Case No. 18-7658

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS DARIUS JONES,

***Petitioner*,**

v.

STATE OF OKLAHOMA,

***Respondent*.**

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 28, 2019

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

No. 18-7658

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October Term, 2018

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the Oklahoma Court of Criminal Appeals entered September 28, 2018. *See* 9/28/2018 *Order Denying Third Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2017-1313) ("Pet. App. 1").

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No.

CF-1999-4373. In 2002, Petitioner was tried by jury for one count of first degree murder. A bill of particulars was filed alleging two statutory aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person and (2) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *See* Okla. Stat. tit. 21, § 701.12. At the conclusion of the trial, the jury found Petitioner guilty as charged, found the existence of both statutory aggravating circumstances, and recommended a death sentence. Petitioner was sentenced accordingly.[1]

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions and sentences in a published opinion filed on January 27, 2006. *See Jones v. State*, 128 P.3d 521 (Okla. Crim. App. 2006). The OCCA granted Petitioner's petition for rehearing, but denied relief, on March 14, 2006. *Jones v. State*, 132 P.3d 1 (Okla. Crim. App. 2006). This Court denied Petitioner's certiorari request on October 10, 2006. *See Jones v. Oklahoma*, 549 U.S. 963 (2006).

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

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on November 3, 2008. On May 22, 2013, the district court issued an order denying Petitioner's

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

petition for habeas corpus relief. *See Jones v. Trammell*, No. CIV-07-1290-D, slip op. (W.D. Okla. May 22, 2013) (unpublished).

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

On June 23, 2017, Petitioner filed a second application for state post-conviction relief, which was denied by the OCCA in an unpublished opinion on September 5, 2017. *See* 9/5/2017 *Order Denying Second Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2017-654). This Court denied certiorari on January 22, 2019. *Jones v. Oklahoma*, No. 17-6943, __ S. Ct. __, 2019 WL 271963 (2019).

On December 29, 2017, Petitioner filed his *third* application for state post-conviction relief, which the OCCA denied on September 28, 2018. Pet. App. 1.

Petitioner's petition for a writ of certiorari was placed on this Court's docket on January 25, 2019. Respondent's brief in opposition is due on March 1, 2019.

STATEMENT OF FACTS[2]

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

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

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

> Police then drove to Jones's parents' home, called a telephone number supplied by King, and spoke to someone who identified himself as Julius Jones. Jones initially agreed to come out and speak to police, but changed his mind. Police made several attempts to re-establish telephone contact; eventually a female answered and claimed Jones was not there. While some officers maintained surveillance at the home, others sought and obtained warrants to arrest Jones and search his parents' home for evidence. Police found a .25–caliber handgun, wrapped in a red bandana, secreted in the attic through a hole in a bedroom ceiling and found papers addressed to Jones in the bedroom. Police also found a loaded, .25–caliber magazine, hidden inside a wall-mounted door-chime housing. Further investigation revealed that the bullet removed from Howell's head, and a bullet shot into the dashboard of the Suburban, were fired from the handgun found in the attic of the Jones home.
>
> Christopher Jordan was arrested on the evening of July 30. Jones, who managed to escape his parents' home before police had secured it, was arrested at a friend's apartment on the morning of July 31. The two men were charged conjointly with conspiracy to commit a felony, and with the murder of Howell. Jordan agreed to testify against Jones as part of a plea agreement. At trial, Jordan testified that the two men had planned to steal a Chevrolet Suburban and sell it; that they followed Howell's vehicle for some time with the intent to rob Howell of it; that once Howell pulled into the driveway, Jordan stayed in their vehicle while Jones, armed with a handgun, approached the Suburban on foot; that after the robbery-shooting, Jones drove the Suburban away and told Jordan to follow him; and that Jones subsequently claimed his gun had discharged accidentally during the robbery.

