evidence from Andre Taylor, Linda Wood, and Dr. Ray Hand. (04/05/05 Tr. 12) Sadly, this information was readily available and would have served as powerful impeachment evidence. Unfortunately, since Mr. Albert's self-serving testimony at the hearing went unchallenged, the court, in its Findings at ¶ 11 stated as fact, "[f]ollowing the testimony of Appellant's mother, Linda Wood, Appellant demanded that no more family members be permitted to testify in mitigation." As to this Court's question number 1- "[w]hether the evidence identified in the application was reasonably available to trial counsel in preparation for trial," the trial court responded "[a]lthough attempts by trial counsel to locate Appellant's natural father were unsuccessful, he in all probability would not have testified had he been contacted due to Appellant's desire to have no further family members testify following his mother's testimony." (Findings at page 11) Since this information is clearly incorrect, it renders the trial court's Findings unreliable.

3. Failed to show trial court was concerned trial counsel was unprepared.

Before Petitioner's trial began, the court voiced its concern counsel was not ready to proceed with Petitioner's trial. The trial court inquired "[h]ave you had adequate time to get prepared and so forth?" Mr. Albert responded he was ready for trial. (03/29/04 Tr. 5-6) Appellate counsel should have confronted Mr. Albert about his colloquy with the court, which would have reminded

the trial court of its concerns pre-trial as to whether or not counsel was ready to proceed to trial.

4. Failed to prepare for the testimony of Raymond Gross, Jr.

a. Failed to cross-examine Mr. Gross with divorce decree.

Appellate counsel called Petitioner's father Raymond Gross, Jr., as a witness at the evidentiary hearing. (Vol. I Tr. 16) He testified he had not been called as a witness, nor contacted by any member of the trial team. He expressed he would have been willing to testify. (*Id.* at 16) Although Mr. Gross stated his marriage to Linda Wood was "pretty rocky," he denied most of the allegations of abuse Ms. Wood and his sons testified had occurred. (*Id.* at 19) Although appellate counsel had in their possession a copy of the Gross' divorce decree which documented the physical abuse and the fact a permanent restraining order was in place against Raymond Gross, it was not utilized. (*See* Ex. 8-C, page 2 at ¶ 5) It also provided the children would be exchanged between the parties at the Stillwater Police Department and the Logan County Sheriff's Department. (*Id.* at ¶ 15)

b. Failed to provide trial court with relevant divorce documents.

Although appellate counsel had a copy of the Gross' "Decree of Divorce," they did not have a copy of the parties divorce file. (*See* Ex. 8 (A-C)) The "Petition for Divorce," Ex. 8-A at ¶ 4, detailed Linda Wood Gross in 1988 sought a divorce on the grounds of incompatibility and "extreme cruelty." The petition states the "defendant is a violent man and has kept the plaintiff from seeing her children" and she requested a temporary order restraining the defendant from harassing her or her children. (*Id.* at ¶ 15) A "Temporary Order" provided the children will be exchanged in front of the Stillwater Police Department or at the Logan County Sheriff's Department. (*See* Ex. 8-B)

c. Failure to investigate Raymond Gross' criminal background.

Appellate counsel also failed to investigate Raymond Gross' criminal background. If appellate counsel had performed this investigation, he would have discovered Mr. Gross had a prior criminal conviction for Feloniously Pointing a Weapon at Linda Wood and Acie A. Anderson in Payne County Case No. CRF-88-188. The Preliminary Information filed detailed Mr. Gross on June 15, 1988, "feloniously and without lawful cause point a .44 caliber Magnum Smith & Wesson

revolver at one Linda Jewel Gross for the purpose of threatening and intimidating her, and with the unlawful, malicious and felonious intent then and there on the part of said defendant to injure the said Linda Jewel Gross physically or by mental or emotional intimidation," and stated the identical language as to Acie Anderson. (*See* Ex. 12 A-C) Petitioner obtained the Case Report issued by the Oklahoma State University Police Department which further described this offense as an attempted abduction of ex-wife. [9] It noted both Linda Gross and Acie Anderson had cuts and abrasions from being pistol whipped and Mr. Gross had told them "I'm going to shoot you." (*See* Ex. 15)

d. Failed to request records detailing the abuse Ms. Wood suffered.

At the evidentiary hearing Linda Wood testified about the abuse she suffered at the hands of Raymond Gross and about their "horrific" relationship. (Vol. I Tr. 112) She expressed he was "very possessive, very jealous, very controlling" and he alienated her from contact with her family. (*Id.* at 113) He monitored her every move from going to the grocery store to going to work. He told her what she could and could not wear and accused her of having affairs. (*Id.*)

Ms. Wood testified one time he took her out into the middle of nowhere and told her to "give my baby a kiss good-bye because that was the last time I would see him, he was going to kill me." (*Id.* at 115) Another time he grabbed her by her ponytail and slung her into a patio glass window. (*Id.* at 116) She expressed, "he has hit me with his fist. He has hit me with a pipe wrench. He took a gun to my head and took all the bullets out but one, and actually pulled the trigger. And when the gun did not go off, he has hit me in the head with his gun." (*Id.*) Many of the physical incidents occurred in front of her children. She recalled one instance when he tied her to a chair with extension cords and poured alcohol on her and then threatened to set her on fire. (*Id.* at 117) She said he had handcuffed her to the car door several times. He did this so she could not protect herself as he beat her face. (*Id.*) Another time drug her down the road as she was cuffed to the car door. (*Id.* at 117-18) She testified she has a scar on the top of her head from when he hit her with the handle

[9] Petitioner received additional police reports from the Stillwater Police Department regarding this incident. These records are to the Amended Application as Exhibit 21.

of the gun. (*Id.* at 116) She has permanent whiplash from her head going backward so many times and permanent damage to the joints in her shoulders from her arms being bent behind her. She stated she has two fake front teeth from when he knocked them out. (*Id.* at 119)

Unfortunately, all the above information was elicited from Ms. Wood without any documentary support. Although appellate counsel discussed the divorce decree with Ms. Wood, it was not admitted as a separate exhibit. The State on the other hand pulled one DHS record from the volumes of records and questioned Ms. Wood about how DHS had concluded she had made a invalid complaint about him abusing her and her children. (*Id.* at 130-31) The State also made light of the fact Ms. Wood reported very few of the incidents to the police since her husband was a police officer. The State also pointed out no police reports had been provided to the court to detail the abuse, nor medical records in regards to her injuries, nor documentation that she had stayed at any of the battered women's shelters. (*Id.* at 132-33, 135, 141)

Petitioner has since requested records from the battered women's shelters where she stayed. Although, most of the shelters expressed they do not keep records for that length of time, one shelter, the Stillwater Domestic Violence Services, Inc., reported Linda Wood (Gross) "was sheltered by SDVS for one day on 5-16-88, and referred to another shelter on 5-25-94." (*See* Ex. 16) Petitioner also obtained a letter and bill for services rendered on July 29, 1996, by dentist Kelly Brown who made Ms. Wood's fake two front teeth. (*See* Ex. 11)

The most pertinent information Petitioner was able to locate are Ms. Wood's requests for Protective Orders against Raymond Gross out of Tulsa County, Oklahoma for 1986 and 1987. These documents are attached as Exs. 9 and 10. In the1986 "Petition for Protective Order," Linda Wood reported under question 7: "My husband hit me 4 times with his fist in my face. He verbally abused me. He also physically forced me to have intercourse against my will and to commit sexual acts against my will. He also threatened to kill me and to take my children. This has been a daily occurrence for sometime." (*See* Ex. 9-A)

An "Emergency Protective Order" was granted which reflected she left her home, called the

police, and visited a shelter. She checked the following abuse had occurred: slaps, kicks, punches, burns, choking, physical abuse while pregnant and he has used a weapon (gun) to abuse her. (*See* Ex. 9-B) As to the injuries received, she checked: bruises, concussions, cuts, internal injuries, complications with pregnancy, burns, and broken bones. As to medical care she received she checked: self care, doctor's care, emergency room, hospitalization, and surgery, which she wrote "had to have jaw wired." She also checked he has threatened to kill her and has access to guns. Unfortunately, the "Emergency Protective Order" was dismissed because she failed to appear to prosecute it. (*See* Ex. 9-C) This is understandable Raymond Gross was the Chief of Police of the Langston Police Department as detailed in the emergency order.

In 1987, Ms. Wood filed another "Petition for Protective Order" and listed the following:

> Raymond threatened to kill me. He kicked me in my left leg and Raymond hit me in the back of my head. Raymond forced me to have sexual intercourse against my will. (Raymond) He forced me to preform sexual acts against my will. In the past Raymond has fractured my jaw, knocked out my teeth, handcuffed me to a car and beat me. Raymond has put a gun to my head, hit me with a gun, hit me in the mouth with handcuffs. Chained me to a swingset in an abandoned park and left me there overnite. Raymond has sodomized me. Tied me to the bed with extension cords. Threatened my life with a gun, a knife, a pipe wrench. And Raymond has forced me to have sex and perform sexual acts everyday for 1 entire year. (*See* Ex. 10-A)

An "Emergency Protective Order" was granted which reflected Ms. Wood had contacted a crisis line. (*See* Ex. 10-B) She checked the following abuse occurred 3 or more times a month: slaps, kicks, punches, choking, and throwing of objects and he has used a weapon (gun) and handcuffs to abuse her. As to her injuries, she checked: bruises, concussions, cuts, and broken bones. As to medical care received, she checked: self care, doctor's care, emergency room, and hospitalization. She also checked he had threatened to kill her and had access to guns. Although a Protective Order was initially granted it was dismissed after because neither party appeared. (*See* Ex. 10 C & D) However, this can be explained by the fact Ms. Wood filed for divorce at the end of November 1988.

e. Conclusion.

Since none of the evidence listed above was presented at this hearing, the court reported the following as to the testimony of Raymond Gross:

> Raymond Gross' testimony was in direct conflict with the abuse outlined in Appellant's Application. DHS records provided to this Court indicate that reported abuse by Linda Wood was unfounded and vindictive. Raymond Gross' testimony was consistent and not impeached and was found to be credible by this Court. It would not have been beneficial for Appellant to call Raymond Gross as a witness in mitigation at his trial in order to establish that Appellant had grown up in an abusive home. Raymond Gross' testimony provided just the opposite.

(*See* Findings, page 2 at ¶ 2.) Clearly, if the court had been presented with this information, it would not have concluded the abuse reported by Linda Wood was "unfounded and vindictive." Petitioner submits appellate counsel provided ineffective assistance of counsel for not bringing these matters to the trial court's attention at the hearing, for not requesting these records to support Ms. Wood's allegations of abuse at the hearing and for not impeaching Mr. Gross with the documents that were available. This failure by appellate counsel undermines the reliability of the trial court's Findings. This Court must reverse Petitioner's case for a new trial or for a new evidentiary hearing.

5. Failed to mention trial counsel never stated he had not provided ineffective assistance of counsel.

At the evidentiary hearing, Mr. Albert testified about his performance at Petitioner's trial and admitted "I could have done better." (Vol. II Tr. 246) Since Petitioner's trial he has removed himself from the Oklahoma County list for counsel appointments in death penalty cases. (*Id.* at 247) He testified he did not have the time to adequately prepare in Petitioner's case.[10] (*Id.* at 248) As to second stage, Mr. Albert testified he did not adequately prepare a mitigation case to effectively represent or defend Petitioner. (*Id.*) He testified he could have been "better and more effective," had he been more involved. (*Id.* 248-49) Mr. Albert agreed it was his responsibility and not Dr. Hand's to develop second stage. (*Id.* at 249) He testified his affidavit contained the truth as to the steps he took to prepare for trial. (*Id.* at 252) He admitted he signed his affidavit and even made corrections to it before he signed it. (*Id.* at 246, 255-57, 268)

Although appellate counsel elicited this testimony from Mr. Albert, he failed to state in his

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[10] It is unfortunate he testified at the evidentiary hearing he was not ready for trial. Especially since the court had pre-trial inquired whether he was ready to proceed. *See* Proposition III(B)(3)

Supplemental Brief that Mr. Albert was does deny signing the affidavit, or state the information contained in it is not truthful. As one would expect, Mr. Albert offered lots of explanations during the hearing that can best be described as professional self-preservation; however, he never once testified the affidavit he signed was untruthful. Appellate counsel's failure to provide this critical information to this Court, leaves the insinuation trial counsel provided effective assistance of counsel. However, that was simply not the case.

6. Failed to list all the factual inaccuracies contained in trial court's Findings.

Petitioner submits the trial court's Findings are clearly not supported by the trial record or the record developed at the hearing. Unfortunately, many of these inconsistencies were not addressed by appellate counsel in his Supplemental Brief. For the convenience of this Court, Petitioner will address the relevant factual inconsistencies in the order in which the trial court addressed them.

The trial court, in its Findings on page 4, erroneously found Dr. Ray Hand, the psychological expert who testified for Petitioner at trial, had the records from Stillwater Public Schools, Meadowlake Hospital, Office of Juvenile Affairs, DHS, and Butner School System. The trial court stated, "much of this information was made available to the jury" at trial. However, the testimony presented at the evidentiary hearing does not support this finding. Bieva Holladay, the records sponsor from Stillwater Public Schools, and Linda Marshall, the records representative for Butner Schools in Cromwell, consistently testified no request for records pertaining to Petitioner had been received prior to the request made by the appellate team. (Vol. I Tr. 10, 12, 13-14; 45) While the State attempted to give the appearance the Oklahoma Office of Juvenile Affairs ("OJA") records were contained in the DHS records since OJA used to be a part of DHS, it is clear from the testimony of OJA representative Helen Killian, their records would only have been received per a direct request to them and not a general request to DHS. (Vol. I Tr. 41-43) Ms. Killian, too, confirmed the only request for records received by OJA had been made by the appellate team.(Vol. I Tr. 86-87) It is clear Dr. Hand did not have the voluminous records from OJA much less the school records since

they were never requested in the first place.[11]

The trial court at ¶ 2 of its Findings also determined it would not have been beneficial for Appellant to have called his father, Raymond Gross, as a witness in mitigation at his trial. Although Mr. Gross did admit to some physical violence, his testimony regarding Petitioner's relationship with his older brother Zjaiton Wood, a.k.a. Jake, would have provided powerful mitigation. Mr. Gross testified Zjaiton had a strong influence over Petitioner and he explained "If Zjaiton tells Termane, 'Let's go ten blocks on your kneecaps,' Termane will follow him." (Vol. I Tr. 22). Also salient is his testimony he cares for Petitioner. (Vol. I Tr. 23).

The trial court's determination "Appellant provided no evidence that corroborates the claim made by Linda Wood that Appellant had been abused by his father," was clearly contradicted by the testimony presented by Zjaiton and Andre Wood. Andre testified Raymond Gross was abusive to all of his children, including Petitioner, and he was especially abusive to Linda Wood. (Vol. I Tr. 158) Zjaiton confirmed Raymond Gross was abusive to Petitioner. (Vol. II Tr. 331-332).

The court at ¶ 3 of its Finding concluded the evidence Dr. Ray Hand provided to the jury regarding the foster care Petitioner had received was adequate. However, the evidence presented by Petitioner's former foster mother Jan Davis, provided personal observations of his behavior. Although Dr. Hand may have testified Petitioner was at one time placed in foster care and he was successful during placement; Jan Davis offered first-hand accounts of his success. Jan Davis saw him act as a peacemaker in her home with the other foster children. (Vol. I Tr. 79) She expressed he had good manners and complied with her rules. (*Id.* at 79-80) He "seemed to do well in school. He loved football, basketball. Took on all the sports he could." (*Id.* at 80) Clearly, Dr. Hand's testimony from a stale review of records could not replace the personalization Ms. Davis provided. (*Id.* at 81-82)

The trial court at ¶ 4 of its Findings stated the testimony of Petitioner's former juvenile mentor Matthew Netherton, was "of little value as mitigation evidence," and based this on the

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[11] Counsel testified he had provided two to three hundred pages of records to Dr. Hand. (Vol. II Tr. 244). As this Court can see, the OJA records, which were admitted as Def. Exs. 3 & 4, are voluminous and in excess of 300 pages.

inconsistencies between his testimony he had a high opinion of Petitioner and saw him do many positive things, with his handwritten notes of his behavior. However, Mr. Netherton's notes must be viewed in the context Mr. Netherton mentored Petitioner (Vol. I Tr. 89). Mr. Netherton worked with troubled youth and his notes are simply a reflection of the ups and downs the treatment process. Mr. Netherton's testimony concerning Petitioner was very positive. He testified he volunteered for the Special Olympics, and spoke in front of a juvenile delinquency class. (*Id.* at 98) Regarding Petitioner's involvement with juvenile delinquency class, Mr. Netherton found, "The kids loved him. They asked him questions. He didn't want to leave. By the end of the day, he wanted them to keep asking him questions because he felt – he felt that he could help people. That's what he was doing with those students." (*Id.* at 99) When asked if his opinion of all the hundreds of kids he had mentored was as high as his opinion of him, Netherton replied, "No, not at all." (*Id.* at 105, 106).

Mr. Netherton also testified during the two years he mentored him, his father was never around. (*Id.* at 90, 93) He thought Linda Wood was more of a friend to her children than an authority figure, and found it was "fairly common" for Petitioner to be left in the care of his older brothers. Mr. Netherton stated he was personally scared of Jake Wood. (*Id.* at 94-95).

The trial court at ¶ 7 of its Findings determined Andre Wood's testimony at the hearing was consistent with his testimony at the jury trial and therefore, "the jury at Appellant's trial had the benefit of any mitigating content of his testimony." This finding is completely unsupported by the trial record. Andre was called by the State as a first stage witness. His testimony did not address any mitigation. Therefore, **none** of the mitigating testimony Andre provided at the hearing had been received by the jury at Petitioner's trial. (Emphasis added.)

Andre testified at the hearing that "growing up with my dad was pretty rough... He was a very mean man. Very, very mean. He was abusive to me, to both my brothers, and to my mom, especially my mom." (Vol. I Tr. 157-58) He testified his father put his mother in the hospital once; he broke her jaw and fractured three of her ribs; he had handcuffed her to a car and drug her down a highway, and he had even poured alcohol on her and threatened to set her on fire. (*Id.* at 158)

Andre testified Petitioner was physically abused by his father and recalled an incident where his dad "snatched him [Termane] up from the table and took a leather strap that you would sharpen a razor on and beat him, beat him pretty good. I mean to the point where he had bruises and welts and marks all over his legs and back." (*Id.* at 161)

The court also found in ¶'s 8 and 10 the testimony of both Wesley Welch and Michael Hiltzman, former friends and foster brothers of Petitioner, was not credible. It appears the court made this finding based upon the witnesses' felony criminal records. Petitioner submits the jury may have found otherwise as they had clearly accepted and given some weight to the testimony of another convicted felon called at Petitioner's jury trial –codefendant Brandy Warden.

The trial court at ¶ 11 of its Findings addressed the testimony of trial counsel John Albert. First, the court found, "Mr. Albert attempted to locate Appellant's natural father, Raymond Gross, but was unable to locate him." However, direct appeal investigator Brenda McCray testified it was not difficult to locate Mr. Gross. She simply asked his son, Andre Wood, who told her where he lived. (Vol. II Tr. 300). The court also determined Mr. Albert would have attempted to interview any potential witnesses given to him by the Appellant. This is clearly an attempt to shift the responsibility of case investigation onto Petitioner. Furthermore, and more importantly, Mr. Albert testified he relied upon Jack Stringer, an investigator employed by the Oklahoma Indigent Defense System (hereinafter "OIDS"), as his investigator. (Vol. II Tr. 241-42) Jack Stringer on the other hand testified he was assigned by OIDS to work only on the behalf of Zjaiton Wood. (Vol. II Tr. 229) Further, no one ever asked him to do any investigative work on Petitioner's case because a conflict of interest existed between the Wood brothers. (*Id.* at 229-30)

The court determined in ¶ 11 of its Findings Mr. Albert had in his possession, prior to trial, all of the same records gathered by counsel for Appellant's co-defendant, Zjaiton Wood. Then contradicted its own findings in ¶ 14 by stating "no one on the trial team for the co-defendant provided anything directly to Appellant's trial team." Lead counsel for Zjaiton, Ms. Wayna Tyner of OIDS, testified about this issue at the evidentiary hearing. Ms. Tyner testified a conflict of interest

existed between Zjaiton and Termane. (Vol. III. Tr. 396) Ms. Tyner clearly expressed there was never a time when she or anyone else on Zjaiton's defense team conducted investigation on behalf of Termane. (*Id.*) Ms. Tyner explained both trial counsel for Zjaiton and for Wood possessed some letters purportedly written by Brandy Warden. Additionally, Ms. Tyner testified counsel for Termane should have received some of the same DHS records she received since Termane's counsel had joined in her motion for their production. (*Id.* at 399) However, no other items of evidence or investigation were shared. (*Id.* at 400)

The trial court also determined that although Mr. Albert had not impeached the State's star witness Brandy Warden "with some letters allegedly written by her and sent to Appellant," he had presented to the jury all the information contained in them. Petitioner submits, had trial counsel conducted handwriting analysis on the letters prior to trial, not only would the pertinent content of the letters have come before the jury, but also, Ms. Warden would have been caught in a false statement before the jury, since she denied writing these letters at trial. The impeachment value was not just in the content of the letters, but also in demonstrating, live and in front of a jury, Ms. Warden committed perjury, which did not occur at Petitioner's trial.

The trial court at ¶ 13 of its Findings determined the testimony of handwriting expert Pat Tull would not have been admissible since Ms. Tull did not take a handwriting exemplar from Brandy Warden. Since appellate counsel did not seek an order from the trial court requesting a handwriting exemplar,[12] Tull utilized, as the "known" handwriting sample for Ms. Warden, a letter signed "Brandy Warden" that was filed in her court file for consideration at her sentencing.[13] Pat Tull concluded the known letter by Ms. Warden from the court file was written by the same person who sent the letters in question to Petitioner while he was in county jail. (Vol. II Tr. 349-50)

The court's Findings in ¶ 12 as to the testimony of Zjaiton Wood is, once again, contrary to

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[12] In sub-proposition B(8) Petitioner argues appellate counsel was ineffective for not seeking this order.

[13] At Ms. Warden's sentencing hearing, her counsel represented this letter was written by Ms. Warden. A copy of the known letter was admitted as Defendant's Exhibit 10 at the evidentiary hearing. *See* Exhibit 13 ¶ 6, affidavit of investigator Brenda McCray for further details.

the evidence presented. Zjaiton testified in the guilt/innocence phase of Petitioner's trial. His testimony concerned only first-stage issues. Therefore his hearing testimony, which included details of the physical and mental abuse he and his family suffered at the hands of their father cannot be characterized as "substantially the same" as his first-stage jury trial testimony. (Vol. II Tr. 331-32) Zjaiton testified, "I just wanted to show him [Termane] that the world we lived in is a world of cruelty." (*Id.* at 337) He admitted he physically beat Petitioner. (*Id.* at 335) He also expressed he loved him and he was his best friend. (*Id.* at 337)

The trial court, in addressing juror Jera Burton's testimony in its Findings at ¶ 15, completely disregarded her testimony because she could not remember the mitigation presented at trial and because the State had not been present when she was shown the affidavits collected by the appellate team. Petitioner submits her testimony should not be so readily dismissed. Ms. Burton testified she would have liked to have heard the type of evidence presented in the affidavits and it would have affected her decision, "I just probably would have held my ground as far as the sentencing goes," and this evidence made her look at him as a different person. (Vol. III Tr. 424-25, 414)

Clearly, the factual contradictions and inconsistencies outlined above, render the trial court's Findings and ultimate conclusions suspect and unreliable.

7. Failed to provide this Court with Dr. Allen's findings.

As discussed in Proposition I, the trial court would not allow Dr. Allen to testify at the hearing. Dr. Allen is the one witness who reviewed the hundreds of pages of mitigation-related records and court documents collected by the appellate team, and interviewed and/or reviewed affidavits by family, friends, and mentors. She is the one witness would have been able to explain how all this new evidence would have effected the outcome of the trial had she been allowed to testify. Although Dr. Allen's report was admitted as Def. Ex. 8, appellate counsel failed to include in the Supplemental Brief the trial court erred by not allowing her to testify and failed to provide what she would have testified to had she been allowed. (*See* Ex. 3)

Petitioner submits had Dr. Allen been allowed to testify she would have conveyed to the

court the following information pulled from these headings in her report:

> **Early Childhood Development and Experiences:** [his parents] together and individually, categorically failed him... His development took place amid consistent poverty, recurring moves, normalized violence and criminality both inside and outside the home, abject emotional and physical neglect, and ongoing experiences of racial hostility and rejection from both Caucasians and African-Americans. Finally, his parents allowed the criminal gang- first brought to him through his mentally ill and extremely violent older brother, Jake- to take over his upbringing at around age 11.... Mr. Wood's most basic needs continually went unmet.... The strongest indicator of Tremane's capacity at that time to function as a healthy, law-abiding young man were the consistent reports of his pro-social development and notable successful rehabilitative behaviors while in residential care. However just as remarkable were the losses in that progress as soon as he was returned to his home and community, which was overwhelmingly structured by gang violence and parental chaos. And that was the pattern of his life until he finally surrendered to the emotional and financial support that criminal gang activity provided him as an older teenager and adult.
>
> **The Defendant's Parents Failed:** The most significance force in Tremane's early life are his memories (and their corroboration by other family members) of the many incidents of extreme violence of his father toward his mother.... Not only was extreme domestic violence a central experience of the three boys: when the boys took their mother's side and tried to protect her, their father turned his violence on them, beating them sadistically.... Tremane today can easily recall the potent combination of terror, anger, and helplessness he felt as a child being forced to witness such brutality against his mother, as spilling over to himself and his brothers. Children's experience of domestic violence is well-known in the field as child abuse by proxy. It can be more pernicious in a child's development than general child abuse because it conveys to the child that not only is their home not safe, but that adults are inadequate in the world.... It is of course, the major source of his diagnosis of Post Traumatic Stress Disorder and Generalized Anxiety Disorder....When the parents split for good when Tremane was 8 years old, Linda was unable to earn a good enough living for her family and was not receiving child support. [On almost all of the treatment documentation from Tremane's life with his mother, his family's whereabouts are stated as unknown.] Linda Wood admits that she was away from home working or going to school all the hours of the day except for sleeping. The boys were left completely on their own and the neighborhood did not appreciate it in the least. CPS call about lack of supervision went by without effective responses. They were considered "outcasts" (Linda Wood's word) in the neighborhoods they lived in because of the behaviors of the youngest sons, Linda's absence, and her inclination to blame everyone else in the neighborhood but herself and her children. She taught them steadily to believe that others were to blame for their problems and that most of it was due to racial prejudice.... Linda Wood stated in her mitigation affidavit that she, indeed, made many mistakes with her children and she stated that her children "grew up in an environment of terror, deprivation and exclusion."

Dr. Allen opined Mr. Wood suffered from attachment disorder because his parents were unavailable. She stated his brother Jake was the closet figure of attachment in his early life and then later the criminal gang. Dr. Allen also determined by the time Tremane was 11, Jake had become

the defacto father and "head of the household" even up to the time of this crime. Because Jake was the his only functional bond, she reports he would endure his "bullying and beating." Dr. Allen described his mother as sadly pathetic and that the records consistently revealed he did well while in the program, but that once he was returned to his mother's home he reintegrated into the gang.

As for Tremane's "Neurological and Psychiatric Issues," Dr. Allen's review of the records documented depression, dependency, PTSD and generalized anxiety. As for "Race as a Consideration in Development" Dr. Allen explained the biracial child is placed in a rather unique situation because they live in both the "white" and the "black" world and have the expectations and rejections of both. She described when Tremane lived in a predominantly white town he was often rejected due to his skin color. However, when he lived in a black community he would be rejected because he "wasn't black enough." She concluded this section with, "I present this duality as a fundamental stressor in the defendant's life, and one for which he was never responsible and could not overcome on his own."

Her report listed his personality strengths as his "abiding love for his mother, brothers, and even his father whom he is attempting to forgive" and he has "strong love for his two children and a desire to be the best parent he can be under the circumstances." She reported "Tremane expressed sadness, feelings of helplessness, and certain remorse," as to the victim's murder. Finally, Dr. Allen felt he could positively conform to prison life.

Clearly, Dr. Allen should have been allowed to testify at the evidentiary hearing. Her testimony is clearly more thorough and detailed than Dr. Hand's. Dr. Allen's report provided mitigating circumstances not addressed by Dr. Hand, such as remorse. Appellate counsel should have provided this information in his Supplemental Brief.

8. Failed to obtain an order for handwriting exemplars from Brandy Warden.

Appellate counsel argued trial counsel had been ineffective for failing to properly impeach state's star witness, Brandy Warden, with a handwriting expert. Although Ms. Warden was the only witness that placed Petitioner at the crime scene, trial counsel had in his possession two letters,

purportedly written by Ms. Warden to Petitioner, wherein she stated she knew he did not murder the victim. However, Ms. Warden denied writing these letters. Since trial counsel had not hired a handwriting expert, his attempts to impeach her fell short. In closing argument, the State capitalized on trial counsel's failure to utilize a handwriting expert by pointing out if counsel had believed Ms. Warden had written those letters, he would have hired an expert to prove it. (04/02/02 Tr. 182-83)

On direct appeal, appellate counsel hired Pat Tull, a handwriting expert who expressed Ms. Warden had in fact written those exculpatory letters. However, Ms. Tull made her comparison of the questioned letters with a known letter purportedly written by Ms. Warden. At the time Ms. Tull made her analysis, Petitioner was on appeal to this Court, therefore the trial court was without jurisdiction to issue an order requesting Ms. Warden to provide handwriting exemplars. However, once Petitioner's case was remanded, appellate counsel should have sought this order. Since this was not done, the court in its Findings in ¶ 13 disregarded Ms. Tull's opinion because "[s]he did not take a handwriting exemplar from any person, including Brandy Warden, in connection with her comparison." Had Ms. Tull been provided with handwriting exemplars from Ms. Warden, the court would not have been able to completely ignored this damaging evidence to Ms. Warden's credibility.

9. Failed to admit videotape produced by the Stillwater Police Department .

Sandra Marshall, a former probation and parole officer with the OJA, testified she had been assigned to work with Petitioner's family while they were living in Stillwater, Oklahoma. (Vol. II Tr.183-85) She saw him once a week for about a four month period. Ms. Marshall explained some of the issues he was facing as young man growing up in Stillwater was the low tolerance for his family by the community, school, and by the Stillwater Police Department. (*Id.* at 187) However, when Ms. Marshall attempted to elaborate on each of the issues he was facing, such as "being biracial in Stillwater, Oklahoma, in the early '90's was probably not a real easy thing..." or having the police stop them every time they saw them on the street, her testimony was met by an objection by the State which was sustained by the trial court. (*Id.* at 187, 191)

Since appellate counsel was not allowed to develop Ms. Marshall's testimony or even present

the testimony of Dr. Allen, counsel should have offered into evidence a videotape made by the Stillwater Police Department which featured the Wood brothers.(*See* Ex.13) This videotape titled "Gangs in Stillwater" shows firsthand how the police viewed the Wood brothers, and the low tolerance the community had for them, which were the very obstacles Ms. Marshall testified prevented Petitioner from successfully completing his treatment/probation plan. (*See* Ex. 17-DVD)

10. Failed to present evidence Brandy Warden's sentence was reduced.

At Petitioner's trial, Brandy Warden testified she had received a deal from the State. She received 45 years for accessory to murder and 10 years for conspiracy to commit a felony. (04/01/04 Tr. 132, 201) She testified she was not charged for her participation in the robbery of the LaFranca's Pizza, although her other co-defendants were charged. (04/05/04 Tr. 21) On April 15, 2004, just 11 days after testifying in Petitioner's trial, Ms. Warden went before the trial court on her application for a one year review in which her sentence was modified from 45 years to 35 years. Interestingly, two orders were filed into the record as to her modification. The first order filed on April 15, 2004, simply reflected the outcome of the proceeding; however the second order filed on April 19, 2004, reflected her sentence modification was "granted over the strenuous objections of the State." (*See* Exs.18-A & B) There is no transcript of this proceeding. Counsel should have presented this information to the court.

Additionally, appellate counsel should have presented the court with Ms. Warden's record from Payne County Case No. 2000-202, where she pled guilty to larceny of a house and received a 3 year deferred sentence because she agreed to testify against her co-defendant. (*See* Ex. 19A) When Ms. Warden was arrested in Oklahoma County, her Payne County probation and parole officer recommended her sentence be accelerated.(*See* Ex. 19-B) Despite this recommendation, her sentence was not accelerated, but dismissed. (*See* Ex. 19-C) This evidence should clearly have been submitted for the court to consider regarding her credibility.

Furthermore, appellate counsel, on remand should have utilized the discovery mechanisms provided by the district court to seek information from the Cleveland County, Payne County, and

Oklahoma County District Attorneys Offices as to whether she received any deals or leniency in exchange for her testimony against her three co-defendants. From the record before us, it certainly appears she received leniency in Cleveland and Oklahoma County. Any information concerning any deals or leniency Ms. Warden may have received constitutes undisclosed impeachment under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), which must be disclosed at this time.[14]

11. Conclusion.

Clearly, if the trial court had been presented with the above evidence, it would not have concluded in its Findings at page 14 "that confidence in the verdict of the jury has not been undermined by any testimony presented at the evidentiary hearing." Or, in its final paragraph "this Court cannot find that trial counsel's methods of utilizing the available mitigation evidence was anything but sound trial strategy, nor that Appellant has demonstrated that he was prejudiced and deprived of a fair trial." Petitioner submits appellate counsel's failure to provide effective assistance of counsel at the hearing undermined the reliability of the trial court's Findings. Therefore, this Court must reverse Petitioner's case for a new trial or for a new evidentiary hearing.

C. Ineffectiveness of trial counsel which appellate counsel failed to raise.

Petitioner respectfully requests this Court to consider the issues raised in his direct appeal with the issues enumerated in the sub-propositions of error below which were not raised on direct appeal when addressing whether Petitioner was provided effective assistance of counsel. Petitioner submits he was not provided effective assistance of counsel at trial nor was he provided effective assistance of appellate counsel on direct appeal.

1. Trial counsel failed to present available evidence to support his defense.

During the first stage, the defense called Petitioner's brother, Zjaiton Wood, to the stand.

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[14] Petitioner previously filed a Motion for Discovery addressing this issue and requested an evidentiary hearing.

