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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT GRANTING PARTIAL RELIEF (JULY 2, 2021)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner-Appellant,

v.

JIMMY MARTIN, Warden,

Respondent-Appellee.

PUBLISH

No. 19-5091

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:16-CV-00433-JED-FHM)

Before: MORITZ, SEYMOUR, and BRISCOE,
Circuit Judges.

MORITZ, Circuit Judge.

An Oklahoma jury convicted Alonzo Johnson of murder and conspiracy to commit murder. After unsuccessfully challenging his convictions in state court, Johnson filed a 28 U.S.C. § 2254 petition seeking federal

habeas relief. As relevant here, he asserted that the prosecution exercised its peremptory strikes in a racially discriminatory manner to exclude minorities from the jury, in violation of his Fourteenth Amendment rights as set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). Johnson also asserted, in relevant part, that gruesome evidence, juror misconduct, and cumulative error rendered his trial fundamentally unfair. The district court denied relief.

For the reasons explained below, we affirm the denial of relief on Johnson's gruesome-evidence, juror-misconduct, and cumulative-error claims. But because we conclude that the Oklahoma Court of Criminal Appeals (OCCA) relied on an unreasonable factual determination and unreasonably applied *Batson* to reject Johnson's *Batson* claim and further determine that Johnson raised a prima facie case of discrimination under the first step of *Batson*, we reverse the district court's denial of habeas relief on Johnson's *Batson* claim and remand for further proceedings consistent with this opinion.

Background

Although we will add more facts as needed to our analysis below, we begin by briefly setting the scene.[1] This appeal arises from a murder-for-hire plot involving five individuals: Mohammed Aziz, Allen Shields (Allen), Fred Shields (Fred), Terrico Bethel, and Johnson. The victim was Neal Sweeney, a fuel supplier.

Sweeney's fuel marketing company supplied fuel to convenience stores, including stores owned by Aziz.

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[1] We take these undisputed facts from the district court's decision below.

As a result of a dispute involving Aziz's nonpayment of bills, Sweeney obtained a default judgment against Aziz. Aziz, who had "developed an 'intense hatred' toward Sweeney," approached Allen and asked if Allen knew anyone who could kill someone for him. App. 30 (quoting R. vol. 1, 62). Allen spoke to his brother, Fred, about finding someone to do the job. Fred set the price for the murder at $10,000 and recruited Bethel to carry it out.

Fred also recruited Johnson, a cousin of the Shields brothers. Johnson "purportedly obtained the getaway car and helped coordinate with Aziz." *Id.* Bethel drove the car to Sweeney's office and shot Sweeney at close range, in the head. Later, law enforcement apprehended Fred "on a different crime[,] and [he] exposed the conspiracy" to kill Sweeney "in an effort to make a deal." *Id.* at 30-31.

The State charged Johnson with first-degree murder and conspiracy to commit first-degree murder.[2] His defense at trial centered on arguments that his involvement in the murder plot was minimal and that his coconspirators' testimony against him was unreliable (Aziz testified at Johnson's trial, and the State introduced Allen's preliminary-hearing testimony). The jury convicted Johnson on both counts. The trial court sentenced him to life imprisonment on each count, to run consecutively.

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[2] The other men faced similar charges. A jury convicted Fred and Bethel of first-degree murder, among other things, and both received life sentences. Allen faced a conspiracy charge but died before Johnson's trial. Aziz pleaded guilty to solicitation of murder and was sentenced to 35 years in prison.

Johnson filed a direct appeal, raising eighteen issues, and the OCCA affirmed. *Johnson v. State*, No. F-2013-173 (Okla. Crim. App. July 17, 2014) (unpublished) (*Johnson I*). Johnson then sought postconviction relief, which the state trial court denied. *Johnson v. State*, No. CF-2009-2738 (Tulsa Cnty. Dist. Ct. Oct. 6, 2015) (unpublished) (*Johnson II*). The OCCA affirmed the denial of postconviction relief. *Johnson v. State*, No. PC-2015-923 (Okla. Crim. App. Apr. 7, 2016) (unpublished) (*Johnson III*).

Johnson then filed the § 2254 petition underlying this appeal, raising seven claims. The district court denied the petition and declined to issue a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A). Johnson sought to appeal to this court and filed a combined opening brief and request for a COA. We granted him a partial COA to appeal the district court's resolution of four of his seven claims: the *Batson* claim, the gruesome-evidence claim, the juror-misconduct claim, and the cumulative-error claim.[3] *See* § 2253(c)(3).

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[3] The COA order does not expressly deny a COA on Johnson's three remaining claims: (1) that the admission of Bethel's recorded statements and Allen's preliminary-hearing testimony violated his rights under the Confrontation Clause, (2) that the evidence was insufficient to support his conviction, and (3) that he was denied the right to present a defense. Perhaps recognizing the partial COA grant as an implicit denial of a COA on his remaining claims, Johnson does not reassert his desire for a COA on these claims in his reply brief. In the interest of clarity, we now expressly deny a COA on these three remaining claims, concluding that reasonable jurists could not debate the district court's resolution of them. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that to obtain COA, "petitioner must demonstrate that reasonable jurists would find the district

Analysis

We review the district court's legal analysis de novo. *Smith v. Duckworth*, 824 F.3d 1233, 1241-42 (10th Cir. 2016). In so doing, we remain bound by the constraints of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. *Id.* at 1240-41. AEDPA requires a state prisoner seeking federal habeas relief to show that the state court's resolution of his or her claims (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate[-]court proceeding." § 2254(d). The two prongs of § 2254(d) thus impose "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Smith*, 824 F.3d at 1241 (quoting *Burt v. Titlow*, 571 U.S. 12, 19-20 (2013)).

Under § 2254(d)(1), "[w]hether the law is clearly established is *the* threshold question." *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008). "[W]ithout clearly established federal law, a federal habeas court need not assess whether a state court's decision was 'contrary to' or involved an 'unreasonable application' of such law." *Id.* at 1017 (quoting § 2254(d)(1)). But if such clearly established law exists, a state-court decision is contrary to it if the state court "applies a rule that contradicts the governing law set forth in Supreme Court cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." *Smith*, 824 F.3d at 1241

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court's assessment of the constitutional claims debatable or wrong").

(quoting *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016)). And a state-court decision is an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000).

Under § 2254(d)(2), "[w]e will not conclude a state court's factual findings are unreasonable 'merely because we would have reached a different conclusion in the first instance.'" *Smith*, 824 F.3d at 1241 (quoting *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015)). Instead, we "defer to the state court's factual determinations so long as 'reasonable minds reviewing the record might disagree about the finding in question.'" *Id.* (quoting *Brumfield*, 576 U.S. at 314). In line with this deference, we presume that a state court's factual findings are correct, "and the petitioner bears the burden of rebutting that presumption by 'clear and convincing evidence.'" *Id.* (quoting § 2254(e)(1)).[4] But "'deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield*, 576 U.S. at 314 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*)). Accordingly, "if the petitioner can show that 'the state courts plainly misapprehend[ed] or misstate[d] the

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[4] The Supreme Court has "not yet 'defined the precise relationship between § 2254(d)(2) and § 2254(e)(1).'" *Brumfield*, 576 U.S. at 322 (quoting *Titlow*, 571 U.S. at 18). Accordingly, it is "not entirely clear whether § 2254(e)(1)'s presumption applies to our § 2254(d)(2) analysis." *Vreeland v. Zupan*, 906 F.3d 866, 880 n.3 (10th Cir. 2018). But because Johnson "appears to concede it does, we need not resolve this 'open question'" here. *Id.* (quoting *Sharp v. Rohling*, 793 F.3d 1216, 1228 n.10 (10th Cir. 2015)).

record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.'" *Smith*, 824 F.3d at 1241 (alterations in original) (quoting *Ryder*, 810 F.3d at 739).

I. *Batson* Claim

Johnson—who is African American—argues that the district court erred in denying his claim that the prosecution used its peremptory challenges to systematically exclude racial minorities from the jury in violation of *Batson*. *Batson* held that the "Equal Protection Clause prohibits the prosecution's use of peremptory challenges to exclude potential jurors on the basis of their race." *Saiz v. Ortiz*, 392 F.3d 1166, 1171 (10th Cir. 2004). In other words, *Batson* recognized "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85-86.

A trial court faced with a *Batson* challenge must apply a three-step burden-shifting analysis. *See id.* at 96-98. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, . . . the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (citation omitted). "Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination." *Id.*

A. Additional Facts and Procedural Background

At Johnson's trial, the prosecutor exercised his first six peremptory challenges in the following order: (1) Dr. Tawil, (2) Mr. Dickens, (3) Ms. Aramburo de Wassom, (4) Ms. Wilson, (5) Ms. Carranza, and (6) Ms. Martinez. When the prosecutor moved to dismiss Mr. Dickens, an African American, from the jury pool, the trial court asked: "Your race neutral reason?" R. vol. 3, 449. The prosecutor responded: "Judge, he has a Ph.D., [and] we're concerned about him being a professor of liberal arts. It's been my practice to not keep those types of educated people, Ph.D.s in liberal arts, on the jury. We think they're too exacting at times, too liberal." *Id.* The trial court then stated: "Well, I'll determine there's a race[-]neutral reason. There are other prospective African Americans on the jury." *Id.*

After the prosecutor moved to dismiss Ms. Martinez with his sixth strike, defense counsel stated:

> Your honor, I'd like to point out at this point that I think every peremptory challenge . . . so far[,] except Ms. Wilson[,] has been of a minority[:] Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, [Ms. Martinez],[5] and

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5 Defense counsel repeated "Ms. Carranza," but it appears that he intended to say "Ms. Martinez": she was the other minority female excused, and the court referred to "Ms. Martinez" in its response to defense counsel. R. vol. 3, 450.

> Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.[6]

Id. at 450. The trial court responded:

> Well, I don't think that this establishes a pattern. Again, in terms of— Ms. Martinez, I won't state their reasons for them, but Ms. Martinez was patently—she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here.

Id. at 450-51.

The prosecutor next sought to excuse Ms. Williams, stating—without being prompted by either a defense objection or a question from the trial court—that although Ms. Williams was "African American, . . . [the] race[-]neutral reason for her is she's a pastor. I think pastors traditionally are very, very forgiving, [and] have trouble with judgment. She's worked with drug addicts and counseled them in the past[,] showing . . . a propensity towards treatment rather than judgment." *Id.* at 452. The trial court interrupted this explanation and said, "Well, you would have effectively eliminated all the African Americans[,] and I'm not going to do that." *Id.*

Later, at sentencing, the trial court stated that it "probably made an error during the voir dire to the

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[6] The record does not reveal the specific race of any of these six jurors except for Mr. Dickens, who the court identified as African American. But when defense counsel identified five of these six jurors as minorities, neither the trial court nor the prosecutor disputed that characterization.

detriment . . . of the State when" the prosecutor sought to excuse Ms. Williams. R. vol. 5, 758. Specifically, the trial court explained that it had recently been reminded that the absence of any minorities on the jury "was not a basis to prevent a strike"; instead, "there needed to be a finding that there was either [a] systematic or [a] specific discriminatory practice." *Id.* at 759. Thus, because the absence of any minorities was the rationale for the trial court's decision to reject the prosecutor's peremptory challenge to Ms. Williams, the trial court acknowledged that it "made an error." *Id.*

Johnson then raised his *Batson* challenge on direct appeal, arguing that the "prosecutor systematically removed minorities from the jury." R. vol. 1, 181. Rejecting this argument in a single paragraph, the OCCA first stated "the trial court did not abuse its discretion when it found that the State did not engage in systemic or specific discrimination." *Johnson I*, slip op. at 3. The OCCA then acknowledged the trial court's error in refusing to allow the prosecutor to excuse Ms. Williams and further noted 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." *Id.* Last, the OCCA concluded that Johnson was not entitled to relief because he had "failed to establish purposeful discrimination on the part of the State." *Id.*

Johnson again asserted his *Batson* claim in his state-court application for postconviction relief. Both the state trial court and the OCCA held that because Johnson brought his *Batson* claim on direct appeal, consideration of its merits in postconviction proceedings

was barred by res judicata. *Johnson II*, slip op. at 7; *Johnson III*, slip op. at 3.