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

[3] As he did in the Tenth Circuit, Petitioner tries to make it appear that Ms. Tobey's description of the shooter more closely matches Mr. Jordan based on "half-an-inch of hair sticking out from underneath the stocking cap" worn by the shooter. Pet. at 3-4 & n.2. The Tenth Circuit recognized that Ms. Tobey described "hair between [the shooter's] stocking cap and 'where his

REASONS FOR DENYING THE WRIT

Petitioner claims he has recently discovered that a juror in his trial harbored racial animus. The OCCA procedurally barred the claim when it was raised in Petitioner's third post-conviction application, filed fifteen years after his sentence was imposed. Petitioner has failed to show that the OCCA has decided an important question of federal law in a way that conflicts with another state court of last resort or of a United States court of appeals. Nor has Petitioner shown that the OCCA decided an important question of federal law that has not been, but should be, settled by this Court. Rather, Petitioner merely disagrees with the OCCA's application of a procedural bar to his case. Petitioner presents no compelling reason for this Court to review the OCCA's decision. This Court should not grant certiorari to review this particular case.

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

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

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ear connect[ed] to his head'", not hair sticking *out* from beneath the shooter's cap. *See Jones*, 805 F.3d at 1214 (alteration adopted).

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

Petitioner filed a third post-conviction application in which he claimed to have discovered that a juror in his case harbored racial animus against him. 12/29/2017 *Third Application for Post-Conviction Relief – Death Penalty Case* (Okla. Crim. App. No. PCD-2017-1313). The OCCA found the claim procedurally barred because it was already raised and rejected on direct appeal or, to the extent the claim differed from that raised on direct appeal, it was not presented in either of his two previous post-conviction applications. Pet. App. 1 at 4-8.

Petitioner presents this Court with two questions. First, Petitioner asks whether racial prejudice influenced the decision of at least one juror in his case. Second, Petitioner asks whether the procedural bar applied in his case affords him an adequate corrective process. Petitioner's questions, which center around a procedurally barred claim, do not present any compelling questions for this Court's review.

1. Petitioner Presents No Evidence of a Conflict Among Courts

As stated above, Petitioner presents two questions for review. Petitioner has not shown that the OCCA's resolution of his claim conflicts with a decision of this Court, another state court of last resort or a United States court of appeals. Nor has Petitioner shown that the OCCA decided an important question of federal law that has not been, but should be, settled by this Court. Indeed, the legitimacy of state procedural rules, even when those rules preclude review of alleged violations of federal law, is beyond question. *See Wainwright v. Sykes*, 433 U.S. 72, 80-85

(1977) (describing this Court's long history of requiring habeas petitioners to exhaust federal claims in state court, and of respecting adequate and independent state procedural rules). Accordingly, the OCCA's rejection of this claim did not run afoul of federal law. More importantly for present purposes, Petitioner's challenges to the procedural bar implicate only his case and present no important questions of federal law. Certiorari should be denied.

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

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). On direct review, this rule is jurisdictional. *Id.* Petitioner's racial discrimination claim is procedurally barred. Accordingly, this Court cannot answer Petitioner's first question presented, *i.e.*, whether at least one juror's verdict was influenced by racial animus.

Petitioner attempts to avoid the procedural bar by raising an additional question which challenges the adequacy and independence of said bar. These arguments are case-specific and do not present an important federal question which requires this Court's review. Nor is Petitioner's case, in which the State of Oklahoma has provided him a direct appeal and *three* post-conviction applications, the appropriate case in which to determine whether the Fourteenth Amendment requires States to afford an adequate process for the determination of federal claims. *See* Pet. at 32-35.

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

3. Petitioner Merely Complains About the Application of State Law to the Facts of His Case

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

The OCCA may not consider a claim raised in a successive post-conviction application 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
>
> 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. tit. 22, § 1089(D)(8).

The OCCA barred Petitioner's claim as both: 1) a claim that was previously raised and 2) a claim that could have been, but was not, presented previously.[4] Pet. App. 1 at 4-8. Petitioner is not claiming that Oklahoma's bar of claims not raised in a first application for post-conviction relief is not adequate or independent. *See Banks v. Workman*, 692 F.3d 1133, 1145-47 (10th Cir. 2012) (concluding this bar is adequate and independent); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012) (same).