Zjaiton informed the jury he, not Tremane, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton testified Tremane was not with them during the commission of the crimes, but another individual named "Alex" was present, Zjaiton's admission he was the murderer, not Tremane, was critical.

Defense counsel was ineffective for not presenting readily available evidence which supported Zjaiton's testimony. This evidence is contained in the pre-sentence investigation report ("PSI") of co-defendant Lanita Batemen prepared by probation and parole officer Margaret Little.[15] Ms. Bateman's PSI expressed Jermane (sic) Wood was involved in the crimes, but Zjaiton, a.k.a. Jake, was the person who stabbed the victim. After they left the motel, Jermane (sic) was dropped off at his girlfriend's house. Bateman reported the following occurred at Jake's mother's house, "There, me and Brandy was shaking and crying and his mom asked what had he done now? He took her to her room and told her that he thought he had killed a guy. She started screaming and crying then she watch the news til the next morning and thats when it said something about the homicide." (*See* Ex. 20 under heading "Defendant's Verison.")

Since counsel did not support Zjaiton's testimony, the State argued in first stage Zjaiton was a gang banging, dope slinging convict whose testimony was unbelievable and expressed,

> -I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (04/02/04 Tr.7)

There can be no reasonable strategy ascribed to trial counsel's failure to challenge the State's theory of the case and failing to provide adequate evidentiary support and argument for a viable defense. *See Washington v. State*, 1999 OK CR 22, 989 P.2d 960, 979-80 (which noted adversarial testing is the bedrock of our criminal justice system which necessarily requires the effective

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[15]Although Ms. Bateman invoked her Fifth Amendment rights and did not testify at Petitioner's trial or evidentiary hearing, her probation officer, Margaret Little, could have testified at trial and actually did testify at the evidentiary hearing. Unfortunately, appellate counsel failed to elicit this information from Ms. Little.

assistance of counsel and that counsel's failure to subject the State's case to adversarial testing, deprived defendant of a fair and reliable sentencing proceeding.) Likewise here, trial and appellate counsel's failure to develop and marshal the evidence in support of a viable defense which would have resulted in acquittal, was ineffective assistance of counsel and accordingly, his conviction and sentence must be reversed. This Court has reversed where trial counsel failed to develop and assert defenses which could have been supported by the available record. *See Jennings v. State*, 1987 OK CR 219, 744 P.2d 212, 214; *Smith v. State*, 1982 OK Cr 143, 650 P.2d 904, 908. *See also Groseclose v.* Bell, 130 F.3d 1161 (6th Cir. 1997); *Harris ex rel. Ramseyer v. Wood,* 64 F.3d 1432 (9th Cir. 1995); *DeLuca v. Lord*, 858 F. Supp. 1330, 1346 ff. (S.D.N.Y. 1994); *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Proffit v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987).

2. Trial counsel failed to list a crucial mitigating circumstance.

As discussed above in this sub-proposition (C)(1), Zjaiton Wood testified he, not Termane, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton's admission he was the murderer, not Petitioner was critical, counsel failed to include this on the list of mitigating circumstances submitted to the jury. (O.R. Vol. IV at 634) This very circumstance, "the defendant acted under duress or under the domination of another person," is specifically listed as a mitigating circumstance the jury should consider. *See* OUJI-CR-4-79.

3. Trial counsel failed to request a *Harjo* hearing.

Before the State presented the testimony of co-defendant Brandy Warden, defense counsel approached and objected to any testimony regarding the pizza robbery and "any statements made by Zjaiton Wood or Lanita, the other girl involved in this case, as co-conspirator hearsay." (04/01/04 Tr. 128-29) The court sustained counsel's request regarding the pizza robbery and overruled counsel's objection as to co-conspirator statements. (*Id.* at 129) Petitioner submits defense counsel should have requested a *Harjo* hearing to determine whether Ms. Warden's testimony was admissible, and his failure to do so was ineffective assistance of counsel.

In *Harjo v. State* 1990 OK CR 53, ¶ 21, 797 P.2d 338 , this Court held before the State may

admit hearsay statements of co-conspirators the State must prove: "(1) a conspiracy existed, (2) the declarant and the defendant against whom the declarations are offered were members of the conspiracy, and (3) the statements were made in the course and in furtherance of the conspiracy by a preponderance of the evidence. *Id.* at ¶ 21, *citing Bourjaily v. United States,* 483 U.S. 171, at 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) Since defense counsel never requested a *Harjo* hearing, the trial court never made this determination and it was error for any co-conspirator statements to be admitted without the State having to first prove a conspiracy existed. Oddly, when the State objected, based on hearsay, to a conversation Ms. Warden was present for with Zjaiton Wood, the court sustained this objection. Defense counsel then inquired, "Is your ruling that hearsay cannot come out through another co-conspirator?" The trial court responded, "The objection is hearsay and I sustained it. I think that is plenty clear." (*Id.* at 196)

Petitioner submits had trial counsel requested an actual *Harjo* hearing and not made just an objection based on co-conspirator hearsay, the trial court would have suppressed Ms. Warden's testimony. However, due to trial counsel's ineffective assistance of counsel, this improper evidence was submitted to the jury. Therefore, Mr. Wood's conviction must be reversed and his case remanded for a new trial.

4. Trial counsel failed to challenge admissibility of DNA evidence.

During the first stage, the State presented the testimony of OKC Police Department analyst Kyla Marshall who testified as to her DNA analysis of a glove recovered from the motel room. (04/02/04 Tr. 20, 24) Although there was no blood on the glove, skin cells were recovered and submitted for DNA testing. (*Id.* at 24-25) The results from this testing revealed a mixture of at least three individuals; however, the profiles were incomplete. (*Id.* at 26) Therefore, the most Ms. Marshall could say was Petitioner could be a "possible contributor" to the mixture and "he couldn't be excluded as a potential contributor to the mixture. But, again, because it is a mixture, those alleles that are consistent with him could be coming from other people." (*Id.* at 37, 40-41)

Ms. Marshall couldn't state it was his DNA on either test that she performed. (*Id.* at 47, 52)

She opined "it is not that I can't include him, I can't state it is him, but there is a failure to exclude." (*Id.* at 48) She also testified she was unable to provide statistics because "again I have a mixture and I know that I don't have all the information. So there is no way that I could do stats on that." (*Id.*) Additionally, she stated when she received the glove for testing it was not in a sealed condition, and she was uncertain as to how long it had been at the district attorney's office before it was submitted to her for analysis. (*Id.* at 49) She stated this provided the "potential for contamination," where someone could just walk by and handle the glove. (*Id.* at 50)

During the first stage closing, the State argued the DNA evidence could not exclude Petitioner and that the "DNA was consistent with him not to the exclusion of everyone else, because it is a mixture. But he has got types at every location in the glove that match his. The fact that it is a mixture can't say to the exclusion of everyone else." (*Id.* at 155) In closing argument defense counsel attempted to argue this evidence was a non-issue by pointing out it was not blood that had been tested but skin cells, and Petitioner could not be excluded or included as a donor. Further, defense counsel argued this evidence was contaminated. (*Id.* at 168)

The State must be able to prove the evidence's location at all pertinent times. *Faulkenberry v. State*, 1976 OK CR 131, 551 P.2d 271 The burden of showing, to a reasonable certainty, that evidence has not been tampered with or altered rests upon the party offering it. *Grider v. State*, 1987 OK CR 212, 743 P.2d 678; *Wilson v. State*, 1987 OK CR 86, 737 P.2d 1197. In determining whether an adequate foundation has been laid for the chain of custody of an item, the trial court should consider the nature of the article, the circumstances surrounding its preservation, and the likelihood of contamination or alteration. *Driskell v. State*, 1983 OK CR 22, 659 P.2d 343, 354-55. A more exhaustive foundation is required where the evidence consists of contraband or bodily specimens. *Fixico v. State*, 1987 OK CR 64, 735 P.2d 580, 582. Because of the difficulty in identifying the substance in such cases, "a break in the chain of custody ... would be of a grave concern." *Brown v. State*, 1974 OK CR 16, 518 P.2d 898, 901-02. In *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 389-99 this Court expressed, "The purpose of the chain of custody rule is to guard against

substitution of or tampering with the evidence between the time it is found and the time it is analyzed. The State must lay a foundation showing that the evidence offered is in substantially the same condition as when the crime was committed."

Here, analyst Marshall admitted when she received the glove it was not in a sealed condition. She was uncertain as to how long it had been at the district attorney's office before it was submitted to her. (04/02/04 Tr. 49, 50) Given Oklahoma County's recent scrutiny and litigation due to Joyce Gilchrist, this evidence's "potential for contamination" should not be overlooked or taken lightly. Additionally, her testimony was unreliable because it provided absolutely no statistical information for the jury's consideration. In *Taylor v. State*, 1995 OK CR 10, 889 P.2d 319, this Court held, "[w]ithout the statistical component of DNA profiling evidence, juries would be unable to assess the significance of the match evidence." *Id.* at ¶ 41. Because of the breaks in the chain of custody and the testimony of analyst Marshall this evidence had the potential for contamination, and had no statistical relevance, the admission of the DNA evidence was error. Mr. Wood's due process rights were violated and his conviction should be vacated and his case remanded for a new trial.

5. Trial counsel failed to object to handwriting exemplars.

Petitioner submits he was forced to physically construct evidence (handwriting exemplars) against himself in violation of the his Fifth Amendment right against self-incrimination. (04/01/04 Tr. 254, 267-68) A letter purportedly written by Petitioner, State's Ex. 112, provided the following incriminating evidence,

> So any ways I need to know some things, you say you are pleading guilty, so what are you going to tell them bout the glove? It was mine and you got it from my house that why my D.N.A. is on it. Are you going to tell them that you called me and asked me to come picc you up at the store after the fact. Cuz its just some shit I need to know. Cuz I know my attorneys won't come talk to you shit they won't even come talk me.

This letter was admitted to the jury without objection. Petitioner submits trial counsel provided ineffective assistance of counsel for not objecting to the admission of this evidence, or at a minimum, trial counsel should have requested a *Daubert* hearing to determine its reliability.

While Petitioner was awaiting trial handwriting exemplars were taken from him. (04/01/04

Tr. 254, 267-68) The comparison in this case was performed by David Parrett, who testified,

> First of all, no two people write exactly alike. And each person's handwriting, each individual's handwriting, if it is naturally prepared, that handwriting contains repeated individual characteristics. And by individual characteristics, I mean there is a difference between class characteristics, which are general characteristics of a population. And those minute things that you do in your own handwriting that no one else does. And you have a level of skill in your handwriting. And by that, what I'm talking about is that for instance I have little short legs. I can only run so fast. Well, your handwriting is similar in that you had a level of skill in your handwriting. You can't surpass that level of skill. Now, you can write worse than you naturally write. But you can't write any better.

(*Id.* Tr. 272) Mr. Parrett was asked to make a comparison between Petitioner's and Zjaiton's handwriting exemplars and State's Exhibit No. 112. (*Id.* at 274, 277) Mr. Parrett expressed Zjaiton was excluded as the writer of the questioned document. (*Id.* at 293) As to Petitioner, he "found a sufficient number of significant, individual similarities" to conclude he wrote the letter. (*Id.* at 294)

In closing, the State capitalized on this unchallenged evidence and argued to the jury Petitioner writes a letter to his brother and says, "What about my DNA in the glove?" (04/02/04 Tr. 155) The State further argued,

> Termane says his DNA is in the glove in that letter... Why does he have to go to all of the trouble to get that letter through the sewer line or through some inmate's hands or however that happened to make sure his brother knew the truth? Have you ever thought about that? That leaves you to one conclusion, ladies and gentleman. Termane Wood did this crime. (Id. at 165)
>
> Now, Kyla Marshall, the expert, can't tell you conclusively for sure that it is Termane's DNA in the glove. But Termane Wood tells you for sure that he believes that his DNA is in the glove. And he's trying to get Zjaiton to explain that away. You read it. (Id. at 180)
>
> But it is important for Zjaiton to say that he went and got the gloves at Termane's house because again the kite letter, Number 112, suggests that Termane and Zjaiton are getting their story together about how Termane's DNA gets in that glove. (*Id.* at 191)

The issue of handwriting uniqueness has been questioned by other courts in this country. As of 2005, some courts have determined the forensic document examiner's testimony did not meet reliability of *Daubert/Kumho* and excluded this testimony. *United States v. Lewis,* 220 F.Supp.2d 548 (S.D.W.Va.2002); *United States v. Brewer,* 2002 WL 596365 (N.D.Ill. 2002);*United States v.*

Hidalgo, 229 F.Supp.2d 961, 967 (D.Ariz.2002); *United States v. Saelee,* 162 F.Supp.2d 1097 (D.Alaska 2001); *United States v. Fujii,* 152 F.Supp.2d 939 (N.D.Ill.2000). Other courts allowed the examiner to testify to particular similarities and dissimilarities between the documents, but excluded their ultimate opinion as to authorship. *United States v. Rutherford,* 104 F.Supp.2d 1190 (D.Neb.2000); *United States v. Santillan,* 1999 WL 1201765 (N.D.Cal. 1999); *United States v. Hines,* 55 F.Supp.2d 62 (D.Mass.1999); *United States v. Oskowitz,* 294 F.Supp.2d 379,384 (E.D.N.Y. 2003); *United States v. Van Wyck,* 83 F.Supp2d 515 (D.N.J. 2000).

Mr. Parrett's conclusions "no two people write exactly alike" is hard to believe. (04/01/04 Tr. 272) Further, his conclusion "that the writer of the K-1, known document, Termane Wood prepared the text on the letter Q-1" is also improper. (*Id.* at Tr. 294) It is stated in unequivocal terms, not in terms that handwriting in "the letter" was consistent with the handwriting exemplars taken from Petitioner. This Court has held "it is improper for a forensic expert to state an opinion with absolute certainty where such is beyond the present state of the art of forensic science. *See McCarty v. State,* 1988 OK CR 271, 765 P.2d 1215, 1218- 19 (holding that "admission of this opinion testimony was error, because Ms. Gilchrist did not, and could not, testify that such opinion was based on facts or data 'of a type reasonably relied upon by experts in the particular field' in forming such an opinion."); *Moore v. State,* 1990 OK CR 5, 788 P.2d 387, 399-400.

Since trial counsel did not request a *Daubert* hearing, any basis for Mr. Parrett's opinions was not tested by the trial court although his testimony violated Petitioner's 5th Amendment rights as well as his right to a fair trial.

6. Trial counsel failed to object to improperly excused jurors.

During jury selection, potential jurors were questioned by the Court about whether they could consider all three punishments. Potential juror, Brenda Sumhall, after expressing "[a]ll three, no. ... I cannot consider all three," was summarily excused without the trial court ever clarifying for the record which penalty she could not impose. (03/30/04 Tr. 13-15) Two jurors were removed by the

court for not being able to impose a sentence less than death.[16] In stark contrast, the court summarily excused ten jurors who voiced concerns about their ability to impose the death penalty.[17] Of these ten jurors, defense counsel only questioned one juror, Thieh Trink. (03/29/04 Tr.50-52) Another potential juror, Bennett Ughamadu, who first expressed he didn't "have any problem" with considering all three punishments, was later excused by the court when he expressed he preferred to give something other than the death penalty due to his religious beliefs. Although Mr. Bennett, upon questioning by the State, clarified this did not mean he could not give death as a penalty, was excused by the court, again, without questioning by defense counsel. (03/29/04 Tr. 122 -28) Defense counsel never objected to the their dismissal. Finally, four jurors who strongly favored the imposition of the death penalty sat on Mr. Wood's jury.[18] Defense counsel never challenged these jurors for cause despite the fact they each expressed their preference for the death penalty.

In capital cases, the Supreme Court has set forth certain guarantees to ascertain the imposition of the death sentence is not arbitrary and capricious. "A death sentence cannot be cannot be carried out if the jury that imposed...it was chosen by excluding [prospective jurors] for cause simply because they voiced general objections to the death penalty or expressed conscientious religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). This Court has held that all doubts regarding juror impartiality must be resolved in favor of the defendant. *Hawkins v. State*, 1986 OK CR 58, 717 P.2d 1156.

The trial court's summary dismissal of the string of potential jurors who voiced general

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[16] Potential jurors Daniel Wade (03/29/04 Tr. 66-67) and Robert Abraham (03/29/04 Tr. 225-26).

[17] Potential jurors Theih Trink (03/29/04 Tr. 50-52); Cathleen Lawry (03/29/04 Tr. 63-64); Michael Gilbert (03/29/04 Tr. 95-95); Bennett Ughamadu (03/39/04 Tr. 122-128); Neyoma McAlister (03/29/04 Tr. 150-51); Linda Green (03/29/04 Tr.184); Robert Megehee (03/30/04 Tr. 10); Rodney Bolden (03/30/04 Tr. 61-62); Teresa Terry (03/31/04 Tr. 18); and Demetra Gaddis (03/31/04 Tr. 61).

[18] Jurors Elliott, Burton, Dodson, and Clemenceau. (03/29/04 Tr. 116, 169, 198; 03/31/04 Tr. 24)

dislike for the possibility of having to impose the death penalty without allowing defense counsel an attempt to question them resulted in a violation of Petitioner's rights under the 5th and 14th Amendments, and Okla. Stat. Art. II, §§ 7 and 20.

7. Trial counsel failed to object when jurors moved their vehicles.

As discussed in Proposition V, at the end of first and second stage the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Additionally, it does not appear from the record the bailiff or a deputy escorted the jurors who moved their vehicles. Unfortunately, trial counsel failed to object to this procedure despite the fact that this Court in *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, held 22 O.S. § 857 is mandatory and designed to preserve the purity of jury trials. Petitioner submits if it is determined that this error was waived due to the absence of an objection by trial counsel, then trial counsel's failure to object should be indicative of ineffective assistance of counsel.

8. Trial counsel failed to request court to instruct as to life with parole.

Trial counsel failed to ask the court to instruct jurors pre-evidence or post- evidence for an instruction on the definition of life with parole. The Oklahoma Legislature enacted a truth in sentencing law which forbids a prisoner with a sentence of life with parole on a murder conviction from being paroled unless 85% of his sentence had been served. *See* 21 O.S. § 13.1 This Court recently held *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 278,

> ...for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our traditional prohibition of mentioning parole at trial.... [T]he 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained.

Although none of the jurors asked specifically how long a life sentence will keep someone in prison, trial counsel did inform several jurors during voir dire that a life sentence meant Petitioner could get out of prison one day. (03/29/04 Tr. 109, 134, 179, 199, 208, 234; 03/30/04 Tr. 22, 32) This statement, without clarification as to how much time Petitioner would have to serve before even

being considered by the pardon and parole board is misleading. There is a great risk that if the jury is not fully informed about its sentencing options, it will choose the death sentence because it does not completely understand the sentencing options. The trial court should have instructed Mr. Wood's jurors that a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and that Mr. Wood, if found guilty of murder in the first degree, would have to serve at a minimum of 85% of that forty-five years. *Id.* at 283.

9. Trial counsel failed to request proper jury instructions.

Petitioner had a fundamental right to have his guilt or innocence determined by a jury properly instructed on Oklahoma law. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). The purpose of jury instructions is to place before the jury a correct and full statement of the law which is applicable to the case. *Ake v. State*, 1989 OK CR 30, 778 P.2d 460, 470. OKLA. STAT. tit. 12 § 577.2 (1991) provides the instructions set forth in the Oklahoma Uniform Jury Instructions should be used when applicable in a particular case. Petitioner submits his jury was not properly instructed since several instructions simply were not given, while others omitted words, and then one instruction submitted to the jury is not even in the Oklahoma Uniform Jury Instructions.

Despite the applicability of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 150-51, 107 S.Ct. 1676, 1684, 95 L.Ed.2d 127 (1987), "that the accused intended to kill or exhibited such reckless disregard that he is adequately culpable to be death eligible," to Mr. Wood's felony murder conviction, defense counsel failed to request the jury be instructed. As a result, Petitioner's jury was never informed of its constitutional obligation to examine his individual culpability prior to imposing the death penalty. Since evidence had been presented by Zjaiton Wood he was the one that stabbed the victim, regardless of a request from counsel, the trial court's failure to *sua sponte* instruct the jury on the constitutional requirements for the imposition of the death penalty on one convicted of felony murder who did not kill in the course of the felony was fundamental error. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Further, this Court has held Instruction No. 4-71, OUJI-CR(2d) is necessary

in felony murder cases as it enables the jury to give individualized consideration to the defendant's culpability as required by the Supreme Court. *Allen v. State*,1994 OK CR 30, 874 P.2d 60, 64-65; *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 402.

Additionally, instructions defining "attempts" were omitted. The jury in Instruction No. 10, was informed attempted robbery was the underlying felony the State used to support felony murder. (*See* O.R. IV 655) The Notes on Use for OUJI CR(2d) 4-65 state "[i]f the predicate felony is an attempted crime, the trial judge should give the appropriate instructions for attempts." The "attempts" instructions, OUJI CR (2d) 2-10 thru 2-15, were not given to the jury. The other instructions omitted address circumstantial evidence. According to Instruction No. 52, the State relied on circumstantial evidence in an attempt to prove Petitioner was a continuing threat. (*See* O.R. IV at 632). The Notes on Use for OUJI-CR(2d) 4-77 require the court to provide the jury with additional instructions that define direct evidence versus circumstantial evidence and the weight to given to each; however these instructions were not provided. *See* OUJI-CR(2d) 9-2, 9-3, and 9-4.

The following jury instructions, although given to the jury, were missing words

-Instruction No. 44 left out "or" and according to OUJI-CR(2d) 4-68 should read "shall be punished by death **or** imprisonment for life..." *See* (O.R. IV at 624).

-Instruction No. 46 left out "with the possibility of parole" and according to OUJI-CR(2d) 4-70 should read "return a sentence of life imprisonment **with the possibility of parole** or life imprisonment without parole." *See* (O.R. IV at 626).

-Instruction No. 47 left out "At the present time there exists" and according to OUJI-CR(2d) 4-72 this language should start the sentence. (O.R. IV at 627).

-Instruction No. 37 left out "or testimony" and according to OUJI-CR(2d) 10-7 should read "In so doing I have not expressed nor intimated in any way the weight or credit to be given any evidence **or testimony** admitted during the trial." (O.R. IV at 682).

Finally, the trial court submitted its own non-OUJI instruction, Instruction No. 5:

If you have a reasonable doubt as to the guilt of the Defendant on any or all such offenses, you must first find him not guilty of that particular crime. The three (3) counts are to be considered separately. By that I mean that each count is to be given separate though and deliberation. (O.R. IV 649)

While the relevant and proper instructions should have been given by the trial court as a

matter of fundamental right, defense counsel still has a duty to request all relevant and proper instructions if he is to function effectively. This error was fundamental because the instructions failed to force the jury's consideration of the evidence into proper legal channels so that it could reach a legally sound verdict. *Kamees v. State*, 1991 OK CR 91, 815 P.2d 1204, 1207; *see also Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Furthermore it deprived Petitioner of due process and a reliable sentencing proceeding in violation of the 8th and 14th Amendments. *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985).

10. Failed to Object to Prosecutorial Misconduct.

Petitioner, in Proposition IV, sets forth the instances of prosecutorial misconduct that occurred in this case and argues in that proposition trial counsel and appellate counsel were ineffective for their failure to develop this legal issue for this Court to consider.

D. Failure of appellate counsel to perform the professional duty owed to Mr. Wood.

Mr. Wood was denied effective assistance of counsel when his appellate defense counsel failed to perform the professional duty owed to him under prevailing professional norms and the mandates of the law. In *McGregor v. State*, 1997 OK CR 10, 953 P.2d 332, *cert. denied*, 521 U.S. 1108, 117 S. Ct. 2489, 138 L. Ed.2d 996 (1997), this Court established ineffective assistance of appellate counsel claims are properly before this Court only if this Court finds the allegations are true and the performance of the appellate defense counsel would constitute the denial of reasonably competent assistance of counsel under prevailing professional norms. In this case, appellate counsel's performance constituted denial of reasonably competent assistance of counsel under prevailing professional norms. (*See* Rule 1.1 of the Rules of Professional Conduct regarding thoroughness and preparation.) As detailed in all the sub-propositions above, it is clear the required attention and adequate preparation was not provided by appellate counsel. As a result of appellate counsel's failure to perform the professional duty owed to him under prevailing professional norms, Mr. Wood received ineffective assistance of appellate counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L.

Ed.2d 821 (1985); *Garrison v. State*, 2004 OK CR 35, 103 P.3d 590. Mr. Wood respectfully requests a new trial or a new sentencing trial.

PROPOSITION IV
PROSECUTORIAL MISCONDUCT RESULTED IN UNFAIR PROCEEDINGS.

A. Bad Acts and Evidence of Other Crimes.

1. Prejudicial and Improper Bad Acts Admitted During First Stage.

During first stage the State called Coleman Givens who was staying at a motel across from the Ramada Inn and testified as to the events he observed as they unfolded that night. (O3/31/04 Tr. 224-29) Over defense counsel's objections, the State also elicited improper and irrelevant testimony from Mr. Givens which dealt with the conversations he heard between the co-defendants on the way to Petitioner's preliminary hearing. (*Id.* at 252-55, 256-58) One conversation was if "they didn't say or do like he wanted, he was going to drag them all, you know down with him." (*Id.* at 255-56) They then allegedly questioned him as to what he was going to say. He felt they were trying to make him nervous. Although Givens reported Petitioner asked him what he was going to say; he felt threatened by Zjaiton and expressed he "kind of told me what not to say." (*Id.* at 259, 261)

The State elicited another bad act while cross-examining Zjaiton. The State questioned Zjaiton with "Isn't it true, sir, that on April the 6th of 2002, over in county jail, you and your brother kicked another inmate in the face and injured him, is that right?" (04/02/04 Tr. 112) Defense counsel's objections were overruled. (*Id.* at 112-14)

2. Evidence of Another Crime.

Prior to trial, the Court ruled in the case of co-defendant Bateman the La Franca Pizza Robbery was inadmissible in first stage as *Burks* evidence and the same ruling applied in Petitioner's case. (O.R. 579) Despite this ruling, during first stage, the State forced Zjaiton Wood to testify he and Petitioner had robbed the pizza place earlier that evening. (04/02/04 Tr. 129-30). Again defense counsel's objections were overruled.

3. Legal Argument.

In *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, 774 this Court established a procedure to be followed when the State seeks to introduce other crimes evidence. This procedure was not aimed solely at providing pretrial notice to the defendant but also required a specification of the exception under which the evidence is sought to be admitted; a visible connection between the offense charged and the offense sought to be proved; a showing the evidence is not cumulative and is necessary to support the State's burden of proof; proof of the other crimes by clear and convincing evidence; and an instruction to the jury as to the limited purpose for which the evidence is admitted. 594 P.2d at 774-75. This Court cautioned "[s]uch evidence should not be admitted where it is a subterfuge for showing to the jury that the defendant is a person who deserves to be punished." 594 P.2d at 775.

Here, none of the safeguards of the *Burks*' requirements were established. The State did not file any pre-trial notice it intended to introduce evidence of other crimes or bad acts. The State was never required to specifically identify what evidence it would be sponsoring, was never required to show a legitimate purpose for the introduction of this evidence, was never required to meet a burden of proof with regard to the evidence, and the jury was never instructed it was to use the evidence only for a limited purpose. Therefore, this bad character evidence and "other crimes" evidence, which was intentionally elicited by the State, and improper for the jury to consider resulted in an unfair trial and a violation of due process. U.S. Const. Amend. 8th and 14th and Okla. Const. art. II, § 7 and 9.

Additionally, the introduction of this irrelevant evidence was improper under 12 O.S. §§ 2402 and 2404(B). Even if this Court determines it was arguably relevant, then its probative value was substantially outweighed by the danger of unfair prejudice under 12 O.S. § 2403. The State's intentional admission of this improper character evidence painted Petitioner as a bad person which was not relevant to the charges against him. Further, the admission of this improper, irrelevant evidence for the jury to consider, calls into the question the reliability of Petitioner's trial, and whether Petitioner received a fundamentally fair trial.

B. The Prosecutor Misstated the Law and Demeaned Mitigating Evidence.

Throughout second stage closing, the prosecutor misstated the law and informed the jury a

mitigator had to meet a two-prong test before it could be considered in mitigation. (04/05/04 Tr. 117) The prosecutor stated, " Number one, you must find or you may find that the mitigator is in fact true. And if it is true, then you have a second prong. You have to ask yourself, well, if it is true, does it extenuate or reduce the degree of moral culpability or blame? Once again, don't take my word for it. It is in black and white. It is the law. It's the law." The prosecutor then went over each of the 17 mitigating circumstances listed in Instruction No. 54 and reiterated the alleged two prong test and how each did not meet this test. (04/05/04 Tr. 117-18, 118-19). After addressing the last of the 17 mitigators, the State restated the following:

> So, when you go through these 17 proposed mitigating factors, you go through each one of them yourself. You will think of more things that I didn't to help you know these are not mitigating circumstances. You have to find two things: Number one, are they true? Like the first mitigator is, the defendant is 24-years-old. Well, I give you that, he is. That is true. But the number two prong, did that mitigate? Does that extenuate or reduce the degree of moral culpability or blame. A two-prong test. Go through each and ask yourself, number one, is it true? And number two, does it reduce the degree of moral culpability or blame? I submit to you, you will not find one of those to be mitigating. (*Id.* at Tr. 127)

Petitioner respectfully submits this two-prong test is not the law. As set forth in Instruction No. 53, "Mitigating circumstances are which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." *See* OUJI CR(2d) 4-78. The jury is allowed to decide which circumstances it finds mitigating, and the jury does not have to unanimously agree on the mitigators. Additionally, the mitigating circumstances do not have to be proven beyond a reasonable doubt. *Id.*

Furthermore, the clear purpose of the prosecutor's comments and application of a two-prong test was to inform the jurors that they could ignore these mitigating circumstances because, based upon the prosecutor's personal opinion, the circumstances were not worthy of consideration. These remarks were made to confuse the jury about its responsibility for evaluating the mitigating evidence in the way it was legally required. Persuading the sentencer to ignore mitigating evidence is error. *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934,

106 L.Ed.2d 256 (1989). The Supreme Court has held a defendant in a capital case has a constitutional right to consideration of mitigating factors by the sentencer, and the sentencer cannot be precluded from considering mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Misleading the jury about its responsibilities with regard to capital sentencing violates the 8th Amendment. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

C. Improperly accused Petitioner of lacking remorse.

During second stage closing the State argued Petitioner was not remorseful for these crimes,

> Another thing when Dr. Hand testified, what is even more important is what he didn't say. The one thing that Dr. Ray Hand didn't say about this defendant is that he is remorseful for committing this murder. Or that he was sorry for committing this murder. I submit to you that he is because he is not. And that's what makes him different from people like you and me. That is why he deserves the death penalty on top of everything else we discussed. Ask yourselves if you were driving home last Friday night from this jury service and you accidentally ran over another person, accidentally killed that person, not intending to, you would be devastated. Every one of you would. This person stuck a big knife into the chest of a 19-year-old man. Stuck it in there five inches. And he never said to one person, "I'm sorry about that." He has never said to one person "I'm remorseful about that." What kind of a person is that? Somebody that is different from you and me. And that fact, I submit to you, in addition to all of the others facts is the reason why he deserves the death penalty. How can you kill, intentionally, knowingly kill another human being and not be sorry about it?

(04/05/04 Tr. 133-34) The State also commented, "[w]e have to deal with - - what we have today is this defendant. A man who can kill an innocent victim without mercy and without remorse. I submit to you that Mr. Wood needs to be on death row where he can't hurt anyone." (*Id.* at 139)

Petitioner recognizes this Court has held "lack of remorse" is pertinent to the continuing threat aggravating circumstance. *Pickens v. State*,1993 OK CR 15, 850 P.2d 328, 337; *Sellers v. State*, 1991 OK CR 41, 809 P.2d 676, 689. However, cases in which lack of remorse has been held to be relevant are those in which the defendant admitted committing murder, then expressed a lack of remorse for the deed. There is a huge difference between an individual maintaining he did not commit the offense charged, and one who admits he committed the offense but is not sorry. Under the State's warped theory of criminal justice, a defendant who maintains his innocence throughout

trial should automatically be eligible for the death penalty because he expresses no remorse.

At trial, the defendant is cloaked with the constitutionally protected right to maintain his innocence. It is still the law that a death sentence may not be based on factors that are constitutionally impermissible or irrelevant to the sentencing process. Likewise, a capital sentencing jury may not draw adverse inferences from conduct that is constitutionally protected. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). It is well settled that to punish a person for exercising a constitutional right is a "due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Here, the State twisted his constitutional right to claim innocence into evidence he should be executed for exercising this right, unfairly undermining his 8th and 14th Amendment rights to a fair and reliable sentencing.

D. Invoking sympathy and arguing facts outside the record.

Despite the fact no victim impact testimony was presented, the State argued:

> - His [Ronnie Wipf's] mom and dad on his birthday don't get to go to the prison and visit him. They go to a grave up on the hill in Montana. That is where they visit Ronnie. (04/05/04 Tr. 118-19)
>
> - I'll bet that Ronnie Wipf's mom and dad would like to visit him in prison instead of in his grave. (*Id.* at 119)
>
> - Well, once again, you know Ronnie Wipf was 19 years-old. I bet his folks would like to see him grow into a young man and have children and visit him and their grandchildren. That will never happen. He age is going to be 19. (*Id.* at 120)
>
> - There used to be a young man, a 19-year-old young man, Ronnie Wipf, who was loved by his family. (*Id.* at 140)
>
> - Don't get hung up about where our victim is. Whether he is on a hill or in a valley. We don't care about that. But his folks will visit his grave. He is buried. Doesn't make any difference where it is at. (*Id.* at 158)

This Court has held that a prosecutor may not argue and infer facts which were not admitted as evidence. *Howell v. State*, 1994 OK CR 62, 882 P.2d 1086; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220 (Okl.Cr. 1988); *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350. Here, the prosecutor's closing served no other purpose than to prejudice the jury against Petitioner with this proposed evidence about how the victim's family felt. Yet, there was absolutely no evidence

presented to support the State's argument. This Court has held that it is improper for the prosecutor to attempt to distract and inflame the jury with tactics designed to cause the jury to find against the defendant for sympathy for the victim. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1225; *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350, 354; *Williams v. State*, 1983 OK CR16, 658 P.2d 499, 501; *Dupree v. State*, 1973 OK CR 397, 514 P.2d 425, 427-28.