Reviewing the OCCA's adjudication of this claim, the district court began with the proposition that "[b]ecause the OCCA applied *Batson*, relief is only available if it 'was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge.'" App. 35 (quoting *Collins*, 546 U.S. at 338). Additionally, the district court relied on *Black v. Workman* for the proposition that a habeas court must "defer to the state trial judge's finding of no racial motivation 'in the absence of exceptional circumstances.'" 682 F.3d 880, 897 (10th Cir. 2012) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). The district court then determined that no exceptional circumstances existed here. In so doing, the district court specifically noted the prosecutor's explanation for striking Mr. Dickens (he had a Ph.D.). It also determined that the record supported the explanations provided by the trial court for the dismissal of the other minority jurors. Accordingly, it found no evidence of racial motivation and declined to "disturb the OCCA's application of *Batson*." App. 36.

B. Discussion

On appeal, Johnson contends that the district court erred by mischaracterizing his *Batson* claim as arising under step three of *Batson*. In so doing, Johnson renews the second-step *Batson* argument he raised in his habeas petition. And he further asserts—as required by the barrier imposed by § 2254(d)—that the OCCA (1) unreasonably applied *Batson* in finding the second step satisfied where the trial court, rather than the prosecutor, supplied race-neutral reasons

for the strikes at issue and (2) found and relied on an unreasonable fact when it determined that the prosecutor supplied race-neutral reasons for the challenged strikes.

1. The State's Arguments

Before turning to Johnson's arguments, we first address and reject two points raised by the State.

i. Procedural Bar

The State suggests in passing[7] that this court should not consider Johnson's *Batson* claim because he failed to raise it in his direct appeal to the OCCA. In so doing, the State appears to be asserting a two-part procedural-bar argument:

(1) Johnson did not raise his specific step-two *Batson* argument in his direct appeal, and (2) when he raised it in his application for postconviction relief, the OCCA implicitly rejected it on waiver grounds as an argument that could have been but was not raised on direct appeal. *See Harmon v. Sharp*, 936 F.3d 1044, 1060 (10th Cir. 2019) (noting that "[o]n habeas review, this court does not address issues that have been defaulted in state court on an independent and adequate state procedural ground" (quoting *English*

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[7] Specifically, the State devotes two sentences to this argument, asserting that because Johnson "did not make this argument to the OCCA on direct appeal," it "would be improper" for us to consider it now. Aplee. Br. 19. In support, the State cites only *Sexton v. Beaudreaux*, a case that did not concern procedural bar. 138 S. Ct. 2555, 2560 (2018) (per curiam) (noting in passing that Ninth Circuit erred when it "considered arguments against the state court's decision that [petitioner] never even made in his state habeas petition").

v. Cody, 146 F.3d 1257, 1259 (10th Cir. 1998))); *Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013) (providing that in Oklahoma postconviction proceedings, "issues that were not raised previously on direct appeal, but which could have been raised, are waived").

We reject this argument because, according to both the state trial court and the OCCA, Johnson *did* raise his *Batson* claim on direct appeal. *See Johnson II*, slip op. at 7; *Johnson III*, slip op. at 3. Indeed, the State acknowledged as much below, noting that (1) Johnson "raised this claim on direct appeal to the OCCA" and "[t]he OCCA addressed the claim on the merits and denied . . . relief," and (2) Johnson "*also* raised this claim in his post[]conviction proceeding[,] but the OCCA, *noting the claim had been previously raised and addressed in [Johnson]'s direct appeal*, declined to again address the claim as it was 'barred as res judicata.'" R. vol. 1, 127 & n.7 (emphases added) (quoting *Johnson III*, slip op. at 3). Given that the state courts determined this particular argument was raised on direct appeal, we reject the State's procedural-bar argument.

ii. Type of *Batson* Error

The State next contends that Johnson is not entitled to habeas relief because he alleges trial-court error at the second step of *Batson*, but the trial court's ruling stopped at the first step of *Batson*. In other words, the State contends that the trial court's response to defense counsel's objection about a pattern of striking minorities amounted to a ruling that defense counsel failed to establish a prima facie case of discrimination. Thus, continues the State, the *Batson* inquiry never proceeded to the second step, and no second-step error could have occurred.

Although the State's interpretation may be plausible, we ultimately reject it. Recall that after the State's sixth peremptory challenge, defense counsel objected that "there's a pattern here . . . of striking all minorities off this jury." R. vol. 3, 450. The trial court responded:

> Well, I don't think that this establishes a pattern. Again, in terms of— Ms. Martinez, I won't state their reasons for them, but Ms. Martinez was patently—she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here.

Id. at 450-51. In these four sentences, the trial court stated at the beginning and at the end that there was no pattern of discrimination. The State contends that this conclusion, combined with the trial court's decision not to ask the prosecutor for race-neutral reasons, "was an implicit ruling that [Johnson] failed to make a prima facie showing that the State's use of peremptory challenges . . . showed a pattern of discrimination." Aplee. Br. 20; *see also Saiz*, 392 F.3d at 1177-78 (noting that "initial obligation under *Batson* [is] to make a prima facie showing that the prosecution's peremptory strikes were discriminatory" and "infer[ring] from the trial court's decision not to go on to step two of the *Batson* analysis (asking the prosecution to explain its peremptory strike) that it concluded that [the defendant] had failed to establish a prima facie case of discrimination").

But critically, the State's proposed interpretation of the trial court's ruling is contrary to the OCCA's interpretation. In rejecting Johnson's *Batson* claim,

the OCCA specifically approved the trial court's procedure at the second (and third) step of *Batson* when it stated 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." *Johnson I*, slip op. at 3. Because the OCCA treated the trial court's ruling as going beyond the first step of *Batson*, we reject the State's proposed interpretation of the trial court's ruling as limited to *Batson*'s first step.

2. Johnson's Arguments

Having rejected the State's overarching arguments in favor of affirming the district court's denial of habeas relief on Johnson's *Batson* claim, we now turn to Johnson's arguments in favor of reversal.

i. The District Court's Decision

As an initial matter, we agree with Johnson that the district court erred by treating his *Batson* claim as aimed at the third step of *Batson*. Johnson plainly asserted in his habeas petition that the trial court erred at the second step of *Batson* by failing to ask the prosecutor for race-neutral reasons. But to reject his claim, the district court relied on *Black* and *Snyder*, which addressed challenges to rulings at the third step of the *Batson* analysis. *See Black*, 682 F.3d at 895-96 (noting that "the prosecutor's explanation satisfied step two of the *Batson* three-step process" and moving on to "determine whether 'it was unreasonable to credit the prosecutor's race-neutral explanations'" (quoting *Collins*, 546 U.S. at 338)); *Snyder*, 552 U.S. at 479, 484-85 (considering plausibility of "the

prosecution's two proffered grounds for striking" juror and noting that "the question presented at the third stage of the *Batson* inquiry is 'whether the defendant has shown purposeful discrimination'" (quoting *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005) (*Miller-El II*) (Thomas, J., dissenting))). Accordingly, in our de novo review of the district court's legal analysis, we depart from the district court's step-three analysis and focus specifically on Johnson's step-two argument. *See Smith*, 824 F.3d at 1241-42.

ii. § 2254(d)

To obtain habeas relief, Johnson must first pass through the barrier imposed by § 2254(d). On this point, Johnson advances arguments under both prongs, asserting that the OCCA denied relief based on an unreasonable application of *Batson* under subsection (d)(1) and an unreasonable determination of the facts under subsection (d)(2). *See* § 2254(d). Recall, again, that the OCCA's discussion of Johnson's *Batson* claim spanned only three substantive sentences:

> 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. 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. As [John-

> son] ultimately failed to establish purposeful discrimination on the part of the State[,] no relief is required.

Johnson I, slip op. at 3 (emphasis added) (citations omitted). Clearly, in the second of these three sentences, the OCCA expressly approved of the trial court's determination that the prosecutor's "*explanations* for excusing *each* of the minority jurors were legitimate race-neutral *reasons*." *Id.* (emphases added).

But this conclusion is factually incorrect. The record plainly shows that the trial court only determined that *one* explanation offered by the prosecutor for excusing *one* minority juror was a legitimate race-neutral *reason*: it accepted that the prosecutor struck Mr. Dickens because he had a Ph.D. The prosecutor did not offer any reasons for his next set of strikes. Instead, the trial court provided its *own* reasons for the strikes, speculating as to what the prosecutor's reasons might have been. And paradoxically, it did so after declaring that it would not "state [the prosecutor's] reasons." R. vol. 3, 450. The trial court also later rejected the prosecutor's proffered reason for striking Ms. Williams.[8]

Accordingly, Johnson has shown by clear and convincing evidence that the OCCA "plainly misapprehend[ed] or misstate[d] the record" when it purported to approve the trial court's acceptance of the

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[8] The trial court eventually concluded that it could have and perhaps should have accepted the prosecutor's reason for striking Ms. Williams. But such belated recognition does not change what happened during jury selection, which was that the trial court rejected the prosecutor's proffered reason and did not allow the prosecutor to strike Ms. Williams.

prosecutor's multiple race-neutral reasons for his strikes—in reality, the trial court accepted only one such reason from the prosecutor and merely speculated as to the other reasons, which it supplied itself. *Smith*, 824 F.3d at 1241 (alterations in original) (quoting *Ryder*, 810 F.3d at 739); *see also* § 2254(d)(2), (e)(1). The OCCA then relied on this unreasonable factual determination to reject Johnson's *Batson* challenge and find no purposeful discrimination. *See Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011) (emphasizing that "to receive relief under [§ 2254(d)(2)], the petitioner must show that the state court's adjudication of the claim 'resulted in a decision that was *based on* an unreasonable determination of the facts in light of the evidence presented'" (quoting § 2254(d)(2))).

Moreover, to the extent that the OCCA considered the trial court's sua sponte speculation about potential race-neutral reasons as part of the *Batson* analysis, doing so was an unreasonable application of *Batson*. The second step of *Batson* specifically requires "*[t]he prosecutor* . . . [to] articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 97-98 (emphasis added); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) ("As the *Batson* Court explained and as the Court later reiterated, once a prima facie case of racial discrimination has been established, *the prosecutor must provide* race-neutral reasons for the strikes." (emphasis added)). And *Batson* means what it says: the court must ask the prosecutor to provide reasons, rather than merely speculating about what such reasons might be. *See Johnson v. California*, 545 U.S. 162, 172 (2005) ("The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and

imperfect speculation when a direct answer can be obtained by asking a simple question."); *Flowers*, 139 S. Ct. at 2244 ("The Court has explained that 'the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.'" (quoting *Snyder*, 552 U.S. at 477)); *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) (noting that speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for peremptory strike).

Thus, when a trial court offers its own speculation as to the prosecutor's reasons for striking minority jurors, it essentially disregards its own core function under *Batson*—to evaluate the reasons offered by the prosecutor, including the prosecutor's demeanor and other contextual information, in order to determine the prosecutor's true intent. *See Flowers*, 139 S. Ct. at 2243-44. And in that regard, it matters not a whit that the trial court may have offered perfectly good reasons for striking the minority jurors. As the Ninth Circuit explained in a factually analogous case, "it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken." *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) (*Paulino I*); *see also id.* at 1089-90 (finding that trial court "clearly contravened" *Batson* when it "offered, sua sponte, its speculation as to why the prosecutor may have struck the five potential jurors in question"). Similarly, the Third Circuit faulted a state appellate court for "conflat[ing] steps one and two of the *Batson* analysis in the sense that it identified and then analyzed potential justifications for the challenged strikes—something that should not occur until step two—in its step[-]one analysis of whether [petitioner]

had successfully established a prima facie case." *Hardcastle v. Horn*, 368 F.3d 246, 256 (3d Cir. 2004); *see also id.* at 261 (noting "the *Batson* Court's emphasis on the subjective intent of the prosecutor").