Petitioner's only challenge to this bar is his argument that the claim was not available until this Court's decision in *Pena-Rodriguez*. Thus, Petitioner merely disagrees with the OCCA's application of its procedural bar to the facts of his case. There is no important federal question for this Court to review.

Moreover, Petitioner is incorrect. In *Pena-Rodriguez*, defense counsel discovered immediately after trial that one juror had made statements indicating his verdict was influenced by the defendant's race. *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 861-62 (2017). The trial court nonetheless denied the defendant's motion for a new trial pursuant to Colorado's "no-impeachment rule"

[4] Respondent will briefly address Petitioner's arguments regarding the OCCA's application of *res judicata*, that court's concern over the adequacy of Petitioner's evidence, and Petitioner's concern about section 1089(D)(8)(b)(2). However, the OCCA's application of its adequate and independent bar of claims raised for the first time in a successive post-conviction application, and which could have been raised previously, is sufficient to support its judgment. As such, any opinion by this Court on other matters would be merely advisory. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (this Court will not consider federal questions where there is a state law determination that is sufficient to support the judgment).

which "generally prohibits a juror from testifying as to any statement made *during deliberations* in a proceeding inquiring into the validity of the verdict." *Id*. at 862 (emphasis added). This Court held that the Constitution requires an exception to the no-impeachment rule "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant[.]" *Id*. at 869.

Oklahoma's no-impeachment rule is very similar to Colorado's, and prohibits juror testimony (or affidavits) only about events that occur during deliberations. Okla. Stat. tit. 12, § 2606(B). As found by the OCCA, "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[5] allegations post-trial." Pet. App. 1 at 6-7. Indeed, as will be discussed below, Petitioner claimed on direct appeal that Juror J.B. made improper comments during trial, and the OCCA fully considered this claim. *Jones v. State*, 128 P.3d 521, 535 (Okla. Crim. App. 2006). The OCCA did not mention the no-impeachment rule. *Id.*

Petitioner's discussion of *Pena-Rodriguez* is a red herring. Petitioner did not attempt to show the OCCA that he could not have interviewed Juror V.A. immediately after trial (as the defendant did in *Pena-Rodriguez*), before filing his direct appeal, or during his first or second post-conviction proceedings. Petitioner

[5] The OCCA's rules require that the names of jurors be redacted from pleadings and other documents that are posted on the internet. Rule 2.6(E)(1)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016). Accordingly, in the interest of the former jurors' privacy, the State will use initials in this response.

was represented by counsel for all of these proceedings. *See Jones*, 128 P.3d at 531; Pet. App. 11; 2/25/2005 *Original Application for Post-Conviction Relief—Death Penalty Case* (OCCA No. PCD-2002-630). Petitioner has utterly failed to demonstrate that the factual or legal bases for his claim were previously unavailable.[6]

This Court has long stated that it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)); *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *Williams v. Norris*, 12 [25 U.S.] Wheat. 117, 120 (1827)). On appellate review, "[t]he question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." *McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821). Thus, this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).

The OCCA denied Petitioner's post-conviction application pursuant to an indisputably adequate and independent state procedural rule. Petitioner's complaints about other aspects of the OCCA's order are irrelevant. However, the State will briefly discuss these arguments and show them to be without merit.

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[6] Petitioner asserts that Juror V.A. "came forward" to reveal the alleged racial bias of another juror. Pet. at 10, 15. In reality—assuming the veracity of Petitioner's evidence—an investigator who works on Petitioner's case contacted Juror V.A. Pet. App. 3. Petitioner has provided no explanation for his apparent failure to reach out to Juror V.A. earlier. This claim was not unavailable.

a. The OCCA properly considered the weak nature of Petitioner's "evidence"

Petitioner first complains that the OCCA regarded his use of screenshots of alleged Facebook messages as insubstantial. According to Petitioner, the OCCA refused to consider his claim because he did not provide an affidavit, and this supposed requirement was "novel and unforeseeable", and therefore inadequate. Pet. at 21-28. Petitioner's argument does not merit a writ of certiorari for a number of reasons.