E. Prosecutor presented inconsistent factual theories as to the victim's murder.

Petitioner's jury trial occurred before his brother Zjaiton Wood's trial. At Petitioner's trial, Zjaiton took the stand and testified he "grabbed the victim by the head and I stabbed him in the chest and told him I was God." (04/02/04 Tr. 94) Zjaiton further testified "I don't want my brother to die for something that he is not guilty of. I mean, if he was guilty of this, you know what I am saying, I would tell him to be a man and face the heat. But he's not guilty." (*Id.* at 97)

Despite this evidence, during first stage closing argument the State argued Petitioner committed this murder, not his brother Zjaiton. (4/04/04 Tr. 5, 6, 7, 8) The State argued Zjaiton did not make Petitioner commit this murder, he had a choice and he knowingly and voluntarily took his life. (*Id.*) The State completely discounted the testimony of Zjaiton with the following,

> -I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (*Id.* at 7)

However, at Zjaiton trial, which was before the same judge with the same prosecutors, the State did an about face and argued Zjaiton stabbed the victim, not Petitioner. Although Zjaiton did not take the stand, his prior testimony from Petitioner's trial was presented through Linda Wood and Officer Billy Ricketts.[19] (Linda Wood - Z.Wood 02/22/05 Tr. 221-28; Officer Ricketts - Z. Wood 02/23/05 at 203-09) Petitioner submits the State's presentation of inconsistent theories as to who actually murdered the victim violated his due process rights to a fair trial and his conviction must

[19] Petitioner filed a Motion to Cross Reference with Zjaiton Wood's record before this Court in F-2005-246.

be reversed.

This Court addressed a similar situation in *Littlejohn v. State*, 1998 OK CR 75, 989 P.2d 901. In *Littlejohn* the prosecutor argued inconsistent triggerman theories at each co-defendant's trial to obtain a conviction. Since this was a case of first impression, this Court turned to *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992) for guidance. In *Parker* there were three co-defendants, three separate trials, and three separate arguments as to who was the shooter. The *Parker* court determined, "given the uncertainty of the evidence, the court reasoned it was proper for the prosecutors in the other cases to argue alternative theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendant's juries." 974 F.2d at 1578. Utilizing this analogy, this Court in *Littlejohn* held it was permissible for the State to argue alternative theories as to who was the shooter when there was no physical evidence demonstrating who had fired the fatal shot, and that the "the evidence was less than conclusive as to the identity of the shooter." *Id.* at ¶ 27.

However, the *Parker* court condemned the use of the State utilizing contradictory evidence to obtain a conviction. In *Littlejohn*, this Court cited to the following analysis in *Parker*,

> ....two defendants were convicted for the same murder in separate trials. The state had contended at the first defendant's trial that the first defendant had actually killed the victim. The first defendant testified at his trial that he did not participate in the murder and accused the second defendant of being the perpetrator. One year later, the state used the testimony of the first defendant to show that the second defendant had actually killed the victim. **The concurrence concludes that the prosecutor had obtained the second conviction through the use of evidence that he could not have believed, given that the prosecutor had disputed the first defendant's testimony in the first trial.** (citations omitted.) *Parker*, 974.F.2d at 1578 (emphasis added).
>
> The Parker court found these two cases distinguishable because Parker's prosecution 'did not involve the use of necessarily contradictory evidence.' *Id.* at ¶ 25.

Here, the prosecutor disputed and ridiculed Zjaiton's testimony to obtain a conviction against Petitioner. Then in Zjaiton's trial his testimony suddenly becomes believable and is used by the State to obtain a conviction against him as well. This involves the use of necessarily contradictory evidence which is not condoned by *Littlejohn* or *Parker*.

If this Court determines that it was not improper for the prosecutors to argue inconsistent contradictory theories as to who stabbed the victim to obtain a conviction, Petitioner submits his case, at a minimum, must be sent back for a new sentencing. Recently, the Supreme Court, in *Bradshaw v. Stumpf*, 545 U.S. 175, 187, 125 S.Ct. 2398, 2407-08, 162 L.Ed.2d 143 (2005), in addressing prosecutorial inconsistencies to obtain convictions held, "[t]he prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.* The Supreme Court remanded the case to determine what effect the prosecutor's conduct claim related to Stumpf's sentence of death.

Petitioner submits the State's conduct clearly impacted his sentence. In support of the especially heinous, atrocious and cruel aggravating circumstance the State argued:

> -Which it is, I submit to you, to murder a man, to stab him with a knife like was done in this case, and stick it five inches into his body. (04/05/04 Tr. 111)
>
> -You have to resort to stabbing him five inches into his body with that knife. I submit to you that that was extremely wicked for them to do that. (*Id.*)
>
> -Well, what was in the minds of these defendants, especially the defendant on trial today, Mr. Termane Wood, when he stuck that big knife into the chest of Ronnie Wipf? (*Id.*)
>
> -I submit to you that the abuse inflicted to Ronnie Wipf in this case was so serious that it caused his death. Look at that knife. Look at that wound and ask yourself whether or not that was serious abuse. (*Id.* at 112)
>
> -Did Ronnie Wipf suffer? He doesn't just - - he didn't lie down and go to sleep. He suffered. That knife was five inches into his chest. He walked around in his own blood. You will have the pictures up there and see that. Even on his feet there is blood that has dripped from his body. That means it came from the wound and it dripped to his feet. He was standing some time after that knife went into his chest, because blood came out of his chest and dripped on to his feet. You will see the bottom of his feet, where after he bled on the floor he walked on that. That is the reason it is on the bottom of his feet. He was alive long enough to walk in his own blood. Long enough for his blood to spill out and drop on his feet. He was alive long enough to remove that knife from his chest and to lay there on the bed and bleed out after he had already bled into his own body a quart and a half of blood. I submit to you he suffered. And he suffered greatly. (*Id.*)

As for the aggravating circumstance of murder to avoid lawful arrest the State argued:

> - They killed this guy for purposes of a trying to avoid lawful prosecution and arrest. They didn't kill the pizza guy. They were in control of that situation. When they lost control in

this room, it was this man [Termane] that said "Shoot the bastard." (*Id.* at 154-55) The State, in arguing against mitigation, states "Zjaiton Wood did not make Termane Wood murder Ronhie Wipf on that night." (*Id.* at 126)

Clearly, this evidence impacted Petitioner's resulting sentence of death. The prosecutor repeatedly argued Petitioner stabbed the victim and explained in great detail how those facts supported the aggravating circumstances alleged and diminished his mitigating circumstances. Therefore, Petitioner's resulting sentence of death is in violation of due process and must be vacated.

F. Prosecutor misled the trial court at the remanded evidentiary hearing.

During the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases and only had 3 cases had resulted in a sentence of death. (Vol. II Tr. 260) Although appellate counsel tried to have the court take judicial notice of a handwritten list of 8 cases which had resulted in a death sentence, the trial court denied this request. (Vol. III Tr. 409-12) This denial was based on the State's assertion Mr. Albert had not been the trial counsel on at least 2 of the 8 cases on the list. (*Id.* at 410-11) Prosecutor Smith expressed, "James Fisher is listed on here as one of the people, and I can tell you for sure, I tried that case and John Albert was not involved in that case. And this list is incorrect at this first name." (*Id.* at 410) Prosecutor Smith then states "I tried Terry Lyn Short in this courthouse. And to the best of my recollection, I can't remember who the defense attorney was now because it's been so long, but I don't believe it was Mr. Albert." (*Id.* at 411)

As addressed in Proposition II of this Application, Mr. Albert has been involved in at least 8 capital cases wherein a sentence of death which include James Fisher and Terry Short. This misstatement of fact, which was adamantly argued by the State as fact, undoubtably calls into the question of the reliability of the trial court's Findings.

G. Conclusion.

Although some of the State's commentary and arguments were not met with contemporaneous objection, none of the above instances of misconduct constitute a fair comment on the evidence, and all constitute a complete denial of due process. *Donnelly v. DeChristoforo*, 416

U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Lack of an objection does not preclude the Court from reviewing improper comments. *Atterberry v. State*, 1986 OK CR 186, 731 P.2d 420; *Cobbs v. State,* 1981 OK CR 60, 629 P.2d 368. However, if this Court determines these claims are procedurally barred because an objection was not raised by trial counsel nor addressed on direct appeal by his appellate counsel; Petitioner submits the failure of his prior counsel to raise these meritorious issues resulted in ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) *Evitts v. Lucey,* 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985).

The combined effect of the prosecutorial misconduct was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings and resulted in deprivation of the constitutional rights enumerated above. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1221; *Spees v. State*, 1987 OK CR 62, 735 P.2d 571, 576; *Freeman v. State*, 1984 OK CR 60,681 P.2d 84, 85; *Rice v. State*, 92 P.2d 857, 859 (Okl.Cr. 1939) Mr. Wood was denied his 14th Amendment right to a fair trial and fair hearing by the repeated abuses of the prosecutor; therefore, his conviction and sentence mandate reversal.

PROPOSITION V
ERROR OCCURRED WHEN JURORS MOVED VEHICLES AFTER BEING SWORN.

At the end of first stage at approximately 5:53 p.m. on April 2, 2004, the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Deliberations began at approximately 6:26 p.m. (04/02/04 Tr. 204-11, 213) At the end of second stage at approximately 5:57 p.m. on April 5, 2004, after the jurors were sworn, but before they began deliberations, the trial court once again allowed the jurors to move their vehicles. Deliberations began at approximately 6:23 p.m. (04/05/05 Tr. 159-61, 163) The record is silent as to which jurors left to move their vehicles. Additionally, it does not appear from the record that the bailiff or a deputy escorted the jurors who moved their vehicles.

Oklahoma Statute Title 22, § 857 provides in pertinent part:

> After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

In *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, this Court held that the above statute is mandatory and designed to preserve the purity of jury trials. While the law providing for juror sequestration for deliberation is not protected under the federal constitution, it is specifically mandated by Oklahoma statute. Deprivation or deviation of this statute, constitutes a due process violation. *See also, Golden v. State*, 2006 OK CR 2, 127 P.3d 1150, 1153 (holding that deprivation of statutorily prescribed peremptory strikes was a violation of due process).

In addition, the record is silent as to when and even if the bailiff was sworn after the first and second stage evidence and argument had been presented to the jury. *See Castro v. State,* 1987 OK CR 182, 745 P.2d 394, 406 (holding second stage of a capital jury trial "is more like a separate trial in that it involves new findings of fact.") Thus, the bailiff should have been sworn; it was error not to do so. This Court has held that "the fact that the bailiff in the present case was not immediately sworn to keep the jury together after they had heard the charge does not eliminate the error but rather compounds it." *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 48. The fact the bailiff was not sworn after the charge given for first and second stage deliberations combined with the fact the jurors were allowed to move their cars after being sworn is reversible error, a violation of due process, and also structural error affecting the framework of the trial and the sanctity of the jury function in our court system. *See Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed.2d 175 (1980) and *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L .Ed.2d 302 (1991).

Petitioner's conviction should be overturned, and he should receive a new trial.

PROPOSITION VI
THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE.

In *United States v. Rivera*, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held the

cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Rivera*, 900 F. 2d at 1469; *see also Cargle v. Mullin*, 317 F.3d 1196, 1206 -1207 (10th Cir. 2003). In assessing cumulative error, this Court must consider both first and second stage errors.

> prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated among such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment. Finally, we conclude that prejudice from guilt-phase error may be cumulated with prejudice from penalty-phase error.

Id. at 1200. Therefore, even though each instance of error alone would not require reversal, some or all errors combined may warrant reversal.

The ineffectiveness of trial and appellate counsel and the errors enumerated by appellate counsel and post-conviction counsel, denied Mr. Wood substantial statutory and constitutional rights. His death sentence was obtained in violation of the 6th, 8th, and 14th Amendments to the Federal Constitution and Article 2, §§ 7, 9, and 20 of the Oklahoma Constitution. Mr. Wood should therefore be granted a new trial, or in the alternative, his death sentence should be modified to life imprisonment or life imprisonment without parole.

PRAYER FOR RELIEF

Wherefore, Mr. Wood respectfully requests that this Court enter an order vacating his convictions and sentences and remanding his case for a new trial or new sentencing. In the alternative, Mr. Wood respectfully requests this Court to impose a sentence of life imprisonment or life imprisonment without parole, or to remand this case for a full and fair evidentiary hearing on the issues presented.[20]

---

[20] Mr. Wood's Appendices to the Original Post-Conviction Application, Motion for Discovery, and Motion for Evidentiary Hearing, were filed on December 26, 2006.

Respectfully submitted,

Julie Gardner, OBA #16425
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 290-7030
Fax: (405) 290-7035
Attorney for Termane Wood

VERIFICATION OF COUNSEL FOR PETITIONER

I, Julie Gardner, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Julie Gardner, OBA #16425

Subscribed and sworn to before me this 25h day of April, 2007.

Notary Public

My Commission expires: 1/15/2008
My Commission number: 04000440

CERTIFICATE OF SERVICE

By my signature below, I certify a copy of the foregoing was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of the Court of Criminal Appeals this 25th day of April, 2007.

Julie Gardner, OBA #16425
228 Robert S. Kerr, Suite 100
Oklahoma City, Oklahoma 73102
(405) 290-7030
Fax: (405) 290-7035
Attorney for Termane Wood

Attachment 2

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TERMANE WOOD	)	
	)	PC Case No.:
Petitioner,	)	
	)	**CAPITAL POST CONVICTION**
vs.	)	**PROCEEDING**
	)	Prior Post Conviction No.: PCD-2005-143
THE STATE OF OKLAHOMA	)	Direct Appeal No.: PCD-2005-143
	)	Oklahoma County
Respondent.	)	District Court Case No: 5:10-cv-00829-HE

SECOND APPLICATION FOR POST CONVICTION RELIEF - DEATH PENALTY

DEATH PENALTY CASE

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ATTORNEY FOR PETITIONER

TREMANE WOOD

July 5, 2011

PART A: PROCEDURAL HISTORY

Petitioner, Tremane[1] Wood, appearing specially through undersigned counsel,[2] submits his second application for post-conviction relief under Section 1089 of Title 22. Pursuant to Rule 9.7(A)(3), a copy of the original amended application for post conviction relief filed April 25, 2007, is appended to this second application as Attachment 1. The addendum and appendix of exhibits have not been attached, but are available should the Court find them necessary for its review of this application. The sentence(s) from which relief is sought are:

Count I - Death
Count II - Life
Count III - Life

1. (a) Court in which sentences were rendered: Oklahoma County District Court

   (b) Case Number: CF-2002-46 Oklahoma County

2. Date of original sentence: April 2, 2004

3. Terms of sentences:

   Murder in the First Degree - Death
   Robbery with Firearms - Life
   Conspiracy to Commit a Felony - Life

4. Name of Presiding Judge: Honorable Ray C. Elliott.

---

[1]The state court record incorrectly spells Tremane Wood's first name as "Termane."

[2] Undersigned counsel is appearing specially and on a *pro bono* basis in an effort to get Tremane's claims before the Court. Should this Court grant an evidentiary hearing, undersigned counsel respectfully requests he be appointed to represent Tremane.

5. Petitioner is currently in custody at Oklahoma State Penitentiary, H-Unit.

Does Petitioner have criminal matters pending in other courts? Yes (X)* No ()

*Tremane has a habeas corpus petition pending in the Western District of Oklahoma under Case No. 5:10-cv-00829-HE. This is actually a civil or quasi-civil matter but Tremane mentions it here for the sake of completeness. More information is provided in the procedural history.

I. CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime for which a sentence of death was imposed:

Murder in the First Degree

Aggravating factors alleged and found:

a. The defendant knowingly created a risk of death to more than one person;

b. The murder was especially heinous, atrocious, or cruel;

c. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

a. The defendant is only 24 years old.

b. The defendant's parents were divorced at a young age.

c. The defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.

d. The defendant has a son, Brendon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

e. The defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

f. The defendant had no father figure during his childhood, and little support from his natural father.

g. The defendant's mother was absent during most of his childhood and was faced with substitute parenting.

h. The defendant has a moderately severe mental health disorder.

i. The defendant can live in a structured prison environment without hurting anyone.

j. The defendant's previous felony conviction was non-violent. This is his first violent conviction.

k. With increased age, the defendant could become a positive influence on others, even in prison.

l. The defendant has been employed in the past.

m. The defendant has had prior drug dependencies.

n. The defendant spent time in foster care.

o. The defendant took directions from older brother, Zjaiton Wood.

p. The defendant is of educational potential.

q. The defendant is of average intelligence.

Was Victim Impact Evidence introduced at trial? Yes (X) No ( )

7. Check whether the finding of guilty was made:

After plea of guilty () After plea of not guilty (X)

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ( )

9. Was the sentence determined by (X) a jury, or ( ) the trial judge.

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed:

Robbery with Firearms - Life
Conspiracy to Commit a Felony - Life

11. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X)

12. If found guilty after plea of not guilty, check whether the finding was made by:

A jury(X) A judge without a jury ( )

III. CASE INFORMATION

13. Name of lawyer in trial court:

Johnny Albert
3001 NW Classen Blvd.
Oklahoma City, OK 73106

Lance Phillips
7 South Mickey Mantle Dr. Suite 377
Oklahoma City, OK 73104

14. Was lead counsel appointed by the court? Yes (X) No ( )

15. Was the conviction appealed? Yes (X) No ( )

To what court or courts? Oklahoma Court of Criminal Appeals, Case Nos. D-2005-171; and PCD-2005-143.

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument (if set): November 28, 2006

Date of Petition for Rehearing: May 21, 2007

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes (X) No ( )

16. Name and address of lawyers for appeal:

Perry Hudson
1315 N. Shartel Ave.
Oklahoma City, OK 73103

Jason Spanich
805 Northwest 8
Oklahoma City, OK 73106
Was an opinion written by the appellate court? Yes (X) No( )

Wood v. State, 158 P.3d 467 (Okla. Crim. App. 2007).

18. Was further review sought? Yes (X) No( )

Petition for writ of certiorari to the United States Supreme Court:
Denied: *Wood v. Oklahoma*, 552 U.S. 999 (Mem) (2007).

Amended Application for Post Conviction Relief, filed April 25, 2007.
Denied: *Wood v. State*, Case No. PCD-2005-143, Unpublished Order (Okla. Crim. App. June 30, 2010).

Issues raised in original post-conviction application:

Proposition I: Trial Court Erred by Excluding Testimony from Expert Witness

Proposition II: Newly Discovered Evidence and New Law Renders Mr. Wood's Conviction and Sentence Suspect and Unreliable

Proposition III:	Petitioner Received Ineffective Assistance of Appellate and Trial Counsel in Violation of the Sixth, Eighth, and Fourteenth Amendments, and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution
Proposition IV:	Prosecutorial Misconduct Resulted in Unfair Proceedings
Proposition V:	Error Occurred When Jurors Moved Vehicles after Being Sworn
Proposition VI:	The Cumulative Impact of Errors Identified on Direct Appeal and Post-Conviction Proceedings Rendered the Proceeding Resulting in the Death Sentence Arbitrary, Capricious, and Unreliable

Petition for a Writ of Habeas Corpus, Case No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma: Pending.

Issues raised in Habeas Petition:

Claim One:	Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Counsel During the Penalty Phase of his Capital Murder Trial Because Counsel Failed to Investigate and Present Mitigating Evidence
Claim Two:	Prosecutorial Misconduct During his Trial Deprived Tremane of his Due Process Rights
Claim Three:	Tremane Was Denied His Fourteenth Amendment Right to Counsel During His Direct Appeal Proceedings
Claim Four:	Because of errors regarding the aggravating factors in Tremane's case, his death sentence is in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights
Claim Five:	The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury
Claim Six:	Tremane Was Denicd His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

Claim Seven: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair

Claim Eight: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings

Claim Nine: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Claim Ten: Tremane's Due Process Rights were Violated by the State Withholding Exculpatory Evidence

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes (X) No ()

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ()

21. Have other motions been filed with this application or prior to the filing of this application? Yes () No (X)

22. List propositions raised.

Proposition One: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury.

Proposition Two: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair.

Proposition Three: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert.

Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings.

Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights.

Proposition Six: Tremane's Due Process Rights were Violated by the State Withholding Exculpatory Evidence.

Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief.

PART C: FACTS

Preliminary Matters

References to the record will be made as follows:

1. The Original Record is referred to as (O.R. __, __ using the volume number in roman numerals and the page number).

2. Transcripts of the Preliminary Hearing will be referred to as (PH Tr.__, __ using the volume number in roman numerals and the page number).

3. Transcripts of the jury trial will be referred to in this application as (Tr. ___, ___ using the transcript volume number in roman numerals and the page number).

4. Motion Hearings will be referred to in this application as (M. Tr. Date, ____) setting out the date of the hearing and the page number).

Procedural History

Tremane Wood, along with his older brother Zjaiton ("Jake") Wood, Jake's girlfriend Lanita Bateman, and Tremane's former girlfriend and mother of his child, Brandy Warden, were all charged with first-degree felony murder for the death of Ronnie Wipf that occurred around 3:30am on January 1, 2002. (O.R.1 at 71, 614-16.) Tremane also was charged with one count of robbery with firearms and one count of conspiracy to commit felony (robbery). (*Id.*) A bill of particulars was filed alleging four aggravating circumstances: (1) that during the murder, the defendant knowingly created a great risk of death to more than one person;

(2) that the murder was especially heinous, atrocious, or cruel; (3) that the murder was committed for purposes of preventing lawful arrest or prosecution; and (4) there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (*Id.* at 72.)

The jury found Tremane guilty of all charges. (Tr. 4/2/04 at 214-15.) The jury found only three aggravating circumstances, rejecting the circumstance that the murder was committed for purposes of preventing lawful arrest or prosecution; The jury recommended life sentences on the non-capital counts and the death penalty on the capital count. (Tr. 4/5/04 at 163-64.) Tremane was formally sentenced on May 7, 2004.

Tremane appealed his conviction and sentences, which was denied. *Wood v. State*, No. D-2005-171 (Okla. Crim. Ct. App. Apr. 30, 2007).

Tremane's original Application for Post-Conviction Relief was filed on December 26, 2006. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. Ct. App. June 30, 2010).

Tremane's Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) was filed in the Western District of Oklahoma on June 30, 2011. *Wood v. Workman*, No. CIV-10-0829-HE (W.D. Okla.).

Tremane now pursues this Second Application for Post-Conviction Relief.

The Record in This Proceeding

The record in this proceeding consists of the direct appeal record, the record in Wood's

original Application for Post-conviction Relief and the Exhibits and Attachments submitted with this Application. An Appendix is filed contemporaneously with this Application containing:

1. Supplementary materials submitted in accordance with subsection OCCA Rule 9.7 A(f) and Rule 9.7 (D) [Attachments 2-17.]

2. Copy of Tremane's original amended Post-Conviction Application, OCCA Rule 9.7A (d) [Attachment 1.]

III. Factual Summary

On December 31,2000, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 03/31/04 at 118.) While at the Bricktown Brewery the men met and socialized with Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back to a motel, (*Id.* at 120-24), which they did after talking to Tremane and Jake, (Tr. 4/1/04 at 146-47; Tr. 3/31/04 at 122.)

Once inside the room, the four agreed on $210.00 in exchange for sex. (Tr. 3/31/04 at 125-27.) Lanita pretended to call her mother, but actually called Jake. (Tr. 3/31/04 at 109.)

Jake and Tremane came to the motel room, and Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165-66.) Lanita and Brandy ran out of the room, and Jake and Tremane ran in. (Tr. 4/1/04 at 168.)

Jake approached Arnold with the gun; Tremane approached Ronnie with the knife, and

Ronnie put up a fight. (Tr. 3/31/04 at 133-35.) Jake left Arnold to go assist Tremane who had been struggling with Ronnie. (*Id.* at 135.) After Tremane demanded more money from Arnold, he returned to the struggle and Arnold fld the room. (*Id.* at 139.) Ronnie died from a single stab wound to the chest. (Tr. 04/02/04 at 11-12, 18.) Arnold was unable to identify who stabbed Ronnie. (3/31/04 at 172.)

At trial, Jake testified during the first stage of trial that he and another man named "Alex" committed this crime. (Tr. 04/02/04 at 89, 91-95.) Jake testified he initially had the gun when he and Alex entered the motel room. (*Id.* at 94.) Jake explained that when he saw that the victim was getting the best of Alex, he went over and punched Ronnie in his head and body. (*Id.* at 94.) Jake grabbed the knife and stabbed Ronnie in the chest. (*Id.* at 94.) At the conclusion of first stage, the jury found Tremane guilty on all counts. (*Id.* at 214-15.)

In second stage, the State incorporated all the evidence from first stage. In addition, evidence of a pizza place robbery committed by Tremane, Jake, Lanita, and Brandy, earlier on December 31st, was also presented. (Tr. 04/05/04 at 17-18, 24-26.)

Tremane called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 163-64.)

B. Facts Supporting Second Application for Post-Conviction Relief

The relevant facts supporting Tremane's Post-Conviction claims are adduced in the

individual propositions raised and in the attachments to the Application referenced in those propositions.

PART D: PROPOSITIONS - ARGUMENTS AND AUTHORITIES

REVIEW PURSUANT VALDEZ v. STATE

This Court has recognized it may grant relief anytime "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right," regardless of when the claim is presented. *Valdez v. State*, 46 P.3d 703, 710-11 (Okl. Cr. 2002). In *Valdez*, this Court acknowledged that the petitioner's claim was barred from review under 22 O.S. § 1089(D), but held that it could adjudicate the claim in order to prevent a miscarriage of justice, and granted the petitioner relief from his erroneous death sentence. *See Valdez*, 46 P.3d at 710-11.

Following *Valdez*, this Court granted David Brown an evidentiary hearing on a successive post-conviction application, citing *Valdez*. (*See* Attachment 3, Order Extending the Stay of Execution and Granting Motion for Evidentiary Hearing, *Brown v. State*, No. PCD-2002-781.[3] This Court later cancelled the hearing and dismissed the case due to counsel's recalcitrance in conducting the hearing. However, the principle remains: This Court always retains the power to correct substantial denials of statutory or constitutional rights, and such claims may be raised and reviewed on a second or successive post-conviction

[3] Brown ultimately received the hearing under another case number as a result of issues concerning counsel.

application. The Court recently took a compatible approach in *Slaughter v. State*, 108 P.3d 1052 (Okla. Crim. Ct. App. 2005), electing to review the merits of claims in a third post-conviction application.[4]

The same rule should apply here. If this Court finds it cannot reach Tremane's claims or some aspect of them in the ordinary course, the court nevertheless should reach the merits under the *Valdez* principle. This case presents facts congruent with those in *Valdez*.

This Court has wisely retained the power to correct injustices such as those in Tremane's case. Failure to grant review in this case and, upon review, to grant relief would run counter to the rule of law set forth in *Valdez*. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980) (individual has a due process interest in orderly application of procedures provided by a State). This Court therefore should consider Tremane's case on the merits, order any evidentiary hearing it deems necessary, and grant Tremane relief from his convictions and death sentences.

Proposition One: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury

The court impermissibly coerced the jury into delivering a dispositive decision when it informed jury that it "had to reach a unanimous decision" and that a "hung jury was not an

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[4] Part of the rationale for applying procedural defaults is apparently the concern that petitioners may "lie behind the log" in hopes of springing a claim late in the case. It would be exceedingly foolish to do so not only because of the potential the claim would not be considered but also because of the value of presenting claims in concert. Tremane is in the unenviable position of having viable claims that were missed or not artfully presented by prior counsel.

option." (*See* Declaration of Michael Colbart, attached as 4, ¶ 2; Declaration of Candelaria Nunez, attached as 5, ¶ 2.) Such coercion was a violation of Tremane's due process rights, and his right to an impartial jury trial and a fair sentencing. *See United States v. McElhiney*, 275 F.3d 928, 937 (10th Cir. 2001); *Jones v. United States*, 527 U.S. 373, 381–82 (1999); *see also* Okla. const. Art. II-19 and II-20.

For more than a century, the United States Supreme Court has warned trial courts that they must be vigilant to instruct a jury in such a way as to not coerce the jury into returning a death sentence. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 238-41 (1988) ("Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body."); *Allen v. United States*, 164 U.S. 492, 493, 501 (1896). Instructing a jury in such a way as to eliminate the possibility of a deadlock—particularly during the penalty phase where a deadlock demands the dismissal of the jury and the imposition of life sentence[5]—impermissibly coerces the jury into returning a death sentence. *Jenkins v. United States*, 380 U.S. 445 (1965) (holding that comment, "You have got to reach a decision in this case," during supplemental charge was of itself coercive and therefore ground for reversal). Nevertheless, the court in this case did just that and, in doing so, denied Tremane the basic constitutional protections afforded every capital defendant.[6]

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[5]21 Okla. Stat. Ann. § 701.11 (2004); *see also Davis v. State*, 665 P.2d 1186, 1203 (Okla. Ct. Crim. App. 1983).

[6]This Court recently reversed a conviction where the presiding judge in Tremane's trial (Judge Elliott) made coercive comments to a jury suggesting that they had to reach a verdict. *See Bills v. State*, CF-2009-404, Opinion, May 4, 2011 (attached as Attachment 6).

While it is fundamental to our jury system that a criminal case "may terminate with the failure to reach a verdict," the court in this case repeatedly denied the jurors the option of disunity and, in turn, denied Tremane the possibility of a mistrial. *McElhiney*, 275 F.3d at 935. According to Juror Colbart, the jury was also "told that if we did not reach a unanimous decision, we could not break for the weekend." (Attachment 4, ¶ 2.) Juror Nunez adds that, to the best of her recollection, she and her fellow jurors "were instructed to continue to deliberate until [they] had reached a unanimous decision." [7] (Attachment 5, ¶ 2.) Consistent with the transgressions described in the declarations of Jurors Colbart and Nunez—the trial transcript reveals that the court also instructed the jurors to return "verdicts of either guilty and not guilty" on more than a dozen occasions.[8] A failure to agree during the penalty phase would have been a victory for Tremane and a legitimate end of the trial. *McElhiney*, 275 F.3d at 935.

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[7]That Juror Nunez now attests to being mislead by the court is entirely understandable given, inter alia, the court's affirmative answer to her direct question during voir dire,"when you say unanimous, do you mean all agree?" (Tr. 3/30/04 at 168, 170-71.)

[8]*See, e.g.*, Tr. 3/31/04 at 87- 88 ("You may be in that room, depending on how long you feel it takes to arrive at *one of the two verdicts*." (emphasis added)); Tr. 3/31/04 at 40 ("Every piece of evidence that is admitted, it will be your duty to review to decide *one of two choices, guilty or not guilty*." (emphasis added)); Tr. 3/31/04 at 16 ("It will be the duty of the jury, and you if you sit on the jury, to determine whether the defendant is guilty or not guilty." (addressing prospective jurors)); Tr. 3/30/04 at 166 ("But the verdict on the punishment must be unanimous just as your verdict of either guilty or not guilty." (addressing prospective jurors)); Tr. 3/31/04 at 87. ("You stay in that room without leaving until you arrive at three verdicts of either guilty or not guilty."); Tr. 3/31/04 at 96 ("It is your responsibility . . . to reach verdicts of guilty or not guilty based on the evidence."); Tr. 4/2/04 at 201 ("You just stay up there until you arrive at three unanimous verdicts.").

The declarations of Jurors Colbart and Nunez vividly demonstrate that the court "affirmatively misled" the jury as to its deliberative options and thereby violated Tremane's constitutional rights. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (holding that a constitutional violation would result from a jury being "affirmatively misled regarding its role in the sentencing process"); *see also Mills v. Tinsley*, 314 F.2d 311, 313 (10th Cir. 1963) ("To compel a jury to agree upon a verdict is a denial of a fair and impartial jury trial, and, hence is a denial of due process."). Such coercion not only resulted in violations of Tremane's Sixth Amendment and due process rights; it also resulted in a violation of his Eighth Amendment right to heightened reliability in death-penalty proceedings. *See Jones*, 527 U.S. at 381-82 (noting that "a jury cannot be 'affirmatively misled regarding its role in the sentencing process.'" (citation omitted)); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that "the penalty of death is qualitatively different from a sentence of imprisonment" and therefore "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). "[S]entences of death must be absolutely, unquestionably fair." *Hain v. State*, 852 P.2d 744, 753 (Okla. Crim. Ct. App. 1993). As to the context and circumstances of Tremane's trial, "the record in this case reveals an ever-rising tide of coercion ultimately resulting in [a] unanimous death sentence[]." *Hooks v. Workman*, 606 F.3d 715, 741 (10th Cir. 2010); *see also Gilbert v. Mullin*, 302 F.3d 1166, 1175 (10th Cir. 2002) ("[C]ourts should be wary of the potentially coercive effect of holding jurors late into the night and even into the early morning hours.").

The taint of coercion is undeniable. *See Goff v. United States*, 446 F.2d 623, 626 (10th Cir. 1971) ("The court must avoid any indicia of coercion."). If even one juror believed trial court was insisting on a unanimous verdict, that would be one juror too many. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 462 (1978) (holding that "the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the court was insisting on a dispositive verdict"). Here there were two. Because Tremane's constitutional rights were violated by the court's improper and coercive comments to the jury, he is entitled to relief.

Proposition Two: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair.

To succeed on a claim of prosecutor misconduct, Tremane must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, *see Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (*citing Griffin v. California*, 380 U.S. 609 (1965)) (footnote omitted), or that the prosecutor's misconduct rendered the trial fundamentally unfair, *see Berger v. United States*, 295 U.S. 78 (1935). *See also Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230; Okla. const. Art. II-7.

Following Tremane's capital trial this Court ordered a hearing on Tremane's claim of ineffective assistance of trial counsel. Familial abuse was a central issue during these proceedings with Linda, Andre, and Jake Wood all offering testimony regarding abuse inflicted on Linda by Tremane's father, Raymond Gross. In cross-examining defense

witnesses, the State created the impression that Linda's claims of abuse were untrue, with particular reference to an absence of medical or hospital records to support Linda's claims. (Tr. 2/23/06 at 170-71; Tr. 2/27/06 at 341.) At that time, the prosecutor had in its position medical records reflecting treatment Linda had received after various incidences of abuse, including contusions, abrasion and a broken tooth (Attachment 7 at 2), and for being hit in the chest and stomach (*Id.* at 1).

In a similar form, the State cross-examined Raymond Gross in a manner designed to suggest he was a law-abiding, non-violent man, who had not inflicted terror and abuse on his family. (*See, e.g.* Tr. 2/23/06 at 23-26.) The State conducted this cross-examination despite having records in its possession that painted a violent picture of Raymond, abusing and threatening his wife and children. (*See* Attachment 8.)