In line with these authorities, we hold that the OCCA's reliance on the trial court's sua sponte speculation about the prosecutor's reasons was an unreasonable application of *Batson* to Johnson's claim of discriminatory peremptory strikes. *See Brinson v. Vaughn*, 398 F.3d 225, 233 (3d Cir. 2005) (finding that state court unreasonably applied *Batson* to reject claim of discriminatory strikes where "the trial judge did not follow the three-step process outlined in *Batson*," including by "not call[ing] upon the prosecutor to state his reasons for the contested strikes"). Simply put, because *Batson* mandates that the prosecutor supply the race-neutral reasons, it was not reasonable for the OCCA to accept the trial court's speculation about those reasons in lieu of the prosecutor's actual reasons.

iii. The *Batson* Test

Because the OCCA based its decision on an unreasonable factual finding and also unreasonably applied *Batson*, we review Johnson's *Batson* claim de novo, without deferring to the OCCA. *See Milton v. Miller*, 744 F.3d 660, 670-71 (10th Cir. 2014) (explaining that if petitioner satisfies § 2254(d)(1), federal habeas court reviews petitioner's claim de novo, "rather than deferring to the OCCA's resolution of that claim"); *Byrd*, 645 F.3d at 1172 (explaining that if petitioner satisfies § 2254(d)(2), we review claim de novo and without AEDPA deference).

Under the first step of *Batson*, Johnson "must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson*, 545 U.S. at 168 (quoting *Batson*, 476 U.S. at 93-94). This step is not "so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." *Id.* at 170. On the contrary, "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* And "the methods by which prima facie cases c[an] be proved" are "permissive." *Id.* at 169 n.5.

Here, to establish an inference of discrimination, Johnson primarily alleges a pattern of discrimination in which the prosecutor used five of his first six peremptory strikes to excuse minority jurors.[9] And a prosecutor's pattern of strikes against minority jurors is enough, on its own, to establish a prima facie case of discrimination. *See Batson*, 476 U.S. at 97; *Paulino I*, 371 F.3d at 1092 (finding that "the excusal of five out of six black jurors by means of five out of six

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[9] Johnson further supports his position by noting the prosecutor's later failed attempt to remove Ms. Williams, the last remaining African American, from the jury. Although this attempt might support an inference of discrimination, we do not consider it here because we are concerned with the facts as they existed at the time of Johnson's objection and before the prosecutor's attempt to strike Ms. Williams. *See Paulino I*, 371 F.3d at 1091 (evaluating prima facie case of discrimination by "looking at the pattern of strikes only at the time of [the] objection").

peremptories" was sufficient "pattern of strikes t[o] raise[] a plausible inference of discrimination");

Brinson, 398 F.3d at 234-35 (concluding that "[t]he pattern of strikes alleged by the defense is alone sufficient to establish a prima facie case" when prosecutor "used 13 of 14 strikes against African Americans"); *Holloway*, 355 F.3d at 722 (finding prima facie case established when prosecutor used 11 of 12 strikes against African Americans).

Nevertheless, the State contends that there is no inference of discrimination here because Johnson "did not even make a record as to the races" of each of the jurors at issue. Aplee. Br. 21. But as Johnson replies, neither the trial court nor the prosecutor objected to defense counsel's representation that the prosecutor had used five of six strikes against minorities. On the contrary, the trial court implicitly accepted that representation by responding with its own race-neutral reasons for why the prosecutor might have struck three of the jurors at issue. Moreover, as the State acknowledges, "racial identity between the defendant and the excused prospective juror is not necessary for a *Batson* claim." *Id.* (emphasis omitted); *see also Powers v. Ohio*, 499 U.S. 400, 416 (1991) (holding that *Batson* does not require racial identity between defendant and prospective juror). Thus, the absence of a record as to the specific racial makeup of the five minority jurors is not fatal to Johnson's prima facie case of discrimination.

The State further argues that Johnson fails to establish a prima facie case of discrimination because "there were obvious reasons for . . . dismissal that prevented a prima facie showing," including that two of the excused jurors had difficulty with English and

that one did not want to be a juror. Aplee. Br. 21. But even if we can consider such allegedly obvious reasons in assessing Johnson's prima facie case, those reasons do not significantly undermine Johnson's prima facie case as they did in the cases the State relies on. For example, in *Johnson v. Campbell*, the Ninth Circuit found no prima facie showing of discrimination based in part on "an obvious neutral reason for the challenge." 92 F.3d 951, 953 (9th Cir. 1996). But that "obvious neutral reason" played a significant role in undoing any inference of discrimination because of the weakness of the prima facie case to begin with: the *Batson* challenge involved only a single juror allegedly struck because of his sexual orientation. *Id.* Here, by contrast, Johnson has pointed to a pattern of striking five of six minority prospective jurors.[10] Accordingly, we reject the State's arguments and conclude that the clear pattern of strikes against five of six minority jurors establishes an inference of discrimination.

Thus, Johnson has made a prima facie showing of racial discrimination under *Batson*. *See* 476 U.S. at 97. Although such a showing "does not necessarily establish racial discrimination," it "is more than sufficient to require a trial court to proceed to step two of the *Batson* procedure." *Brinson*, 398 F.3d at 235.

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[10] The State also cites *Capers v. Singletary*, 989 F.2d 442 (11th Cir. 1993), and *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986) (per curiam). We find *Capers* unpersuasive here because it applied *Swain v. Alabama*, 380 U.S. 202 (1965), which *Batson* overruled. *See Capers*, 989 F.2d at 444 & n.2. And the court in *Dennis* did not, contrary to the State's assertion, consider any obvious neutral reasons at the prima facie stage. *See* 804 F.2d at 1211. It therefore does not support the State's argument on this point.

Yet the trial court did not do so, "relying instead on its own speculation as to what might have been the prosecutor's reasons." *Paulino I*, 371 F.3d at 1092. We therefore conclude that the trial court erred.

iv. Remedy

But this error does not automatically entitle Johnson to habeas relief. Because no court later held an evidentiary hearing, the State has never presented evidence of the prosecutor's actual, nondiscriminatory reasons for striking the five minority jurors. *See id.* In this circumstance, it is not "appropriate to take the extraordinary step of granting habeas corpus relief without first providing the [S]tate with a hearing at which it could offer evidence in support of the challenged strikes." *Hardcastle*, 368 F.3d at 261. Instead, the better path is to remand for an evidentiary hearing to provide the State with "a chance to present evidence in support of its peremptory strikes." *Id.* at 250; *see also Madison v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1333, 1339 (11th Cir. 2012) (*Madison I*) (finding unreasonable application of *Batson* and prima facie case of discrimination; "remand[ing] the case for the district court to complete the final two steps of the *Batson* proceedings").

We therefore reverse the district court's ruling on Johnson's *Batson* claim and remand to the district court for a *Batson* reconstruction hearing. *See Paulino v. Harrison*, 542 F.3d 692, 700 (9th Cir. 2008) (*Paulino II*); *cf. United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (remanding for district court to conduct hearing on prosecutor's reasons for strike where defendant was convicted pre-*Batson* such that "neither the trial court nor the parties were aware of

the standards to be used in evaluating the . . . proffered reasons for striking [the juror]"). A *Batson* reconstruction hearing is "an evidentiary hearing that takes place some[]time after the trial, where the prosecutor testifies to [his or] her actual reasons for striking the venire[]members in question, or the State presents circumstantial evidence of those reasons." *Paulino II*, 542 F.2d at 1314; *see also Madison v. Comm'r, Ala. Dep't of Corr.*, 761 F.3d 1240, 1249-50 (11th Cir. 2014) (*Madison II*) (explaining that *Batson* reconstruction hearing is proper and not contrary to anything in *Cullen v. Pinholster*, 563 U.S. 170 (2011), "or any other principle of habeas corpus").

Before conducting such a hearing, the district court should consider whether the passage of over eight years since Johnson's trial or any other circumstances have made such an inquiry "impossible or unsatisfactory." *Jordan v. Lefevre*, 206 F.3d 196, 202 (2d Cir. 2000). If the district court concludes that a *Batson* reconstruction hearing is impossible or unsatisfactory, it must grant habeas relief in the form of an order that Johnson be released from custody unless the State grants him a new trial within 120 days from the entry of the district court's order. *See id.* (noting that if district court decides *Batson* reconstruction hearing is not possible, it should "order that the state grant [petitioner] a new trial"); *Miller-El II*, 545 U.S. at 266 (granting relief on *Batson* claim and "remand[ing] for entry of judgment for petitioner together with orders of appropriate relief"), *decision on remand*, 142 F. App'x 802, 803 (5th Cir. 2005) (unpublished) (remanding to district court to enter order directing petitioner's release "from custody unless the State

grants [him] a new trial within 120 days from the date of the entry of the district court's order").

If the district court determines that a *Batson* reconstruction hearing will not be impossible or unsatisfactory, it shall conduct one, thereby providing the State with an opportunity to present evidence as to the prosecutor's race-neutral reasons for the challenged strikes. *See Brinson*, 398 F.3d at 235; *Paulino I*, 371 F.3d at 1092; *Hardcastle*, 368 F.3d at 250; *Jordan*, 206 F.3d at 202; *Madison I*, 677 F.3d at 1339. The district court should then make findings at the third step of *Batson* as to whether the strikes were based on race. *See Brinson*, 398 F.3d at 235; *Paulino II*, 542 F.3d at 702 (holding that even if prosecutor fails to come forward with step-two reason, trial court must complete step three). If the district court concludes that Johnson has not met his ultimate burden of showing purposeful discrimination, it should deny Johnson's claim. But if Johnson can show purposeful discrimination, the district court should grant habeas relief as described above, ordering Johnson released unless retried within a limited period of time.[11]

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[11] Although the parties do not discuss as much, there appears to be some dispute about where a *Batson* reconstruction hearing can or should take place. The Second Circuit, without explanation, has said that the district court may either conduct the hearing itself or remand the case to state court via a conditional writ to hold the hearing. *See, e.g.*, *Galarza v. Keane*, 252 F.3d 630, 640-41 (2d Cir. 2001); *Tankleff v. Senkowski*, 135 F.3d 235, 250 (2d Cir. 1998). But at this point, Johnson has established only a prima facie case of discrimination. In this situation, we cannot grant a writ of habeas corpus, even conditionally, "because we cannot hold as a matter of law, on the undeveloped record in this case, that [Johnson] is entitled to habeas relief." *Keller v. Petsock*, 853 F.2d 1122, 1129-30 (3d Cir. 1988); *see also*

II. Gruesome Evidence

Johnson next argues that the introduction of gruesome evidence about the murder and crime scene prejudiced him and resulted in a fundamentally unfair trial. At trial, Johnson unsuccessfully objected to the introduction of this evidence, which included: (1) testimony from a witness who explained that she used a