First, Petitioner seeks mere error-correction, and fails to present an important question of federal law. Second, as shown above, the OCCA's refusal to consider this claim because it could have been presented previously is sufficient to preclude review of its decision. Third, the OCCA did not deny the post-conviction application because of Petitioner's failure to support it with reliable evidence. The OCCA briefly "note[d]" Petitioner's reliance upon screenshots rather than an affidavit from Juror V.A. or the investigator with whom Juror V.A. allegedly conversed. Pet. App. 1 at 2-3. The OCCA then said, "notwithstanding this omission [Petitioner's failure to present reliable evidence in support of his claim] and having reviewed Jones's claim and supporting exhibits, we find Jones's claim is barred on grounds of *res judicata* and waiver." Pet. App. 1 at 4. The OCCA's decision did not rest on Petitioner's failure to present reliable evidence. Any opinion by this Court would be advisory. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (this Court

will not consider federal questions where there is a state law determination that is sufficient to support the judgment).

Fourth, the OCCA's comment on the Petitioner's failure to present an affidavit was not novel or unforeseeable. Petitioner does not suggest that he was entitled to relief based on the screenshot. Rather, Petitioner needed an evidentiary hearing to attempt to prove his claim. Pet. App. 7 (Petitioner's motion for an evidentiary hearing). Yet, the OCCA's rules require a post-conviction petitioner who seeks an evidentiary hearing to present affidavits. Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2008). The OCCA relied upon this rule. Pet. App. 1 at 4. There was nothing unforeseeable about the OCCA's statement.[7]

Finally, Petitioner's focus on the OCCA's reference to affidavits is a red herring. Petitioner does not dispute that the OCCA has long required, and may properly require, a post-conviction petitioner to present reliable evidence. *Cf. Pena-Rodriguez*, 137 S. Ct. at 870 (stating that, in deciding whether to apply the no-impeachment rule, a court may consider "the reliability of the proffered evidence."). The OCCA relied upon a prior published decision in which it denied an application for post-conviction relief, and motions for discovery and an evidentiary hearing,

[7] Petitioner appears to suggest the OCCA failed to require affidavits in *Coddington*. The OCCA did not "interpret[] [Rule 9.7(D)(5)] to require only" that the request for a hearing show by clear and convincing evidence the materials have or are likely to have support. Pet. at 25. The OCCA simply applied the plain language of a different part of Rule 9.7(D)(5) and found Petitioner could not satisfy it. *Coddington v. State*, 259 P.3d 833, 840 (Okla. Crim. App. 2011). Although the OCCA did not specify whether Coddington had presented affidavits, it noted he included an "Appendix of Exhibits." *Id*. Further, it is unclear how the OCCA could have known that "[a]ppellate counsel interviewed several jurors after Coddington's first trial, but did not ask about their backgrounds" if Coddington did not provide affidavits. *See id*. at 836.

based on the petitioner's failure to present an affidavit. *Hatch v. State*, 924 P.2d 284, 296 (Okla. Crim. App. 1996). The court further stated in *Hatch* that it could not grant relief "based upon bald allegations or suspicions[.]" *Id.* Consistent with this requirement, the OCCA's rules prohibit an evidentiary hearing unless the petitioner presents "sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact[.]" Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2008).