The prosecution's duty to turn over *Brady* material continued after trial. *Smith v. Roberts*, 115 F.3d 818 (820) (10th Cir. 1997) (*citing Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)). Not only did the prosecution fail to turn over these records, it created the material misrepresentation that the Wood family's testimony regarding the abuse endured by Linda was simply false because it was unsupported by records, and because Raymond denied it. While the State did not present false testimony, the cross-examination it conducted, particularly in light of its knowledge of these medical records and the criminal offenses related to Raymond, created a materially false impression. The State's suppression of this evidence allowed it to effectively neutralize what would have been compelling support for

Tremane's claim of ineffective assistance of trial counsel, and to mislead the trial court (an independent act of misconduct that deprived Tremane of a fair hearing). *See Berger*, 295 U.S. 78. Considering the prosecutorial misconduct cumulatively, Tremane was deprived of his due process rights.

Proposition Three: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert.

In all cases, but more critically in capital cases, counsel has a duty to challenge the State's case against the defendant and, when necessary, employ experts to defend against the State's experts. *See* ABA Guideline 10.7, Commentary (noting that counsel has a duty "to scrutinize carefully the quality of the state's case" and "aggressively re-examine all of the government's forensic evidence"). In the instant case that did not happen. As a result, the testimony regarding the autopsy of the victim in this case went unchallenged. In failing to challenge the forensic testimony, counsel's performance fell below the objective standard of reasonableness—that is, it was outside the "wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Had the defense presented expert testimony of a forensic pathologist, the jury would have heard evidence that could have ultimately made a difference in the guilt and/or penalty phase of Tremane's trial.

At trial, the jury heard virtually unchallenged testimony from the chief medical examiner Dr. Fred Jordan; he was not the doctor who actually performed the autopsy of the victim. (Tr. 4/2/04 at 6.) Dr. Jordan testified that the cause of death was from a five-inch

deep stab wound. (*Id.* at 14.) Had trial counsel retained an expert and presented such testimony the jury would have learned that Dr. Jordan's testimony was inaccurate. A defense expert could have demonstrated that the width of the wound was not as wide as the width of the knife. (*See* Report of Michael Iliescu, M.D., 6/27/11, Attachment 9, at 3-4.) Therefore, the entire length of the knife could not have been inserted into the victim's body.

Moreover, a defense expert could have attacked the autopsy report in several ways. First, the documentation of the stab wound was made after the body was autopsied. This is against the common practice in forensic pathology of documenting the injuries before the autopsy examination is performed. (*Id.* at 6.) Second, the stab wound should have been documented with the approximation of the edges of the wound (with the wound being closed), which was not done in this case. (*Id.* at 6-7.) Finally, an expert would have criticized the medical examiner for not taking photographs of the body before conducting the autopsy. (*Id.* at 6.)

Another problem with the State's autopsy report involved the toxicology. (*Id.* at 6.) The State's report says Ronnie had no drugs or alcohol in his system at time he died. (Tr. 4/2/04 at 11.) Ronnie's friend Kleinsasser testified that Ronnie was drinking (Tr. 3/31/04 at 121.) Codefendant Lanita Bateman also indicated that Ronnie was drunk. (Declaration of Lanita Bateman, attached as Attachment 10, at 2.) This information lends serious questions to the credibility of the autopsy.

Had this evidence been presented during the guilt phase of Tremane's trial, the State's

case would have been challenged regarding the circumstances surrounding the victim's death. The jury could have determined that the autopsy report was not accurate and that there were problems with Dr. Jordan's testimony. Moreover, the jury could have also discredited the State's argument that the stab wound was five inches, which was repeatedly emphasized in support of the heinous, atrocious or cruel aggravating circumstance. (Tr. 4/5/04 at 8, 111, 112, 133, 157.) The State told the jury that it was "shockingly evil" to stab a man with a knife and "stick it five inches into his body." (*Id.* at 111.) This repeated reference to the depth of the wound portrayed a more graphic image to the jury that could have been discredited.

Here, had counsel performed under prevailing professional norms, the evidence regarding the crime in this case would have been challenged and effectively undermined. This would have impacted both the guilt and penalty phases of Tremane's trial. In particular, the jury may not have found the aggravating circumstance of heinous, atrocious, or cruel. Minimally, the State would not have been able to use these facts to bolster its case for death. (*See, e.g.* Tr. 4/5/04 at 8, 111, 112, 133, 157.) Resultantly, there is a likelihood that Tremane would not have been sentenced to death. In this case, counsel's failures "undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings.

This Court has held that the state statutory right to post-conviction counsel in capital

cases carries with it a requirement that post-conviction counsel perform effectively. *Hale v. State*, 1997 OK CR 16,934 P.2d 1 100; *see also* OKLA. STAT. tit. 22, 4 1356. Hale recognized the unfairness in providing a lawyer but not requiring that lawyer to be effective. This Court has recognized the right as arising under State law but it also has federal Due Process implications. *Evitts v. Lucev*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Hicks v. Oklahoma*, 447 U.S. 343,100 S. Ct. 2227,65 L. Ed. 2d (1980); *Hatch v. Oklahoma*, 58 F.3d 1447, 1460 (10th Cir. 1995). In *Hale*, this Court held that a claim of ineffective assistance of post-conviction counsel was cognizable on a second post-conviction application, since this was the "first available opportunity" for the petitioner to raise such a claim. *Id.* at 1 102. Similarly, in *Spears v. State*, No. PC-99- 1099 (Oct. 13,1999), this Court reached the merits of the petitioner's claim presented in a second post conviction that his first post-conviction counsel was ineffective. (Attachment 11.)

Strickland, 466 U.S. at 686-88, sets forth the standard for assessing ineffective assistance of appellate counsel. *Hale*, 934 P.2d at 1102-03. Tremane must demonstrate deficient performance and prejudice. *See id.* To establish prejudice postconviction counsel's failure to raise certain issues "undermines confidence in the appellate process." *Id.* at 1103.

Tremane's postconviction counsel was ineffective for each instance, considered separately or cumulatively, in which counsel failed to raise the following issues: (1) failure to investigate and present relevant mitigating evidence in support of trial IAC for same; (2) failure to raise a claim of ineffective assistance of direct appeal counsel for failing to raise

trial IAC for not challenging death to two or more people; and (3) failure to hire a forensic pathologist to challenge the autopsy findings. (*See* Attachments 12, 14, 16-17.)

The claims counsel failed to raise were supported by the facts and the law. They were obvious errors counsel should have presented for appellate review:

(1) Postconviction counsel failed to assert appellate IAC for failing to investigate and present relevant mitigating evidence in support of ineffective assistance of trial counsel for same. (*See* Proposition Three.) Counsel indicates she did not collect medical records related to Tremane's mother, or conduct additional background investigation into Tremane's parents' families. She had no strategic reason for this failure. (*See* Declaration of Julie Gardner, 6/24/11, attached as Attachment 12, ¶¶ 7-8.)

(2) Postconviction counsel failed to assert appellate IAC for failing to argue trial counsel's ineffective assistance with respect to the allegation that Tremane knowingly created a knowing risk of great harm to two or more persons. This aggravating factor was not supported by the facts in evidence and was dismissed in Jake Wood's case. (*See* Z. Wood Tr. 2/28/05 at 23, attached as Attachment 13.) PCR counsel Julie Gardner indicates that she was unaware that this same aggravator was dismissed in Jake's case. (*See* Attachment 12, ¶12.)

(3) Postconviction counsel failed to assert trial and appellate IAC failure to hire a forensic pathologist to challenge the autopsy findings. Counsel should have consulted with a neutral forensic expert, which would have led counsel to discover real problems with this forensic evidence as outlined in Proposition Three (incorporated here by reference). Tremane

had a right to effective assistance of postconviction counsel. This right was violated by counsel's omissions.

Postconviction counsel had available compelling claims of IAC of both trial and appellate counsel. Trial and appellate counsel missed obvious errors—had either challenged the great risk of harm aggravator, it would have been successful. (*See* Z. Wood Tr. 2/28/05 at 23, attached as Attachment 13) (trial court dismisses great risk of harm aggravator at Jake's trial). Similarly, there were serious flaws with in Ronnie's autopsy, which led to inaccurate findings—most significantly, that the stab wound was five inches deep. A forensic expert would have revealed these flaws, and allowed Tremane to call into question the medical examiner's testimony. This would have drastically altered the State's repeated cry for the death penalty due to the depth of the wound inflicted on Ronnie.

There was a powerful story to be told in mitigation, and both trial and appellate counsel failed to tell the complete story. Postconviction counsel also could have asserted deficient performance and prejudice for failing to obtain present all relevant mitigation. Linda's medical records, which would have bolstered her claims of abuse, *cf. Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), and additional information available regarding the families would have demonstrated that Tremane found no solace, no help outside of his immediate family—he was met with abuse and neglect inside, and outside, of his home. The additional witnesses available, as well as records created years before the crime would have bolstered Tremane's mitigation case. Prior counsel's failure to investigate and present such evidence

deprived the jury, and later the trial court, of a full understanding of the relevant, compelling mitigating factors.

With one aggravating circumstance gone, the State's graphic language now limited, Tremane's complete case in mitigation of the death penalty would have carried far more power. These failures were deficient performance that prejudiced Tremane, *Strickland*, 466 U.S. at 686-88, depriving Tremane of his due process and effective assistance of counsel rights. U.S. Const. amend. VI, XIV; Okla. Const. art. II-7, II-20. (*See* Attachments 12, 14, 16-17.) Representation which departs from prevailing professional norms constitutes sufficient cause for post conviction review of this claim in a second post conviction application. OKLA. STAT. tit. 22, § 1089(D)(4) (b)(2).

Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights.

Trial counsel John Albert now indicates that, at the time of Tremane's 3.11 hearing, he "was in a very bad place in his life. [He] had hit rock bottom." (Attachment 14, ¶9.) At the time, Albert was "drinking excessively and using drugs." (*Id.* at ¶9.) In addition, Albert faced a pending bar investigation. (*Id.* at ¶10.) Ten days later, Albert entered rehab. (*Id.* at ¶9.) As a result of these circumstances, Albert describes himself as "very defensive" during his testimony at Tremane's 3.11 hearing. (*Id.* at ¶10.) He was "worried about the impact that being found ineffective would have on [his] license to practice law." (*Id.* at ¶10.)

Sober since he entered rehab (*Id.* at ¶9), Albert's declaration demonstrates he rendered deficient performance during Tremane's capital trial. Albert "simply did not have the time

to adequately represent Tremane in his capital trial." (*Id.* at ¶3.) He failed to prepare witnesses, including Dr. Hand. (*Id.* at ¶7, "I did not prepare Dr. Hand for his testimony nor did a I review any documents before providing them to Dr. Hand.") Albert candidly admits to a lack of investigation, "I did not do the necessary investigation and preparation required to defendant a capital client." (*Id.* at ¶11.) And, he offers no strategic reasons for failing to investigate Tremane's background, gather records, conduct relevant interviews or prepare Dr. Hand. (*Id.* at ¶11.) Moreover, Albert believes all of this would have made a difference. (*Id.* at ¶12.)

Albert's defensive testimony deprived the Oklahoma courts of facts necessary to assess Tremane's claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Rule 3.11 plays an important role in the Oklahoma direct appeal process. "As a matter of policy, Rule 3.11 requires criminal defendants to bring their *Strickland* claims on direct appeal rather than in post-conviction proceedings and to lay their evidentiary cards on the table before the OCCA." *Wilson v. Workman* 577 F.3d 1284, 1304 (10th Cir. 2009) (en banc) (Tymkovich, J., dissenting).

Given the important role that Rule 3.11 proceedings play in Oklahoma's direct appeal process, Albert's defensive testimony created a fundamental flaw in the fact finding process, which deprived Tremane of his due process interest in those very proceedings. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *see also* Okla. Const. art. II-7. This is all the more so when the defendant's "life" interest is at stake in the proceedings. *Ohio Adult Parole Auth. v.*

Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).

Proposition Six: Tremane's Due Process Rights were Violated by the State Withholding Exculpatory Evidence.

Brandy Warden was on probation in Payne County, Oklahoma, at the time these offenses were committed. (Attachment 15; *see also* Exhibit 19B attached to Tremane's First Amended Application for Post-Conviction Relief.) Yet she never faced charges in Payne County, Oklahoma for violating the terms of her probation. Any deal struck that relieved Warden of criminal charges in exchange for her testimony was material and exculpatory. *See Brady v. Maryland*, 373 U.S. 83 (1963). The State's failure to turn over such evidence deprived Tremane of his due process rights. *Brady*, 373 U.S. 83; *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S.419 (1995); *see also* Okla. Const. art. II-7.

Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief.

Assuming *arguendo*, any individual error in Tremane's case is deemed insufficient to warrant relief, relief is nonetheless required due to a cumulation of errors. *United States v. Rivera,* 900 F.2d 1462 (10th Cir. 1990)(cumulative error analysis is an extension of the harmless error rule). None of the individual errors in this case can be deemed harmless. This Court should cumulate the errors identified here with each other and with the errors advanced previously on direct appeal and in Tremane's initial post-conviction filing. Further, pursuant the Sixth, Eighth, and Fourteenth Amendments, claims that have equivalent prejudice or harmless error components should be considered together for purposes of prejudice or

harmless error review. *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003).

CONCLUSION

Tremane's convictions and death sentences were obtained in violation of his state and federal rights. This Court should exercise its power to do fundamental justice and grant relief. Alternatively, this Court should grant Tremane's request for discovery and order an evidentiary hearing in order to allow additional fact development.

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VERIFICATION OF COUNSEL FOR PETITIONER

I, James Rowan, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

James T. Rowan
James Rowan

7/6/2011
Date

CERTIFICATE OF SERVICE

I certify that a copy of this Second Application for Post-Conviction Relief was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of this Court on the date it was filed.

James T. Rowan

James Rowan

Attachment 3

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD,	)	
	)	
Petitioner,	)	**Case No.** _____
	)	
vs.	)	
	)	**Oklahoma County**
STATE OF OKLAHOMA,	)	**Case CF-2002-46**
	)	
Respondent.		

AFFIDAVIT IN FORMA PAUPERIS

I, TREMANE Wood, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20th day of June, 2017 at MCALESTER, PITTSBURG, OK/A
(City, County, State)

KIM A. MARKS NOTARY # 04006555 EXP. 07/20/20 PUBLIC STATE OF OKLAHOMA

Tremane Wood
Signature

TREMANE Wood
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp: 07-20-2020

AFFIDAVIT IN FORMA PAUPERIS

I, TREMANE Wood, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20TH day of June, 2017 at McAlester, OK, PITTSBURG
(City, County, State)

KIM A. MARKS NOTARY # 04006555 EXP. 07/20/20 PUBLIC STATE OF OKLAHOMA

Tremane Wood
Signature

TREMANE Wood
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp. 07-20-2020

1000734163

IN THE DISTRICT COURT, SEVENTH JUDICIAL DISTRICT
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JUL 28 2004
PATRICIA PRESLEY, COURT CLERK
by _____ Deputy

THE STATE OF OKLAHOMA,)
PLAINTIFF,)
vs.)
Termane Wood)
DEFENDANT,)

CF-02-46

ORDER APPOINTING CONFLICT DEFENDER

NOW on this 2nd day of October, 2002, the Court, being fully advised in the premises, finds that a conflict exists between this defendant and the Public Defender and that a contracted Conflict Defender should be appointed for this defendant.

IT IS THEREFORE ORDERED by the Court that John Albert _____ is appointed as the attorney for the defendant Termane Wood.

Ray C. Elliott
District Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT
JUN 22 2017
RICK WARREN COURT CLERK Oklahoma County

1000734164

IN THE DISTRICT COURT, SEVENTH JUDICIAL DISTRICT
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JUL 28 2004
PATRICIA PRESLEY, COURT CLERK
by _____ Deputy

THE STATE OF OKLAHOMA,)
)
PLAINTIFF,)
)
)
vs.)
)
Termane Wood)
)
DEFENDANT,)
)

CF- 02-46

ORDER APPOINTING CONFLICT DEFENDER

NOW on this 2nd day of October, 2002, the Court, being fully advised in the premises, finds that a conflict exists between this defendant and the Public Defender and that a contracted Conflict Defender should be appointed for this defendant.

IT IS THEREFORE ORDERED by the Court that Lance Phillips _____ is appointed as the attorney for the defendant Termane Wood.

Ray C. Elliott
District Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT
JUN 22 2017
RICK WARREN COURT CLERK Oklahoma County

1000860522

IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
SEP 03 2004
PATRICIA PRESLEY, COURT CLERK
Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CF-2002-46
	)	
TERMANE WOOD,	)	
	)	
Defendant.	)	

ORDER

NOW on this 2nd day of Sept., 2004, this matter comes on for consideration of the issue of payment of attorney fees for appointed counsel. The Court, being advised of the premises, finds that attorney of record, John B. Albert, was appointed on the 2nd day of October, 2002, and represented the above named Defendant by Order of the Court.

The Court is further advised that this was a Capital Murder in the First Degree case. Pursuant to contract with the Oklahoma County Public Defender's Office it is hereby ordered that the amount of TEN THOUSAND DOLLARS ($10,000.00) be paid to John B. Albert for his services in the above styled case.

Tom D. Gurich
PRESIDING ADMINISTRATIVE JUDGE

APPROVED:

ROBERT A. RAVITZ
PUBLIC DEFENDER OF OKLAHOMA COUNTY

JOHN B. ALBERT
Attorney for Defendant, Marcus Cargle

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JUN 22 2017

RICK WARREN COURT CLERK
Oklahoma County

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

AFFIDAVIT

I, John B. Albert, of lawful age being first duly sworn upon oath, deposes and states as follows:

1. That I have incurred the following time in the case of State of Oklahoma v. Termane Wood, CF-2002-46, wherein I was appointed as Conflict Defender. The trial in said case was from March 29, 2004 through April 7, 2004, before Judge Ray C. Elliott.

Date:	Legal Work:	Time Spent:
October 2, 2002	Pretrial Conference	2.00
January 7, 2003	Status Conference	1.00
February 12, 2003	Status Conference	1.00
March 3, 2003	Status Conference	1.00
March 19, 2003	Status Conference	1.00
April 16, 2003	Status Conference	1.00
May 28, 2003	Status Conference	1.00
July 16, 2003	Status Conference	1.00
August 6, 2003	Prepare Witness Statement	1.00
August 19, 2003	Motion Hearing	2.00
August 20, 2003	Motion Hearing	2.00
August 27, 2003	Status Conference	2.00
September 3, 2003	Motion to Continue Trial	1.00
February 23, 2003	Motion Hearing	2.00
March 5, 2004	Hearing – Amend Charges	1.00
March 29, 2004	Motion Hearing/Trial	8.00
March 30, 2004	Trial	8.00
March 31, 2004	Trial	8.00
April 1, 2004	Trial	8.00
April 2, 2004	Trial	8.00
April 5, 2004	Trial	8.00
April 6, 2004	2nd Stage Trial	8.00
April 7, 2004	2nd Stage Trial	8.00
May 7, 2004	Sentencing	2.00

FURTHER AFFIANT SAYETH NOT.

JOHN B. ALBERT

Subscribed and sworn to before me this 15th day of July, 2004.

Notary Public

My Commission Expires:

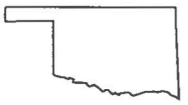
11-25-2004

Comm # 00019389

NOTARY SEAL PUBLIC

MELISSA HOLETZKY
Cleveland County
Notary Public in and for
State of Oklahoma
My commission expires Nov. 25, 2004.

Attachment 4



Appendix IA[1]

Race and Death Sentencing for Oklahoma Homicides, 1990-2012[2]

I. Introduction

In the first 15 years of the 21st century, we have seen several indicators that the use of the death penalty is in sharp decline in the United States. According to the Death Penalty Information Center, between 1996 and 2000 an annual average of 275 new prisoners arrived on America's death rows, but by 2015 this figure had precipitously decreased to 49.[3] The average number of executions per year has fallen nearly fifty percent since the last five years of the twentieth century, from 74 between 1996 and 2000 to 576 in the years 2011-2015.[4] In just the past 10 years, seven states have abolished the death penalty,[5] the Delaware Supreme Court invalidated that state's statute in August 2016,[6] and four more states –Washington, Oregon, Colorado and Pennsylvania – have seen their governors impose moratoria on executions. A September 2016 poll by the Pew Research Center found that slightly less than half of Americans (49 percent) supported the death penalty,[7] the lowest level of support in more than 40 years. A 2015 poll by Quinnipiac indicates that more Americans (48%) now prefer a sentence of Life Imprisonment without Parole (which is available in all death penalty jurisdictions) to a death sentence (45%).[8] Even in Oklahoma, a November 2015 poll found that the majority of the population (52 percent) would prefer a sentence of life plus restitution rather than the alternative of the death penalty.[9] A second poll taken in July 2016 found that 55 percent of the "likely voters" in the state would prefer life

[1] This report is an early draft of an independent study (current through November 1, 2016), submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. The final study will be published by the Northwestern University School of Law in the fall of 2017. *See* Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides, 1990-2012*, 107 Nw. U. J. Crim. L. & Criminology. The Commission is grateful to the authors for providing this study for its consideration during its review of Oklahoma's death penalty. **Please note: the Commission did not edit this draft report and any errors should be attributed the authors. Moreover, the views reflected by the authors do not necessarily reflect those of the Commission.** This study is included in the Commission's report as a reference for Appendix I.

[2] This report was authored by Glenn L. Pierce, Michael L. Radelet, and Susan Sharp. Radelet is a Professor of Sociology, University of Colorado-Boulder; Pierce is a Principal Research Scientist, School of Criminology & Criminal Justice, Northeastern University, Boston; Sharp is the David Ross Boyd Professor Presidential Professor Emerita, Department of Sociology, University of Oklahoma. The three authors are listed alphabetically; each made equal contributions to this project. The authors wish to thank Melissa S. Jones and Amy D. Miller for their assistance in helping to build the Oklahoma death row data set.

[3] *Death Sentences in the United States From 1977 by State and by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[4] *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year.

[5] New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).

[6] Eric Eckholm, *Ruling by Delaware Justices Could Deal Capital Punishment in the State a Final Blow*, NEW YORK TIMES, Aug. 2, 2016, at A11.

[7] Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades* (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/.

[8] *Quinnipiac University Poll Release Detail*, http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=2229 (June 1, 2015).

[9] *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative/ (Nov. 19, 2015); *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative/ (Nov. 19, 2015); Graham Lee Brewer, *New Poll Shows Over Half of Oklahomans Support Life Sentences Over the Death Penalty*, NEWSOK, http://newsok.com/article/5461486.

sentences without parole and mandatory restitution instead of the death penalty.[10] These results document a changing climate around death penalty debates: apparently more Americans now prefer long prison terms rather than the death penalty.

One reason for the decline in support for and the use of the death penalty is growing concerns that the penalty is not reserved for "the worst of the worst." In a nationwide Gallup Poll taken in October 2015, 41 percent of the respondents expressed the belief that the death penalty was being applied unfairly, and a 2009 Gallup Poll found that 59 percent of the respondents believed that an innocent person had been executed in the preceding five years.[11] This concern is undoubtedly on the minds of many Oklahomans, since ten inmates have been released from its death row since 1972 because of doubts about guilt.[12]

In this article, we examine another question that is related to the contention that the death penalty is reserved for the worst of the worst: the possibility that the race of the defendant and/or victim affects who ends up on death row. To do so, we will study all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012, and compare those cases with the subset that resulted in the imposition of a death sentence.

Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population.[13] Racial and ethnic minorities are over-represented among those on death row, which housed 46 men and one woman as of July 1, 2016 (23 white, 20 black, 3 Native American, 2 Latino).[14] Between 1972 and October 31, 2016, Oklahoma conducted 112 executions (with the first occurring in 1990), which ranks second among U.S. states behind Texas and gives Oklahoma the highest per capita execution rate in the U.S.[15]

Of the 112 executed inmates, 67 were white (60 percent), 35 black, 6 Native American, 2 Asian, 1 Latino, and 1 whose race was classified as "Other."[16] The races of the homicide victims in the death penalty cases are also predominately white, with 83 of the 112 executed inmates convicted of killing at least one white victim (74.1 percent), 19 at least one black victim, 7 at least one Asian victim, 5 at least one Latino victim, 1 at least one Native American victim, and 1 who killed two people whose races are classified as "Other" (both the assailant and his two victims were Iraqi).[17]

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[10] Silas Allen, *Majority of Oklahomans Support Replacing Death Penalty with Life Sentences, Poll Shows*, THE OKLAHOMAN, Aug. 6, 2016, http://newsok.com majority-of-oklahomans-support-replacing-death-penalty-with-life-sentences-poll-shows/article/5512695.

[11] *Gallup Poll Topic: Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx.

[12] These former death row inmates include Charles Ray Giddens (released in 1981), Clifford Bowen (1986), Richard Jones (1987), Greg Wilhoit (1995), Adolph Munson (1995), Robert Miller (1998), Ronald Williamson (1999), Curtis McCarty (2007), Yancy Douglas (2009), and Paris Powell (2009). *See* Death Penalty Information Center, *List of Exonerees Since 1975*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty.

[13] https://suburbanstats.org/population/how-many-people-live-in-oklahoma

[14] DEATH ROW USA, Summer 2016, http://www.naacpldf.org/files/publications/DRUSA_Summer_2016.pdf (current as of July 1, 2016).

[15] http://www.deathpenaltyinfo.org/state-execution-rates. Among the executed are two juveniles (one of whom was just 16 at the time of his crime), three women, and seven inmates who dropped their appeals and asked to be executed. *See also Executions Statistics* available from the Oklahoma Department of Corrections, https://www.ok.gov/doc/Offenders/Death_Row/. There have also been four death sentences commuted to prison terms by Oklahoma governors since 1972: Phillip Smith (2001), Osvaldo Torres (2004), Kevin Young (2008), and Richard Smith (2010). *See* Michael L. Radelet, *Commutations in Capital Cases on Humanitarian Grounds*, available at http://www.deathpenaltyinfo.org/clemency#List.

[16] This does not include Timothy McVeigh, executed under federal authority in June 2001 for murdering 168 people in the explosion of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995.

[17] These tallies were calculated from data provided by Death Penalty Information Center, *Searchable Execution Database*, available at http://www.deathpenaltyinfo.org/views-executions. Because four executed inmates were convicted of killing multiple victims who had different races, one execution can fit two or more of these criteria, giving us a total for these calculations of 116.

II. Previous Research

Concerns about the impact of the defendant's and/or victim's race on death penalty decisions have a long history in the U.S. Soon after the 1976 decision in Gregg v. Georgia that breathed new life into death penalty statutes,[18] researchers led by the late University of Iowa legal scholar David Baldus began to study the possible relationships, with the most comprehensive study by Baldus and his team focusing on Georgia.[19] Those race studies conducted prior to 1990 were reviewed by the U.S. government's General Accounting Office in 1990, which produced a report concluding that in 82 percent of the 28 studies reviewed, "race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."[20]

In 2005, Baldus and George Woodworth in effect updated and expanded the GAO Report, reviewing 18 race studies that had been published or released after 1990.[21] Their conclusions are worthy of a lengthy quote:

> Overall, their results indicate that the patterns documented in the GAO study persist. Specifically, on the issue of race-of-victim discrimination, there is a consistent pattern of white-victim disparities across the systems for which we have data. However, they are not apparent in all jurisdictions nor at all stages of the charging and sentencing processes in which they do occur. On the issue of race-of-defendant discrimination in the system, with few exceptions the pre-1990 pattern of minimal minority-defendant disparities persists, although in some states black defendants in white-victim cases are at higher risk of being charged capitally and sentenced to death than are all other cases with different defendant/victim racial combinations.[22]

Overall, Baldus and Woodworth concluded that the studies displayed four clear patterns: 1) with few exceptions, the defendant's race is not a significant correlate of death sentencing, 2) primarily because of prosecutorial charging decisions, those who kill whites are significantly more likely than those who kill blacks to be sentenced to death, 3) black defendants with white victims are especially likely to be treated more punitively, and 4) counties with large numbers of cases with black defendants or white victims show especially strong impacts on black defendants or on those with white victims.[23]

Professor Baldus passed away in 2011, but one of his students, Catherine Grosso, has taken the reigns and assembled a team that has continued Baldus's work. Among their publications is one that recently updated the Baldus literature review.[24] Published in 2014, the researchers had by then identified 56 studies that had been completed after the 1990 GAO Report. Their review identified four patterns:

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[18] Gregg v. Georgia, 428 U.S. 153 (1976).

[19] David C. Baldus, George G. Woodworth, & Charles A. Pulaski, Jr. Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990).

[20] *See* General Accounting office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, GAO GGD-90-57 (1990), at 5.

[21] David C. Baldus & George Woodworth, G., *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 Criminal Law Bulletin 194 (2003).

[22] *Id.*, at 202.

[23] *Id.*, at 214-15.

[24] Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in America's Experiment with Capital Punishment, 3rd ed. (J. R. Acker, R. M. Bohm, & C. S. Lanier, eds. 2014), 525-76.

- Four of the studies did not discover any race effects.
- Four found independent effects of the race of the defendant (that is, effects that remained after statistically controlling for other relevant variables).
- Twenty-four studies in 15 jurisdictions found significant race-of-victim effects.
- Nine found that black defendants with white victims were more harshly treated than other homicide defendants.[25]

Unfortunately, none of these post-1990 studies focused on Oklahoma, and only one credible study has explored the possibility of racial disparities in Oklahoma in the post-*Furman* years.[26] In that study, first published in *Stanford Law Review*,[27] Samuel Gross and Robert Mauro studied all homicides and death sentences in Oklahoma during the 55-month period, August 1976 through December 1980.[28] Thus, these data are almost forty years old. Included were 43 death sentences imposed in 898 cases.[29] Initially the researchers found that death sentences were imposed in 16.7 percent of the cases in which a black was suspected of killing a white (B-W), 6.6 percent of the cases where a white was suspected of killing a white (W-W), and 1.5 percent of the black on black (B-B) cases.[30]

If the homicide was accompanied by other felony circumstances, no cases with black victims resulted in a death sentence, compared to 30.6 percent of the white victim cases. If the victim and defendant were strangers, 21.8 percent of the white Victim cases resulted in a death sentence, compared to 3.4 percent of such cases with black victims.[31]

In 2016 a second study of death sentencing in Oklahoma was published.[32] The paper attempted to look at death sentencing in Oklahoma in a sample of 3,595 homicide cases over a 38-year time span, 1973-2010. Unfortunately, some of the data presented by the authors in that paper is incorrect, so the paper is not useful. For example, in Appendix B we are told that 8 percent of the white-white homicides contained "capital" or "first-degree" (as opposed to "second-degree" murder charges) (137/1,696), compared to 55 percent of the black-black cases (548/659).[33] We are also told that the data set includes 1,050 cases "charged capital" in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma.[34]

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[25] *Id.*, at 358-59. Because some of the studies reached more than one of these conclusions, the sum of these findings (41) is greater than the total number of studies (56).

[26] SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 88-94 (1989).

[27] Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27 (1984).

[28] GROSS & MAURO, *supra* note 26, at 253.

[29] *Id.*, at 253.

[30] *Id.*

[31] *Id.*, at 256.

[32] David P. Keys & John F. Galliher, *Nothing Succeeds Like Failure: Race, Decisionmaking, and Proportionality in Oklahoma Homicide Trials, 1973-2010*, in RACE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V. KEMP 125 (David P. Keys & R. J. Maratea eds. 2016). We mention this study only to show our awareness of it and to alert future students of the death penalty in Oklahoma that its data is fundamentally flawed, from which no conclusions are possible.

[33] *Id.*, at 142.

[34] Email exchange available with the author (Radelet).

III. Methodology

We examined all cases in which the death penalty was imposed for Oklahoma homicides that occurred between January 1, 1990, and December 31, 2012. Using 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns. We ended with cases in 2012 because we found only one death penalty case for a 2013 murder, and any homicides that occurred in 2013 or later might still be awaiting final disposition. During those 23 years, the state recorded some 5,090 homicides, for an annual average of 221.[35]

A. Homicide Data Set

To begin, we assembled a data set on all Oklahoma homicides with an identified perpetrator over a 23 year period from 1990 to 2012.[36] We obtained these data from the FBI's "Supplemental Homicide Reports," or SHRs. Supplemental Homicide Reports are compiled from data supplied by local law enforcement agencies throughout the United States, who report data on homicides to a central state agency, which in turn reports them to the FBI in Washington for inclusion in its Uniform Crime Reports.[37] While the Reports do not list the suspects' or victims' names (and only the month and year of the offense — not the specific date), they do include the following information: the month, year, and county of the homicide; the age, gender, race,[38] and ethnicity of the suspects and victims; the number of victims; the victim-suspect relationship; weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).[39] Local law enforcement agencies usually report these data long before the defendant has been convicted, so offender data are for "suspects," not convicted offenders.[40]

The SHRs include information on all murders and non-negligent manslaughters, but they do not differentiate between the two types of homicides. They define murders and non-negligent manslaughters as "the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded."[41]

In addition, the SHRs have a separate classification for justifiable homicides, which are defined as "(1) the killing of a felon by a law enforcement officer in the line of duty; or (2) the killing of a felon, during the commission of a felony, by a private citizen."[42] Because the data come from police agencies, not all the identified suspects are eventually convicted of the homicide.

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[35] Oklahoma Crime Rates 1960-2015, available at http: www.disastercenter.com crime okcrimn.htm.

[36] This is similar to the methodology used in other studies that Pierce and Radelet have conducted using information from the Supplemental Homicide Reports. *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LOUISIANA LAW REVIEW 647 (2011); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1 (2005); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA LAW REVIEW 1 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 NORTH CAROLINA LAW REVIEW 2119 (2011). The methodology was developed and first used by GROSS & MAURO, *supra* note 26, at 35-42.

[37] *See* http: www.bjs.gov-content pub-pdf-ntmh.pdf (last visited August 1, 2016). We have used SHR data in other research projects, and an earlier version of this paragraph was included in Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1, 15 (2005).

[38] The racial designations used in the UCR are defined as follows: (1) white. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East. (2) black. A person having origins in any of the black racial groups of Africa. (3) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition. (4) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, (5) Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa. (6) Unknown). Federal Bureau of Investigation, UNIFORM CRIME REPORTING HANDBOOK 97, 106 (2004).

[39] *See id.*, NAT'L ARCHIVE OF CRIM. JUSTICE DATA.