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§ 2254(a) (providing that state prisoner may obtain writ in federal court "only on the ground that he [or she] is in custody in violation of the Constitution or laws or treaties of the United States"); *Billiot v. Puckett*, 135 F.3d 311, 316 n.5 (5th Cir. 1998) (explaining "that a federal habeas court cannot 'remand' a case to the state courts"; it can only grant writ of habeas corpus, conditionally or otherwise). As such, we agree with the Third Circuit that in these circumstances, § 2254 does not authorize us "to remand a habeas corpus petition to a state court for an evidentiary hearing." *Hardcastle*, 368 F.3d at 261 (quoting *Keller*, 853 F.2d at 1129). We further agree that "even if we were able to remand directly to the state court, neither this [c]ourt nor the Supreme Court has held 'that the state courts should, after having foregone the opportunity to hold an evidentiary hearing and resolve the issue, be given another opportunity to do so.'" *Hardcastle*, 368 F.3d at 261 (quoting *Keller*, 853 F.2d at 1129); *see also Rose v. Lee*, 252 F.3d 676, 688 & n.11, 689-91 (4th Cir. 2001) (finding state court's adjudication contrary to clearly established federal law but "disagree[ing] with the district court's conclusion that a federal court lacks authority to conduct an independent review of the claim" and rejecting district court's remand of claim to state court). Indeed, in at least one case, even the Second Circuit remanded for a *Batson* reconstruction hearing in the district court without mentioning the option of remanding the case to state court. *See Jordan*, 206 F.3d at 202. Moreover, other circuits have simply remanded for *Batson* reconstruction hearings at the district court as a matter of course, without discussing whether to return the case to state court. *See, e.g.*, *Paulino I*, 371 F.3d at 1092; *Madison I*, 677 F.3d at 1339; *Harris v. Haeberlin*, 752 F.3d 1054, 1055 (6th Cir. 2014); *Holder v. Welborn*, 60 F.3d 383, 385 (7th Cir. 1995). Accordingly, we remand to the district court, not the state court.

jacket to stem the blood from Sweeney's head while waiting for the paramedics to arrive, as well as a photograph of the jacket; (2) testimony describing the crime scene, including the statement that "there was blood everywhere, and . . . some of [Sweeney's] brains were on the floor," R. vol. 3, 548; (3) testimony from a paramedic describing the wound as involving "a lot of hair and blood, [and] also gray matter or brains" and further stating that "there were pieces of both those things, blood clots, gray matter on the floor, all consistent with a high-velocity type wound," *id.* at 589; and (4) various photographs of the crime scene, including "an area of blood" and "blood clots and some gray matter seen in [an] area on the floor," *id.* at 593; "the interior side of the wall [showing] what appears to be human tissues and hair," *id.* at 636-37; and a telephone and a power strip with red stains that appeared to be blood.

On direct appeal, Johnson argued that the trial court erred in admitting this evidence because it was more prejudicial than probative and violated his right to a fair trial under the Sixth Amendment and to due process under the Fourteenth Amendment. The OCCA did not explicitly address the constitutional aspect of this argument and rejected the claim overall in a single sentence: "[T]he trial court did not abuse its discretion when it admitted the testimony and photographs depicting the crime scene and the nature, extent[,] and location of the victim's injury." *Johnson I*, slip op. at 9. In support, the OCCA cited state cases finding no abuse of discretion in admitting crime-scene evidence in similar circumstances. *Id.*

In his habeas petition, Johnson reasserted his constitutional claim that the admission of this evidence

"resulted in a fundamentally unfair" trial. R. vol. 1, 81. Specifically, Johnson pointed out both that the State refused defense counsel's offer to stipulate to the manner of death and that it was undisputed Johnson did not shoot Sweeney. Johnson therefore asserted that this "evidence was unfairly prejudicial, designed by the State to appeal to the emotions of the jury, and resulted in a fundamentally unfair adjudicatory process." *Id.*

The district court rejected Johnson's claim. It acknowledged that when "habeas petitioners challenge the admission of [graphic] evidence as violative of the Constitution," courts must consider "whether the admission of evidence so infected the trial with unfairness as to [violate] due process." App. 44-45 (alterations in original) (quoting *Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir. 2003)); *see also Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) ("The essence of our inquiry . . . is whether the admission of the photographs rendered the proceedings fundamentally unfair."). And the district court found no unfairness rising to level of a due-process violation here because the evidence described and corroborated the nature of the murder and the State presented strong evidence of Johnson's guilt.

On appeal, Johnson reiterates the argument he made below. In response, the State first argues that this court should decline to consider whether the OCCA's decision was contrary to or an unreasonable application of clearly established federal law because, as a threshold matter, there is no clearly established federal law governing "the admission of allegedly gruesome testimony and photographs." Aplee. Br. 31; *see also House*, 527 F.3d at 1018. Specifically, the State

contends that Johnson's citation to *Darden v. Wainwright*, 477 U.S. 168 (1986), "is unconvincing" and fails to provide clearly established federal law. Aplee. Br. 32. In *Darden*, the Supreme Court considered "whether the prosecutors' [admittedly improper] comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). And the State insists that because *Darden* involved prosecutorial misconduct, rather than evidentiary errors, it "is not an on-point case, and it far from establishes clearly established federal law in regard to this issue." Aplee. Br. 32.

In support, the State cites *Estelle v. McGuire*, 502 U.S. 62 (1991). There, having found the challenged evidence to be relevant, the Court stated that it "need not explore further *the apparent assumption* of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence *that is not relevant* to be received in a criminal trial." *Estelle*, 502 U.S. at 70 (emphases added). But importantly, at the outset of its discussion of this claim, the Court described its overall inquiry as "whether the admission of the evidence violated [petitioner's] federal constitutional rights." *Id.* at 68. And Johnson raised the same inquiry in his habeas petition: Did the admission of gruesome crime-scene evidence violate his constitutional right to due process?

Indeed, the Supreme Court has expressly considered whether "the introduction of . . . evidence . . . violated the Due Process Clause of the Fourteenth Amendment" by using the "analytical framework" provided by the prosecutorial-misconduct inquiry in *Donnelly* (which *Darden* followed). *Romano v. Okla-*

homa, 512 U.S. 1, 12 (1994). We have done the same, even after *House*'s holding clarifying the role of clearly established federal law under AEDPA. Specifically, in *Hooks v. Workman*, we reached the merits of the petitioner's due-process claim alleging admission of prejudicial and irrelevant evidence without questioning the existence of clearly established federal law. 689 F.3d 1148, 1180 (10th Cir. 2012); *see also id.* (explaining that petitioner "is entitled to relief only if an alleged state-law error . . . 'was so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process'" (quoting *Revilla v. Gibson*, 283 F.3d 1203, 1212 (10th Cir. 2002))). And we did so despite noting the absence of clearly established federal law supporting several of the petitioner's other claims. *See id.* at 1170 (finding no clearly established law requiring OCCA "to account for and apply" particular statistical theory to evidence of petitioner's IQ score), *id.* at 1175 (noting no clearly established federal law for claim arising from removal of juror for cause). Thus, we reject the State's argument that Johnson's claim fails for want of clearly established federal law.

Turning to the merits, Johnson argues the OCCA unreasonably concluded that the admission of the crime-scene evidence did not render the proceedings fundamentally unfair. *See Smallwood*, 191 F.3d at 1275. "[B]ecause a fundamental-fairness analysis is not subject to clearly definable legal elements, when engaged in such an endeavor a federal court must tread gingerly and exercise considerable self-restraint." *Spears*, 343 F.3d at 1226 (alteration in original) (quoting *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002)). At the same time, "the fundamental-fairness

inquiry requires us to look at the effect of the admission of the [evidence] within the context of the entire" trial. *Id.* Doing so requires weighing the relevance of the challenged evidence against its prejudicial value, in light of the other evidence against the petitioner. *See id.*

The OCCA did not explain what the evidence at issue here tended to prove or how its probative value outweighed its prejudicial impact. *See Johnson I*, slip op. at 9. The district court, for its part, concluded that "[t]he challenged evidence . . . corroborated testimony that the victim sustained a high[-]velocity gunshot wound when a shooter entered his office[] and was discovered with his head against the window." App. 45.

And indeed, to obtain the murder conviction, the State had to show (1) the unlawful death of a human, (2) caused by the defendant, (3) with malice aforethought. *See* Okla. Stat. tit. 21, § 701.7(A). That Johnson was indisputably not the shooter does not change what the State had to prove because an individual who aids and abets in the commission of a crime is "equally culpable with other princip[als]." *Conover v. State*, 933 P.2d 904, 910 (Okla. Crim. App. 1997), *abrogated on other grounds by Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam); *see also Glossip v. State*, 157 P.3d 143, 151 (Okla. Crim. App. 2007) (explaining that aiding and abetting includes "advis[ing] or encourag[ing] the commission of the crime" (quoting *Spears v. State*, 900 P.2d 431, 438 (Okla. Crim. App. 1995))); Okla. Stat. tit. 21, § 172. Thus, to prove that Johnson was guilty of murder, the State had to establish not only Johnson's involvement in the murder plot, but also the fact of the murder itself.

At least some of the evidence Johnson complains of was relevant to proving the murder, such as the testimony from the paramedic describing the victim's head wound and the crime scene. Further, at least some of the photographs were relevant to corroborate the paramedic's testimony. Thus, this case is similar to *Thornburg v. Mullin*, where the petitioner challenged the admission of "six photographs depicting the charred remains of the victims' bodies" on the basis "that he had no plans to dispute the manner of death." 422 F.3d 1113, 1128 (10th Cir. 2005). We declined to grant habeas relief, noting that "[e]ven if [the defendant] did not dispute the manner of death, the [S]tate still bore the burden to convince the jury that its witnesses . . . provided an accurate account of events." *Id.* at 1129.

Additionally, this case is not like *Spears*, where we found fundamental unfairness and granted habeas relief based on the admission at sentencing in a capital trial of photographs depicting the victim with 50 to 60 stab wounds. 343 F.3d at 1227-28. There, the photographs were not probative to prove conscious physical suffering because uncontradicted evidence showed that the victim died or lost consciousness early in the beating, so "there was no logical connection between the photographs and the proposition they were offered to prove." *Thornburg*, 422 F.3d at 1129 (distinguishing *Spears*). Here, by contrast, there was a connection between the crime-scene evidence and the murder charge against Johnson.

Moreover, even if some of the challenged evidence was cumulative, that accumulation does not rise to the level of rendering Johnson's trial fundamentally unfair in violation of due process when considered in light of the strong evidence of Johnson's guilt. Where

evidence against a defendant is strong, the likelihood that erroneously admitted evidence will have an unduly prejudicial impact is lessened. *Compare Wilson v. Sirmons*, 536 F.3d 1064, 1115 (10th Cir. 2008) (noting that "the evidence at the guilt phase was particularly strong" before "conclud[ing] that the admission [of relevant but gruesome photographs] did not make the proceeding fundamentally unfair"), *with Spears*, 343 F.3d at 1228 (granting habeas relief based on prejudicial photographs in part because, in addition to having little to no probative value, they "were the primary aggravating evidence specifically presented at the second stage" and "constitute[d] a major part of the State's second-stage case").

Here, the district court summarized the evidence against Johnson as follows:

> Aziz—who ordered the murder—testified that [Fred] accepted the job via his brother [Allen] and set a price of $10,000. According to [Allen], he met [Fred] and [Johnson] at his (Allen's) home in the days before the murder. Allen testified Fred and [Johnson] left the house to travel to Muskogee, and Aziz similarly recalled hearing that Fred was going to steal a getaway van from Muskogee. Charles Billingsley, who was not a defendant in the case, testified that he helped [Johnson] take a white Ford van from the detail shop next to Billingsley's business. On the morning of the murder, [Allen] recalled that [Johnson] came to his home. According to [Allen], [Johnson] wanted him to ask Aziz for the money so the passenger riding with [Johnson] (Terrico Bethel) could "get the murder done." That

> same day, Aziz recalled [Johnson] knocking on the window of his business and saying[,] "watch the news." [Johnson] never returned the white van, but Billingsley recalls seeing it on television in connection with the murder. [Allen] testified that after the murder, he collected the first $5,000 from Aziz and gave it to [Johnson]. These facts are supported by phone records showing various calls between the co[]conspirators in the time leading up to the murder.

