APPENDIX of Respondent

Response to Petition for Writ of Habeas Corpus filed by the State in the federal district court below on December 5, 2016 [Edited].

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALONZO CORTEZ JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 16-CV-433-JED-FHM**
	)	
TIM WILKINSON, Warden,	)	
	)	
Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The Attorney General of the State of Oklahoma, E. Scott Pruitt, appearing on behalf of the above-named Respondent in response to the Petition for Writ of Habeas Corpus on file herein, shows the Court as follows:

1. Petitioner, Alonzo Cortez Johnson, an Oklahoma Department of Corrections inmate in custody at the Davis Correctional Facility in Holdenville, Oklahoma, has filed with this Court, through counsel, a Petition seeking federal habeas corpus relief.

2. Petitioner is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of Tulsa County, State of Oklahoma, Case No. CF-2009-2738. Petitioner was found guilty by a jury and convicted of Conspiracy to Commit First Degree Murder, After Former Conviction of Two or More Felonies, and First Degree Murder. Petitioner was sentenced to life imprisonment on each count and the sentences were ordered to run consecutive to one another.

3. Petitioner appealed his convictions to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"), raising eighteen (18) propositions of error. Petitioner's brief on appeal, the State's response, and Petitioner's Reply brief are attached hereto as Exhibits 1, 2, and 3. In an

limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). Pursuant to Section 2254(a), the power of a federal habeas corpus court is expressly limited to violations of federal law; questions of state law are not cognizable issues. *See Brinlee v. Crisp*, 608 F.2d 839, 843 (10th Cir. 1979) (holding that claims of state procedural or trial error do not present cognizable federal questions in a habeas corpus suit).

PROPOSITION ONE

PETITIONER HAS NOT DEMONSTRATED THAT THE OCCA'S DECISION DENYING HIS *BATSON* CLAIM WAS EITHER CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, SUPREME COURT LAW.

Petitioner alleges in his first ground for relief that the prosecutor "systematically" used the State's peremptory challenges to unfairly exclude racial minorities from his jury. *Petitioner's Brief in Support*, pp. 7-11. Petitioner raised this claim on direct appeal to the OCCA. Exhibit 1, pp. 3-5. The OCCA addressed the claim on the merits and denied Petitioner relief. Exhibit 4, p. 3.[7] Petitioner fails to show the OCCA's decision was either contrary to, or an unreasonable application of Supreme Court law, or that the OCCA made an unreasonable determination of the facts in light

[7]Petitioner also raised this claim in his post-conviction proceeding but the OCCA, noting the claim had been previously raised and addressed in Petitioner's direct appeal, declined to again address the claim as it was "barred as *res judicata*." Exhibit 7, pp. 1-3.

of the evidence presented in the State court proceeding. As a result, federal habeas corpus relief is not warranted.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that a defendant may raise an equal protection challenge to the use of a peremptory challenge by demonstrating that the prosecutor exercised the challenge on the basis of race. *Batson*, 476 U.S. at 96. In order to demonstrate a *Batson* violation a petitioner must first make a *prima facie* showing that a peremptory challenge was exercised on the basis of race. *Batson*, 476 U.S. at 95-97. *See Rice v. Collins*, 546 U.S. 333, 338 (2006) (noting that first step in "three step" *Batson* inquiry is the trial court's determination whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race). If such a showing is made, the prosecution must offer a race-neutral reason for striking the prospective juror. *Batson*, 476 U.S. at 97. *See, e.g., Rice*, 546 U.S. at 338 ("Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." (internal quotations omitted)). In light of the parties' submissions on the issue, the trial court must then determine whether the petitioner has carried his or her burden of proving purposeful discrimination. *Batson*, 476 U.S. at 97-98. *See, e.g., Rice*, 546 U.S. at 338 (noting that the final step in the *Batson* analysis "involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike" (internal quotations omitted)).

On direct appeal Petitioner argued the prosecutor systematically removed all minorities from his jury and kicked off four prospective jurors for no plausible reason but their race. Exhibit 1, pp. 3-5. In denying the issue on direct appeal the OCCA found as follows:

> In Proposition One, Appellant contends that the State systematically removed minorities from the jury contrary to *Batson v. Kentucky*, 476 U.S. 79, 100 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We find that the trial court did not abuse its discretion when it found that the State did not engage in systemic or specific discrimination. *Mitchell v. State*, 2011 OK CR 26, ¶ 41, 270 P.3d 160, 173. Although the trial court erred to the detriment of the State when it refused to permit the prosecutor to excuse an African-American juror because it would have left the jury without any African-Americans, we find that the trial court's determination that the State's explanations for excusing each of the minority jurors were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented. *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208, 170 L. Ed. 2d 175 (2008); *Powers v. Ohio*, 499 U.S. 400, 404, 111 S. Ct. 1364, 1367, 113 L. Ed. 2d. 411 (1991) ("Although a defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.") (quotation and citation omitted); *Day v. State*, 2013 OK CR 8, ¶ 15, 303 P.3d 291, 299. As appellant ultimately failed to establish purposeful discrimination on the part of the State no relief is required. *Batson*, 476 U.S. at 90, 95, 106 S. Ct. at 1719, 1722. Proposition One is denied.