Petitioner presented screenshots of an alleged exchange on Facebook between someone purporting to be "Rebecca"—who claimed to be an investigator working on Petitioner's case—and a person purporting to be named V.A., who claimed to have been a juror on Petitioner's case. As noted by the OCCA, Petitioner did not even present an affidavit from "Rebecca" to confirm her status as an investigator and to attempt to establish that the person in the Facebook message is truly the V.A. who was a juror in Petitioner's case. Due to the nature of this claim, it appears that affidavits from "Rebecca" and/or "V.A." (and/or another juror or jurors) are the only evidentiary support Petitioner could have presented. Thus, the OCCA naturally noted Petitioner's failure to present affidavits. Petitioner has failed to provide this Court with any reason to believe the OCCA would not have accepted some other form of reliable evidence, had Petitioner offered any.[8] The OCCA's comment on the weight of Petitioner's evidence was not novel, unforeseeable,[9] or "inequitable."[10]

[8] Petitioner relies upon three recent unpublished decisions in which the OCCA did not fault post-conviction applicants for failing to present affidavits. These cases were based on a study which

b. The OCCA's *res judicata* bar is adequate

Petitioner also complains about the adequacy of the OCCA's *res judicata* bar. Petitioner does not present an important federal question, as the OCCA's decision rested on at least one adequate procedural bar. In any event, this bar is adequate.

The OCCA stated that, "[w]hile this claim was not raised in this exact manner previously," Petitioner had argued on direct appeal that Juror V.A. overheard Juror J.B.—the same jurors apparently implicated in Petitioner's current claim—state "that they should place [Petitioner] in a box in the ground for what he has done." Pet. App. 1 at 4. The trial court held a hearing on Juror V.A.'s allegation. Pet. App. 1 at 4-5; (Tr. XII 99; Tr. XIII 29-91). Petitioner does not challenge the OCCA's finding that "[t]he only perceivable difference between Jones's original claim and his current claim is Juror V.A.'s new assertion that Juror J.B.

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purported to show that race plays a role in Oklahoma's capital sentencing scheme. Pet. App. 9, 10, 13. This is not the sort of claim for which an affidavit would be necessary, or expected.

[9] The defendant cites two OCCA cases in which Facebook posts were admitted at trial. The State presumes that, unlike in Petitioner's post-conviction application, there was a foundation laid for the admission of the posts at trial. Moreover, in *Williamson*, the OCCA determined the Facebook post was not sufficient to make out a *prima facie* case for the defendant's requested jury instructions. *Williamson v. State*, 422 P.3d 752, 760 (Okla. Crim. App. 2018). In *Bosse*, the defendant referenced Facebook while telling investigators about this relationship with the victim. *Bosse v. State*, 400 P.3d 834, 842 (Okla. Crim. App. 2017). It is unclear whether the Facebook status or message were actually introduced at trial. Neither of these cases indicate Petitioner's reliance upon a purported Facebook exchange to impeach the jury's verdict in his case was proper or sufficient.

[10] Petitioner claims he "diligently endeavored to find and locate [Juror V.A.] in order to procure her sworn statement" but was not able to do so within the sixty days required by state law. Pet. at 28 n.9 (citing Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2008)). However, as noted above, Petitioner is the one who sought out Juror V.A. in the first place. Petitioner had Juror V.A.'s social security number. Pet. App. 4. Petitioner made no attempt to show the OCCA why, having located V.A. on Facebook, he was unable to obtain an affidavit from her in two months' time, much less why he did not present an affidavit from his own investigator. There was nothing inequitable about the OCCA's treatment of Petitioner's "evidence."

made a racial epithet." Pet. App. at 5. The OCCA was understandably quite skeptical of this revelation, more than fifteen years after trial:

> 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.[11] Consequently, to the extent Jones's present claim was previously raised on direct appeal, his claim is barred by *res judicata*.

Pet. App. 1 at 5.