App. 43 (citations omitted). This strong evidence of Johnson's involvement in Sweeney's murder lessens the impact of possible prejudice flowing from the admission of crime-scene evidence. *Thornburg*, 422 F.3d at 1129. Thus, "[r]eviewing the record under AEDPA's constraints," in light of the probative value of the challenged evidence and the strong evidence of Johnson's guilt, we cannot "conclude that the OCCA acted contrary to or unreasonably applied federal law in concluding that [its] admission was proper." *Id.*

III. Juror Misconduct

Next, Johnson argues that the district court erred in denying his juror-misconduct claim. Johnson first raised this claim in a motion for a new trial, which he filed after one of the jurors, Staci Petersen, contacted defense counsel and "advised that she felt forced, intimidated[,] and threatened by the acts of the other jurors into voting guilty." R. vol. 1, 407. Johnson submitted an affidavit from Petersen along with his motion for a new trial. In that affidavit, Peterson asserted that she voted guilty in part because "[j]uror Faith Williams said, 'do you really want [Johnson] to be

walking on the streets? *He's got other charges* and won't be getting out of jail.'" *Id.* at 414-15 (emphasis added). Petersen further declared that the other jurors wrongly informed her a guilty vote on the conspiracy charge necessitated a guilty vote on the murder charge. She also reported that she saw one juror sleeping through the trial.

Johnson attempted to corroborate Petersen's statements with an affidavit from another juror, Tony Perez, who confirmed Petersen's intimidation allegations and said that he, too, believed that a guilty vote on the conspiracy charge necessitated a guilty vote on the murder charge. Petersen and Perez also expressed confusion regarding the need for a unanimous decision. But Perez did not mention the comment about Johnson's other charges.

In addition to her affidavit, Peterson wrote a letter to the trial court in which she reported that she was ridiculed by the other jurors, pressured into voting with the other jurors to convict, and confused about having to come to a unanimous decision. She further said that she believed the jury convicted Johnson because he was African American. This letter did not mention Williams's statement about Johnson's other charges.

Moving for a new trial, Johnson asserted that there was nothing mentioned at trial about other charges pending against him and therefore argued that "the jury panel was tainted by outside information." *Id.* at 411. The trial court denied the motion without a hearing, stating that "[j]urors cannot impeach their verdicts after they have been discharged." *Id.* at 428.

On direct appeal, Johnson argued that this juror misconduct and the trial court's refusal to conduct an evidentiary hearing deprived him of a fair trial. The OCCA rejected these claims. *Johnson I*, slip op. at 13. First, it noted that an evidentiary hearing was not required because Johnson filed his motion outside the ten-day window set forth in Oklahoma Rule of Criminal Procedure 2.1(A)(2). *Id.* And it further found no abuse of discretion in the trial court's decision not to conduct a hearing. *Id.* Second, the OCCA determined that "[t]he trial court properly refused to receive the juror's post[]verdict letter and, later, the two jurors' affidavits asserting allegations concerning the motives, methods, and mental processes by which the jury reached its verdicts because jurors are not permitted to impeach their verdicts." *Id.* at 14. And Johnson "otherwise[] failed to establish juror misconduct by clear and convincing evidence." *Id.*

In his habeas petition, Johnson argued that the OCCA's rulings were "an unreasonable application of *Remmer* [*v. United States*, 347 U.S. 227 (1954)]." R. vol. 1, 84. The district court disagreed, explaining that "like Oklahoma law, federal law 'prohibit[s] the admission of juror testimony to impeach a jury verdict.'" App. 46 (alteration in original) (quoting *Tanner v. United States*, 483 U.S. 107, 117 (1987)); *see also* Okla. Stat. tit. 12, § 2606(B); Fed. R. Evid. 606(b). And it noted that although there was an exception to the no-impeachment rule "where external, prejudicial information is improperly brought to the jury's attention," such exception was not available here, where the reference to other charges was vague and where Petersen did not mention the other charges in her letter to the trial court. App. 46.

On appeal, Johnson again argues that the OCCA's decision is an unreasonable application of *Remmer*. But Johnson misstates *Remmer*'s holding. Without a pinpoint citation, Johnson suggests that *Remmer* stands for the proposition "that no extraneous material is permitted in the jury room during deliberations." Aplt. Br. 43. Yet the Supreme Court made no such statement in *Remmer*, which did not involve the introduction of extraneous material in the jury room. Instead, it involved private communications with a juror: (1) someone outside of the jury suggested to a juror during trial "that he could profit by bringing in a verdict favorable to petitioner"; and (2) the trial court, the prosecutor, and the FBI investigated this potential bribe situation without informing or including the defense. 347 U.S. at 228; *see also Tanner*, 483 U.S. at 117 (citing cases where jurors were allowed to testify about "influence by outsiders" and describing *Remmer* as case involving "bribe offered to juror"). Accordingly, we reject the argument that the OCCA unreasonably applied *Remmer* when denying Johnson's juror-misconduct claim.

Nevertheless, Johnson is generally correct that an exception to the no-impeachment rule exists, such that an evidentiary hearing—including juror testimony—is required "where extrinsic influence or relationships have tainted the deliberations." *Tanner*, 483 U.S. at 120; *see also* Fed. R. Evid. 606(b)(2)(A) (allowing juror testimony when "extraneous prejudicial information was improperly brought to the jury's attention"). But as the State persuasively argues, the OCCA did not unreasonably apply any such rule in affirming both the refusal to conduct an evidentiary hearing and the denial of Johnson's motion for a new trial.

As an initial matter, everything included in Petersen's letter to the trial court and almost everything included in the jurors' affidavits is inadmissible juror-impeachment evidence: Petersen and Perez primarily describe Petersen's mental state as a result of being intimidated by the other jurors and their misunderstandings about the relationship of the two counts and the requirement of unanimity. *See Warger v. Shauers*, 574 U.S. 40, 51 (2014) (explaining that evidence does not fall into exception for extraneous material if it is part of "the general body of experiences that jurors are understood to bring with them to the jury room"); *Tanner*, 483 U.S. at 118 (describing jurors' failure to understand instructions or mental incompetence as internal matters about which jurors may not testify); *Matthews v. Workman*, 577 F.3d 1175, 1181 (10th Cir. 2009) (noting Oklahoma evidentiary rule that "prohibits jurors from testifying 'as to the effect of anything upon his or another juror's mind or emotions as influencing him to assent to or dissent from the verdict'" (quoting *Matthews v. State*, 45 P.3d 907, 914 (Okla. Crim. App. 2002))). And "[t]here is nothing in clearly established Supreme Court law requiring states to take cognizance of evidence excludable under such common evidentiary rules." *Matthews v. Workman*, 577 F.3d at 1182. Further, "in light of numerous other protections designed to secure an impartial and competent jury . . . the Constitution does not require a post[]-verdict hearing in which such evidence is admissible." *Id.* at 1183.

Critically, the inclusion of the reference to Johnson's "other charges" does not affect the inadmissibility of this juror-misconduct evidence. R. vol. 1, 414. Such a statement—where the trial included no evi-

dence of Johnson having other charges— arguably falls outside the no-impeachment rule and into its exception for extrinsic influence. *See Warger*, 574 U.S. at 51 (explaining that "information is deemed 'extraneous' if it derives from a source 'external' to the jury," including "publicity and information related specifically to the case the jurors are meant to decide" (quoting *Tanner*, 483 U.S. at 117)). But we agree with the district court that this single reference to other charges "is too vague to conclude extra-record facts prejudiced the outcome at trial" or to trigger the need for an evidentiary hearing. App. 47.

We reach this conclusion because when considering whether the jury considered extraneous material, "the inquiry is not whether the jurors . . . discussed any matters not of record, but whether they discussed *specific extra-record facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby." *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (emphasis added) (quoting *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 n.5 (2d Cir. 1970)). And as to conducting a hearing, a court confronted with a juror-misconduct claim "'has wide discretion in deciding how to proceed' and appropriately denies a hearing when a party presents 'only thin allegations of jury misconduct.'" *United States v. Brooks*, 569 F.3d 1284, 1288 (10th Cir. 2009) (quoting *United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992)). Thus, we conclude that the OCCA did not unreasonably apply any clearly established federal law when it affirmed the trial court's decisions to not

conduct an evidentiary hearing and to deny Johnson's motion for a new trial.[12]

IV. Cumulative Error

Last, Johnson argues that the district court erred in denying relief on his cumulative-error claim. He first raised a cumulative-error claim on direct appeal, contending that various errors accumulated to deprive him of a fair trial in violation of his due-process rights. The OCCA rejected this claim. *Johnson I*, slip op. at 18.

In his habeas petition, Johnson argued again that cumulative error rendered his trial fundamentally unfair. The district court rejected this claim because cumulative error only applies "where there are two or

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[12] Petersen's letter to the trial court also alleged that the jury voted to convict Johnson because he is African American. For the first time in his reply brief, Johnson argues that this allegation should have triggered an evidentiary hearing and substantive relief. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (holding that "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" so that trial court can "consider the evidence of the juror's statement and any resulting denial of the jury[-]trial guarantee"). We decline to consider Johnson's argument because he raises it for the first time in his reply brief. *See United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019). Moreover, *Pena-Rodriguez* was not decided until well after Johnson's conviction became final; it therefore does not provide clearly established federal law applicable in Johnson's habeas proceeding. *See House*, 527 F.3d at 1015 (stating that "AEDPA 'requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state[]court conviction became final'" (emphasis added) (quoting *Williams*, 529 U.S. at 380)).

more actual errors," and the district court found none. App. 47 (quoting *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998)).

On appeal, Johnson first argues that AEDPA deference does not apply because the OCCA did not adjudicate his cumulative-error claim on the merits. *See Harris v. Poppell*, 411 F.3d 1189, 1195 (10th Cir. 2005). In support, Johnson points out that although he asserted a cumulative-error claim related to his *trial*, the OCCA ruled only that Johnson "was not denied a fair *sentencing* trial by cumulative error." *Johnson I*, slip op. at 18 (emphasis added). The State disputes this reading, arguing that "the reference to a 'sentencing trial' was merely a typographical error" and pointing out that the OCCA cited in support cases involving claims of cumulative trial error. Aplee. Br. 51 (quoting *Johnson I*, slip op. at 18). We need not resolve this dispute because Johnson's cumulative-error claim fails even under de novo review.

In arguing that cumulative constitutional errors in his trial deprived him of his due-process right to a fair trial, Johnson seeks to accumulate all six of the substantive errors alleged in his habeas petition. But as he acknowledges and as the State argues, Johnson cannot accumulate errors for which he does not have a COA. *See Young v. Sirmons*, 551 F.3d 942, 972-73 (10th Cir. 2008). Accordingly, our analysis of Johnson's cumulative-error claim is limited to the three substantive claims for which he has a COA. And because Johnson has not shown more than one error, he is not entitled to habeas relief on his cumulative-error claim. *See Ellis v. Raemisch*, 872 F.3d 1064, 1090 (10th Cir. 2017) ("[T]here must be more than one error to conduct cumulative-error analysis.").

Conclusion

For the reasons explained above, we affirm the district court's denial of habeas relief on Johnson's gruesome-evidence, juror-misconduct, and cumulative-error claims. But we reverse and remand on Johnson's *Batson* claim. The OCCA relied on an unreasonable factual determination when it reviewed and approved of the prosecutor's race-neutral reasons for the challenged peremptory strikes of racial minorities when in fact, the prosecutor offered only one such reason and the trial court offered the others. It further unreasonably applied *Batson* by substituting the trial court's speculation for the prosecutor's race-neutral reasons. Reviewing Johnson's *Batson* claim de novo, we conclude that Johnson established a prima facie case of discrimination at *Batson* step one. But the trial court erred at *Batson* step two by failing to request the prosecutor's race neutral reasons and substituting its own speculation for those reasons. We therefore reverse the district court's order denying relief on that claim and remand as previously instructed for the district court to either conduct a *Batson* reconstruction hearing or to determine that such a hearing would be impossible or unsatisfactory.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT GRANTING RESPONDENT-APPELLEE'S MOTION TO RECALL AND STAY THE MANDATE (OCTOBER 25, 2021)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner-Appellant,

v.