Exhibit 4, p. 3.

This Court's review of the state court's decision on the *Batson* claim is limited to the record before the state court. *Pinholster*, 563 U.S. at 185. This Court "must determine 'whether it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge.'" *Black v. Workman*, 682 F.3d 880, 896 (10th Cir. 2012) (quoting *Rice*, 546 U.S. at 338). Factual findings made by the state court are presumed correct unless rebutted by Petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). "Even on direct review, without the deference required by the

AEDPA, the Supreme Court stated that a reviewing court must defer to the state trial judge's finding of no racial motivation 'in the absence of exceptional circumstances.'" *Black*, 682 F.3d at 897 (quoting *Snyder v. Louisiana,* 552 U.S. 472, 477 (2008)).

The Supreme Court recently revisited the issue of purposeful discrimination in jury selection in *Foster v. Chatman*, 578 U.S. ___, 136 S. Ct. 1737, 1747 (2016). However, the decision in *Foster* "did not change the *Batson* analysis one iota." *Flowers v. Mississippi*, 579 U.S. ___, 136 S. Ct. 2157, 2158 (2016) (Alito, J. and Thomas, J., dissenting). Indeed, in *Foster*, the Court reiterated the three-step process set forth in *Batson* for determining when a strike is discriminatory. *Foster*, 136 S. Ct. at 1747 (citing *Snyder*, 552 U.S. at 477-478, and *Batson*, 476 U.S. at 96-98). The Court further reiterated that any analysis under *Batson* required deference "to state court factual findings unless [the Court] conclude[s] that they are clearly erroneous." *Foster*, 136 S. Ct. at 1747 (citing *Snyder*, 552 U.S. at 477). After applying the *Batson* analysis to the extremely unique circumstances presented in *Foster*, the Court concluded purposeful discrimination had occurred and remanded the matter to the state court for further proceedings. *Foster*, 136 S. Ct. at 1755.[8] Unlike the facts and circumstances present in *Foster*, Petitioner's claim of purposeful discrimination has absolutely no support in the record.

In this case, the record reflects that at the conclusion of *voir dire* the court asked both parties to exercise their peremptory challenges (Tr. Vol. II, 219). The prosecutor's second peremptory challenge was to prospective juror Dickens, an African-American college professor who held a

[8]The substantial evidence of racial bias in *Foster* included actual notes and comments by the prosecutors in reference to African-American potential jurors coupled with inconsistent reasons given by the prosecutors as grounds for the dismissal of those same jurors. *Foster*, 136 S. Ct. at 1748-1755. No such similar evidence of racial bias exists in this matter.

doctorate in social sciences and had outside knowledge of the rules of evidence (Tr. Vol. I, 31; Tr. Vol. II, 77-79, 152-155, 159-160). The court, without any objection to the challenge by defense counsel, asked the prosecutor for his "race neutral reason" (Tr. Vol. II, 220). The prosecutor responded he was concerned because Mr. Dickens was a professor of liberal arts and, based on his experience, would be too exacting and too liberal (Tr. Vol. II, 220). The court concluded the prosecutor's response was sufficiently race neutral, and noted other African-American persons remained in the jury pool (Tr. Vol. II, 220). Thereafter, the prosecutor exercised its peremptory challenges to excuse prospective jurors De Wassom, Wilson, Carranza, and Martinez (Tr. Vol. II, 220-221). The prosecutor also excused prospective juror Tawil who was an emergency room doctor (Tr. Vol. II, 56-58, 219). After the prosecutor utilized his sixth challenge on prospective juror Martinez, defense counsel stated to the court that he thought the prosecutor's challenges revealed a "pattern" of striking minorities from the jury (Tr. Vol. II, 221). The court disagreed and stated no unlawful pattern had been established given that Ms. Martinez was "hardly involved in the process" and both Ms. Carranza and Ms. De Wassom had "difficulty" understanding the English language (Tr. Vol. II, 221-222). The court's observations are sufficiently supported by the record which reveals Ms. Carranza and Ms. DeWassom both spoke English as a second language and Ms. Martinez had stated her brother should not have been put in jail for drunk driving and that she did not want to be on the jury in this case (Tr. Vol. II, 50-52, 84-85, 89, 128). Furthermore, prospective juror Tawil had worked closely in the same emergency room with another prospective juror, Dr. Victoria Wilson, who was excused by defense counsel (Tr. Vol. II, 56-58, 221).