[40] *Id.*

[41] *See* FEDERAL BUREAU OF INVESTIGATION, *Uniform Crime Reporting Statistics, UCR Offense Definitions*, http:, www.ucrdatatool.gov-offenses.cfm (last visited August 1, 2016).

[42] *Id.*

For our project, a total of 4,813 homicide suspects were identified from Oklahoma SHR's for homicides committed during the period 1990 through 2012. Only those SHR cases that recorded the gender of the homicide suspect were included in the sample, effectively eliminating those cases in which no suspect was identified. In other words, for SHR homicide cases where no suspect gender information was recorded, we assumed that the police had not been able to identify a suspect for that particular homicide incident, rendering sentencing decisions irrelevant.

Finally, we constructed one new SHR case and added it to our data when we found a death penalty case with no corresponding case in the existing SHR data. To better pinpoint the race differences, we also dropped 82 cases in which there were multiple victims who were not all the same races, and an additional 64 cases where either the victim or offender was Asian. This resulted in a reduction of 146 homicide cases (three percent of the original sample of 4,813 homicide cases) and one addition, resulting in a final sample size of 4,668 cases.

In addition to the race of the victim, the SHR data include information on the number of homicide victims in each case, and on what additional felonies, if any, occurred at the same time as the homicide. These variables are key to the analysis reported below.

B. Death Row Data Set

Unfortunately, there is no state agency, organization, or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the "Death Row Data Set."

To do this, we used data compiled by the NAACP Legal Defense and Educational Fund, Inc., and issued in a (usually) quarterly publication called "Death Row USA."[43] This highly-respected source lists (by state) the name, race and gender of every person on America's death rows. Unfortunately, it contains no other information about the defendant (e.g., age), victim (e.g., name, age, race), or crime (e.g., date, location, or circumstances).

Copies of most back issues of Death Row USA are available online,[44] and other issues are available in hard copy in many law libraries, including the University of Colorado's. From these sources we made copies of all the Oklahoma inmates listed in the 85 issues of Death Row USA published in the years 1990-2012. From those we identified the *additions* to the lists, since the additions would give us a preliminary list of those sentenced to death for homicides committed on or after January 1, 1990. We were not interested in the names of inmates who were on death row in the first issue we examined since all of those inmates were convicted of murders from the 1970s or 1980s. We were only interested in the additions, and then only those sent to death row for murders committed on or after January 1, 1990.

With that list, we conducted internet searches for information about the crime – specific date, county of offense, name of victim/s (and age, sex, and race), and the like. All those whose crimes occurred in the 1980s or after December 31, 2012 were deleted. We also used a web site maintained by the Oklahoma Department of Corrections to confirm the inmate's race and gender, as well as the county of conviction and the inmate's date of birth.[45] Because this source provides only the date of the conviction, not the date of the offense, information on the date of offense had to be obtained from other sources (primarily newspaper articles and published appellate decisions in the case).

In the end, we identified 153 death sentences imposed against 151 offenders for homicides committed 1990-2012. Two men, Karl Myers and Darrin Pickens, had two separate death sentences imposed in two separate trials for two separate homicides, so each defendant is counted twice.

[43] DEATH ROW USA, http: www.naacpldf.org death-row-usa.

[44] *See id.*

[45] OKLAHOMA DEP'T OF CORRECTIONS, *Offender Look-Up* Database, https: okoffender.doc.ok.gov .

On multiple victim homicides, we counted the homicides with at least one female victim as homicides with female victims.

IV. Results

A. Frequencies and Cross-Tabulations

Table 1 displays descriptive statistics from our data. There are a total of 4,668 homicides included, of which 2,060 (44.1 percent) involved both white suspects and white victims, and 1,266 (27.1 percent) involved black suspects and black victims. There are 427 cases with a black suspect and white victim (9.1 percent), and 143 cases with a white suspect and a black victim (3.1 percent).

Table 1: Oklahoma Homicides by Suspect's and Victim's Race/Ethnicity

	Race/Ethnicity of Victim				
	White Only	Black Only	Hisp. Only	Nat. Am. Only	TOTAL
White Suspect	2060	143	38	99	2340
Black Suspect	427	1266	42	30	1765
Hispanic Suspect	65	21	133	8	227
Nat. Am. Suspect	151	15	12	158	336
TOTAL	2703	1445	225	295	4668

Table 2 shows that overall, 143 (3.06 percent) of the homicides with known suspects resulted in a death sentence. Homicides with white victims are the most likely to result in a death sentence. Here 106/2703 resulted in death (3.92 percent), whereas 37/1965 of the homicides with nonwhite victims resulted in death (1.88 percent).[46]

Table 2: Oklahoma Homicides and Death Sentences by Race of Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	2703	106	3.92
Black Victim	1445	27	1.87
Hispanic Victim	225	6	2.67
Native American Victim	295	4	1.36
TOTAL	4668	143	3.06

Table 3 looks at only those homicides with male victims. There are a sufficient number of cases to make conclusions only for cases with either white or black victims.[47] Of the white male victim cases 2.26 result in a death sentence, but only .77 of the black male cases result in a death sentence. Thus, homicides with white male victims are 2.94 times more likely to result in death than cases with black male victims (2.26 divided by .77).

Table 4 shows that homicides with at least one female victim are 4.6 times more likely to result in a death sentence (7.21 percent) than the homicides with no female victims shown in Table 3 (1.57 percent). There are 1,235 cases in the data with at least one female victim, and again we focus on differences between cases with white victims and black victims, and do not look at the other race/ethnicity categories that have low sample counts. The data show only small differences in death sentencing rates among cases with at least one female victim between white (7.57 percent) and black (6.67 percent) victims. Clearly, race makes less of a difference when women are killed than when men are killed.

Table 5 examines the percentage of cases that resulted in a death sentence by the race of the defendant. There is virtually no difference in the probability of a death sentence by race of defendant, with 3.2 percent of the white offenders sentenced to death and 3 percent of the nonwhite defendants.

[46] These 37 suspects were implicated in 27 cases with black victims, 6 with Hispanic victims, and 4 with Native American victims. The 1,965 victims included 1,445 cases with black (only) victims, 225 with Hispanic victim only, and 295 with Native American victim only.

[47] That is, there are so few cases with black, Hispanic, or Native American victims that small fluctuations in the number of death sentences will result in large proportional differences.

Table 3: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with No Female Victims

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	1857	42	2.26
Black Victim	1175	9	0.77
Hispanic Victim	189	1	0.53
Native American Victim	212	2	0.94
TOTAL	3433	56	1.57

Table 4: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with At Least One Female Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	846	64	7.57
Black Victim	270	18	6.67
Hispanic Victim	36	5	13.89
Native American Victim	83	2	2.41
TOTAL	1235	89	7.21

Table 5: Death Sentences by Race of Defendant

		White	Nonwhite	Total
Death Penalty Imposed	No	2266	2259	4523
		.968	.970	
	Yes	74	69	143
		.032	.030	
	Total	2340	2328	4668

Chi Square 1.55; 1 df; NS

Table 6: Death Sentences by Race of Victim

		White	Nonwhite	Total
Death Penalty Imposed	No	2597	1928	4525
		.961	.981	
	Yes	106	37	143
		.039	.019	
	Total	2703	1965	4668

Chi Square 15.92; 1 df; p<.001

However, there is much more to this story. Table 6 looks at the percentages of death penalty cases by the race of the victim. Here we see that 1.9 percent of those who were suspected of killing nonwhites were ultimately sentenced to death (37 divided by 1965), whereas 3.9 percent (106 divided by 2703) of those suspected of killing whites ended up on death row. The probability of a death sentence is therefore 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites.

Table 7 combines both suspect's and victim's races/ethnicities.[48] The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences was 1.9 and 1.8 percent death sentence respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence, compared to 5.8 percent of the nonwhites suspected of killing white victims. The gender of the victim also makes a very large difference in who ends up on death row. As Table 8 shows, 1.6 percent of the defendants suspected of killing males (no female victims) were sentenced to death, compared to 7.2 percent of those who were suspected of killing one or more women.

Table 7: Death Sentences by Races of Defendant and Victim

Defendant-Victim Race/Ethnicity

(W= White; NW=Nonwhite)

	NW-W	W-W	NW-NW	W-NW	Total
No	606	1991	1653	275	4525
	.942	.967	.981	.982	.969
Death Penalty Imposed					
Yes	37	69	32	5	143
	.058	.033	.019	.018	.031
Total	643	2060	1685	280	4668

Chi Square 25.48; 3 df; p<.001

Table 9 (on next page) shows the likelihood of a death sentence by the race and gender of the victim. Among those suspected of killing white males, 2.3 percent are sentenced to death, whereas among those suspected of killing nonwhite males, only .8 percent are sent to death row. On the other hand, 7.6 percent of those suspected of killing white females are sentenced to death, as are 6.4 percent of those suspected of killing nonwhite females.

Finally, Table 10 (on next page) displays the percent of death penalty cases broken down by the presence of zero, one, or two "additional legally relevant factors." The factors we included are 1) whether the homicide event also included additional felonies, and 2) whether there were multiple victims. All cases had 0, 1, or 2 of these factors present. Table 10 shows what would be expected: 1.7 percent of the cases with no additional legally relevant factors ended with a death sentence, 6.2 percent of the

Table 8: Death Sentences by Gender of Victim (V=Victim)

		No Female V	1+ Female V	Total
	No	3378	1146	4535
		.984	.928	.969
Death Penalty Imposed				
	Yes	54	89	143
		.016	.072	.031
	Total	3433	1235	4668

Chi Square 97.07; 1 df; p<.001

[48] When the analysis examines the potential effect of more than one independent variable the likelihood of a death sentence, we combine the separate racial/ethnic minority categories (i.e., black, Hispanic, and Native American) into a single minority category. Each of these minority subgroups are recognized as groups that are subject to subject to discrimination.

Table 9: Death Sentences by Race/Gender of Victim

(W= white; NW=Nonwhite)

		W-F	W-M	NW-F	NW-M	Total
	No	782	1815	364	1564	4525
		.924	.977	.936	.992	.969
Death Penalty Imposed						
	Yes	64	42	25	12	143
		.076	.023	.064	.008	.031
	Total	846	1857	389	1576	4668

Chi Square 104.69; 3 df; p<.001

Table 10: Death Sentences by Number of Additional Legally Relevant Factors (ALRF)

		No ALRF	1 ALRF	2ALRF	Total
	No	3510	978	37	4525
		.983	.938	.698	.969
Death Penalty Imposed					
	Yes	62	65	16	143
		.017	.062	.302	.031
	Total	3852	1043	53	4668

Chi Square 187.9; 2 df; p<.001

cases with one factor, and 30.2 percent of the cases with two factors.

We now turn our attention to pinpointing the effects of each of our predictor variables.

B. Multiple Logistic Regression Analysis

Table 11 presents the results from a statistical technique called logistic regression.[49] This is the statistical technique of choice used to predict a dependent variable that has two categories, such as whether or not a death

[49] In logistic regression, the dependent variable is predicted with a series of independent variables, such as gender, income, etc. The model predicts the dependent variable with a series of independent variables, and the unique predictive utility of each independent variable can be ascertained. As we have explained elsewhere:

> Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, y=P / 1-P and; (1) $\ln(y) = \hat{a}_o + X\hat{a} + \varepsilon$ where $\hat{a}_o$ is an intercept, $\hat{a}_i$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ε is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.

Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 59 (2002).

sentence is imposed.[50]

Table 11 shows that there are five variables in our model that are associated with who is sentenced to death in Oklahoma: 1) having a white female victim, 2) having a white male victim, 3) having a female victim from a minority race of ethnicity, 4) having one additional legally relevant factor (a homicide event with more than one victims OR one in which there were additional felony circumstances present, and 5) having two additional legally relevant factors present (a homicide event with more than one victims AND one in which there were additional felony circumstances present. The reference category for the latter two variables is "no additional factors." We also included a variable measuring the race of the defendant (white vs. minority), but that factor was not statistically significant.

Table 11: Logistic Regression Analysis of Victim's Race/Gender and Number of Additional Legally Relevant Factors on the Imposition of a Death Sentence (n=4668)

	β	Sig.	Exp β
Independent Variables			
White Female Victim	2.261	.000	9.592
White Male Victim	1.171	.001	3.225
Minority Female Victim	2.161	.000	8.678
One additional aggravator*	1.235	.000	3.439
Two additional aggravators**	2.553	.000	12.847
Defendant's Race (white vs. minority)	.284	.164	1.328
Constant	5.799	.000	.003

*Either multiple victim homicide or homicide with additional felony circumstances

**Both multiple victim homicide and homicide with additional felony circumstances

It is no surprise that having one or both legally relevant factors increases the odds of a death sentence dramatically. Let's focus on the column labeled Exp β. The Exp β for "one additional aggravator" is 3.459 (rounded to 3.4), which is also the odds ratio. Thus, after controlling for all the other variables in the model, the odds of receiving a death sentence are 3.4 times higher in cases with one additional legally relevant factor (compared to cases with no additional legally relevant factors). When the two additional legally relevant factors are both present, the Exp β tells us that the odds of a death sentence are 12.847 (12.8) times higher than cases where no additional factors are present. This is what would be expected – clearly those cases are highly aggravated.

More interesting are the effects of race and gender. Here the excluded category (the comparison group) includes cases with male victims, minority races (black, Hispanic, or Native American). The Exp β in Table 11 shows that the odds of a death sentence for those with white female victims are 9.59 time higher than in cases with minority male victims. The odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence with minority male victims. Finally, the odds of a death sentence for those with minority female victims are 8.68 times higher than the odds of a death sentence with minority male victims. And all these race/gender effects are net of our two control variables (multiple murder victims and the presence of additional felony circumstances), and all are statistically significant.

[50] Logistic regression is a statistical method to predict the value of one variable with a series of other variables. The technique is regularly used in studies of race and death sentencing. See, e.g., David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Equal Justice And The Death Penalty* 78 n.55 (1990) (explaining how logistic regression models can be used to calculate the odds of a death sentence); Gross & Mauro, *supra* note 15, at 248–52 (using a logistic regression model to help predict the probability of a death sentence); Raymond Paternoster et al., JUSTICE BY GEOGRAPHY AND RACE: THE ADMINISTRATION OF THE DEATH PENALTY IN MARYLAND, 1978–1999, 4 MARGINS 1, 31–44 (2004) (using logistic regression to address the relationship between victim and offender race).

V. Conclusion

The data show that death sentencing in Oklahoma is not related to the race of the defendant. However, there are rather large disparities in the odds of a death sentence that correlate with the gender and the race/ethnicity of the victim. Controlling for other factors — the presence of additional felony circumstances and the presence of multiple victims — cases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD	)	PC Case No.:
	)	
Petitioner,	)	**CAPITAL POST CONVICTION PROCEEDING**
	)	Second Post Conviction No.: PCD-2011-590
vs.	)	First Post Conviction No.: PCD-2005-143
	)	Direct Appeal No.: D-2004-550; D-2005-171
THE STATE OF OKLAHOMA	)	Oklahoma County
	)	U.S. Court of Appeals Case No: 16-6001
Respondent.	)	

PETITIONER TREMANE WOOD'S MOTION FOR DISCOVERY

Petitioner Tremane Wood respectfully requests an order of discovery pursuant to Okla. Stat. tit. 22, § 1089(D)(3) and Rules 9.7(D)(2) and (D)(4) of the Rules of the Oklahoma Court of Criminal Appeals. Wood is submitting this motion, as well as a Motion for Evidentiary Development, contemporaneously with the filing of his Third Application for Post Conviction Relief. All averments and supporting attachments presented in Wood's application are hereby incorporated by reference.

Wood has raised a colorable claim that new evidence renders his sentence of death unlawful under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19, and 20 of the Oklahoma Constitution. He has alleged that a new study of Oklahoma's capital-sentencing system establishes that the race of the victim who he was accused and convicted of killing operated to greatly increase the likelihood that he would receive a sentence of death.

To support his proposition, Wood relies on a study appended to the recent Report released by the Oklahoma Death Penalty Commission. Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n*, Appendix IA, 211-22 (Apr. 25, 2017), http://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf. That study ultimately concluded that race plays a decisive role in who receives the death penalty in Oklahoma. *Id.* at 211, 214.

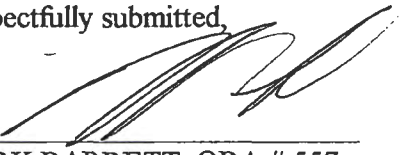
The statewide findings published in this new study are sufficient to entitle Wood to relief. However, discovery of information specific to Oklahoma County homicide prosecutions will further facilitate review of his application. This Court should therefore order a records deposition or subpoena duces tecum to require the Oklahoma County District Attorney's Office to identify: (1) any and all policies and procedures, formal or informal, concerning standards and practices used to determine in which homicides cases to seek the death penalty from 2001 to 2005; (2) information on the race and gender of the victims and the defendants in all homicide cases prosecuted by the Oklahoma County District Attorney's Office from 1990 to 2012, including: (a) the list of homicide cases prosecuted in Oklahoma County from 1990 to 2012; (b) the list of first-degree murder cases prosecuted in Oklahoma County from 1990 to 2012; (c) the list of cases prosecuted in Oklahoma County from 1990 to 2012 in which the death penalty was sought at any time in the proceedings; (d) the race, gender, and name of each victim for all cases listed in (a), (b), and (c); (e) the race, gender, and name of each defendant for all cases listed in

(a), (b), and (c); and (f) the ultimate sentence for each defendant in all cases listed in (a), (b), and (c).

Wood is aware of this Court's decision in *Bland v. State*, 1999 OK CR 45, ¶ 6, 991 P.2d 1039, 1041 (Okla. Crim. App. 1999), which held that during postconviction proceedings, "the only discovery permitted is through the procedure established for an evidentiary hearing." Considering that, pursuant to this Court's Rules 9.7(D)(4) and (D)(5), an evidentiary hearing in the district court is the appropriate mechanism for Wood to factually develop his claim, discovery is necessary in order to prepare for any such evidentiary hearing on these matters.

This Court should order discovery in order to facilitate meaningful review of Wood's Third Application for Post Conviction Relief. Okla. Stat. tit. 22, § 1089(D)(3). This Court should grant the requested discovery or remand Wood's case to the district court for an evidentiary hearing and discovery aimed at determining whether and to what degree race—both of Wood and that of his victim—impacted prosecutors' decision to seek the death penalty against Wood in the first instances, and jurors' subsequent imposition of that ultimate sanction.

Respectfully submitted,



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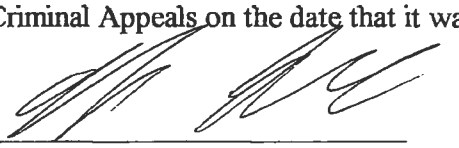
barrettlawoffice@gmail.com
ATTORNEY FOR PETITIONER

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.



MARK BARRETT

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD	)	PC Case No.: PCD 2017 6531
	)	
Petitioner,	)	**CAPITAL POST CONVICTION PROCEEDING**
	)	Second Post Conviction No.: PCD-2011-590
vs.	)	First Post Conviction No.: PCD-2005-143
	)	Direct Appeal No.: D-2004-550; D-2005-171
THE STATE OF OKLAHOMA	)	Oklahoma County
	)	U.S. Court of Appeals Case No: 16-6001
Respondent.	)	

PETITIONER TREMANE WOOD'S MOTION FOR EVIDENTIARY HEARING

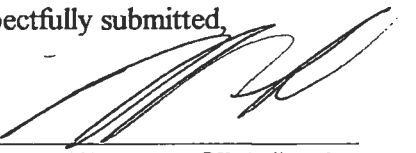
Petitioner Tremane Wood respectfully requests an evidentiary hearing on any controverted, previously unresolved issues of fact that may arise in connection with his Third Application for Post Conviction Relief filed simultaneously with this motion. All averments and supporting attachments presented in Wood's Application are hereby incorporated by reference.

In his Third Application for Post Conviction Relief Wood raises one proposition, which involves issues of fact; specifically, that race played a decisive role in determining Wood's sentence, in violation of the Oklahoma and the United States Constitutions. That proposition could not have been previously raised because the grounds on which it relies became available for the first time on April 25, 2017, when a preliminary study on race and the death penalty in Oklahoma was published. The study, appended to the Report of the Oklahoma Death Penalty Commission, comprehensively examined the role race played in death sentences in Oklahoma capital cases from 1990 to 2012. *See* Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n*,

Appendix IA, 211-22 (Apr. 25, 2017), http://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf. No reliable study of that nature has been conducted in Oklahoma in almost four decades. *Id.* at 214.

While the application itself presents sufficient evidence exists to warrant relief, if this Court should find the evidence presented creates controverted, previously unresolved factual issues then an evidentiary hearing is required. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(4)-(5). If this Court grants a hearing, in addition to the information presented in the attachments to his application, Wood requests permission to bring forth other evidence as needed to further support the proposition raised in his application.

Respectfully submitted,



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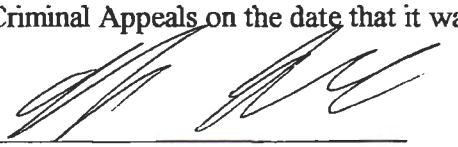

MARK BARRETT

A-13

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

PCD 2017 66

ANTHONY SANCHEZ,	)	
	)	PC CASE NO.: _____
	)	
Petitioner,	)	**CAPITAL POST-CONVICTION PROCEEDING**
	)	
vs.	)	
	)	
THE STATE OF OKLAHOMA,	)	Cleveland County Dist. Ct.
	)	No. CF-2000-325
Respondent.	)	Direct App. No. D-2006-627

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 26 2017
MICHAEL S. RICHIE
CLERK

PETITIONER ANTHONY SANCHEZ'S
SECOND APPLICATION FOR POST-CONVICTION RELIEF
DEATH PENALTY

June 26, 2017

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IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

ANTHONY SANCHEZ,	)	**Case No. _____**
Petitioner,	)	**County Cleveland**
	)	**District Court Case # CF-2000-325**
vs.	)	
	)	**Direct Appeal Case # D-2006-627**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	
	)	

SECOND APPLICATION FOR POST CONVICTION RELIEF IN A DEATH PENALTY CASE

PART A – PROCEDURAL HISTORY

Petitioner, Anthony Sanchez, through undersigned counsel, submits his application for post-conviction relief under Okla. Stat. tit. 22, § 1089. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Count I	-	Murder in the First Degree - Death by Lethal Injection
Count II	-	Rape in the First Degree - 40 Years Imprisonment
Count III	-	Forcible Anal Sodomy - 20 Years Imprisonment

1. Court in which sentence was rendered:

Cleveland County District Court, Case No. CF-2000-325

2. Date of sentence:

June 6, 2006

3. **Terms of sentence:**

Count I	-	Murder in the First Degree - Death by Lethal Injection.
Count II	-	Rape in the First Degree - 40 Years Imprisonment and a $10,000.00 fine.
Count III	-	Forcible Anal Sodomy - 20 Years Imprisonment and a $10,000.00 fine.

4. **Name of Presiding Judge:** Hon. William C. Hetherington, Jr.

5. **Is Petitioner currently in custody? Yes (X) No ( )**

Where? H Unit, Oklahoma State Penitentiary, McAlester, Oklahoma.

Does Petitioner have criminal matters pending in other courts? Yes ( ) No (X).

If so, where? N/A

List charges: N/A

Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions? Yes ( ) No (X)

If so, where? N/A

List convictions and sentences: N/A.

I.
CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime, for which a sentence of death was imposed:

(a) First Degree Murder, in violation of 21 O.S. § 701.7 (A).

Aggravating factors alleged:

(a) The murder was especially heinous, atrocious, and cruel;

(a) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

(b) At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating factors found:

(a) The murder was especially heinous, atrocious, and cruel;

(b) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

(c) At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

(a) The defendant's age;

(b) The defendant's character;

(c) The defendant's emotional/family history;

(d) The defendant's life has value and meaning to others.

Was Victim Impact Evidence introduced at trial? Yes (X) No ( ).

7. **Check whether the finding of guilty was made:**
   After plea of guilty ( ) After plea of not guilty (X)

8. **If found guilty after plea of not guilty, check whether the finding was made by:**
   A jury (X) or; A judge without a jury ( ).

9. **Was the sentence determined by (X) a jury, or ( ) the trial judge?**

II.
NON-CAPITAL OFFENSE INFORMATION

10. **Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).**

Count II	-	Rape in the First Degree in violation of Okla. Stat. tit. 21, § 1114 - 40 Years Imprisonment and a $10,000.00 fine.
Count III	-	Forcible Anal Sodomy in violation of Okla. Stat. tit. 21, § 888 - 20 Years Imprisonment and $10,000.00 fine.

11. **Check whether the finding of guilty was made:**

After a plea of guilty ( ) After a plea of not guilty (X)
Not Applicable ( )

12. **If found guilty after a plea of not guilty, check whether the finding was made by:**

A jury (X) A judge without a jury ( ) Not Applicable ( )

III.
CASE INFORMATION

13. **Name and address of lawyer in trial court:**

Silas Lyman
1800 E Memorial Rd #106
Oklahoma City, OK 73131

Names and addresses of all co-counsel in the trial court:

Diane Box
444 NW 44th
Oklahoma City, OK 73118

Matthew Haire
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070

14. **Was lead counsel appointed by the court? Yes (X) No ( ).**

15. **Was the conviction appealed? Yes(X) No( )**

To what court or courts? Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: April 10, 2008

Date Response filed: August 8, 2008

Date Reply Brief filed: August 28, 2008

Date of Oral Argument: February 10, 2009

Date of Petition for Rehearing (if appeal has been decided): N/A.

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes ( ) No (X)

If so, what were the grounds for remand? N/A

Is this petition filed subsequent to supplemental briefing after remand? N/A

16. **Name and address of lawyers for appeal?**

Michael D. Morehead
Janet Chesley
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070

17. **Was an opinion written by the appellate court?**
Yes(X) No ( )

If "yes," give citations if published: *Sanchez v. State,* 2009 OK CR 31, 223 P.3d 980

18. **Was further review sought? Yes (X) No( )**

If "Yes," state when relief was sought, the court in which relief was sought, the nature of the claims(s) and the results (include citations to any reported opinions).

Certiorari from direct appeal was denied in *Sanchez v. Oklahoma,* 562 U.S. 93, 131 S.Ct. 326, 178 L.Ed. 2d 212 (2010); the first post-conviction application was denied. Case PCD-2006- 1011 (April 10, 2010); a petition for writ of habeas corpus was denied in *Sanchez v. Trammell,* CIV-10-1171-HE, 2015 Dist. Lexis 18544 (W.D. Okla. 2015); a certificate of appealability was denied in *Sanchez v. Warrior,* 2016 U.S. App. Lexis 247 (10th Cir. 2016); a petition for certiorari was

denied in *Sanchez v. Duckworth,* __U.S. ___,
137 S.Ct. 119, 1965 L.Ed.2d 96 (2016).

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application?
Yes (X) No ( )

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ( )

21. Have other motions been filed with this application or prior to the filing of this application? Yes ( ) No (X)
If yes, specify what motions have been filed:

22. List propositions raised (list all sub-propositions).

PROPOSITION ONE: NEWLY DISCOVERED EVIDENCE ESTABLISHES THE RACE AND SEX OF THE PERSON WHO MR. SANCHEZ WAS CONVICTED OF KILLING INCREASED THE LIKELIHOOD THAT HE WOULD BE SENTENCED TO DEATH, VIOLATING HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THEUNITED STATES CONSTITUTION, AND UNDER ARTICLE II, SECTIONS 7, 9, 19 AND 20 OF THE OKLAHOMA CONSTITUTION.

I. Introduction

II. Mr. Sanchez satisfies the successor post-conviction requirements of 22 O.S. §1089(D)(8)(b) and Rule 9.7 of the Rules of the Court of Criminal Appeals

III. Newly discovered evidence shows Mr. Sanchez faced a greater risk of execution by the mere fact that the person killed was a white woman.

PART C: FACTS

Mr. Sanchez was convicted of killing Jewell Busken, a white woman, who disappeared on December 20, 1996. Her body was found later that day near Lake Stanley Draper. See State's Exhibit 1 – autopsy report noting Ms. Busken was a white female.

The primary evidence against Mr. Sanchez was a cold hit which matched Mr. Sanchez's DNA with DNA found on Ms. Busken's leotards and panties. (Tr. 2291-2304)

However, there were two eyewitness, neither of whom identified Mr. Sanchez during their testimonies. Kay Merryman, who saw both Ms. Busken and the perpetrator in Ms. Busken's car on the way to the lake, helped with sketches and described a man several years older than Ms. Busken. (Tr. 1925-36) Ms. Busken was in her early twenties, whereas Mr. Sanchez turned eighteen the month prior to the homicide.

David Kill, who saw the perpetrator leaving the lake area in Ms. Busken's car, was in the courtroom with Mr. Sanchez when he testified he had not seen the man in the car since December 20, 1996 (Tr. 1967)

PART D: ARGUMENTS AND AUTHORITIES

PROPOSITION I

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE RACE AND SEX OF THE PERSON MR. SANCHEZ WAS 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 UNDER ARTICLE II, SECTIONS 7, 9, 19 and 20 OF THE OKLAHOMA CONSTITUTION.

I. Introduction

On April 25, 2017, the Oklahoma Death Penalty Review Commission – a bipartisan group of eleven prominent Oklahoma released a report entitled "The Report of the Oklahoma Death Penalty Commission" (hereafter "the Report") which detailed its in-depth study of all aspects of Oklahoma's death penalty system.

In the Report, Commissioners identified what it said were voluminous and serious flaws in Oklahoma's system of capital punishment – flaws it concluded pose a significant and unacceptable risk that innocent Oklahomans are facing execution.

Appended to the Report is and independent and novel study of the way in which race and sex play decisive roles in who lives and who dies for Oklahoma homicides. (Report at 211, 214, Appendix 1A)

The study, entitled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," examined the possibility that race and sex have an effect on who is sentenced to death.

Among the study's chief findings is the fact that "[h]omicides with white victims are the most likely to result in a death sentence." (Report at 217)

The report found a particularly large spike in death sentences when the victim is a white female, noting "the odds of a death sentence for those with white female victims are 9.59 times higher than in cases with minority male victims." (Report at 221)

The report showed that persons convicted of killing white persons are almost two

times more likely to receive death sentences than those convicted of killing a nonwhite person.

That Mr. Sanchez faced a greater risk of execution by the fact that the deceased was white offends the constitutions of the United States and Oklahoma. U.S. Const., amends 6, 8, 14, Okla. Const. Art. II, §§ 7, 9, 19, 20.

The Court should therefore grant Mr. Sanchez relief from his unconstitutional sentence.

II. Mr. Sanchez satisfies the successor post-conviction requirements of 22 O.S. § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

Oklahoma statute provides that the merits of a subsequent post-conviction application may be considered when the factual basis for the claim was previously unavailable and there is clear and convincing evidence that the new evidence would have caused the death penalty not to be imposed. 22 O.S. § 1089(D)(8)(b)

Rule 9.7(G) of the Oklahoma Court of Criminal Appeals allows this Court to entertain a subsequent application which asserts claims "which have not been and could not have been previously presented in the original application because the factual basis was unavailable.

The statute and rule are satisfied in Mr. Sanchez's case because this discriminatory sentence claim was not previously raised and could not have been previously raised. The study, showing the discriminatory pattern was occurring in Oklahoma, was not

published until April 25, 2017.

The study's authors make the novelty of their undertaking clear. The study in the Death Penalty Commission's report was the first study since 1990 to focus on Oklahoma. Report at 213-14.

III. Newly discovered evidence shows Mr. Sanchez faced a greater risk of execution by the mere fact that the person killed was a white woman.

As stated earlier, Mr. Sanchez was convicted of fatally shooting Jewell Busken , a white female. See State's Exhibit 1 – autopsy report.

The central question that researchers Pierce, Radelet, and Sharp (alternatively "researchers," hereafter) set out to answer is whether race -- either of homicide defendants and/or victims -- "affects who ends up on death row" in Oklahoma. (Report at 212.) In order to answer this question, they studied all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012. (Id.) They then compared these cases to the subset of cases that resulted in the death penalty being imposed. (Id.) Importantly, the data set used by researchers included, in addition to the race of the victim, information on "the number of homicide victims in each case" as well as "what additional felonies, if any, occurred at the same time as the homicide." (Report at 216.) Pierce, Radelet and Sharp explain that "[t]hese variables are key" to the study's analysis and conclusions. (Id.)

Researchers found that 3.06 percent of homicides with known suspects that occurred in Oklahoma between 1990 and 2012 resulted in the imposition of a death sentence. (Report at 217.) Most troublingly, they also found that "[h]omicides with white victims *are the most likely* to result in a death sentence" in Oklahoma. (Id.) To be more specific: researchers found that 3.92 percent of homicides with white victims resulted in death sentences compared to just 1.88 percent of homicides that involved nonwhite victims. (Id.)

If the imposition of a death sentence is indeed supposed to reflect a "community's outrage" at the crime that a defendant stands accused of committing, *Furman v. Georgia*, 408 U.S. 238, 303, 92 S.Ct. 2726, 2759, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), this study demonstrates that communities in Oklahoma – a majority-white state– are significantly more outraged when white lives are lost than when nonwhite lives are forfeited. This is precisely the kind of race-based discrepancy in meting out death that is repugnant both to modern societal mores and to the constitutions of the United States and the State of Oklahoma. *McCleskey v. Kemp*, 481 U.S. 279, 366, 107 S.Ct. 1756, 1806 95 L.Ed.2d 262 (1987) (Stevens, J., & Blackmun, J., dissenting) (noting that racial disparity in capital sentencing is "constitutionally intolerable").

As noted above, a particularly large rate of death sentences exist when the victim is both white and female. Gender discrimination in jury determinations is likewise

unconstitutional. *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.E.d. 2d 690 (1975).

In light of the unconstitutional disparities as to race and gender, Mr. Sanchez's death sentence cannot stand.

IV. Mr. Sanchez was sentenced to death in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article II Sections 7, 19, and 20 of the Oklahoma Constitution.

Under constitutions of the United States and the State of Oklahoma, a criminal defendant is guaranteed the right to an impartial jury. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."); Okla. Const. art. 2, § 20 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury..."); *see also Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed. 2D 751 (1961) (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair and impartial jury as "a basic requirement of due process" (internal quotation marks omitted)).