Petitioner claims this bar was inadequate because he "has located not a single case where the OCCA invoked res judicata to procedurally bar a claim in a post-conviction application the factual and legal bases for which materially differ from a claim previously raised on direct appeal." Pet. at 29. The OCCA, however, did not believe the factual and legal bases for these claims differed. As shown above, the OCCA doubted that Juror V.A. overheard a racial epithet and believed Petitioner was merely re-presenting his direct appeal claim. The OCCA routinely holds—as it did here—that, to the extent a claim duplicates that presented previously, it is barred by *res judicata* and, to the extent the claim is actually a new

[11] Petitioner misunderstands this sentence. Petitioner appears to believe the OCCA meant that Juror V.A. told the trial court about the alleged racial epithet, but that her report somehow eluded the record. Pet. at 29. The OCCA was stating that it was very skeptical that a juror used a racial epithet because Juror V.A.'s actions established that, had Juror J.B. or another juror made the comment she allegedly reports in the screenshot, she would undoubtedly have informed the trial court. Thus, the OCCA believed Petitioner was attempting to re-present the claim it had adjudicated on direct appeal, contrary to section 1089(D)(8).

one, it is barred by section 1089(D)(8). *See e.g., Slaughter v. State*, 969 P.2d 990, 996 (Okla. Crim. App. 1998); *Turrentine v. State*, 965 P.2d 985, 987 & n.1 (Okla. Crim. App. 1998); *Gilbert v. State*, 955 P.2d 727, 732 (Okla. Crim. App. 1998). There is nothing "novel" about this bar. Pet. at 30.

c. The OCCA applied a rule that is independent of federal law

Finally, Petitioner claims the OCCA's application of section 1089(D)(8)(b) was "interwoven with federal law" and promises to make that showing in Section IV of his petition. Pet. at 32. However, Petitioner makes no independence argument in Section IV. Petitioner argues in that section that the procedural bar violates due process and equal protection, but he does not even attempt to show that the OCCA's application of the bar was not based solely on state law. This Court should not entertain this argument because it does not present an important question of federal law and because Petitioner has wholly failed to develop it.

Giving the petition an exceedingly liberal interpretation, to which it is not entitled[12], the only way in which section 1089(D)(8)(b) could arguably depend on federal law is in its requirement that a post-conviction petitioner must show "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. tit. 22, § 1089(D)(8)(b)(2).

In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), this Court held that when

[12] *Cf. Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (holding that a *pro se* complaint is to be liberally construed, and not held to the same standard as pleadings drafted by lawyers).

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Here, the independence of the bar is apparent from the face of the opinion. The OCCA expressly applied its precedent and a state statute. Pet. App. 1 at 7-8. The OCCA did not cite any federal law, aside from holding that Oklahoma law allowed Petitioner to bring his claim before this Court's decision in *Pena-Rodriguez*. The statute requires any petitioner bringing a successive post-conviction application to show that the legal basis for the claim was previously unavailable, or that the factual basis for the claim was previously unavailable, *and* that no reasonable fact finder would have rendered the same verdict if not for the error. Okla. Stat. tit. 22, § 1089(D)(8). Petitioner has failed to point to one of this Court's decisions, or any federal law, which applies this "no reasonable fact finder" standard. This is a state law standard that applies to every claim, regardless of what federal law might require for the claim at issue.

In any event, Petitioner failed to show that the factual basis for the claim was previously unavailable. Accordingly, Petitioner's claim would have been barred even if he satisfied the "no reasonable fact finder" standard. *Cf. Johnson v. State*, 841 P.2d 595, 596-97 (Okla. Crim. App. 1992) (recognizing that "and" refers to the conjunctive and reversing a conviction where a jury instruction used the word "and"

instead of "or", improperly requiring the jury to find two prongs where only one was required). The OCCA's denial of this claim was not interwoven with federal law.

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

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

a. *Case v. Nebraska*

Petitioner first asks this Court to answer the question "whether the Fourteenth Amendment requires that States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Pet. at 32 (quoting *Case v. Nebraska*, 381 U.S. 336, 337 (1965)). Oklahoma does afford adequate corrective process for the determination of federal claims.

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

These two cases illustrate perfectly the reason that the Petition should be denied. Petitioner had the opportunity to present constitutional claims on direct appeal and in his initial post-conviction application. The fact that Petitioner failed to follow the statute by presenting his claims as soon as they were available[13] does not equate to the complete unavailability of post-conviction review in *Case*.