The prosecutor attempted to utilize one of the State's last strikes to excuse prospective juror Williams, an African-American pastor (Tr. Vol. II, 223). The prosecutor offered a race neutral

reason that she was a pastor who had counseled drug addicts and in his experience pastors had trouble passing judgment as required (Tr. Vol. II, 223). *See, e.g., Hernandez v. New York*, 500 U.S. 352, 360 (1991) ("A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation."). Although the prosecutor's reason was sufficiently race neutral, the court did not allow the strike because it "would have effectively eliminated all the African Americans" from the panel (Tr. Vol. II, 223). During sentencing the court acknowledged that its ruling in *voir dire* on the Williams's strike had been in "error" given that the prosecutor had offered a race neutral reason and the fact that no African-American person was left in the pool was not a basis for preventing the strike (S. Tr. 4-5). *See, e.g., Powers v. Ohio*, 499 U.S. 400, 404 (1991) (noting that a defendant "has no right to a petit jury composed in whole or in part of persons of the defendant's own race" (internal quotation marks and alteration omitted)).

Petitioner argues that the trial court's comments and observations during *voir dire* revealed a pattern of discriminatory excusals by the prosecutor of minority potential jurors. *Petitioner's Brief in Support*, p. 8. However, as reflected at the sentencing hearing, the trial court stated that its error during *voir dire* was in not allowing the prosecutor to strike Ms. Williams from the jury because there had been no "systematic or discriminatory practice" by the prosecutor in exercising peremptory challenges (S. Tr. 5).

In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Supreme Court considered a case where the prosecution peremptorily struck ten of the eleven qualified African-American venire panel. However, in that case, the numbers were the result of jury shuffling, disparate lines of questioning, completely implausible explanations for removal and a twenty year history of discrimination against

African-American jurors. *Miller-El*, 545 U.S. at 265-266. As evidenced by the record, no similar factors existed in this case.

Petitioner further complains that both the trial court, and the OCCA in its review of the trial court's findings, unreasonably applied the procedure set forth in *Batson* to Petitioner's discriminatory pattern claim. In particular, Petitioner argues *Batson* was unreasonably applied because it was the trial court, rather than the prosecutor, which provided race neutral reasons for the prosecutor's excusal of several minority potential jurors. *Petitioner's Brief in Support*, pp. 9-11. However, as reflected in the recitation of the record facts above, the prosecutor did provide sufficient race neutral reasons for excusing minority potential jurors *when queried*. Otherwise, when defense counsel made a blanket statement regarding his view that the prosecutor had a discriminatory purpose for excusing some minorities from the panel,[9] the court stated, based on its observations of the *voir dire* proceedings, that the potential jurors had been excused for legitimate race neutral reasons and that no pattern had been established by Petitioner (Tr. Vol. II, 221-222). The court's observations were supported by the record (Tr. Vol. II, 50-52, 84-85, 89, 128). Hence, there are no "exceptional circumstances" which negate this Court's duty to defer to the state trial judge's finding of no racial motivation. *See Black*, 682 F.3d at 897 ("Even on direct review, without the deference required by the AEDPA, the Supreme Court stated that a reviewing court must defer to the state trial judge's finding of no racial motivation 'in the absence of exceptional circumstances.'" (quoting *Snyder*, 552 U.S. at 477)). *See also Foster*, 136 S. Ct. at 1747 (reiterating that any analysis under *Batson* requires

[9]There is absolutely no indication from the record that all *minority* potential jurors were excused from the panel. Rather, the trial court noted only that all but one African-American person had been eliminated by the parties from the panel during the *voir dire* proceedings (Tr. Vol. II, 223).

deference "to state court factual findings unless [the Court] conclude[s] that they are clearly erroneous" (citing *Snyder*, 552 U.S. at 477)).

Petitioner carries the ultimate burden of proving purposeful discrimination. *See Rice*, 546 U.S. at 338 ("the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike" (internal quotations omitted)). Based on the circumstances presented during *voir dire*, Petitioner failed to carry his burden in this case. The record reflects the prosecutor, when queried, offered race neutral and plausible reasons for excusing the potential jurors from the pool. Defense counsel offered nothing concrete to rebut those reasons and nothing in the record suggests any racial motivation on the part of the prosecutor in exercising the State's peremptory challenges. *Snyder*, 552 U.S. at 477. As a result, the trial court's rulings during *voir dire* did not constitute an abuse of discretion and the OCCA's decision upholding the trial court's decision was not an unreasonable application of *Batson* in light of the facts presented in the record. 28 U.S.C. § 2254(d)(2). As a result, Petitioner's first ground for relief is without merit and should be denied by this Court. *Black*, 682 F.3d at 897.

PROPOSITION TWO

PETITIONER HAS FAILED TO DEMONSTRATE THE OCCA'S DECISIONS DENYING HIS CONFRONTATION CLAUSE CLAIMS WITH RESPECT TO THE ADMISSION OF THE STATEMENTS OF TERRICO BETHEL AND THE PRELIMINARY HEARING TESTIMONY OF ALLEN SHIELDS AT TRIAL WERE EITHER CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, SUPREME COURT LAW.

Petitioner alleges in his second ground for relief that the trial court's admission of the out-of-court statements of Terrico Bethel and the preliminary hearing testimony of Allen Shields violated