A jury is "impartial" within the meaning of these constitutional guarantees where it does "not favor[] a party or an individual because of the emotions of the human mind, heart, or affections." *Tegeler v. State*, 130 P. 1164, 1168 (Okla. Crim. App. 1913). In other words, "an impartial jury means a jury not biased in favor of one party more than another; indifferent; unprejudiced; disinterested." *Stevens v. State*, 1951 OK CR 86, 232 P.2d 949, 958 (internal quotation marks omitted); *see also Irvin v. Dowd*, 366 U.S. 717,

722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

The United States Supreme Court has emphasized that special care is required to guard against racial bias among jurors. "Racial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (internal quotation marks omitted). "Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Id.* This Court has similarly recognized that "concerns regarding the risk of racial prejudice infecting a capital sentencing proceeding" are especially and uniquely important in ensuring the right to an impartial jury. *Frederick v. State*, No. D-2015-15, 2017 OK 12, ¶ 27, ___ P.3d ___ (Okla. Crim. App. May 25, 2017).

In *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), the United States Supreme Court vacated a defendant's death sentence because the trial court prevented that defendant from asking prospective jurors during voir dire whether the fact that the defendant was black and the victim was white would affect their ability to be impartial. The Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36-37.

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

While the Court in *Turner* expressed the hope that the individual questioning of jurors during voir dire could help to eliminate the risk of racial bias influencing trial and sentencing outcomes, the new study that Mr. Sanchez has put forward demonstrates that racial bias continues to play a statistically significant role in shaping capital-sentencing outcomes in Oklahoma.

Indeed, since the Court's decision in *Turner*, the limitations of individual voir dire as an effective tool for weeding out racial bias has been well documented. According to scholar William J. Bowers, et al.:

> "Asking prospective jurors about their racial attitudes was supposed to provide the tools necessary to rid juries of people whose decisions are likely to be influenced by race of the defendant or victim. But the tools are not working. . . . [W]hatever attempts may have been made thanks to *Turner*, the risk of racial bias remains all too manifest.

William J. Bowers et. al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DePaul L. Rev. 1497, 1532-33 (2004) [hereinafter *Crossing Racial Boundaries*]. A recent study demonstrated flaws within the voir dire process in capital cases that, in fact, *increase* the risk of racially biased jurors making in onto a jury. According to this study, "the death qualification process results in jurors who are more racially biased, both implicitly and explicitly." Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 568 (2014) [hereinafter *Devaluing Death*]. In addition to this, efforts to explicitly question jurors on their racial attitudes and potential biases are not only unsuccessful, but they may have the adverse effect of reinforcing those same biases. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017); *see also Crossing Racial Boundaries*, 53 DePaul L. Rev. at 1533 ("People are generally reluctant to admit that they hold racist attitudes or opinions or even to acknowledge this to themselves. Researchers

find that racially prejudiced people will consciously attempt to avoid appearing to be racially biased.").

Thus, available evidence illustrates that death qualification—which occurs in every capital case—"actually exacerbate[s]" *implicit* racial biases "by the exclusion of less biased Americans through the death qualification process." *Devaluing Death*, 89 N.Y.U.L. Rev. at 564. Significantly, "jurors who were death-qualified displayed higher levels of bias related to implicit racial worth"—in other words, these jurors valued the lives of white people more than those of black people. *Devaluing Death*, 89 N.Y.U.L. Rev. at 559. In short, the capital-jury selection process does more to ensure that racially biased jurors end up on capital juries than to guard against this outcome.

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

Here, the "rather large disparities in the odds of the death sentence" in Oklahoma for those accused of killing a white person, surpasses the constitutionally acceptable tipping point. (Report at 222.) Where Mr. Sanchez's jury was *two times* more likely to sentence him to death based on the race of his victim *alone*, and statistically more likely to do so because the victim was also female, his right to that impartial jury guaranteed to all criminal defendants, particularly those on trial for their life, has been transgressed. *Turner*, 476 U.S. at 35 (explaining that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death" verdict.).

The risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent." *Id.* at 39 (Brennan, J., concurring in part and dissenting part) (explaining that he would go further than the majority and vacate the convictiat the guilt phase of a bifurcated capital trial.").

A defendant "is . . . entitled to be tried before a jury whose minds are open on every issue and not embedded with any pre-conceived opinions." *West v. State*, 1968 OK CR 112, 443 P.2d 131, 133, *overruled on other grounds by McKay v. City of Tulsa*, 1998 OK CR 238, 763 P.2d 703. Mr. Sanchez was denied this most elemental right, rendering his sentence of death a violation of the United States and Oklahoma Constitution.

Gender discrimination, like racial discrimination, is deserving of special scrutiny.

Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

That death sentences are determined by who the victim is, rather than by the nature of the act, is abhorrent to state and federal constitutional sensibilities. It is the equivalent of creating an American or Oklahoma aristocracy and decreeing that offenses against the aristocracy should be punished more severely than offenses against the less worthy.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

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.

MARK BARRETT

ATTACHMENT 1

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

ANTHONY SANCHEZ,	)	
Petitioner,	)	**County Cleveland**
	)	**District Court Case # CF-2000-325**
vs.	)	
	)	**Direct Appeal Case # D-2006-627**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	
	)	**PCD-06-1011**

COURT OF CRIMINAL APPEALS FORM 13.11A
ORIGINAL APPLICATION FOR POST CONVICTION RELIEF
IN A DEATH PENALTY CASE

PART A – PROCEDURAL HISTORY

Petitioner, Anthony Sanchez, through undersigned counsel, submits his application for post-conviction relief under Okla. Stat. tit. 22, § 1089. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Count I	-	Murder in the First Degree - Death by Lethal Injection
Count II	-	Rape in the First Degree - 40 Years Imprisonment
Count III	-	Forcible Anal Sodomy - 20 Years Imprisonment

1. **Court in which sentence was rendered:**

   Cleveland County District Court, Case No. CF-2000-325

2. **Date of sentence:**

   June 6, 2006

3. **Terms of sentence:**

Count I	-	Murder in the First Degree - Death by Lethal Injection.
Count II	-	Rape in the First Degree - 40 Years Imprisonment and a $10,000.00 fine.
Count III	-	Forcible Anal Sodomy - 20 Years Imprisonment and a $10,000.00 fine.[1]

4. **Name of Presiding Judge:** Hon. William C. Hetherington, Jr.

5. **Is Petitioner currently in custody? Yes (X) No ( )**

Where? H Unit, Oklahoma State Penitentiary, McAlester, Oklahoma.

Does Petitioner have criminal matters pending in other courts? Yes ( ) No (X).

If so, where? N/A

List charges: N/A

Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions? Yes ( ) No (X)

If so, where? N/A

List convictions and sentences: N/A.

[1]See Attached Judgment and Sentence (Appendix 1) and Death Warrant (Appendix 2).

I.
CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of death was imposed:**

(a) First Degree Murder, in violation of 21 O.S. § 701.7 (A).

Aggravating factors alleged:

(a) The murder was especially heinous, atrocious, and cruel;

(b) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

(c) At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating factors found:

(a) The murder was especially heinous, atrocious, and cruel;

(b) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

(c) At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

(a) The defendant's age;

(b) The defendant's character;

(c) The defendant's emotional/family history;

(d) The defendant's life has value and meaning to others.

Was Victim Impact Evidence introduced at trial? Yes (X) No ( ).

7. **Check whether the finding of guilty was made:**
   After plea of guilty ( ) After plea of not guilty (X)

8. **If found guilty after plea of not guilty, check whether the finding was made by:**
   A jury (X) or; A judge without a jury ( ).

9. **Was the sentence determined by (X) a jury, or ( ) the trial judge?**

II.
NON-CAPITAL OFFENSE INFORMATION

10. **Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).**

Count II	-	Rape in the First Degree in violation of Okla. Stat. tit. 21, § 1114 - 40 Years Imprisonment and a $10,000.00 fine.
Count III	-	Forcible Anal Sodomy in violation of Okla. Stat. tit. 21, § 888 - 20 Years Imprisonment and $10,000.00 fine.

11. **Check whether the finding of guilty was made:**

    After a plea of guilty ( ) After a plea of not guilty (X)
    Not Applicable ( )

12. **If found guilty after a plea of not guilty, check whether the finding was made by:**

    A jury (X) *A judge without a jury ( )* *Not Applicable ( )*

III.
CASE INFORMATION

13. Name and address of lawyer in trial court:

Silas Lyman
1800 E Memorial Rd #106
Oklahoma City, OK 73131

Names and addresses of all co-counsel in the trial court:

Diane Box
444 NW 44th
Oklahoma City, OK 73118

Matthew Haire
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070

14. Was lead counsel appointed by the court? Yes (X) No ( ).

15. Was the conviction appealed? Yes(X) No( )

To what court or courts? Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: April 10, 2008

Date Response filed: August 8, 2008

Date Reply Brief filed: August 28, 2008

Date of Oral Argument: February 10, 2009

Date of Petition for Rehearing (if appeal has been decided): N/A.

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes ( ) No (X)

If so, what were the grounds for remand? N/A

Is this petition filed subsequent to supplemental briefing after remand? N/A

16. **Name and address of lawyers for appeal?**

Michael D. Morehead
Janet Chesley
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070

17. **Was an opinion written by the appellate court?**
Yes( ) No ( ) N/A (X)

If "yes," give citations if published: N/A

If not published, give appellate case no.: N/A

18. **Was further review sought? Yes ( ) No( ) N/A (X)**

If "Yes," state when relief was sought, the court in which relief was sought, the nature of the claims(s) and the results (include citations to any reported opinions).

PART B: GROUNDS FOR RELIEF

19. **Has a motion for discovery been filed with this application?**
Yes (X) No ( )

20. **Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ( )**

21. **Have other motions been filed with this application or prior to the filing of this application? Yes (X) No ( )**

If yes, specify what motions have been filed:

Nov. 21, 2008	Verified Application for Tolling of Briefing Time with Initial Request for 30 Day Extension of Time to File Application for Post-Conviction Relief
Dec. 23, 2008	Verified Application for Tolling of Briefing Time with Second Request for 30 Day Extension of Time to File Application for Post-Conviction Relief
Jan. 26, 2009	Petitioner's Motion for Evidentiary Hearing and Request to Conduct Discovery

22. List propositions raised (list all sub-propositions).

PROPOSITION I

APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO ARGUE PETITIONER WAS UNCONSTITUTIONALLY EXCLUDED FROM THE COURTROOM DURING JURY SELECTION.

PROPOSITION II

THE ABSENCE OF ANY ASSURANCE THAT THE JURY UNANIMOUSLY AGREED ON THE SAME "PREDICATE CRIME" TO SUPPORT THE "AVOID ARREST" AGGRAVATING CIRCUMSTANCE RENDERS THE FINDING OF THE CIRCUMSTANCE INVALID.

PROPOSITION III

APPELLANT COUNSEL WERE INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT A CRITICAL FACTOR IN THE SENTENCING STAGE HAD TO BE FOUND BEYOND A REASONABLE DOUBT DEPRIVED MR. SANCHEZ OF A FAIR SENTENCING DETERMINATION IN VIOLATION OF THE OKLAHOMA CONSTITUTION AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION IV
THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST-CONVICTION PROCEEDINGS RENDERED THE TRIAL RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW.

PART C: FACTS
STATEMENT OF THE FACTS OF THE CASE, INCLUDING REFERENCE TO SUPPORTING DOCUMENTATION, RECORD, AND APPENDICES

1.
CITATIONS TO THE RECORD

Documents contained in the 6 bound volumes of the Original Record in *State v. Sanchez*, Cleveland County Case. No CF-2000-325, will be referenced by the notation "OR," followed by the page number(s) in the Original Record where the document appears, e.g. "OR 30."

The transcript of the preliminary hearing will be referenced as "PHTr.," followed by page. Motion Hearing transcripts will be referenced as "Mot. Tr." followed by the date and page. The transcript of the jury trial will be referenced as "Tr." with cited page number(s), e.g., "Tr. 425-444." The formal sentencing hearing transcript will be referred to as "S.Tr."

Exhibits introduced by the Defense at trial will be referred to as "Def. Ex." followed by the exhibit number. Whereas, exhibits introduced by the State at trial will be referred to as "St. Ex." followed by the exhibit number. Defense exhibits

introduced during the remanded evidentiary hearing will be to referred to as "Def. Evid. Ex." followed by the exhibit number and exhibits introduced by the State will be referred to as "St. Evid. Ex." followed by the exhibit number.

Pursuant to Rule 9.7(D)(1)(a) of the Rules of the Court of Criminal Appeals, the record in this post-conviction proceeding, not otherwise mentioned above, also includes the "record on appeal" in *Sanchez v. State*, Case No. D-2006-627, as defined by Rule 1.13(f), and the same shall be considered to be incorporated herein by reference and by operation of the rule. References to the Appendix of Exhibits in Support of the Application for Post-Conviction Relief will indicate the exhibit number, preceded by the notation "Appendix." Citations to briefs filed on direct appeal will be referenced by identification of the brief and the date filed with this Court.

2.
PROCEDURAL HISTORY

On March 20, 2000, the State of Oklahoma filed an Information against "John Doe," a male individual with a specific DNA profile in the District Court of Cleveland County. (OR 1-3) This Information alleged one count of Murder in the First Degree in violation of **21 O.S. § 701.7**, one count of First Degree Rape in violation of **21 O.S. § 1114**, one count of Forcible Sodomy in violation of **21 O.S. § 888** and one count of Kidnapping in violation of **21 O.S. § 741**.[2] (OR 1-3) In a bill of particulars, the

[2] This count was later dismissed at the request of the State as it was filed after the expiration of the statute of limitations. (Tr. 20-21)

State further alleged the murder was attended by the following statutory aggravating circumstances: (1) the murder of the victim was especially heinous, atrocious, and cruel involving mental and/or physical torture, (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest, and (3) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. (OR 13-14 and 288-290)

Mr. Sanchez pled not guilty to the charges and requested a jury trial. Mr. Sanchez was tried by a jury before the Hon. William C. Hetherington, Jr. in Cleveland County. The jury found Mr. Sanchez guilty on all three counts, recommending a sentence of 40 years imprisonment and a $10,000.00 fine for Count II (first degree rape), and 20 years with a $10,000.00 fine for Count III (forcible sodomy). The jury verdict finding Mr. Sanchez guilty of all three counts was followed by the sentencing stage as to Count I (first degree murder), where the jury returned a verdict finding the existence of the three aggravating circumstances and imposed the death sentence. The District Court pronounced formal judgment and sentence on the verdicts on June 6, 2006. (OR 898-908, S.Tr. 5-6)

Counsel appointed to represent Mr. Sanchez on Direct Appeal timely appealed the judgments and sentences in *Sanchez v. State,* Case No. D-2006-627. That proceeding is fully briefed as of the filing of this Application. Pursuant to **22 O.S.Supp.1996 § 1089** and **Rule 9.7 of the Court of Criminal Appeals Rules**, **22 O.S.Supp.1997 Ch. 18**, Mr. Sanchez timely files this original verified application for post-conviction relief.

3.
FACTS RELATING TO THE OFFENSE

On December 20, 1996, the body of Jewell (Juli) Busken was discovered on the edge of the water at Lake Stanley Draper. (Tr. 2059) Ms. Busken had been shot and was found lying face down in the water with her hands tied behind her with what appeared to be a black shoelace. (Tr. 2057-2065, 2190, 2207-2208, 2227) Several items of evidentiary value were gathered at the lake scene.[3]

Dr. John Parker, performed the autopsy on Ms. Busken. The examination revealed a single gunshot wound to the back of the head. (Tr. 2190-2191) The bullet was still lodged within the brain and followed an upward, left-to-right, and back-to-front trajectory. (Tr. 2195-2196) Dr. Parker also observed some contusions on her right inner thigh, a small contusion on the right side of the labia, and a quarter-inch perianal abrasion. (Tr. 2198-2199, 2210) No trauma was observed

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[3] Processing of the scene started on the 20th of December, but continued into the next day due to the darkness of the night and the extreme cold. (Tr. 2129)

during an internal vaginal examination. (Tr. 2211) Dr. Parker also noted that Ms. Busken's jeans were unbuttoned and unzipped and that her panties were slightly rolled down around her upper thighs. (Tr. 2205) Swabs were taken of her mouth, vagina, and anus. (Tr. 2211) Dr. Parker listed the cause of death as a contact gunshot wound to the head.

Ms. Busken's car was discovered at an apartment complex near the Dublin West apartments.[4] (Tr. 2136) The car was dusted for fingerprints, which resulted in forty-nine prints of varying quality.[5] (Tr. 2537) Further, the investigation revealed that several items of Ms. Busken's property were missing: an opal ring, a Sanyo CD player, a Cobra radar detector, and an NEC cell phone. (Tr. 2460-2461)

All items of evidentiary value were submitted to the Oklahoma City Police Department's forensic lab. Forensic examination revealed the presence of human spermatozoa on the rectal swab, a cutting from the panties, several cuttings from the leotards and a cutting from a pair of pajama bottoms retrieved from Ms. Busken's car. No spermatozoa was detected on the oral swab, vaginal swab, or on other cuttings from the pajama bottoms. (Tr. 2748-2749) Further testing resulted in two DNA profiles, a sperm fraction and an epithelial fraction, from a cutting from the leotards and the panties. A partial profile was obtained from the sperm fraction found on the pajama bottoms. (Tr. 2759-2763)

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[4] Ms. Busken was a resident of the Dublin West apartments.

[5] None of the prints were matched to Anthony Sanchez. (Tr. 2537)

Despite an extensive investigation that included hundreds of interviews and gathering many DNA and fingerprint samples, no matches were made. The case remained unsolved until 2004. On July 26, 2004, Kent Neeland, a criminalist with the Oklahoma State Bureau of Investigation, sent a letter to the Oklahoma City police department informing them of a cold hit on a DNA profile contained within the Combined DNA Index System (CODIS)[6]. The DNA profile identified belonged to Anthony Sanchez.

Additional relevant facts will be presented as necessary in the propositions raised.

PROPOSITION I

APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING ARGUE PETITIONER WAS UNCONSTITUTIONALLY EXCLUDED FROM THE COURTROOM DURING JURY SELECTION.

On the first day of Mr. Sanchez's trial, he was excluded from the courtroom during a critical stage of the voir dire proceedings. (Tr. 18-20) The transcription for January 30, 2006, began with the judge noting that one-hundred-twenty (120) prospective jurors had gathered in court, as well as counsel for both sides. (Tr. 18) The judge then noted that he had approved a "sort of a shock collar system" for use on petitioner during the trial. (Tr. 18) The record indicates that Mr. Sanchez's counsel encouraged Mr. Sanchez to wear the "shock collar" even though there had

[6] CODIS is a nationwide database containing the DNA profiles of known and unknown persons.

been no particular finding of dangerousness. It appears that Mr. Sanchez had a falling out with his counsel over whether he should have to wear the "shock collar". (Tr. 18-20) After admitting that he had not asked Mr. Sanchez if he wanted to be present, counsel waived his client's presence for the initial voir dire proceedings. (Tr. 20)

The trial then commenced without Mr. Sanchez, and the prospective jurors were sworn in. (Tr. 22) The judge spoke at length emphasizing the importance of punctuality to the prospective jurors and introducing them to the court staff. (Tr. 24) The judge talked to the jurors about parking, restrooms, and snacks. (Tr. 24-26) He explained the process of voir dire, and its importance. (Tr. 26-36) After the jurors were excused, Mr. Sanchez was brought into Judge Hetherington's chambers, at his own request, to make a record on his perceived conflict of interest with his attorneys. (Tr. 36-45)

Although the right to be present at one's criminal trial can be rooted in the Sixth Amendment's confrontation clause, the right to be present can also spring from basic due process. **Dodd v. State**, 2004 OK CR 31, 100 P.3d 1017, 1027-1028 (Okl.Cr. 2004). A defendant has a right to be present at trial when his absence from the proceedings would impair his ability to defend himself. **Id.** A defendant must be allowed to be present where his presence "bears, or may be fairly assumed to bear,

a relation, reasonably substantial, to his opportunity to defend." **Lockett v. State**, 2002 OK CR 30, 53 P.3d 418, 423 (Okl.Cr. 2002), quoting **Snyder v. Massachusetts**, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

Voir dire is a critical stage of a trial, during which a defendant has a right to be present. **Gomez v. U.S.**, 490 U.S. 858, 873, 109 S.Ct. 2237, 2246, 104 L.Ed.2d 923 (1989). A trial begins at least from the time the work of empaneling the jury begins. **Id**. This Court has held that all voir dire proceedings should be held in the presence of the defendant. **Lockett v. State**, 2002 OK CR 30, 53 P.3d 418, 423 (Okl.Cr. 2002).

In **Darks v. State**, 1998 OK CR 15, 954 P.2d 152 (Okl.Cr. 1998), this Court addressed a similar issue.[7] This Court recognized how difficult it can be to prove prejudice when one is excluded from a voir dire proceeding:

> There is no way to assess the extent of prejudice, if any, a defendant may suffer by not being able to advise his attorney during jury selection. Absence from jury selection would deny the defendant his prerogative to challenge a juror simply on the basis of sudden impressions and unaccountable prejudices that we are apt to conceive upon the bare looks or gestures of another.

Darks, 1998 OK CR 15 at ¶ 35, 954 P.2d at 162. This Court found that Darks had voluntarily, knowingly, and intelligently waived his right to be present. **Id**. at 163.

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[7] Unlike Mr. Sanchez, Darks was absent during individual voir dire. **Darks** 954 P.2d at 161-162.

There is absolutely no evidence that Anthony Sanchez waived his right to be present. In **Darks**, the evidence of waiver was off-the-record, and led this Court to advise:

> Although such a waiver may be inferred from the record, we find the preferred practice would be for the trial court, **on the record**, to advise the defendant of his rights and, if the defendant desires, obtain an intelligent and knowing waiver.

Darks, 1998 OK CR 15 at ¶ 38, 954 P.2d 152, 163 (Okl.Cr.1998)(emphasis in original). Here, defense counsel specifically told the judge that he had not even discussed the waiver with Mr. Sanchez.[8] (Tr. 20)

In **Darks**, the defendant claimed that his exclusion from voir dire was structural error. 1998 OK CR 15 at ¶ 38, 954 P.2d at 163. This Court found it unnecessary to address that claim because it found that Darks had validly waived the issue. **Id.** But, in Mr. Sanchez's case there was no waiver. Mr. Sanchez contends that his exclusion from voir dire was structural error. Petitioner has quoted this Court, above, discussing the difficulty of assessing prejudice when a defendant is excluded from voir dire. This Court has recognized that structural errors, like the one at issue here, defy harmless error analysis. **Golden v. State**, 2006 OK CR 2, 127 P.3d 1150, 1154 (Okl.Cr. 2006). One cannot effectively perform a harmless error analysis based upon the deprivation of "sudden impressions and unaccountable prejudices that we

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[8] **Darks** involved some of the same players as those involved in Mr. Sanchez's trial. These included Judge Hetherington, Prosecutor Richard Sitzman, and Defense Attorney Diane Box.

are apt to conceive upon the bare looks or gestures of another." This is exactly the type of error that defies analysis.

This issue was not addressed in Mr. Sanchez's direct appeal, and, in that regard, his appellate counsel were ineffective. **Strickland v. Washington**, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). In determining whether defense counsel failed to provide constitutionally effective assistance of counsel, the United States Supreme Court has set forth a two pronged test. **Id**. at 466 U.S. at 689. In order to satisfy the first prong, a defendant must demonstrate that counsel's errors or omissions were so deficient that they were not "the result of reasonable professional judgment" and were thus "outside the wide range of professionally competent assistance." **Id**. at 690. The second prong requires the defendant show that a reasonable probability exists that, but for counsel's errors, the result of the trial would have been different. A reasonable probability of a different result is one "sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 693-94. *See also* **Cargle v. Mullin**, 317 F.3d 1196 (2003).

Had appellate counsel raised this issue in the direct appeal brief, this Court could have easily found structural error. It is never a sound strategy to abandon a successful structural error argument. This court cannot find that structural error was waived due to ineffective assistance because a structural error cannot be subject to analysis based upon prejudice. **Golden**, 2006 OK CR 2, 127 P.3d at 1154.

Petitioner's unconstitutional exclusion from the courtroom during a critical stage warrants reversal his convictions under the Fifth and Fourteenth Amendments to the United States Constitution. Mr. Sanchez respectfully requests a new trial.

PROPOSITION II

THE ABSENCE OF ANY ASSURANCE THAT THE JURY UNANIMOUSLY AGREED ON THE SAME "PREDICATE CRIME" TO SUPPORT THE "AVOID ARREST" AGGRAVATING CIRCUMSTANCE RENDERS THE FINDING OF THE CIRCUMSTANCE INVALID.

There was insufficient evidence offered in support of the "avoid arrest" aggravating circumstance. As such, the applicable standard of review is found in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *See* **Washington v. State**, 1999 OK CR 22, 989 P.2d 960, 974 (applying **Jackson** standard to sufficiency claims involving aggravating circumstances).

One of the aggravating circumstances alleged by the state and found to exist by the jury was that the murder of Ms. Busken was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." (OR 832) This Court has determined that the "avoid arrest" aggravating circumstance has two components: 1) the state must establish that the defendant committed some "predicate crime"

separate from the murder, and; 2) the state must establish that the defendant killed the victim with the intent to avoid arrest or prosecution for the separate predicate crime. **Alverson v. State**, 1999 OK CR 21, 983 P.2d 498, 520; **LaFevers v. State**, 1995 OK CR 26, 897 P.2d 292, 311. The state has the burden of establishing the existence of each component beyond a reasonable doubt. *See* **Ring v. Arizona**, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d (2002) (holding that a capital jury must make any factual determination bearing on capital punishment beyond a reasonable doubt). Finally, the jury must be unanimous in its findings. (OUJI CR 2d 4-76; OR 823)

Prior to trial, the state filed a *Finalized Bill of Particulars* and *Evidence Summary: Death Penalty Phase "More Definite & Certain" Response* in which it asserted the presence of no less than three predicate crimes supported the avoid arrest aggravating circumstance. (OR 288-290 and 329-330) The state alleged that Ms. Busken was killed to prevent arrest or prosecution for the "kidnapping, raping and sodomizing of Ms. Busken." (OR 288)

The prosecution, by relying on more than one predicate crime, created a situation where the jury was not required to unanimously agree on the existence of the same predicate crime. While it is true that the Supreme Court has not imposed a jury unanimity requirement on the state courts, *See* **Johnson v. Louisiana**, 406 U.S. 356, 362, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), it is equally true that the Supreme Court has held that when the state guarantees a structural protection, as

Oklahoma has done with respect to jury unanimity and aggravating circumstances, it violates the Due Process Clause of the federal constitution if it fails meaningfully to vindicate that guarantee. **Evitts v. Lucey**, 469 U.S. 387, 400-01, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

This Court has held, in an arguably analogous context, that the absence of guaranteed jury unanimity is not objectionable where multiple theories of guilt have been advanced, so long as the state's evidence is sufficient to support the finding of each theory beyond a reasonable doubt. *See e.g.* **Primeaux v. State**, 2004 OK CR 16, 88 P.3d 893, 909; **Phillips v. State**, 1982 OK CR 29, 641 P.2d 556, 559. Here, however, a predicate crime identified by the state lacks evidentiary support.

Mr. Sanchez contends that there is insufficient evidence to allow the jury to find that Ms. Busken was killed to prevent the arrest or prosecution for the independent crime of first degree rape. *See* **Brief of Appellant**, *Sanchez v. State*, D-2006-627, Proposition V. There is simply no evidence allowing the jury to conclude, beyond a reasonable doubt, that Ms. Busken was killed to prevent arrest or prosecution for first degree rape. Because one or more members of the jury may have found the presence of the avoid arrest aggravating circumstance on the basis of a theory that lacks evidentiary support, the Court should find the circumstance invalid.

Mr. Sanchez recognizes that pursuant to **22 O.S. § 1089(C)(1) and (2)**, the only issues that may be raised in a capital post-conviction application are those that

"were not and could not have been raised in a direct appeal" and "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." Under **22 O.S. § 1089(D)(4)(b)**, a ground could not have been previously raised if:

> 1) it is a claim of ineffective assistance of trial counsel involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal, or
>
> 2) is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.

"All claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court." **22 O.S. § 1089(D)(4)(b)**.

The Supreme Court has determined that an ineffective assistance of counsel claim has two components: a defendant must show that trial counsel's performance was deficient, and that the deficiency prejudiced the defense. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To establish deficient performance, a petitioner must demonstrate that trial counsel's representation "fell below an objective standard of reasonableness." **Id.** at 688, 104 S.Ct. at 2064. The Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional

norms." **Id.** For counsel's inadequate performance to constitute a Sixth Amendment violation, the defendant must show that counsel's failures prejudiced his defense. **Id.** at 692, 104 S.Ct. at 2067. To establish such prejudice a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Id.** at 694, 104 S.Ct. at 2068.

Concerning appellate counsel, the Tenth Circuit in **Cargle v. Mullin**, 317 F.3d 1196 (2003), stated:

> the proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **Smith v. Robbins**, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following **Smith v. Murray**, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)).The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding – in this case the appeal – would have been different. **Id.** at 285, 120 S.Ct. 746 (applying **Strickland**).... [I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," **Neill v. Gibson**, 278 F.3d 1044, 1057 (10th Cir. 2001) (quotation omitted), *cert. denied*, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment

involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.

Id. at 1202-03 (footnote omitted).

The review of an appellate counsel ineffectiveness claim is further complicated where, as here, the direct appeal is still pending. Nevertheless, it is respectfully contended that appellate counsel for Mr. Sanchez were ineffective for failing to raise the claim concerning the absence of jury unanimity. Thus, the Court is asked to reach the merits of the claim and find the avoid arrest aggravating circumstance invalid. Furthermore, this Court should find the balance of the mitigating circumstances versus the remaining aggravating factors such that death is an inappropriate penalty. *See* **McGregor v. State**, 1994 OK CR 71, 885 P.2d 1366, 1385-86 (independent reweighing of aggravating and mitigating circumstances where one of several aggravating circumstances has been invalidated is implicit to [this Court's] statutory duty to determine the factual substantiation of a verdict and validity of a death sentence'). The error in this regard has deprived Mr. Sanchez of due process, a fair and reliable sentencing determination and the right to the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution.

PROPOSITION III

APPELLANT COUNSEL WERE INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT A CRITICAL FACTOR IN THE SENTENCING STAGE HAD TO BE FOUND BEYOND A REASONABLE DOUBT DEPRIVED MR. SANCHEZ OF A FAIR SENTENCING DETERMINATION IN VIOLATION OF THE OKLAHOMA CONSTITUTION AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Sanchez's sentence was determined by a jury. In order for the jury to impose a sentence of death, they must make three findings of fact: 1) the person must be found guilty of first degree murder beyond a reasonable doubt; 2) at least one aggravating circumstance must be found beyond a reasonable doubt; and 3) the aggravating circumstance or circumstances must outweigh the mitigating evidence presented at trial. **21 O.S. § 701.11**; *see* **Grant v. State**, 2002 OK CR 36, 58 P.3d 783, 802 n.1 (Okla. Cr. 2002) (Chapel, J. dissenting)

At the close of the sentencing portion of the trial, Mr. Sanchez's jury was given Uniform Jury Instructions OUJI-CR-4-76 and OUJI-CR-4-80 concerning a jury's authority in a capital sentencing proceeding. (OR 823, 827) Appellant had offered alternative instructions that more accurately reflected the United States Supreme Court's current jurisprudence on the subject. (OR 801, 807)

Mr. Sanchez's jury was instructed that the only fact in second stage that must be found beyond a reasonable doubt is whether the State proved an aggravating circumstance. (OR 823, 827) The failure to inform the jury that it also had to find the aggravating circumstance or circumstances must outweigh the mitigating evidence beyond a reasonable doubt renders the resulting death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. *See* **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002).

This Court has consistently maintained that the State is not required to prove beyond a reasonable doubt that the aggravators alleged outweigh the mitigating factors presented. *See* **Harris v. State**, 2004 OK CR 1, 84 P.3d 731, 754-755 (Okl.Cr. 2004); **Torres v. State**, 2002 OK CR 35, 58 P.3d 214 (Okl.Cr 2002). Mr. Sanchez would ask this Court to reconsider as this position is contrary to Supreme Court precedent. **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); **Apprendi v. New Jersey**, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 147 L.Ed.2d 435 (2000); **Jones v. United States**, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 1224 n.6, 143 L.Ed.2d 311 (1999).

In **Jones v. United States**, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 1224 n.6, 143 L.Ed.2d 311 (1999), the Supreme court held "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." **Id.**, 526 U.S. at 243, n. 6. 119 S.Ct. at 1224 n.6. In **Apprendi v. New Jersey**, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 147 L.Ed.2d 435 (2000), the Supreme Court held "[t]he Fourteenth Amendment commands the same answer [as **Jones v. U.S.**] in this case involving a state statute." **Id.**, 530 U.S. at 476, 120 S.Ct. at 2355. Two years later, in **Ring v. Arizona**, 536 U.S. 584, 122

S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court affirmed **Jones** and **Apprendi** and made these constitutional principles applicable to capital sentencing schemes. **Ring**, 536 U.S. at 607, 122 s. Ct. at 2442.

Jones, Apprendi and **Ring** require the capital jury be instructed that it must find the aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt before it may impose the punishment of death. Because the jury's critical factual determination of whether the aggravating circumstances outweigh any mitigating circumstances is also a "fact that increases the penalty for a crime beyond the prescribed statutory maximum," **Apprendi**, 530 U.S. at 490, 120 S.Ct. at 2362-63, the failure of the uniform instructions to require that this fact be found beyond a reasonable doubt violates the Sixth and Fourteenth Amendments.

Under Oklahoma law, a jury verdict finding all the elements of first degree murder beyond a reasonable doubt exposes the defendant to a maximum sentence of life imprisonment without parole. This is indisputable from the text of **21 O.S. 2001 § 701.11**, which provides in part:

> Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

After the finding of guilt, the capital jury is instructed it must find one or more aggravating circumstances before it is authorized to consider increasing the penalty to death. The jury is prohibited from imposing the capital sentence unless it

unanimously finds the second fact: that any such aggravating circumstances outweigh the finding of one or more mitigating circumstances. Previous cases of this Court have also read the statutes to this effect. In **Paxton v. State**, 1993 OK CR 59, 867 P.2d 1309, 1322 (Okl.Cr. 1993), the Court stated "only when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed."