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

Petitioner also recognizes that *Young v. Ragen*, 337 U.S. 235 (1949) is inapposite. Pet. at 32. In *Young*, 337 U.S. at 236-39, the state court provided no procedure by which due process claims could be heard.

Petitioner has had numerous opportunities, in state and federal court, to have his constitutional claims heard. Petitioner's failure to comply with Oklahoma's

[13] Although Petitioner refers to his claim as "newly-available", as has been discussed, he provides no explanation for his apparent failure to reach out to Juror V.A. in the sixteen years between his trial and the alleged Facebook exchange.

reasonable requirement that claims be brought at the first available opportunity is not grounds for this Court's review. *Cf.* 28 U.S.C. § 2244(b)(2) (prohibiting subsequent habeas petitions unless the petitioner can show that the claim relies on a new rule of law or facts which could not have been discovered previously with due diligence).

b. Equal protection and due process

Finally, Petitioner presents several equal protection and due process challenges, none of which present compelling questions for this Court's review. First, Petitioner claims that Oklahoma provides no method for him to bring his claim. This is demonstrably false. As has been shown, Petitioner made no attempt to demonstrate that the factual basis for his claim was not ascertainable before his direct appeal or first post-conviction proceeding. There were avenues available to Petitioner, he simply failed to avail himself of them.

Petitioner's complaint about section 1089(D)(8)(b)(2)'s prejudice requirement is a red herring. Petitioner failed to show—or even attempt to show—that the factual basis for his claim was unavailable. Moreover, the OCCA modified section 1089(D)(8)(b)(2) in Petitioner's case to account for the potential that the racial prejudice alleged by Petitioner influenced the jury's verdict. Pet. App. 1 at 7-8 (finding Petitioner had failed to show "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."). The defendant claims this standard is higher than the federal standard. Pet. at 38. However, the defendant cites no authority explaining what the federal standard is. Instead, the defendant asks this Court to merely see, for example, *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985). Pet. at 38. In *Caldwell*, the prosecutor attempted to diminish the jury's sense of responsibility for its sentencing decision. *Caldwell*, 472 U.S. at 325. *Caldwell* is completely inapposite. Petitioner ignores that, in *Pena-Rodriguez*, this Court held that

> [n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.

Pena-Rodriguez, 137 S. Ct. at 869. Of course, this case is not controlled by *Pena-Rodriguez* because the alleged comment was not made during deliberations. However, *Pena-Rodriguez* sets a fairly high bar for a defendant to even have his claim considered. It is, therefore, not contrary to any rule of federal constitutional law for Oklahoma to require petitioners in successive post-conviction applications to show that a juror's alleged racial bias impacted his or her verdict.

Petitioner also claims he did not have notice of the procedural bar. Pet. at 38. Section 1089(D)(8) has been unchanged since 2004. This argument is without merit. To the extent Petitioner's alleged lack of notice relates to his claims that the bar is

inadequate, the State showed above that Petitioner's contentions do not present compelling federal questions, and are without merit.

Finally, Petitioner claims he has been treated differently than non-capital inmates. Pet. at 39. The right to equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Where persons who are similarly situated are not treated alike, a statute is presumed valid and will be found unconstitutional only if the classification it draws is not rationally related to a legitimate state interest. *Id.* at 440. This general rule does not apply if the classification is based on race, alienage, national origin or gender. *Id.* at 440-41. The general rule is also inapplicable to statutes which "impinge on personal rights protected by the Constitution" such as the right to vote, the right to travel interstate and the right to have children. *Id.* at 440 (citing *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969) (right to vote), *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel) and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children)).