JIMMY MARTIN, Warden,

Respondent-Appellee.

No. 19-5091
(D.C. No. 4:16-CV-00433-JED-FHM)
(N.D. Okla.)

Before: MORITZ, SEYMOUR, and BRISCOE, Circuit Judges.

ORDER

This matter is before the court on Appellee's *Motion to Recall and Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari* in the Supreme Court. Upon review and consideration, the motion is granted.

The mandate issued on October 1, 2021 is recalled. Issuance of the mandate is stayed for 90 days from the date of this order or for any additional period allowed in compliance with Fed. R. App. P. 41(d)(2). If a notice from the Supreme Court clerk is filed with this court during the stay period indicating that Appellee has filed a petition for certiorari, the stay continues until the Supreme Court's final disposition. *See* Fed. R. App. P. 41(d)(2)(B)(ii).

Entered for the Court

/s/ Christopher M. Wolpert
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITIONS FOR REHEARING (SEPTEMBER 13, 2021)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner-Appellant,

v.

JIMMY MARTIN, Warden,

Respondent-Appellee.

No. 19-5091
(D.C. No. 4:16-CV-00433-JED-FHM)
(N.D. Okla.)

Before: MORITZ, SEYMOUR, and BRISCOE, Circuit Judges.

ORDER

Appellant and Appellee's petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT GRANTING JOHNSON A CERTIFICATE OF APPEALABILITY ON FOUR ISSUES (AUGUST 5, 2020)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner-Appellant,

v.

JIMMY MARTIN, Warden,

Respondent-Appellee.

No. 19-5091
(D.C. No. 4:16-CV-00433-JED-FHM)
(N.D. Okla.)

Before: BACHARACH, Circuit Judge.

ORDER

Petitioner Alonzo Cortez Johnson, a state prisoner, filed a 28 U.S.C. § 2254 habeas petition. The district court denied the petition and denied a certificate of appealability ("COA"). Mr. Johnson then filed a motion for a COA and brief in support in this court. Pursuant to Tenth Circuit Rule 22.1(B), the State of Oklahoma has not yet filed a response brief. Following review of

the record and the brief filed by counsel, a COA is granted on the following issues:

> Issue 1: The State Systematically Used Its Peremptory Challenges to Exclude Racial Minorities from the Jury
>
> Issue 4: The Introduction of Gruesome Testimony and Exhibits Resulted in a Fundamentally Unfair Trial
>
> Issue 5: Juror Misconduct Deprived Johnson of a Fair Trial
>
> Issue 7: The Cumulative Effect of the Errors at Trial Deprived Johnson of a Fundamentally Fair Trial in Violation of his Rights under the Sixth and Fourteenth Amendments to the United States Constitution

Respondent is directed to file a response brief within thirty days of the date of this order. Mr. Johnson may file a reply brief within twenty-one days of service of respondent's brief if he so desires. All briefs shall be filed and served in compliance with Fed. R. App. P. 28 and 31.

Entered for the Court

Robert E. Bacharach
Circuit Judge

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DENYING RELIEF (SEPTEMBER 17, 2019)

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

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

JIMMY MARTIN, Warden,[1]

Respondent.

Case No. 16-CV-433-JED-FHM

Before: John E. DOWDELL, Chief Judge,
United States District Court.

OPINION AND ORDER

Before the Court is Alonzo Cortez Johnson's 28 U.S.C. § 2254 habeas corpus petition (Doc. 1). Petitioner challenges his convictions for first degree murder

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[1] Petitioner is incarcerated at North Fork Correctional Center (NFCC) in Sayre, Oklahoma. (Doc. 21 at 1). Jimmy Martin, the warden of NFCC, is therefore substituted in place of Joe Allbaugh as party respondent. *See* Habeas Corpus Rule 2(a). The Clerk of Court shall note the substitution on the record.

and conspiracy in Tulsa County District Court, Case No. CF-2009-2738. For the reasons below, the Court will deny the petition.

I. Background

This case stems from a murder-for-hire scheme involving five defendants. (Doc. 8 at 10-12).[2] The original conflict began when victim Neal Sweeney, a fuel supplier, obtained a default judgment against convenience-store owner Mohammed Aziz. (*Id.* at 10-11). Aziz developed an "intense hatred" toward Sweeney and approached Allen Shields to locate a hitman. (*Id.* at 11). Shields referred the matter to his brother Fred, who set a price of $10,000 for the murder. (Doc. 13-27 at 172). Fred Shields also acted as an intermediary, recruiting Petitioner (his cousin) and a man named Terrico Bethel. (*Id.* at 172-184; *see also* Doc. 13-2 at 44-46). Petitioner purportedly obtained the getaway car and helped coordinate with Aziz, while Bethel shot the victim. (*Id.*). Fred Shields was eventually apprehended on a different crime and exposed the conspiracy in an effort to make a deal. (Doc. 8 at 12).

The State charged Petitioner with conspiracy to commit first degree murder (Count 4) and first-degree murder (Count 10). (Doc. 13-42 at 100; *see also* Doc. 8 at 22). The other men faced similar charges. (Doc. 13-42 at 99-102). A jury convicted Fred Shields and Terrico Bethel of, inter alia, first degree murder, and both received life sentences. (Doc. 8 at 8, n. 2). Allen Shields faced a conspiracy charge but died by suicide

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[2] The Court finds Petitioner's brief (Doc. 8) accurately sets forth certain non-controversial background facts.

during a pretrial hostage situation. (Doc. 13-27 at 72). Mohammad Aziz pled guilty to solicitation of murder and was sentenced to 35 years imprisonment. (Doc. 8 at 8, n. 2).

Petitioner's jury trial commenced on December 3, 2012. (Doc. 13-24). Defense counsel argued his involvement was minimal or nonexistent, and his co-conspirators' testimony was unreliable. After a multi-week trial, the jury convicted Petitioner of all charges. (Doc. 12-4 at 1). The state court sentenced him to life imprisonment on each count, with the sentences running consecutively. (*Id.*).

Petitioner perfected a direct appeal to the Oklahoma Court of Criminal Appeals (OCCA). By a summary opinion entered July 17, 2014, the OCCA affirmed the conviction and sentence. (Doc. 12-4). Petitioner then sought post-conviction relief, which the OCCA also denied. (Doc. 12-6; *see also* Doc. 12-7). Petitioner filed the instant § 2254 petition (Doc. 1) on July 5, 2016. He identifies seven grounds of error:

> (Ground 1): The prosecutor used peremptory challenges to exclude racial minorities from the jury;
>
> (Ground 2): The use of recorded statements violated the Confrontation Clause;
>
> (Ground 3): The evidence was insufficient to sustain a conviction;
>
> (Ground 4): Gruesome photographs and testimony rendered the trial unfair;
>
> (Ground 5): Juror misconduct rendered the trial unfair;

> (Ground 6): The evidentiary rulings violated Petitioner's right to present a defense; and
>
> (Ground 7): Cumulative error rendered the trial unfair.

(Doc. 8 at 2-4).

Respondent filed an answer (Doc. 12), along with relevant portions of the state court record (Doc. 13). Respondent concedes, and the Court finds, that Petitioner exhausted his state remedies and the Petition is timely. *See* 28 U.S.C. §§ 2244(d)(1); 2254(b)(1)(A). Petitioner filed a reply brief (Doc. 17) on January 24, 2017, and the matter is ready for a merits review.

II. Discussion

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs this Court's review of petitioner's habeas claims. *See* 28 U.S.C. § 2254. Relief is only available under the AEDPA where the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Further, because the OCCA already adjudicated petitioner's claims, this Court may not grant habeas relief unless he demonstrates that the OCCA's ruling: (1) "resulted in a decision that was contrary to . . . clearly established Federal law as determined by [the] Supreme Court of the United States," 28 U.S.C. § 2254 (d)(1);[3] (2) "resulted in a decision that . . . involved an

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[3] As used in § 2254(d)(1), the phrase "clearly established Federal law" means "the governing legal principle or principles" stated in "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)); *see also House v. Hatch*, 527

unreasonable application of clearly established Federal law," *id.*; or (3) "resulted in a decision that was based on an unreasonable determination of the facts" in light of the record presented to the state court, *id.* at § 2254(d)(2).

"To determine whether a particular decision is 'contrary to' then-established law, a federal court must consider whether the decision 'applies a rule that contradicts [such] law' and how the decision 'confronts [the] set of facts' that were before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (alterations in original) (quotations omitted). When the state court's decision "identifies the correct governing legal principle in existence at the time, a federal court must assess whether the decision 'unreasonably applies that principle to the facts of the prisoner's case." *Id.* (quotations omitted). Significantly, an "unreasonable application of" clearly established federal law under § 2254(d)(1) "must be objectively unreasonable, not merely wrong." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (quotations omitted). "[E]ven clear error will not suffice." *Id.* Likewise, under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). The Court must presume the correctness of the OCCA's factual findings unless petitioner rebuts that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

F.3d 1010, 1015 (10th Cir. 2008) (explaining that "Supreme Court holdings—the exclusive touchstone for clearly established federal law—must be construed narrowly and consist only of something akin to on-point holdings").

Essentially, the standards set forth in § 2254 are designed to be "difficult to meet," *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and require federal habeas courts to give state court decisions the "benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). A state prisoner ultimately "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

A. Peremptory Challenges (Ground 1)

Petitioner first argues the prosecutor systematically used the State's peremptory challenges to exclude racial minorities from the jury. (Doc. 8 at 13-14). He contends the prosecutor inappropriately challenged prospective minority jurors Dickens, De Wassom, Carranza, Martinez, and Tawil. Petitioner further argues the purported race-neutral explanations for those challenges were pretextual. As support, he cites the state court's refusal to excuse juror Williams, which would have "effectively eliminate[d] all the African-Americans" from the panel. (*Id.* at 14).

Petitioner raised this argument on direct appeal as an equal protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). (Doc. 12-1 at 14). "*Batson* held that the Fourteenth Amendment's Equal Protection Clause prohibits the prosecution's use of peremptory challenges to exclude potential jurors on the basis of their race." *Saiz v. Ortiz*, 392 F.3d 1166, 1171 (10th Cir. 2004). A trial court must apply a three-step burden-shifting framework to assess a Batson challenge:

> First, the trial court must determine whether the defendant has made a prima facie

> showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. 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. Third, the court must determine whether the defendant has carried his burden of proving purposeful discrimination. This final step 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.

Rice v. Collins, 546 U.S. 333, 338 (2006) (internal citations omitted).

The OCCA considered *Batson* and found that Petitioner failed to establish systematic or purposeful discrimination by the State. (Doc. 12-4 at 3). Specifically, the OCCA agreed that "the State's explanations for excusing each minority jurors were legitimate race-neutral reasons." (*Id.*). Citing *Powers v. Ohio*, 499 U.S. 400, 404 (1991), the OCCA also noted the "trial court erred to the detriment of the State when it refused to . . . excuse an African-American because it would have left the jury without any African-Americans." (*Id.*); *see also Powers,* 499 U.S. at 404 ("Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [his] own

race, . . . he . . . does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria").

Because the OCCA applied *Batson*, relief is only available if it "was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Rice*, 546 U.S. at 338. Habeas courts "must grant the trial courts considerable leeway in applying *Batson*," *Id.* at 343-44 (Breyer, J., concurring), and "defer to the state trial judge's finding of no racial motivation in the 'absence of exceptional circumstances.'" *Black v. Workman*, 682 F.3d 880, 897 (10th Cir. 2012) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)).