In **Torres v. State**, 2002 OK CR 35, 53 P.3d at 216, the Court rejected this claim with an unsupportable distinction between fact-finding that triggers death-eligibility (i.e., the finding of at least one aggravating circumstance) and fact-finding that authorizes death imposition (i.e., the weighing determination). This Court held:

> **Ring** describes a substantive element of a capital offense as one which makes an increase in authorized punishment contingent on a finding of fact. Using this description, the substantive element of capital murder in Oklahoma is the jury finding of the aggravating circumstance necessary to support a capital sentence. It is that finding, not the weighing of aggravating and mitigating circumstances, that authorizes the jurors to consider imposing a sentence of death. That is, the increase in punishment from life imprisonment without parole to the death penalty is contingent on the factual finding of an aggravating circumstance.

58 P.3d at 216. Respectfully, the Court's analysis in **Torres** is the very type of element versus sentencing factor formalism rejected by the Supreme Court in **Ring**. As the Supreme Court said there, "the relevant inquiry is one of effect, not form." **Ring**, 536 U.S. at 602, 122 S.Ct. at 2439-2440. The crucial flaw in the **Torres** analysis is that Oklahoma's requirement of a finding of at least one aggravating

circumstance only exposes the defendant to a further factual determination about whether to impose the death sentence, but not to the increased punishment itself. Oklahoma law shields the defendant from the imposition of capital punishment unless the jury makes the further determination that the aggravation outweighs all mitigation. **21 O.S. § 701.11**. The Court's reasoning in **Torres** clearly conflicts with **Ring**, which extends the "beyond a reasonable doubt" requirement to "all the facts which must exist in order to subject the defendant to a legally prescribed punishment." **Ring**, 536 U.S. at 602, 122 S.Ct. at 2440. The constitutionally relevant "effect," as opposed to the constitutionally irrelevant "form," of the Oklahoma sentencing scheme is that it only permits a defendant to be legally subjected to capital punishment based on the jury's weighing determination, not the mere finding of an aggravating circumstance.

The trial court's instructions failed to carry **Ring's** "beyond a reasonable doubt" requirement to the jury's weighing determination, violating Mr. Sanchez's due process right to a jury finding of all the necessary elements of a capital offense beyond a reasonable doubt, as secured by the Fifth, Sixth, Eighth and Fourteenth Amendments and Article II, Sections 7, 19, and 20 of the Oklahoma Constitution. **Sullivan v. Louisiana**, 508 U.S. 275, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993).

This issue was not addressed in Mr. Sanchez's direct appeal, and, in that regard, his appellate counsel were ineffective. **Strickland v. Washington**, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984), **Cargle v. Mullin**, 317 F.3d 1196 (2003).

PROPOSITION IV

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST-CONVICTION PROCEEDINGS RENDERED THE TRIAL RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW.

In **United States v. Rivera**, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held that the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. **Rivera**, 900 F. 2d at 1469; **Cargle v. Mullin**, 317 F.3d 1196 (10th Cir. 2003); **Walker v. Engle**, 703 F.2d 959, 963 (6th Cir. 1983). A valid death sentence must be free of any passion, prejudice or arbitrary factors that taint the reliability of the outcome. The decision to impose a death sentence must reflect a reasoned moral judgment as to the defendant's actions and character in light of the offense and the defendant's background. **Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Failure to adhere to these constitutional mandates at every stage of the capital sentencing and review process creates a risk that a death sentence will be based on considerations that are constitutionally impermissible and totally irrelevant to the offender and the crime. In order to maintain the integrity of the criminal justice system and public confidence in the reliability of its results, it is of vital importance that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion. **Gardner v. Florida**, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct 2978, 2991, 49 L.Ed.2d 944 (1977).

The issues identified in this post conviction application when combined with the other errors identified on direct appeal and at trial, denied Mr. Sanchez substantial statutory and constitutional rights. His sentences were obtained, and can only be carried out, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 6, 7, 9, and 20 of the Oklahoma Constitution. Mr. Sanchez should therefore be granted a new trial, or in the alternative an evidentiary hearing to present evidence supporting this issue.

Respectfully submitted,

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I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

January 26, 2009
Norman, Oklahoma

Wyndi Thomas Hobbs

CERTIFICATE OF SERVICE

I certify that on the _____ day of _____, 2009, a true and correct copy of this document was forwarded to the Attorney General for the State of Oklahoma through the Clerk of this Court.

_____
Wyndi Thomas Hobbs

ATTACHMENT 2

Ut god

ORIGINAL

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED In The
Office of the Court Clerk

JUN 0 8 2006

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

DOCKETED
Rhonda Hall, Court Clerk
DEPUTY

THE STATE OF OKLAHOMA,

Plaintiff,

v.

ANTHONY CASTILLO SANCHEZ,

Defendant.

) APPEAL CASE NO. _____
) DISTRICT COURT CASE NO. CF-2000-325
)
) TYPE OF APPEAL
) (X) Direct Felony Appeal
) ( ) Direct Misdemeanor Appeal
) ( ) Certiorari
) ( ) Revocation/Acceleration
) ( ) Termination From Drug Court
) ( ) State Appeal
) ( ) Juvenile - Adjudication
) ( ) Juvenile - (Certification)
( ) Juvenile - (Reverse Certification)
( ) Youthful Offender - (Sentencing as Adult)
( ) Other (specify) _____
(X) CAPITAL
( ) NON-CAPITAL

NOTICE OF INTENT TO APPEAL; ORDER DETERMINING INDIGENCY, APPELLATE COUNSEL, PREPARATION OF APPEAL RECORD, AND GRANTING TRIAL COUNSEL'S MOTION TO WITHDRAW; COURT REPORTER'S ACKNOWLEDGMENT; AND NOTIFICATION OF APPROPRIATE APPELLATE COUNSEL, IF APPOINTED

I. NOTICE OF INTENT TO APPEAL

The Defendant was sentenced on the 6th day of June 2006, for: Murder in the First Degree, Rape in the First Degree, and Forcible Sodomy.

If certiorari appeal, date of trial court's denial to withdraw plea _____.

Crime(s)	Statute(s)	Sentence
Murder in the First Degree	Okla. Stat. tit. 21, § 701.7(A) (2001)	Death
Rape in the First Degree	Okla. Stat. tit. 21, § 1114(A)(3) (2001)	40 yrs + $10,000 fine
Forcible Sodomy	Okla. Stat. tit. 21, § 888(B)(3) (2001)	10 yrs + $10,000 fine

The sentence(s) was/were ordered to run ( ) concurrently (X) consecutively as follows: _____ The Defendant intends to appeal (X) all convictions arising from the trial had in the above captioned case,

whether hereinabove specifically listed or not; or ( ) only the following Counts:_____ to the Oklahoma Court of Criminal Appeals pursuant to _____ (cite specific statute). This Notice of Intent to Appeal and the Designation of Record, attached as Exhibit "A", pursuant to Rule 2.5(B) of the *Rules of the Court of Criminal Appeals*, Ch.18, App., of Title 22, was filed with the clerk of the trial court within ten (10) days of the date of the pronouncement of the Judgment and Sentence in this case and constitutes a valid initiation of a direct appeal in accordance with the Court of Criminal Appeals Rule 2.1(B). The Defendant further requests that the original record and transcripts be prepared in accordance with the completed Designation of Record, attached as Exhibit A. To assist in the expediting of the appeal, an advisory list of propositions of error, if any, deemed viable by trial counsel, signed by trial counsel (if trial counsel will not be attorney on appeal), is attached as Exhibit "B".

Joe Robertson

Trial Counsel - Substitute Counsel
( ) Retained
(X) Appointed
( ) Individual
(X) Oklahoma Indigent Defense System
( ) Oklahoma County Public Defender
( ) Tulsa County Public Defender

A true and correct certified copy of the Notice of Intent to Appeal and the Designation of Record with acknowledged receipt by the court reporter(s) were mailed this 6th day of June, 2006, to the Clerk of the Oklahoma Court of Criminal Appeals.

Joe Robertson

Joe Robertson
Trial Counsel - Substitute Counsel
OBA No. 7659
Capital Trial Division – Tulsa
610 S. Hiawatha
Sapulpa, OK 74066-4650
Telephone No. (918) 248-5026

II. APPLICATION FOR DETERMINATION OF INDIGENCE

In accordance with Rule 1.14 of the *Rules of the Court of Criminal Appeals*, 22 O.S., Ch.18, App., the Defendant submits that he/she is indigent and cannot pay the costs of an appeal. Counsel states:

(X) Indigency has been previously determined by this Court or its designee, and a pauper's affidavit in accordance with Rule 1.14(A) will be provided if this Court elects to review the Defendant's status.

( ) Indigency has not been previously determined by this Court or its designee, and a pauper's affidavit in accordance with Rule 1.14(A) is attached as Exhibit "C".

It is requested that appropriate counsel be appointed and transcripts be prepared at the expense of the State.

Trial Counsel
Substitute Counsel

III. DETERMINATION OF INDIGENCE

Pursuant to Rule 1.14 of the *Rules of the Court of Criminal Appeals*, Ch.18, App., of Title 22, this Court finds the Defendant (X) IS ( ) IS NOT currently indigent.

THE COURT ORDERS:

A. Preparation of the Appeal Record:

1. A record of this case (X) IS ( ) IS NOT to be prepared at public expense.

2. The court reporter(s) listed below (X) SHALL ( ) SHALL NOT be reimbursed at public expense out of the Court Fund of Cleveland County for preparation of this record:

Name: **RANDI BYERS**
Mailing Address:

Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Transcript Type: Pretrial proceedings, Preliminary Hearing
Transcript Date: 2/23/05-2/24/05 (preliminary hearing)

Name: **CHRISTINA CLARK**
Mailing Address:

Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Transcript Type: Pretrial proceedings
Transcript Date: 10/4/04, 1/19/05, 3/30/05, 12/12/05

Name: **MARSHA L. PAYNE**
Mailing Address:

Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Transcript Type: Pretrial proceedings
Transcript Date: 9/9/05, 10/14/05

Name: **ANGELA THAGARD**
Mailing Address:

Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Transcript Type: Pretrial proceedings, Jury Trial, Sentencing proceedings
Transcript Date: 12/14/05, 1/4/06, 1/13/06, 1/18/06, 1/26/06, 1/30/06-2/17/06 (jury trial), 6/6/06 (formal sentencing)

3. The return to the trial court clerk all transcripts prepared at state expense during the course of the trial proceedings. These transcripts shall be returned within ten (10) days from the date of sentencing. *See* Rule 3.2(E).

B. IF INDIGENT:

1. Joe Robertson, trial counsel for the Defendant, timely completed this Notice of Intent to Appeal and has timely filed a Designation of Record.

2. The court reporter(s) has been served with a copy of the Designation of Record.

3. Appropriate transcripts are ordered at public expense.

4. **Jamie Pybas, (X) CHIEF, CAPITAL DIRECT APPEALS DIVISION OF THE OKLAHOMA INDIGENT DEFENSE SYSTEM** (if the death sentence was imposed) ( )CHIEF OF THE GENERAL APPEALS DIVISION OF THE OKLAHOMA INDIGENT DEFENSE SYSTEM (if the death sentence was not imposed) ( )PUBLIC DEFENDER OF TULSA COUNTY ( )PUBLIC DEFENDER OF OKLAHOMA COUNTY ( )A PRIVATE ATTORNEY, ADDRESS _____, TELEPHONE _____, is appointed to represent the Defendant on appeal. (The public defender of Tulsa County and Oklahoma County may only be appointed if that office represented the defendant at trial unless a conflict of interest exists as determined.)

5. Any Supplemental Designation of Record by the Oklahoma Indigent Defense System pursuant to Section 1362 of Title 22 must be filed and served upon the appropriate court reporter(s) within thirty (30) days from the date of appointment, and the reporter's acknowledgment of service shall be filed in accordance with Rule 1.15(B); 2.1(B)(3).

6. Joe Robertson, trial counsel for the Defendant, is permitted to withdraw as counsel of record. Silas R. Lyman, II, Diane Box, and Matthew D. Haire, who served as counsel for Defendant during his jury trial, have previously been granted permission to withdraw as counsel of record.

7. Cases in which death penalty imposed: **Vicki Werneke, Chief of the Capital Post-Conviction Division of the Oklahoma Indigent Defense System, is appointed to represent the defendant on the filing of an application for post-conviction relief** in accordance with the provisions of §§ 1089 and 1356 of Title 22.

C. IF NOT INDIGENT:

1. _____, trial counsel for the Defendant, timely completed this Notice of Intent to Appeal and has timely filed a Designation of Record.

2. The court reporter(s) has been served with a copy of the Designation of Record.

3. _____ has entered his/her appearance and will represent the Defendant on appeal as retained counsel.

4. _____, trial counsel for the Defendant, has filed a Motion to Withdraw as Counsel. The Motion is granted and trial counsel is permitted to withdraw as counsel of record.

IT IS SO ORDERED.

This order signed this 13 day of June, 2006.

WILLIAM C. HETHERINGTON, Jr.
Judge of the District Court

NOTE: A NOTICE OF INTENT TO APPEAL AND DESIGNATION OF RECORD MUST BE FILED WITHIN TEN (10) DAYS FROM THE DATE THE SENTENCE IS PRONOUNCED IN OPEN COURT WITH THE CLERK OF THE TRIAL COURT. THIS NOTICE AND DESIGNATION IS JURISDICTIONAL AND FAILURE TO TIMELY FILE CONSTITUTES WAIVER OF THE RIGHT TO APPEAL. A CERTIFIED COPY OF THIS NOTICE AND DESIGNATION SHALL ALSO BE FILED BY TRIAL COUNSEL WITH THE CLERK OF THE COURT OF CRIMINAL APPEALS WITHIN TEN (10) DAYS FROM THE DATE THE NOTICE IS FILED IN THE TRIAL COURT. NO TRIAL ATTORNEY MAY BE GRANTED PERMISSION TO WITHDRAW, IF THE DEFENDANT DESIRES TO APPEAL, UNLESS THESE DOCUMENTS ARE FILED. IF THE DEFENDANT DOES NOT WISH TO APPEAL THIS CONVICTION, TRIAL COUNSEL MUST FILE AN AFFIDAVIT SIGNED BY TRIAL COUNSEL AND ACKNOWLEDGED BY THE TRIAL JUDGE WITH THE CLERK OF THE DISTRICT COURT, BEFORE TRIAL COUNSEL IS ALLOWED TO WITHDRAW, ASSERTING THAT THE DEFENDANT HAS BEEN FULLY ADVISED OF HIS/HER APPEAL RIGHTS AND DOES NOT WISH TO PURSUE AN APPEAL OF THE CONVICTION. *See* Rule 1.14(D).

IV. COURT REPORTER'S ACKNOWLEDGMENT

(BYERS)

A. The Designation of Record, attached as "Exhibit A", was received on 6/6, 2006.

B. IF NOT INDIGENT, satisfactory arrangements ( )have ( )have not been made for payment of the transcript cost. These financial arrangements were completed on , _____ 20_____ . If payment has not been made/arranged, explain why: _____

_____

_____

C. Number of trial and/or hearing days: 2 days

D. Estimated number of transcript pages: _____

E. Estimated completion date: ОТ3 filed 4/18/05

F. I acknowledge receipt of this document and understand I must prepare the record within the time limits prescribed by the Oklahoma Court of Criminal Appeals.

DATE: 6/6/06 Randi Byers
Signature - Official Court Reporter

RANDI BYERS

(CLARK)

A. The Designation of Record, attached as "Exhibit A", was received on 6/6, 2006.

B. IF NOT INDIGENT, satisfactory arrangements ( )have ( )have not been made for payment of the transcript cost. These financial arrangements were completed on , _____ 20_____ . If payment has not been made/arranged, explain why: _____

_____

_____

C. Number of trial and/or hearing days: 6

D. Estimated number of transcript pages: _____

E. Estimated completion date: Already filed

F. I acknowledge receipt of this document and understand I must prepare the record within the time limits prescribed by the Oklahoma Court of Criminal Appeals.

DATE: 6/6/06 Christina Clark
Signature - Official Court Reporter

CHRISTINA CLARK

(PAYNE)

A. The Designation of Record, attached as "Exhibit A", was received on _____, 2006.

B. IF NOT INDIGENT, satisfactory arrangements ( )have ( )have not been made for payment of the transcript cost. These financial arrangements were completed on , _____ 20_____ . If payment has not been made/arranged, explain why: _____
_____
_____

C. Number of trial and/or hearing days: _____

D. Estimated number of transcript pages: _____

E. Estimated completion date: Already filed

F. I acknowledge receipt of this document and understand I must prepare the record within the time limits prescribed by the Oklahoma Court of Criminal Appeals.

DATE: 6/6/06 Marsha Payne - by Christina L. Clark
Signature - Official Court Reporter

MARSHA L. PAYNE

(THAGARD)

A. The Designation of Record, attached as "Exhibit A", was received on _____, 2006.

B. IF NOT INDIGENT, satisfactory arrangements ( )have ( )have not been made for payment of the transcript cost. These financial arrangements were completed on , _____ 20_____ . If payment has not been made/arranged, explain why: _____
_____
_____

C. Number of trial and/or hearing days: _____

D. Estimated number of transcript pages: _____

E. Estimated completion date: _____

F. I acknowledge receipt of this document and understand I must prepare the record within the time limits prescribed by the Oklahoma Court of Criminal Appeals.

DATE: 4/6/06 Angela Thagard
Signature - Official Court Reporter

ANGELA THAGARD

V. NOTIFICATION OF COUNSEL, IF APPOINTED

NOTE: No Designation of Record shall be accepted for filing by the trial court clerk unless it contains one of the following:

A. A signed acknowledgment from the court reporter(s) who reported proceedings in a case indicating receipt of the request for transcript(s), the date received, and completed financial arrangements, or an order of the trial court directing the case be prepared at public expense; or, [For Supplemental Designation of Record, a signed certified mail return receipt card acknowledged by the court reporter(s), together with the attorney's certificate of mailing attached is sufficient for compliance.] or,

B. A signed statement by the attorney preparing the designation of record stating that transcripts have not been ordered and a brief explanation why. (Example, I, _____, attorney for the Appellant, hereby state that I have not ordered a transcript because: (1.) A transcript is not necessary for this appeal; (2.) No stenographic reporting was made.)

A true and correct certified copy of this Notice and Order and the Designation of Record were mailed this _____day of _____, 2006, to (X)the Capital Direct Appeals Division, Oklahoma Indigent Defense System, P.O. Box 926, Norman, Oklahoma 73070-0926; ( )the General Appeals Division, Oklahoma Indigent Defense System, P.O. Box 926, Norman, Oklahoma 73070-0926; ( ) Public Defender of Oklahoma County, 611 County Office Building, 320 Robert S. Kerr Avenue, Oklahoma City, Oklahoma 73102; ( )Public Defender of Tulsa County, 189 Courthouse, 500 South Denver Avenue, Tulsa, Oklahoma 74103; ( ) _____, privately retained counsel.

Deputy Court Clerk, Cleveland County

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. CF-2000-325**
	)	
ANTHONY CASTILLO SANCHEZ,	)	***Exhibit "A"***
	)	
Defendant.	)	

DESIGNATION OF RECORD ON APPEAL

The Defendant, ANTHONY CASTILLO SANCHEZ, appeals by and through his attorney of record, and hereby designates the following record and transcripts for the purpose of lodging an appeal in the Oklahoma Court of Criminal Appeals from the Judgment and Sentence imposed by the District Court of Cleveland County in the above-styled cause on the 6th day of June, 2006.

1. Four (4) certified and indexed copies of a complete original record, including but not limited to:

   a. This Designation of Record on Appeal and any Supplemental Designation of Record on Appeal;

   b. The District Court Information and any amendments or supplements thereto;

   c. Orders Appointing both Trial and Appellate Counsel;

   d. Any search warrants and affidavits in support thereof;

   e. Any arrest warrants and affidavits in support thereof;

   f. All motions, applications, notices and/or requests filed on behalf of the State or the Defendant;

   g. All rulings and/or orders of the District Court;

h. All minutes of any nature;

i. All pleadings of any nature;

j. All Pauper's Affidavits;

k. All Notices of Intent to Appeal;

l. All Designations of Record on Appeal, and any amendments or supplements thereto;

m. All jury instructions given by the Court;

n. All jury instructions requested by the State or Defendant;

o. All verdict forms given by the Court, including blank verdict forms;

p. The Judgment and Sentence and any amendments or supplements thereto;

q. Summary of Facts on Sentencing;

r. A complete copy of the appearance dockets and docket sheets in this case;

s. The Trial Judge's Reports and/or Notes;

t. All requests and orders for preparation of transcripts and records at public expense;

u. All transcripts of pretrial hearings, or portions thereof, or any portions of the jury trial previously prepared and filed in Cleveland County District Court Case No. CF-2000-325;

v. All other papers, documents, transcripts, and/or other items of whatever nature contained within the Cleveland County District Court files, and/or in the possession of the Cleveland County District Court Clerk, and pertaining to ANTHONY CASTILLO SANCHEZ or the prosecution of his case.

Please note that it is Mr. Sanchez's intent to designate all papers contained in the District Court files for inclusion in the original record on appeal, whether the same have been herein above specifically designated or not;

2. An original and three (3) certified copies of the complete transcripts of Mr. Sanchez's initial appearance in this case had on September 21, 2004, if such was recorded;

3. An original and three (3) certified copies of the complete transcripts of all pretrial motion or post-trial hearings before Judge Rod Ring, Judge Tom Lucas, Judge William Hetherington, and/or any other district judge or magistrate in Cleveland County, including but not limited to those had on **2/23/05-2/24/05 (Preliminary Hearing; Randi Byers, Court Reporter); 10/4/04, 1/19/05, 3/30/05, 12/12/05 (pre-trial hearings; Christina Clark, Court Reporter); 9/9/05, 10/14/05 (pre-trial hearings; Marsha L. Payne, Court Reporter); 12/14/05, 1/4/06, 1/13/06, 1/18/06, 1/26/06 (pre-trial hearings; Angela Thagard, Court Reporter)**;

4. An original and three (3) certified copies of the complete transcript of all proceedings of **jury trial held January 30 – February 17, 2006**, including, but not limited to, all voir dire, opening statements, closing arguments of counsel, evidence introduced at trial, the testimony of all witnesses, both in the presence of the jury and out of the jury's presence, conferences at the bench, conferences in chambers, objections and exceptions and arguments in support of the objections and rulings on such, exceptions and motions, the same being stenographically reported; and all documentary exhibits and photographic exhibits, including videotapes and court exhibits, *in camera* and/or *ex parte* proceedings, all offers of proof, and any and all matters recorded in any manner during the course or the trial of this case (Angela Thagard, Court Reporter);

5. An original and three (3) certified copies of the complete transcript of all sentencing proceedings held in this case, including Mr. Sanchez's **formal sentencing on June 6, 2006** (Angela Thagard, Court Reporter);

6. All physical, photographic, and documentary exhibits entered into evidence or offered as evidence in this case, as well as a complete list of all exhibits being retained by the court reporter;

7. A complete transcription of all tape recordings and video cassette recordings admitted into evidence at either the preliminary hearing, trial and/or any hearing in this case;

8. Complete transcripts of each and every proceeding had in this case before any judge or magistrate of the District Court of Cleveland County, Oklahoma, which proceeding concerned, affected, or in any manner related to Anthony Castillo Sanchez whether such proceeding has been herein above specifically designated or not.

Please note that pursuant to Okla Stat. tit. 21, § 701.13 (2001) and Rule 9.2(A) *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2001), it is Mr. Sanchez's intent to designate a complete transcript of each and every proceeding which concerned, affected, or in any manner related to his prosecution in this case.

COURT REPORTERS - PLEASE PROVIDE AN ORIGINAL AND THREE (3) CERTIFIED COPIES OF EACH AND EVERY TRANSCRIPT DESIGNATED HEREIN, TOGETHER WITH THE ABOVE DESIGNATED EXHIBITS INDEXED AND INCORPORATED INTO SAID TRANSCRIPTS, PURSUANT TO RULES 2.2(B)(1) AND 2.2(B)(2), *RULES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS*, TITLE 22, CH. 18, APP. (2001). PURSUANT TO RULES 2.2(B)(2) AND 2.2(B)(3), *RULES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS*, TITLE 22, CH. 18, APP. (2001), COURT REPORTERS ARE REQUIRED TO FILE ALL OF THE ABOVE WITH THE DISTRICT COURT CLERK AND TO PROVIDE NOTICE OF THIS FILING TO DEFENDANT'S APPELLATE ATTORNEY, THE DISTRICT COURT CLERK AND THE CLERK OF THE OKLAHOMA COURT OF CRIMINAL APPEALS, AND TO FILE A COPY OF SUCH NOTICE WITH THE DISTRICT COURT CLERK.

COURT REPORTERS - PLEASE BE ADVISED THAT RULE 2.2(B)(1), *RULES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS*, TITLE 22, CH. 18, APP. (2001), REQUIRES THAT CLEAR AND VIEWABLE REPRODUCTIONS OF ALL PHYSICAL, PHOTOGRAPHIC, AND DOCUMENTARY EXHIBITS ENTERED INTO EVIDENCE OR OFFERED AS EVIDENCE DURING TRIAL BE MADE PART OF THE RECORD ON APPEAL. FURTHER,

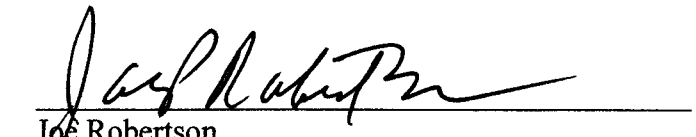
IT IS THE DUTY OF THE PARTY OFFERING SUCH EXHIBIT TO PROVIDE, AND BEAR THE COST OF, SUCH REPRODUCTION.

DISTRICT COURT CLERK - PLEASE PROVIDE FOUR (4) CERTIFIED COPIES OF THE ORIGINAL RECORD AS DESIGNATED HEREIN PURSUANT TO RULE 3.2(B), *RULES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS*, TITLE 22, CH. 18, APP. (2001). PURSUANT TO RULE 2.3(B), *RULES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS*, TITLE 22, CH. 18, APP. (2001), DISTRICT COURT CLERKS ARE REQUIRED TO NOTIFY ALL COUNSEL WHEN THE RECORD ON APPEAL HAS BEEN COMPLETED AND IS READY FOR TRANSMISSION, AND TO NOTIFY THE CLERK OF THE OKLAHOMA COURT OF CRIMINAL APPEALS OF SAME.

DISTRICT COURT CLERKS - PLEASE NOTE THAT PURSUANT TO RULES 2.3(C) AND 3.2(B) AND (C), *RULES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS*, TITLE 22, CH. 18, APP. (2001), DISTRICT COURT CLERKS ARE NOW REQUIRED TO TRANSMIT TWO (2) CERTIFIED COPIES OF THE ORIGINAL RECORD AND THE ORIGINAL AND ONE (1) CERTIFIED COPY OF ALL DESIGNATED TRANSCRIPTS TO THE CLERK OF THE OKLAHOMA COURT OF CRIMINAL APPEALS; THE REMAINING TWO (2) CERTIFIED COPIES OF THE ORIGINAL RECORD AND THE REMAINING TWO (2) CERTIFIED COPIES OF THE DESIGNATED TRANSCRIPTS ARE TO BE TRANSMITTED TO APPELLATE COUNSEL OF RECORD.

Respectfully submitted,

ANTHONY CASTILLO SANCHEZ

By: 

Joe Robertson
Oklahoma Bar No. 7659
Capital Trial Division – Tulsa
610 S. Hiawatha
Sapulpa, OK 74066-4650
(918) 248-5026

ATTORNEY FOR THE DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of June, 2006, a true and correct copy of the foregoing was sent by Certified Mail Return Receipt Requested to:

Randi Byers
Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Christina Clark
Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Marsha L. Payne
Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Angela Thagard
Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Rhonda Hall
District Court Clerk
Cleveland County Courthouse
200 S. Peters Ave.
Norman, OK 73069

Further, undersigned counsel certifies that on the 13 day of June, 2006, a true and correct copy of the foregoing was sent by United States Mail to:

Timothy D. Kuykendall, District Attorney
R. Richard Sitzman, Assistant District Attorney
201 S. Jones Ave.
Norman, OK 73069

Joe Robertson

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT AND COMPLETE COPY OF THE INSTRUMENT HEREWITH SET OUT AS IT APPEARS ON RECORD IN THE COURT CLERK'S OFFICE OF CLEVELAND COUNTY, OKLAHOMA
WITNESS MY HAND AND SEAL THIS 8th DAY OF June, 2020.
RHONDA HALL, COURT CLERK
BY _____ DEPUTY

ATTACHMENT 3

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY C. SANCHEZ,	)	
	)	
Petitioner,	)	**Case No.** _____
	)	
vs.	)	
	)	**Cleveland County**
STATE OF OKLAHOMA,	)	**Case CF-2000-325**
	)	
Respondent.		

AFFIDAVIT IN FORMA PAUPERIS

I, Anthony Sanchez, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20th day of June, 2017 at McAlester, Pittsburg, OK.
(City, County, State)

Anthony Sanchez
Signature

Anthony Sanchez
Printed name

AFFIDAVIT IN FORMA PAUPERIS

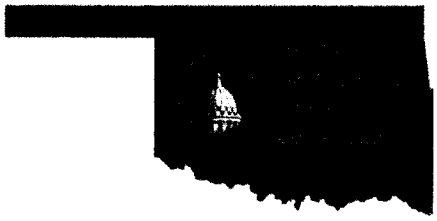
I, Anthony Sanchez, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20th day of June, 2017 at McAlester, Pittsburg, OK.
(City, County, State)

Anthony Sanchez
Signature

Anthony Sanchez
Printed name

ATTACHMENT 4



FOR IMMEDIATE RELEASE

MEDIA CONTACT
Brenda Barwick, APR
(405) 516-9686
brenda@jones.pr

INDEPENDENT BIPARTISAN COMMISSION RECOMMENDS EXTENDING CURRENT MORATORIUM ON THE DEATH PENALTY

Oklahoma City (April 25, 2017) — The Oklahoma Death Penalty Review Commission, a bipartisan group of eleven prominent Oklahomans, unanimously recommends extending the current moratorium on the death penalty in its final report. For nearly a year-and-a-half, the Commission studied all aspects of Oklahoma's death penalty system, from arrest to execution, and today announced its recommendations at a news conference held in the Oklahoma State Capitol.

"The Commission did not come to this decision lightly," said Commission Co-Chair former Governor Brad Henry, of Henry-Adams Companies, LLC. "Due to the volume and seriousness of the flaws in Oklahoma's capital punishment system, Commission members recommend that the moratorium on executions be extended until significant reforms are accomplished."

The bipartisan Commission, comprising five women and six men, represents urban and rural communities, as well as prosecutors, defense attorneys, individuals who have served in each of the three branches of government, law school professors and deans, victims' advocates and Native American advocates. In the course of their work, Commissioners gathered data from state and local government agencies, reviewed scholarly articles, commissioned further research, conducted interviews and heard presentations from those with direct knowledge of how the system operates. Commissioners met with a number of stakeholders who have been directly involved in death penalty cases, including law enforcement, prosecutors, defense attorneys, judges, families of murder victims and those wrongfully convicted.

Gov. Henry added, "Many of the findings of the Commission's investigation were disturbing and led members to question whether the death penalty can be administered in a way that ensures no innocent person is put to death."

Commission members agree that, at a minimum, those who are sentenced to death should receive this sentence only after a fair and impartial process that ensures they deserve the ultimate penalty of death.

(MORE)

To help ensure a fair and impartial process, the Commission's in-depth, 300+ page report includes over 40 recommendations to address systemic problems in key areas, including forensics, innocence protection, the execution process, and the roles of the prosecution, defense counsel, jury and judiciary.

"Our hope is for this report to foster an informed discussion among all Oklahomans about whether the death penalty can be implemented in a way that eliminates the unacceptable risk of executing the innocent, as well as the unacceptable risks of inconsistent, discriminatory and inhumane application of the death penalty," said Gov. Henry.

Joining Gov. Henry as co-chairs are Reta Strubhar, a former judge on the Oklahoma Court of Criminal Appeals (1993-2004) and former Assistant District Attorney of Canadian County (1982-1984); and Andy Lester, of the Spencer Fane law firm and a former U.S. Magistrate Judge for the Western District of Oklahoma who served on President Ronald Reagan's Transition team for the Equal Employment Opportunity Commission (1980-1981).

Members of the Commission are Robert H. Alexander, Jr., of The Law Office of Robert H. Alexander, Jr.; Howard Barnett, President of OSU-Tulsa; Andrew Coats, Dean Emeritus of OU College of Law; Valerie Couch, Dean of Oklahoma City University School of Law; Maria Kolar, Assistant Professor of OU College of Law; Christy Sheppard, a victims' advocate; Kris Steele, Director of The Education and Employment Ministry (TEEM) and former Speaker of the House; and Gena Timberman, founder of The Luksi Group.

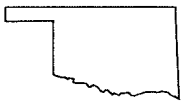
To uphold Oklahoma values and aspirations of innocence protection, procedural fairness and justice, Commission members encourage the Oklahoma legislature, executive branch and judiciary to take actions to address systemic flaws in the death penalty system.

The Oklahoma Death Penalty Review Commission came together shortly after the state imposed a moratorium on the execution of condemned inmates while a grand jury investigated disturbing problems involving recent executions, including departures from the execution protocols of the Department of Corrections.

To download a free copy of the Oklahoma Death Penalty Review Commission report, visit okdeathpenaltyreview.org. For more information about the Commission, visit Facebook at okdeathpenaltyreview and on Twitter @OklaDPReview.

The Constitution Project (TCP) assisted the Commission's work with staff and researchers. TCP is a Washington, D.C., bipartisan, nonprofit organization that fosters consensus-based solutions to the most difficult constitutional challenges of our time.

###



Appendix IA[1]

Race and Death Sentencing for Oklahoma Homicides, 1990-2012[2]

I. Introduction

In the first 15 years of the 21st century, we have seen several indicators that the use of the death penalty is in sharp decline in the United States. According to the Death Penalty Information Center, between 1996 and 2000 an annual average of 275 new prisoners arrived on America's death rows, but by 2015 this figure had precipitously decreased to 49.[3] The average number of executions per year has fallen nearly fifty percent since the last five years of the twentieth century, from 74 between 1996 and 2000 to 37.6 in the years 2011-2015.[4] In just the past 10 years, seven states have abolished the death penalty,[5] the Delaware Supreme Court invalidated that state's statute in August 2016,[6] and four more states –Washington, Oregon, Colorado and Pennsylvania – have seen their governors impose moratoria on executions. A September 2016 poll by the Pew Research Center found that slightly less than half of Americans (49 percent) supported the death penalty,[7] the lowest level of support in more than 40 years. A 2015 poll by Quinnipiac indicates that more Americans (48%) now prefer a sentence of Life Imprisonment without Parole (which is available in all death penalty jurisdictions) to a death sentence (43%).[8] Even in Oklahoma, a November 2015 poll found that the majority of the population (52 percent) would prefer a sentence of life plus restitution rather than the alternative of the death penalty.[9] A second poll taken in July 2016 found that 53 percent of the "likely voters" in the state would prefer life

[1] This report is an early draft of an independent study (current through November 1, 2016), submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. The final study will be published by the Northwestern University School of Law in the fall of 2017. *See* Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides, 1990-2012*, 107 Nw. U. J. Crim. L. & Criminology. The Commission is grateful to the authors for providing this study for its consideration during its review of Oklahoma's death penalty. **Please note: the Commission did not edit this draft report and any errors should be attributed the authors. Moreover, the views reflected by the authors do not necessarily reflect those of the Commission.** This study is included in the Commission's report as a reference for Appendix I.