In *Sheppard v. Early*, 168 F.3d 689, 690-91 (4th Cir. 1999), a death row inmate claimed a statute which determined the time for setting an execution date limited the time within which he could file a petition for writ of certiorari. The petitioner claimed this limitation, which was not applicable to non-capital inmates, violated equal protection. *Sheppard*, 168 F.3d at 692. The court denied the claim because death row inmates are not a suspect class and "[c]apital and non-capital

inmates are not similarly situated." *Id.* at 692-93; *cf. Harris v. Johnson*, 81 F.3d 535, 541 (5th Cir. 1996) (expressing skepticism that capital and non-capital defendants are similarly situated); *Roybal v. Davis*, 148 F. Supp. 3d 958, 1103-04 (S.D. Cal. 2015) (denying equal protection claim based on differences in state habeas procedures for capital and non-capital inmates because they are not similarly situated). The court recognized that non-capital inmates have an interest in promptly pursuing relief whereas inmates sentenced to death have an incentive to delay. *Id.* at 693.

Petitioner is not similarly situated to non-capital inmates. Accordingly, Petitioner has no valid equal protection claim. Further, Petitioner is not a member of a suspect class, nor does he complain about the infringement of a fundamental personal right. As recognized in *Sheppard*, capital inmates have an incentive to delay that non-capital inmates do not. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) ("capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death"). Accordingly, the Oklahoma Legislature's choice to impose stricter requirements on successive post-conviction applications in capital cases is rationally related to the legitimate state interest in timely carrying out death sentences. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality op.) (recognizing states have a legitimate interest in carrying out death sentences in a timely manner). Petitioner's equal protection claim is meritless.

Petitioner's reasons that he thinks the proceedings were unfair, which are wholly unsupported by relevant authority, simply do not present a compelling reason for this Court's review. The OCCA applied an adequate and independent procedural bar to a claim raised in Petitioner's third post-conviction application. This Court should deny certiorari review.

5. *Petitioner's Claim is Contradicted by the Record*

Finally, this Court should deny review because Petitioner has failed to demonstrate any likelihood that his claim might succeed on its merits. As discussed above, Petitioner's "evidence" supporting this claim consists of screenshots of a very brief alleged exchange over Facebook between someone purporting to be an investigator and someone purporting to be a former juror. This alleged exchange took place on November 1, 2017. Pet. App. 3. The OCCA denied relief on September 28, 2018. Pet. App. 1. To this day, Petitioner has never offered the OCCA, nor this Court, reliable evidence to support his claim.[14]

The State submits that the alleged statement indicating racial bias was never made. Juror V.A. allegedly indicated that she "was the juror who went to the judge with the comment from another juror about how [the trial] 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[.]" Pet. App. 3.

During the State's second stage case-in-chief, this same juror, V.A., notified the trial court that when she was in the jury room on a break that day, she heard

[14] In *Tharpe*, relied upon by Petitioner, Pet. at 18-19, the petitioner obtained an affidavit from the juror admitting his bias. *Tharpe v. Sellers*, ___ U.S. ___, 138 S. Ct. 545, 546 (2018).

Juror J.B. say "they should place him in a box in the ground for what he has done." (Tr. XII 95-96). Although the supposed Facebook exchange does not identify the allegedly biased juror, Petitioner does not dispute that V.A. was referring to J.B.[15] Indeed, the language of the alleged exchange—"I was the juror who went to the judge"—confirms that the incident at trial, and the incident now alleged by Petitioner, are one and the same.

This Court has recognized that jurors often voluntarily disclose alleged improper conduct by other jurors in a timely fashion. *Pena-Rodriguez*, 137 S. Ct. at 869-70. This is what Juror V.A. did. It simply defies belief that Juror V.A. either forget to mention Juror J.B.'s alleged use of a racial slur, or felt it was not worth mentioning. This claim is meritless. At the very least, Petitioner's evidentiary showing is so weak, and so convincingly rebutted by the record (not to mention procedurally barred), that this Court should deny review.

CONCLUSION

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

[15] In fact, Petitioner claims that the supposed Facebook exchange indicates that Juror V.A. specifically told the trial court that another juror used a racial slur. Pet. at 8-9. This is belied by the record.

Respectfully submitted,

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