Having reviewed the record, the Court finds no exceptional circumstances in this case. The jurors at issue are Dickens, De Wassom, Carranza, Martinez, and Tawil. Dickens is an African-American liberal arts professor who holds a Ph.D. (Doc. 13-24 at 31). The prosecutor explained that in his experience, liberal arts professors are too exacting and liberal. (Doc. 13-25 at 180). The prosecutor went on to excuse De Wassom, Carranza, and Tawil without an immediate objection by the defense. (*Id.* at 179-181). When the prosecutor excused Martinez, defense counsel argued there was a pattern of striking minority jurors. (*Id.* at 181). The state court disagreed, noting that Martinez was hardly involved and Carranza and De Wassom had difficulty with English. (*Id.* at 181-182). The record confirms Carranza and De Wassom spoke English as a second language and that Martinez did not want to be on the jury. (Doc. 13-25 at 11; 44-45; 50). Martinez also stated her brother should not be in jail for driving while intoxicated. (*Id.* at 45). As to Tawil, there was

no specific objection to, or explanation for, his excusal. To the extent the *Batson* inquiry includes Tawil, the record reflects his former attending physician was also a prospective juror, and the prosecutor expressed concern about them participating together. (Doc. 13-25 at 17-18).

Petitioner offers no evidence to controvert this record, aside from noting Dickens was related to police officers and the state court refused to excuse the last African-American juror. This information does not constitute "clear and convincing" evidence of racial motivation. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (finding clear evidence of racial motivation where the prosecutor's handwritten notes labelled African-American jurors as "B-1, B-2, B-3," etc.); *Miller-El v. Dretke*, 545 U.S. 231, 253 (2005) (racial motivation existed where prosecutor reshuffled a deck of cards to avoid minorities and posed different questions to people of different ethnicities). Moreover, the Court is not convinced the informal nature of the exchange between defense counsel and the state court justifies relief. Defense counsel objected generally to a pattern, rather than any particular strike. The state court disagreed there was a pattern, and defense counsel dropped the matter without seeking further explanations. (Doc. 13-25 at 179-181). On this record, the Court cannot disturb the OCCA's application of *Batson*, and Ground 1 fails.

B. Confrontation Clause (Ground 2)

Petitioner raises a Confrontation Clause claim based on the admission of Terrico Bethel's recorded statements and preliminary hearing testimony by Allen Shields (deceased). (Doc. 8 at 18). Bethel made

the statements during a recorded conversation with his cell mate. The recording was redacted to exclude references to Petitioner. However, Petitioner contends he was still implicated when Bethel stated: "[Fred Shields'] kin folk paid me." (*Id.* at 19). Petitioner further argues he did not have a meaningful opportunity to cross-examine Allen Shields at the preliminary hearing. (*Id.* at 20-21).

The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . " U.S. Const. amend. VI. Admitting an incriminating statement by a codefendant may violate the Confrontation Clause of the Sixth Amendment. *See Bruton v. United States*, 391 U.S. 123, 131-32 (1968). However, the challenged statement must be "'testimonial' in nature, for only statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006). If the evidence is testimonial, the Confrontation Clause requires that the declarant be unavailable and that defendant had a prior opportunity for cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

1. Allen Shields (Deceased)

The parties agree that Allen Shields was unavailable and his statements are testimonial. However, Petitioner contends he did not have a meaningful opportunity to cross-examine Shields during the preliminary hearing. At the time, Petitioner was only charged with conspiracy to commit murder, rather than murder. (Doc. 8 at 21). He also argues he discovered certain details about Allen Shield's plea deal, including the

allowance of conjugal visits, after the preliminary hearing. (*Id.* at 21-22). The OCCA considered and rejected these arguments under *Crawford,* reasoning that "the discovery of potentially new grounds for impeachment . . . did not render the defense's prior opportunity to cross-examine Shields constitutionally inadequate." (Doc. 12-4 at 8-9).

This ruling comports with the record and federal law. The right to confrontation affords the opportunity for effective cross-examination, but does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). "The touchstone for whether the Confrontation Clause has been satisfied is whether the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias." *United States v. Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010).

Here, four different defense attorneys cross-examined Allen Shields at length. (Doc. 13-2 at 86-184). Petitioner's counsel questioned him about: (1) the plea deal, under which he would receive a ten-year suspended sentence for testimony that resulted in a conviction; (2) his inconsistent statements to police; (3) his other crimes involving drug trafficking, kidnapping, and assault; and (4) his lack of personal knowledge about Petitioner's involvement in the crime. (*Id.* at 112-141). The jury therefore had ample information to evaluate Allen Shields' motives and bias, even if they did not know he was also allowed conjugal visits or other jailhouse perks. Moreover, the Court is not convinced the later-added murder charge required a new round of crossexanimation. The Confrontation Clause "does not require that the

defendant have a similar motive [for cross-examination] at the prior proceeding." *United States v. Hargrove*, 382 Fed. App'x 765, 778 (10th Cir. 2010). And, in any event, both charges arose from the same nucleus of facts. The Court finds no constitutional violation based on Allen Shields' preliminary hearing testimony.

2. Terrico Bethel

As to Bethel, the dispute turns on whether the statements are testimonial. Applying *Davis* and *Bruton*, the OCCA suggested they were not, and therefore not subject to the Confrontation Clause. (Doc. 12-4 at 6). The OCCA also analyzed state evidentiary rules and determined the jailhouse recording met the hearsay exception for statements against pecuniary interest (Okla. Stat. tit. 21, § 12-2804(B)(3)). (*Id.*). Having reviewed the record, the Court agrees. The Tenth Circuit has held that a "recorded statement to [a confidential informant], known to [the speaker] only as a fellow inmate, is unquestionably nontestimonial." *United States v. Smalls*, 605 F.3d 765, 778 (10th Cir. 2010). *See also Davis v. Washington,* 547 U.S. 813, 825 (2006) (statements made unwittingly to a Government informant are "clearly nontestimonial"). The OCCA therefore correctly determined Bethel's statements to his cell mate do not implicate the Confrontation Clause. *See Michigan v. Bryant*, 562 U.S. 344, 354 (2011) (noting Supreme Court precedent "limited the Confrontation Clause's reach to testimonial statements").

As to the hearsay analysis, federal courts "may not provide habeas corpus relief on the basis of state court evidentiary rulings unless they rendered the trial . . . fundamentally unfair." *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002). There is no evidence

of unfairness in this case. Bethel's statements were admitted under the hearsay exception for statements against penal interest, which is nearly identical Fed. R. Evid. 804(b)(3). As the OCCA pointed out, "Bethel confessed the conspiracy and murder to [his cell mate]," and "the State redacted all of Bethel's statements that expressly referenced [Petitioner]." (Doc. 12-4 at 6). Further, Petitioner's own counsel refused to redact Bethel's statement about receiving payment from Fred Shield's "kin folk." During an *in camera* conference, counsel stated "I don't want that out;" it appears he planned to argue Bethel was discussing different relatives. (Doc. 13-26 at 139). Under these circumstances, the Court cannot find the trial was fundamentally unfair, and Ground 2 fails.

C. Exclusion of Defense Evidence (Ground 6)

The Court will next address Ground 6, which also pertains to the recorded conversation between Bethel and his cellmate. (Doc. 8 at 33). Petitioner now contends that excluding certain statements by Bethel violated his right to present a defense. *(Id.*). He also argues the state court impermissibly limited his cross-examination of a police witness. (*Id.* at 35).

"The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). However, this right is not absolute; "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)); *see also Chambers v. Mississippi,* 410 U.S. 284, 295 (1973) (defendant's rights to cross-examine witnesses are "not absolute and may, in appropriate

cases, bow to accommodate other legitimate interests in the criminal trial process"). As *Holmes* explained: "While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 547 U.S. at 326.

The challenged statement by Bethel described a house in Tulsa "belong[ing] to a person he was dealing with . . . " (Doc. 8 at 33; *see also* Doc. 12-1 at 54). Petitioner believes the statement is exculpatory because he (Petitioner) lived in Broken Arrow, not Tulsa. (Doc. 8 at 33). Applying *Crane*, the OCCA explained:

> [Petitioner] sought to have his name redacted but to leave in Bethel's directions to [Petitioner's] house, which was in-fact Allen Shields' home. The trial court gave [Petitioner] the option of leaving in both his name and Bethel's erroneous conclusion as to [Petitioner's] home or redacting both the name and Bethel's erroneous conclusion. [Petitioner] chose to have both his name and the erroneous conclusion redacted. We find that [Petitioner's] request to redact his name but leave the erroneous conclusion would have been confusing, misleading, and not assure the fair and reliable ascertainment of guilt or innocence.

(Doc. 12-4 at 14-15). This ruling is well supported by the record. Defense counsel admitted he knew Bethel was describing Allen Shield's house in Tulsa. (Doc. 13-

26 at 434). Therefore, the statement would likely support the evidence that the men met and conspired at Allen Shields' home. (Doc. 13-2 at 42). To the extent defense counsel planned to suggest the house belonged to some unknown third party, who was not associated with Petitioner, the Court agrees the evidence would be misleading.

Petitioner's next argument pertains to the cross-examination of Detective Regalado. (Doc. 8 at 35). Petitioner argues he should have been permitted to admit Regalado's police report to show that Aziz never mentioned Petitioner in Aziz's initial interview. (*Id.*). The OCCA also rejected this claim, finding "[Petitioner] never sought to admit the . . . report into evidence." (Doc. 12-5 at 15). The OCCA further suggested the evidence would be cumulative. (*Id.*). The Court agrees. Both Regalado and Aziz admitted that Aziz did not implicate Petitioner until years after the crime. (Doc. 13-27 at 128-129; 199). Petitioner has not demonstrated the OCCA misapplied the facts or law, and Ground 6 fails.

D. Insufficient Evidence (Ground 3)

In Ground 3, Petitioner contends there was insufficient evidence to sustain his convictions for murder and conspiracy. (Doc. 8 at 23). He contends the State failed to prove he actually participated in the crime, and there is no physical evidence linking him to the shooting. (*Id.* at 23 25). Petitioner also points out that most co-conspirators were "flipped" by the State. (*Id.*). The OCCA rejected these arguments, finding "any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt." (Doc. 12-4 at 10). Specifically, the OCCA found

sufficient evidence to conclude "[Petitioner] became a party to the conspiracy to murder the victim, committed an overt act in furtherance of that agreement, and was criminally responsible for the victim's unlawful death." (*Id.*).

The OCCA applied the federal due process standard, which requires the State to prove every element of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). On federal habeas review, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. "*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). As the Supreme Court explained:

> First, on direct appeal, "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (per curiam). And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court

> decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Id. The Court looks to state law to determine the substantive elements of the crime, "but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman*, 566 U.S. at 655.

"The elements of a conspiracy [to commit murder] are (1) an agreement to commit the [murder], and (2) an overt act by one or more of the parties in furtherance of the conspiracy, or to effect its purpose." *McGee v. State*, 127 P.3d 1147, 1149 (Okla. Crim. App. 2005) (citing Okla. Stat. tit. 21, § 421). To obtain the murder conviction, the State had to show: (1) the unlawful death of a human; (2) caused by the defendant; and (3) with malice aforethought. *See* Okla. Crim. Jury Instruction Nos. 4-61; Okla. Stat. tit. 21, § 701.7(A). In Oklahoma, persons who aid and abet in the commission of a crime are "equally culpable with other principles." *Conover v. State*, 933 P.2d 904, 910 (Okla. Crim. App. 1991), *abrogated on other grounds by Bosse v. Oklahoma*, 137 S. Ct. 1 (2016); *see also* Okla. Stat. tit. 21, § 172. This includes "procur[ing] the crime to be done" and "advis[ing] or encourag[ing] the commission of the crime." *Glossip v. State*, 157 P.3d 143, 151 (Okla. Crim. App. 2007).