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[3] *Death Sentences in the United States From 1977 by State and by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[4] *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year.

[5] New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).

[6] Eric Eckholm, *Ruling by Delaware Justices Could Deal Capital Punishment in the State a Final Blow*, NEW YORK TIMES, Aug. 2, 2016, at A11.

[7] Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades* (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/.

[8] *Quinnipiac University Poll Release Detail*, http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=2229 (June 1, 2015).

[9] *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative (Nov. 19, 2015); *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative (Nov. 19, 2015); Graham Lee Brewer, *New Poll Shows Over Half of Oklahomans Support Life Sentences Over the Death Penalty*, NEWSOK, http://newsok.com/article/5461486.

sentences without parole and mandatory restitution instead of the death penalty.[10] These results document a changing climate around death penalty debates: apparently more Americans now prefer long prison terms rather than the death penalty.

One reason for the decline in support for and the use of the death penalty is growing concerns that the penalty is not reserved for "the worst of the worst." In a nationwide Gallup Poll taken in October 2015, 41 percent of the respondents expressed the belief that the death penalty was being applied unfairly, and a 2009 Gallup Poll found that 59 percent of the respondents believed that an innocent person had been executed in the preceding five years.[11] This concern is undoubtedly on the minds of many Oklahomans, since ten inmates have been released from its death row since 1972 because of doubts about guilt.[12]

In this article, we examine another question that is related to the contention that the death penalty is reserved for the worst of the worst: the possibility that the race of the defendant and/or victim affects who ends up on death row. To do so, we will study all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012, and compare those cases with the subset that resulted in the imposition of a death sentence.

Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population.[13] Racial and ethnic minorities are over-represented among those on death row, which housed 46 men and one woman as of July 1, 2016 (23 white, 20 black, 3 Native American, 2 Latino).[14] Between 1972 and October 31, 2016, Oklahoma conducted 112 executions (with the first occurring in 1990), which ranks second among U.S. states behind Texas and gives Oklahoma the highest per capita execution rate in the U.S.[15]

Of the 112 executed inmates, 67 were white (60 percent), 35 black, 6 Native American, 2 Asian, 1 Latino, and 1 whose race was classified as "Other."[16] The races of the homicide victims in the death penalty cases are also predominately white, with 83 of the 112 executed inmates convicted of killing at least one white victim (74.1 percent), 19 at least one black victim, 7 at least one Asian victim, 5 at least one Latino victim, 1 at least one Native American victim, and 1 who killed two people whose races are classified as "Other" (both the assailant and his two victims were Iraqi).[17]

[10] Silas Allen, *Majority of Oklahomans Support Replacing Death Penalty with Life Sentences, Poll Shows*, THE OKLAHOMAN, Aug. 6, 2016, http://newsok.com/majority-of-oklahomans-support-replacing-death-penalty-with-life-sentences-poll-shows/article/5512695.

[11] *Gallup Poll Topic: Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx.

[12] These former death row inmates include Charles Ray Giddens (released in 1981), Clifford Bowen (1986), Richard Jones (1987), Greg Wilhoit (1993), Adolph Munson (1995), Robert Miller (1998), Ronald Williamson (1999), Curtis McCarty (2007), Yancy Douglas (2009), and Paris Powell (2009). *See* Death Penalty Information Center, *List of Exonerees Since 1973*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty.

[13] https://suburbanstats.org/population/how-many-people-live-in-oklahoma

[14] DEATH ROW USA, Summer 2016, http://www.naacpldf.org/files/publications/DRUSA_Summer_2016.pdf (current as of July 1, 2016).

[15] http://www.deathpenaltyinfo.org/state-execution-rates. Among the executed are two juveniles (one of whom was just 16 at the time of his crime), three women, and seven inmates who dropped their appeals and asked to be executed. *See also Executions Statistics* available from the Oklahoma Department of Corrections, https://www.ok.gov/doc/Offenders/Death_Row/. There have also been four death sentences commuted to prison terms by Oklahoma governors since 1972: Phillip Smith (2001), Osvaldo Torres (2004), Kevin Young (2008), and Richard Smith (2010). *See* Michael L. Radelet, *Commutations in Capital Cases on Humanitarian Grounds*, available at http://www.deathpenaltyinfo.org/clemency#List.

[16] This does not include Timothy McVeigh, executed under federal authority in June 2001 for murdering 168 people in the explosion of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995.

[17] These tallies were calculated from data provided by Death Penalty Information Center, *Searchable Execution Database*, available at http://www.deathpenaltyinfo.org/views-executions. Because four executed inmates were convicted of killing multiple victims who had different races, one execution can fit two or more of these criteria, giving us a total for these calculations of 116.

II. Previous Research

Concerns about the impact of the defendant's and/or victim's race on death penalty decisions have a long history in the U.S. Soon after the 1976 decision in Gregg v. Georgia that breathed new life into death penalty statutes,[18] researchers led by the late University of Iowa legal scholar David Baldus began to study the possible relationships, with the most comprehensive study by Baldus and his team focusing on Georgia.[19] Those race studies conducted prior to 1990 were reviewed by the U.S. government's General Accounting Office in 1990, which produced a report concluding that in 82 percent of the 28 studies reviewed, "race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."[20]

In 2003, Baldus and George Woodworth in effect updated and expanded the GAO Report, reviewing 18 race studies that had been published or released after 1990.[21] Their conclusions are worthy of a lengthy quote:

> Overall, their results indicate that the patterns documented in the GAO study persist. Specifically, on the issue of race-of-victim discrimination, there is a consistent pattern of white-victim disparities across the systems for which we have data. However, they are not apparent in all jurisdictions nor at all stages of the charging and sentencing processes in which they do occur. On the issue of race-of-defendant discrimination in the system, with few exceptions the pre-1990 pattern of minimal minority-defendant disparities persists, although in some states black defendants in white-victim cases are at higher risk of being charged capitally and sentenced to death than are all other cases with different defendant/victim racial combinations.[22]

Overall, Baldus and Woodworth concluded that the studies displayed four clear patterns: 1) with few exceptions, the defendant's race is not a significant correlate of death sentencing, 2) primarily because of prosecutorial charging decisions, those who kill whites are significantly more likely than those who kill blacks to be sentenced to death, 3) black defendants with white victims are especially likely to be treated more punitively, and 4) counties with large numbers of cases with black defendants or white victims show especially strong impacts on black defendants or on those with white victims.[23]

Professor Baldus passed away in 2011, but one of his students, Catherine Grosso, has taken the reigns and assembled a team that has continued Baldus's work. Among their publications is one that recently updated the Baldus literature review.[24] Published in 2014, the researchers had by then identified 56 studies that had been completed after the 1990 GAO Report. Their review identified four patterns:

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[18] Gregg v. Georgia, 428 U.S. 153 (1976).

[19] DAVID C. BALDUS, GEORGE G. WOODWORTH, & CHARLES A. PULASKI, JR. EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

[20] *See* GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD.90-57 (1990), at 5.

[21] David C. Baldus & George Woodworth, G., *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIMINAL LAW BULLETIN 194 (2003).

[22] *Id.*, at 202.

[23] *Id.*, at 214-15.

[24] Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, 3rd ed. (J. R. Acker, R. M. Bohm, & C. S. Lanier, eds. 2014), 525-76.

- Four of the studies did not discover any race effects.
- Four found independent effects of the race of the defendant (that is, effects that remained after statistically controlling for other relevant variables).
- Twenty-four studies in 15 jurisdictions found significant race-of-victim effects.
- Nine found that black defendants with white victims were more harshly treated than other homicide defendants.[25]

Unfortunately, none of these post-1990 studies focused on Oklahoma, and only one credible study has explored the possibility of racial disparities in Oklahoma in the post-*Furman* years.[26] In that study, first published in *Stanford Law Review*,[27] Samuel Gross and Robert Mauro studied all homicides and death sentences in Oklahoma during the 53-month period, August 1976 through December 1980.[28] Thus, these data are almost forty years old. Included were 43 death sentences imposed in 898 cases.[29] Initially the researchers found that death sentences were imposed in 16.7 percent of the cases in which a black was suspected of killing a white (B-W), 6.6 percent of the cases where a white was suspected of killing a white (W-W), and 1.3 percent of the black on black (B-B) cases.[30]

If the homicide was accompanied by other felony circumstances, no cases with black victims resulted in a death sentence, compared to 30.6 percent of the white victim cases. If the victim and defendant were strangers, 21.8 percent of the white Victim cases resulted in a death sentence, compared to 3.4 percent of such cases with black victims.[31]

In 2016 a second study of death sentencing in Oklahoma was published.[32] The paper attempted to look at death sentencing in Oklahoma in a sample of 3,395 homicide cases over a 38-year time span, 1973-2010. Unfortunately, some of the data presented by the authors in that paper is incorrect, so the paper is not useful. For example, in Appendix B we are told that 8 percent of the white-white homicides contained "capital" or "first-degree" (as opposed to "second-degree" murder charges) (137/1,696), compared to 55 percent of the black-black cases (348/659).[33] We are also told that the data set includes 1,030 cases "charged capital" in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma.[34]

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[25] *Id.*, at 538-39. Because some of the studies reached more than one of these conclusions, the sum of these findings (41) is greater than the total number of studies (36).

[26] SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 88-94 (1989).

[27] Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27 (1984).

[28] GROSS & MAURO, *supra* note 26, at 233.

[29] *Id.*, at 235.

[30] *Id.*

[31] *Id.*, at 236.

[32] David P. Keys & John F. Galliher, *Nothing Succeeds Like Failure: Race, Decisionmaking, and Proportionality in Oklahoma Homicide Trials, 1973-2010*, in RACE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V. KEMP 123 (David P. Keys & R. J. Maratea eds. 2016). We mention this study only to show our awareness of it and to alert future students of the death penalty in Oklahoma that its data is fundamentally flawed, from which no conclusions are possible.

[33] *Id.*, at 142.

[34] Email exchange available with the author (Radelet).

III. Methodology

We examined all cases in which the death penalty was imposed for Oklahoma homicides that occurred between January 1, 1990, and December 31, 2012. Using 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns. We ended with cases in 2012 because we found only one death penalty case for a 2013 murder, and any homicides that occurred in 2013 or later might still be awaiting final disposition. During those 23 years, the state recorded some 5,090 homicides, for an annual average of 221.[35]

A. Homicide Data Set

To begin, we assembled a data set on all Oklahoma homicides with an identified perpetrator over a 23 year period from 1990 to 2012.[36] We obtained these data from the FBI's "Supplemental Homicide Reports," or SHRs. Supplemental Homicide Reports are compiled from data supplied by local law enforcement agencies throughout the United States, who report data on homicides to a central state agency, which in turn reports them to the FBI in Washington for inclusion in its Uniform Crime Reports.[37] While the Reports do not list the suspects' or victims' names (and only the month and year of the offense – not the specific date), they do include the following information: the month, year, and county of the homicide; the age, gender, race,[38] and ethnicity of the suspects and victims; the number of victims; the victim-suspect relationship; weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).[39] Local law enforcement agencies usually report these data long before the defendant has been convicted, so offender data are for "suspects," not convicted offenders.[40]

The SHRs include information on all murders and non-negligent manslaughters, but they do not differentiate between the two types of homicides. They define murders and non-negligent manslaughters as "the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded."[41]

In addition, the SHRs have a separate classification for justifiable homicides, which are defined as "(1) the killing of a felon by a law enforcement officer in the line of duty; or (2) the killing of a felon, during the commission of a felony, by a private citizen."[42] Because the data come from police agencies, not all the identified suspects are eventually convicted of the homicide.

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[35] Oklahoma Crime Rates 1960-2013, available at http://www.disastercenter.com/crime/okcrimn.htm.

[36] This is similar to the methodology used in other studies that Pierce and Radelet have conducted using information from the Supplemental Homicide Reports. *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LOUISIANA LAW REVIEW 647 (2011); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1 (2005); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA LAW REVIEW 1 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 NORTH CAROLINA LAW REVIEW 2119 (2011). The methodology was developed and first used by GROSS & MAURO, *supra* note 26, at 35-42.

[37] *See* http://www.bjs.gov/content/pub/pdf/ntmh.pdf (last visited August 1, 2016). We have used SHR data in other research projects, and an earlier version of this paragraph was included in Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1, 15 (2005).

[38] The racial designations used in the UCR are defined as follows: (1) white. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East. (2) black. A person having origins in any of the black racial groups of Africa. (3) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition. (4) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent. (5) Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa. (6) Unknown). Federal Bureau of Investigation, UNIFORM CRIME REPORTING HANDBOOK 97, 106 (2004).

[39] *See id.*, NAT'L ARCHIVE OF CRIM. JUSTICE DATA.

[40] *Id.*

[41] *See* FEDERAL BUREAU OF INVESTIGATION, *Uniform Crime Reporting Statistics, UCR Offense Definitions*, http://www.ucrdatatool.gov/offenses.cfm (last visited August 1, 2016).

[42] *Id.*

For our project, a total of 4,815 homicide suspects were identified from Oklahoma SHR's for homicides committed during the period 1990 through 2012. Only those SHR cases that recorded the gender of the homicide suspect were included in the sample, effectively eliminating those cases in which no suspect was identified. In other words, for SHR homicide cases where no suspect gender information was recorded, we assumed that the police had not been able to identify a suspect for that particular homicide incident, rendering sentencing decisions irrelevant.

Finally, we constructed one new SHR case and added it to our data when we found a death penalty case with no corresponding case in the existing SHR data. To better pinpoint the race differences, we also dropped 82 cases in which there were multiple victims who were not all the same races, and an additional 64 cases where either the victim or offender was Asian. This resulted in a reduction of 146 homicide cases (three percent of the original sample of 4,815 homicide cases) and one addition, resulting in a final sample size of 4,668 cases.

In addition to the race of the victim, the SHR data include information on the number of homicide victims in each case, and on what additional felonies, if any, occurred at the same time as the homicide. These variables are key to the analysis reported below.

B. Death Row Data Set

Unfortunately, there is no state agency, organization, or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the "Death Row Data Set."

To do this, we used data compiled by the NAACP Legal Defense and Educational Fund, Inc., and issued in a (usually) quarterly publication called "Death Row USA."[43] This highly-respected source lists (by state) the name, race and gender of every person on America's death rows. Unfortunately, it contains no other information about the defendant (e.g., age), victim (e.g., name, age, race), or crime (e.g., date, location, or circumstances).

Copies of most back issues of Death Row USA are available online,[44] and other issues are available in hard copy in many law libraries, including the University of Colorado's. From these sources we made copies of all the Oklahoma inmates listed in the 83 issues of Death Row USA published in the years 1990-2012. From those we identified the *additions* to the lists, since the additions would give us a preliminary list of those sentenced to death for homicides committed on or after January 1, 1990. We were not interested in the names of inmates who were on death row in the first issue we examined since all of those inmates were convicted of murders from the 1970s or 1980s. We were only interested in the additions, and then only those sent to death row for murders committed on or after January 1, 1990.

With that list, we conducted internet searches for information about the crime – specific date, county of offense, name of victim/s (and age, sex, and race), and the like. All those whose crimes occurred in the 1980s or after December 31, 2012 were deleted. We also used a web site maintained by the Oklahoma Department of Corrections to confirm the inmate's race and gender, as well as the county of conviction and the inmate's date of birth.[45] Because this source provides only the date of the conviction, not the date of the offense, information on the date of offense had to be obtained from other sources (primarily newspaper articles and published appellate decisions in the case).

In the end, we identified 155 death sentences imposed against 151 offenders for homicides committed 1990-2012. Two men, Karl Myers and Darrin Pickens, had two separate death sentences imposed in two separate trials for two separate homicides, so each defendant is counted twice.

[43] DEATH ROW USA, http://www.naacpldf.org/death-row-usa.

[44] *See id.*

[45] OKLAHOMA DEP'T OF CORRECTIONS, *Offender Look-Up* Database, https://okoffender.doc.ok.gov/.

On multiple victim homicides, we counted the homicides with at least one female victim as homicides with female victims.

IV. Results

A. Frequencies and Cross-Tabulations

Table 1 displays descriptive statistics from our data. There are a total of 4,668 homicides included, of which 2,060 (44.1 percent) involved both white suspects and white victims, and 1,266 (27.1 percent) involved black suspects and black victims. There are 427 cases with a black suspect and white victim (9.1 percent), and 143 cases with a white suspect and a black victim (3.1 percent).

Table 1: Oklahoma Homicides by Suspect's and Victim's Race/Ethnicity

	Race/Ethnicity of Victim				
	White Only	Black Only	Hisp. Only	Nat. Am. Only	TOTAL
White Suspect	2060	143	38	99	2340
Black Suspect	427	1266	42	30	1765
Hispanic Suspect	65	21	133	8	227
Nat. Am. Suspect	151	15	12	158	336
TOTAL	2703	1445	225	295	4668

Table 2 shows that overall, 143 (3.06 percent) of the homicides with known suspects resulted in a death sentence. Homicides with white victims are the most likely to result in a death sentence. Here 106/2703 resulted in death (3.92 percent), whereas 37/1965 of the homicides with nonwhite victims resulted in death (1.88 percent).[46]

Table 2: Oklahoma Homicides and Death Sentences by Race of Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	2703	106	3.92
Black Victim	1445	27	1.87
Hispanic Victim	225	6	2.67
Native American Victim	295	4	1.36
TOTAL	4668	143	3.06

Table 3 looks at only those homicides with male victims. There are a sufficient number of cases to make conclusions only for cases with either white or black victims.[47] Of the white male victim cases 2.26 result in a death sentence, but only .77 of the black male cases result in a death sentence. Thus, homicides with white male victims are 2.94 times more likely to result in death than cases with black male victims (2.26 divided by .77).

Table 4 shows that homicides with at least one female victim are 4.6 times more likely to result in a death sentence (7.21 percent) than the homicides with no female victims shown in Table 3 (1.57 percent). There are 1,235 cases in the data with at least one female victim, and again we focus on differences between cases with white victims and black victims, and do not look at the other race/ethnicity categories that have low sample counts. The data show only small differences in death sentencing rates among cases with at least one female victim between white (7.57 percent) and black (6.67 percent) victims. Clearly, race makes less of a difference when women are killed than when men are killed.

Table 5 examines the percentage of cases that resulted in a death sentence by the race of the defendant. There is virtually no difference in the probability of a death sentence by race of defendant, with 3.2 percent of the white offenders sentenced to death and 3 percent of the nonwhite defendants.

[46] These 37 suspects were implicated in 27 cases with black victims, 6 with Hispanic victims, and 4 with Native American victims. The 1,965 victims included 1,445 cases with black (only) victims, 225 with Hispanic victim only, and 295 with Native American victim only.

[47] That is, there are so few cases with black, Hispanic, or Native American victims that small fluctuations in the number of death sentences will result in large proportional differences.

Table 3: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with No Female Victims

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	1857	42	2.26
Black Victim	1175	9	0.77
Hispanic Victim	189	1	0.53
Native American Victim	212	2	0.94
TOTAL	3433	56	1.57

Table 4: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with At Least One Female Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	846	64	7.57
Black Victim	270	18	6.67
Hispanic Victim	36	5	13.89
Native American Victim	83	2	2.41
TOTAL	1235	89	7.21

Table 5: Death Sentences by Race of Defendant

		White	Nonwhite	Total
Death Penalty Imposed	No	2266	2259	4523
		.968	.970	
	Yes	74	69	143
		.032	.030	
	Total	2340	2328	4668

Chi Square 1.55; 1 df; NS

Table 6: Death Sentences by Race of Victim

		White	Nonwhite	Total
Death Penalty Imposed	No	2597	1928	4525
		.961	.981	
	Yes	106	37	143
		.039	.019	
	Total	2703	1965	4668

Chi Square 15.92; 1 df; p<.001

However, there is much more to this story. Table 6 looks at the percentages of death penalty cases by the race of the victim. Here we see that 1.9 percent of those who were suspected of killing nonwhites were ultimately sentenced to death (37 divided by 1965), whereas 3.9 percent (106 divided by 2703) of those suspected of killing whites ended up on death row. The probability of a death sentence is therefore 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites.

Table 7 combines both suspect's and victim's races/ethnicities.[48] The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences was 1.9 and 1.8 percent death sentence respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence, compared to 5.8 percent of the nonwhites suspected of killing white victims. The gender of the victim also makes a very large difference in who ends up on death row. As Table 8 shows, 1.6 percent of the defendants suspected of killing males (no female victims) were sentenced to death, compared to 7.2 percent of those who were suspected of killing one or more women.

Table 7: Death Sentences by Races of Defendant and Victim

Defendant-Victim Race/Ethnicity

(W= White; NW=Nonwhite)

	NW-W	W-W	NW-NW	W-NW	Total
No	606	1991	1653	275	4525
	.942	.967	.981	.982	.969
Death Penalty Imposed					
Yes	37	69	32	5	143
	.058	.033	.019	.018	.031
Total	643	2060	1685	280	4668

Chi Square 25.48; 3 df; p<.001

Table 9 (on next page) shows the likelihood of a death sentence by the race and gender of the victim. Among those suspected of killing white males, 2.3 percent are sentenced to death, whereas among those suspected of killing nonwhite males, only .8 percent are sent to death row. On the other hand, 7.6 percent of those suspected of killing white females are sentenced to death, as are 6.4 percent of those suspected of killing nonwhite females.

Finally, Table 10 (on next page) displays the percent of death penalty cases broken down by the presence of zero, one, or two "additional legally relevant factors." The factors we included are 1) whether the homicide event also included additional felonies, and 2) whether there were multiple victims. All cases had 0, 1, or 2 of these factors present. Table 10 shows what would be expected: 1.7 percent of the cases with no additional legally relevant factors ended with a death sentence, 6.2 percent of the

Table 8: Death Sentences by Gender of Victim (V=Victim)

		No Female V	1+ Female V	Total
	No	3378	1146	4535
		.984	.928	.969
Death Penalty Imposed				
	Yes	54	89	143
		.016	.072	.031
	Total	3433	1235	4668

Chi Square 97.07; 1 df; p<.001

[48] When the analysis examines the potential effect of more than one independent variable the likelihood of a death sentence, we combine the separate racial/ethnic minority categories (i.e., black, Hispanic, and Native American) into a single minority category. Each of these minority subgroups are recognized as groups that are subject to subject to discrimination.

Table 9: Death Sentences by Race/Gender of Victim

(W= white; NW=Nonwhite)

		W-F	W-M	NW-F	NW-M	Total
	No	782	1815	364	1564	4525
		.924	.977	.936	.992	.969
Death Penalty Imposed						
	Yes	64	42	25	12	143
		.076	.023	.064	.008	.031
	Total	846	1857	389	1576	4668

Chi Square 104.69; 3 df; p<.001

Table 10: Death Sentences by Number of Additional Legally Relevant Factors (ALRF)

		No ALRF	1 ALRF	2ALRF	Total
	No	3510	978	37	4525
		.983	.938	.698	.969
Death Penalty Imposed					
	Yes	62	65	16	143
		.017	.062	.302	.031
	Total	3852	1043	53	4668

Chi Square 187.9; 2 df; p<.001

cases with one factor, and 30.2 percent of the cases with two factors.

We now turn our attention to pinpointing the effects of each of our predictor variables.

B. Multiple Logistic Regression Analysis

Table 11 presents the results from a statistical technique called logistic regression.[49] This is the statistical technique of choice used to predict a dependent variable that has two categories, such as whether or not a death

[49] In logistic regression, the dependent variable is predicted with a series of independent variables, such as gender, income, etc. The model predicts the dependent variable with a series of independent variables, and the unique predictive utility of each independent variable can be ascertained. As we have explained elsewhere:

> Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, y=P / 1-P and; (1) $\ln(y) = \hat{a}_0 . X\hat{a} + {}_3$ where $\hat{a}_0$ is an intercept, $\hat{a}_i$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ${}_3$ is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.

Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 59 (2002).

sentence is imposed.[50]

Table 11 shows that there are five variables in our model that are associated with who is sentenced to death in Oklahoma: 1) having a white female victim, 2) having a white male victim, 3) having a female victim from a minority race of ethnicity, 4) having one additional legally relevant factor (a homicide event with more than one victims OR one in which there were additional felony circumstances present, and 5) having two additional legally relevant factors present (a homicide event with more than one victims AND one in which there were additional felony circumstances present. The reference category for the latter two variables is "no additional factors." We also included a variable measuring the race of the defendant (white vs. minority), but that factor was not statistically significant.

Table 11: Logistic Regression Analysis of Victim's Race/Gender and Number of Additional Legally Relevant Factors on the Imposition of a Death Sentence (n=4668)

	β	Sig.	Exp β
Independent Variables			
White Female Victim	2.261	.000	9.592
White Male Victim	1.171	.001	3.225
Minority Female Victim	2.161	.000	8.678
One additional aggravator*	1.235	.000	3.439
Two additional aggravators**	2.553	.000	12.847
Defendant's Race (white vs. minority)	.284	.164	1.328
Constant	5.799	.000	.003

*Either multiple victim homicide or homicide with additional felony circumstances

**Both multiple victim homicide and homicide with additional felony circumstances

It is no surprise that having one or both legally relevant factors increases the odds of a death sentence dramatically. Let's focus on the column labeled Exp β. The Exp β for "one additional aggravator" is 3.439 (rounded to 3.4), which is also the odds ratio. Thus, after controlling for all the other variables in the model, the odds of receiving a death sentence are 3.4 times higher in cases with one additional legally relevant factor (compared to cases with no additional legally relevant factors). When the two additional legally relevant factors are both present, the Exp β tells us that the odds of a death sentence are 12.847 (12.8) times higher than cases where no additional factors are present. This is what would be expected – clearly those cases are highly aggravated.

More interesting are the effects of race and gender. Here the excluded category (the comparison group) includes cases with male victims, minority races (black, Hispanic, or Native American). The Exp β in Table 11 shows that the odds of a death sentence for those with white female victims are 9.59 time higher than in cases with minority male victims. The odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence with minority male victims. Finally, the odds of a death sentence for those with minority female victims are 8.68 times higher than the odds of a death sentence with minority male victims. And all these race/gender effects are net of our two control variables (multiple murder victims and the presence of additional felony circumstances), and all are statistically significant.

[50] Logistic regression is a statistical method to predict the value of one variable with a series of other variables. The technique is regularly used in studies of race and death sentencing. See, e.g., David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Equal Justice And The Death Penalty* 78 n.55 (1990) (explaining how logistic regression models can be used to calculate the odds of a death sentence); Gross & Mauro, *supra* note 15, at 248–52 (using a logistic regression model to help predict the probability of a death sentence); Raymond Paternoster et al., JUSTICE BY GEOGRAPHY AND RACE: THE ADMINISTRATION OF THE DEATH PENALTY IN MARYLAND, 1978–1999, 4 MARGINS 1, 31–44 (2004) (using logistic regression to address the relationship between victim and offender race).

V. Conclusion

The data show that death sentencing in Oklahoma is not related to the race of the defendant. However, there are rather large disparities in the odds of a death sentence that correlate with the gender and the race/ethnicity of the victim. Controlling for other factors — the presence of additional felony circumstances and the presence of multiple victims — cases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ANTHONY CASTILLO SANCHEZ,	)	PCD 2017 666
	)	PC CASE NO.: _____
Petitioner,	)	**CAPITAL POST CONVICTION PROCEEDING**
	)	
THE STATE OF OKLAHOMA,	)	Cleveland County Dist. Ct.
	)	No. CF-2000-325
Respondent.	)	Direct App. No. D-2006-0627

PETITIONER ANTHONY SANCHEZ'S MOTION FOR DISCOVERY

Petitioner Anthony Sanchez respectfully requests an order of discovery pursuant to Okla. Stat. tit., 22 § 1089(D)(3) and Rules 9.7(D)(2), (D)(4) of the Rules of the Oklahoma Court of Criminal Appeals. Mr. Sanchez is submitting this motion, and a Motion for Evidentiary Hearing, contemporaneously with the filing of his Second Application for Post-Conviction Relief. All averments and supporting attachments presented in Mr. Sanchez's Application are hereby incorporated by reference.

Discovery is necessary because Mr. Sanchez has raised a more than colorable claim that new evidence renders his sentence of death unlawful under the Sixth, Eighth Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19, and 20 of the Oklahoma Constitution. More particularly, Mr. Sanchez has alleged that a new study of Oklahoma's capital sentencing system establishes that the race of the victim who he was accused and convicted of killing operated, by itself, to increase the likelihood that he would receive a sentence of death.

In support of this claim, Mr. Sanchez has put forward a new study that accompanied the recent Report of the Oklahoma Death Penalty Commission (hereinafter "the Report"). Okla. Death Penalty Review Comm'n, The Report of the Okla. Death Penalty Review Comm'n, The Constitution Project, 2xx-xx (Apr. 25, 2017), http://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf. That study ultimately concluded that race plays a decisive role in who receives the death penalty in Oklahoma. (*See* Report at 211, 214.)

The data provided by the authors of this new study is compelling and, Mr. Sanchez submits, entitles him to relief. However, Mr. Sanchez seeks to further factually develop this claim by exploring the ways in which race and gender influenced various decision makers in his case. Specifically, Mr. Sanchez respectfully requests this Court should order records deposition or subpoena duces tecum of: (1) any and all policies and procedures of the Cleveland County District Attorney's Office concerning standards and practices for seeking the death penalty, including any and all that may have existed between 1999 and 2002; (2) pertinent data on the race and gender of the victims and the defendants in all homicide cases prosecuted by the Oklahoma County District Attorney's Office from 1990 to 2012, including: (a) the homicide cases prosecuted in Oklahoma County from 1990 to 2012; (b) the list of first degree murder cases prosecuted in Oklahoma County from 1990 to 2012; (c) the list of cases prosecuted in Oklahoma County from 1990 to 2012 in which the death penalty was sought at any time in the proceedings; (d) the race, gender, and name of each victim for all cases listed in the responses to (a), (b), and (c); (e) the race, gender,

and name of each defendant for all cases listed in (a), (b), and (c); and (f) the ultimate sentence for each defendant in all cases listed in (a), (b), and (c).

Mr. Sanchez is aware of this Court's decision in *Bland v. State*, 1999 OK CR 45, ¶ 6, 991 P.2d 1039, which held that during post-conviction proceedings, "the only discovery permitted is through the procedure established for an evidentiary hearing." Considering that, pursuant to this Court's Rules 9.7(D)(4) and (D)(5), an evidentiary hearing in the district court is the appropriate mechanism for Mr. Sanchez to factually develop his claim, discovery is necessary in order to prepare for any such evidentiary hearing on these matters.

This Court should order discovery in order to facilitate meaningful review of Mr. Sanchez's Second Application for Post-Conviction Relief. Okla. Stat. tit. 22, § 1089(D)(3).

This Court should grant the requested discovery or remand Mr. Sanchez's case to the district court for an evidentiary hearing and discovery aimed at determining whether and to what degree race and gender -- both of Mr. Sanchez and that of his victim -- impacted prosecutors' decision to seek the death penalty against Mr. Sanchez in the first instances, and jurors' subsequent imposition of that ultimate sanction.

CONCLUSION

Mr. Sanchez's sentence of death was obtained in violation of his state and federal constitutional rights. He asks that this Court exercise its power to correct this fundamental injustice and grant sentencing relief. Alternatively, Mr. Sanchez asks this Court grant his request for discovery in order to allow for the further factual development of his claims.

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ATTORNEY FOR PETITIONER

VERIFICATION OF COUNSEL

I, Mark Barrett, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

MARK BARRETT June 16, 2017

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.

MARK BARRETT

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ANTHONY CASTILLO SANCHEZ,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

PCD 2017 666

PC CASE NO.: _____

CAPITAL POST CONVICTION PROCEEDING

Cleveland County Dist. Ct.
No. CF-2000-325
Direct App. No. D-2006-627

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 26 2017
MICHAEL S. RICHIE
CLERK

PETITIONER ANTHONY CASTILLO SANCHEZ'S MOTION FOR EVIDENTIARY HEARING

Petitioner Anthony Castillo Sanchez respectfully requests an evidentiary hearing on any controverted, previously unresolved issues of fact that may arise in connection with his Second Application for Post-Conviction Relief filed simultaneously with this motion. All averments and supporting attachments presented in Mr. Sanchez's Application are hereby incorporated by reference.

In his Second Application for Post-Conviction Relief, Mr. Sanchez raises one proposition, which involves issues of fact; specifically, he alleges that race and gender played a decisive role in determining his sentence of death, in violation of the Oklahoma and the United States Constitutions. Mr. Sanchez could not have raised this proposition previously because the grounds upon which it relies 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. That study, appended to the Report of the Oklahoma Death Penalty Commission, comprehensively examined the role that race played in death sentences rendered in Oklahoma capital cases from 1990 to 2012. *See* Okla. Death Penalty Review Comm'n, The Report of the Okla. Death Penalty Review Comm'n, Appendix IA, 211-22 (Apr.25,2017), http://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf. No reliable study of this nature has been conducted in Oklahoma in almost four decades. *Id.* at 214.

While 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. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(4)-(5). If this Court grants a hearing, in addition to the information presented in the attachments to his application, Mr. Sanchez requests permission to bring forth other evidence as needed to further support the proposition raised in his application.

CONCLUSION

Mr. Sanchez's sentence of death was obtained in violation of his state and federal constitutional rights. He asks that this Court exercise its power to correct this fundamental injustice and grant sentencing relief. Alternatively, Mr. Sanchez asks this Court grant his request for discovery and an evidentiary hearing in order to allow for the further factual development of his claims.

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VERIFICATION OF COUNSEL

I, Mark Barrett, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

MARK BARRETT June 18, 2017

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.

MARK BARRETT