Based on the record, the Court agrees any rational juror could have found the elements of each crime. Aziz—who ordered the murder-testified that Fred Shields accepted the job via his brother Allen Shields and set a price of $10,000. (Doc. 13-27 at 172). According to Allen Shields, he met Fred Shields and Petitioner at his (Allen's) home in the days before the

murder. (Doc. 13-2 at 42). Allen testified Fred and Petitioner left the house to travel to Muskogee, and Aziz similarly recalled hearing that Fred was going to steal a getaway van from Muskogee. (*Id.* at 44-45; *see also* Doc. 13-27 at 173). Charles Billingsley, who was not a defendant in the case, testified that he helped Petitioner take a white Ford van from the detail shop next to Billingsley's business. (Doc. 13-28 at 23-32). On the morning of the murder, Allen Shields recalled that Petitioner came to his home. (Doc. 13-2 at 47). According to Allen Shields, Petitioner wanted him to ask Aziz for the money so the passenger riding with Petitioner (Terrico Bethel) could "get the murder done." (Doc. 13-2 at 49-50). That same day, Aziz recalled Petitioner knocking on the window of his business and saying "watch the news." (Doc. 13-27 at 175). Petitioner never returned the white van, but Billingsley recalls seeing it on television in connection with the murder. (Doc. 13-28 at 40). Allen Shields testified that after the murder, he collected the first $5,000 from Aziz and gave it to Petitioner. (Doc. 13-2 at 65-66). These facts are supported by phone records showing various calls between the co-conspirators in the time leading up to the murder. (Docs. 13-34, 13-35).

Petitioner attempts to overcome this evidence by pointing out: (1) Billingsley never knew what the van was for; (2) Bethel was the actual shooter; (3) there was no evidence regarding the content of various calls and texts between the men; (4) Allen Shields and Aziz testified pursuant to plea deals; and (5) there was no physical evidence linking Petitioner to the murder. (Doc. 8 at 23-26). "[T]he focus of a *Jackson* inquiry is not on what evidence is missing from the record, but whether the evidence in the record, viewed in the

light most favorable to the prosecution, is sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt." *Matthews v. Workman*, 577 F.3d 1175, 1185 (10th Cir. 2009). Here, the testimony of state witnesses and supporting phone records establish Petitioner was part of an agreement to commit murder and took various steps to procure and effect the crime. Habeas relief is unavailable on Ground 3.

E. Crime Scene Evidence (Ground 4)

Petitioner next argues the state court improperly admitted testimony and photographs depicting the crime scene. (Doc. 8 at 27-29). The evidence included a bloody jacket and a photograph depicting blood, tissue, and hair in the victim's office following the shooting. (*Id.*). The prosecutor also introduced testimony describing human issue, blood, and brain matter found on the walls and blinds of the victim's office. (*Id.*). In rejecting Ground 4, the OCCA found the trial court did not err in admitting "testimony and photographs depicting the crime scene and nature, extent, and location of the victim's injury." (Doc. 12-4 at 9). The opinion cited cases holding that a stipulation as to cause of death does not determine whether the probative value of a photo outweighs any prejudice. (*Id.*).

"Federal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights." *Spears v. Mullin*, 343 F.3d 1215, 1225 (10th Cir. 2003). "When, as here, habeas petitioners challenge the admission of [graphic] evidence as violative of the Constitution, [the Court] considers whether the admission of evidence so infected the trial with unfairness as to [violate] due process."

Id. at 1226 (quotations omitted); *see also Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) ("The essence of our inquiry . . . is whether the admission of the photographs rendered the proceedings fundamentally unfair.").

The Tenth Circuit has rejected fundamental unfairness arguments where: (1) the graphic evidence supports the testimony by the medical examiner; and (2) the evidence of guilt is strong. *See Wilson v. Sirmons*, 536 F.3d 1064, 1115 (10th Cir. 2008) ("The photographs, while gruesome . . . allowed the examiner to show where the baseball bat caused various injuries," and in any event, the "evidence at the guilt phase was particularly strong"); *Thornburg v. Mullin*, 422 F.3d 1113, 1129 (10th Cir. 2005) (denying habeas relief where photographs corroborated witness accounts and there was strong evidence of guilt); *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) (same). As discussed above, the State presented strong evidence of guilt. (Supra, Section D). The challenged evidence also corroborated testimony that the victim sustained a high velocity gunshot wound when a shooter entered his office, and was discovered with his head against the window. (Doc. 13-25 at 250-254; *see also* Doc. 13-26 at 16-20). On this record, the Court cannot conclude the challenged evidence rendered the trial unfair, and Ground 4 fails.

F. Juror Misconduct (Ground 5)

Ground 5 raises a due process claim based on juror misconduct. Following trial, Juror Peterson contacted the state judge to report that other jurors ridiculed her and pressured her to reach a verdict during deliberations. (Doc. 12-8 at 29). She alleged she voted

to convict because she understood the verdict had to unanimous, but she believed Petitioner was convicted because he was black and refused to testify. (*Id.*). Juror Peterson also provided an affidavit to defense counsel, which also alleged: (1) Juror Williams said "Do you really want him to be walking on the streets? He's got other charges and won't be getting out of jail;" and (2) Juror Weldon slept at trial. (*Id.* at 38). After some investigation, Petitioner's counsel obtained an affidavit from Juror Perez, who also believed a unanimous verdict was required. (*Id.* at 42). Petitioner filed a motion for a new trial, but the state court denied the motion without holding a hearing. (*Id.* at 52).

After considering Ground 5, the OCCA found no error. (Doc. 12-4 at 13). The opinion concluded no hearing was required because Petitioner failed to file his motion within ten days after entry of the criminal judgment, as required by Oklahoma Crim. Rule. 2.1(A)(2). (*Id.*). The OCCA further found no clear and convincing evidence of misconduct, and noted that in any event, jurors are not permitted to impeach their verdicts." (*Id.* at 14).

The federal constitution guarantees "a tribunal both impartial and mentally competent to afford a hearing." *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (quotations omitted). However, like Oklahoma law, federal law "prohibit[s] the admission of juror testimony to impeach a jury verdict." *Tanner v. United States*, 483 U.S. 107, 117 (1987). This includes situations involving illicit drug use, *Tanner*, 483 U.S. at 117, and undisclosed bias regarding the facts of the case, *Warger*, 135 S. Ct. at 529. As *Tanner* noted, "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the

verdict, seriously disrupt the finality of the process." 483 U.S. 107, 120 (1987). An exception to the no-impeachment rule exists where external, prejudicial information is improperly brought to the jury's attention. *Wagner*, 135 S. Ct. at 529 (citing Fed. R. Evid. 606(b)).[4]

In light of clearly established federal law, the Court cannot find that the OCCA's ruling constitutes an "extreme malfunction in the state criminal justice system." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Juror Peterson did not report the reference to Petitioner's "other charges,"[5] in her original letter to the state court, and in any event, the comment is too vague to conclude extra-record facts prejudiced the outcome at trial. *See, e.g., Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (On juror-misconduct

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[4] In 2017—after briefing was complete in this case—the Supreme Court established a second exception to the no-impeachment rule for evidence of "racial animus [that] was a significant motiving factor in [the] finding of guilt." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). However, habeas relief is only available based on federal law that was "clearly established at the time of the [state] adjudication." *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (quotations omitted). The Court also notes that even if *Pena-Rodriguez* applied, it would not change the outcome in this case. The only evidence of racial bias appeared in Juror Peterson's letter to the state judge, where she wrote: "I believe they convicted [Petitioner] because he was black and didn't take the stand in his own defense." (Doc. 12-8 at 29). She did not provide any specific averments to support this statement or even raise the issue in her detailed, three-page affidavit. (*Id.* at 37-39). Therefore, the Court cannot disturb the verdict based on *Pena-Rodriguez*.

[5] The exact question was: "Do you really want him to walking on the streets? He's got other charges and won't be getting out of jail." (Doc. 12-8 at 38).

claims, the inquiry is "whether they discussed specific extra-record *facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby.") (emphasis in original). The Court is also not convinced the other alleged misconduct (*i.e.* a juror who sometimes slept), or the lack of hearing, rendered the trial fundamentally unfair. Habeas relief is therefore unavailable on Ground 5.

G. Cumulative Error (Ground 7)

Petitioner finally contends he suffered prejudice from the cumulative effect of all errors addressed in Grounds 1-6. (Doc. 8 at 36). The "[c]umulative error analysis [only] applies [in a habeas proceeding] where there are two or more actual errors." *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998). "[I]t does not apply to the cumulative effect of non-errors." *Id.* Having found no error in Grounds 1 through 6, the Court rejects Petitioner's cumulative error claim.

In sum, the Court concludes Petitioner's conviction does not violate federal law. 28 U.S.C. § 2254(a). The Petition is therefore denied.

III. Certificate of Appealability

Habeas Corpus Rule 11 requires "[t]he district court [to] . . . issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate may only issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court rejects the merits of petitioner's constitutional claims, he must make this showing by "demonstrat[ing] that reasonable jurists would find the district court's

assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons discussed above, Petitioner has not made the requisite showing on any of his claims. The Court therefore denies a certificate of appealability.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for a writ of habeas corpus (Doc. 1) is denied.
2. A certificate of appealability is denied.
3. A separate judgment will be entered herewith.

ORDERED this 17th day of September, 2019.

/s/ John E. Dowdell
Circuit Judge
United States District Court

ORDER OF THE OKLAHOMA COURT OF CRIMINAL APPEALS AFFIRMING DENIAL OF POST-CONVICTION RELIEF (APRIL 7, 2016)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2015-923

Before: Clancy SMITH, Presiding Judge, Gary L. LUMPKIN, Vice Presiding Judge, Arlene JOHNSON, Judge, David B. LEWIS, Judge, Robert L. HUDSON, Judge.

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

On October 21, 2015, Petitioner Johnson, by and through counsel William H. Campbell, appealed to this Court from the denial of his Application for Post-Conviction Relief in Tulsa County Case No. CF-2009-2738.

On December 12, 2012, Johnson, represented by counsel, was convicted after a jury trial of Count 4, Conspiracy to Commit Murder and Count 9, First Degree Murder in Tulsa County Case No. CF-2009-2738. In accordance with the jury's recommendation, Johnson was sentenced to life imprisonment for each offense, the sentences ordered to be served consecutively. Johnson appealed to this Court and his conviction was affirmed in an unpublished opinion issued January 10, 2014. *See, Johnson v. State*, F-2013-173 (July 17, 2014) (Not for Publication). All issues previously ruled upon by this Court are *res judicata*, and all issues not raised in the direct appeal, which could have been raised, are waived. A review of this Court's docket indicates this is Johnson's first application for post-conviction relief filed with this Court in this matter.[1]

In his January 2, 2015 application for post-conviction relief filed with the District Court, Johnson raised 5 propositions of error, all centered around the claim that the errors denied Johnson the right to confrontation, due process and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Johnson admits in his application filed in the District Court that each of these claims of error were raised on direct appeal, but argues that the claims were not properly presented, were not presented in a manner in which they have been presented in his post-conviction application, or were decided erroneously by this Court. As an aside, counsel states that each of these errors constituted ineffective assistance of trial counsel.

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[1] Johnson raised 18 propositions on direct appeal.

In a most thorough and complete order, entered September 30, 2015, filed October 6, 2015, the District Court of Tulsa County, the Honorable William D. LaFortune, District Judge, denied Johnson's request for relief. Judge LaFortune noted that Johnson's direct appeal of his conviction was affirmed by this Court, and found that the claims presented in Johnson's application for post-conviction were all presented and rejected on direct appeal. In denying Johnson's request for relief, the District Court cited, with regard to each of Johnson's post-conviction errors, the specific portions of this Court's direct appeal opinion where these exact claims were addressed and rejected. Finding Johnson was not entitled to relief, Judge LaFortune denied his request for the same.

We agree. The Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a Petitioner with a second direct appeal. *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569; *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774. A claim which could have been raised on direct appeal, but was not, is waived. *Fowler*, 1995 OK CR 29 at ¶ 2, 896 P.2d at 569; *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384-85; *Johnson v. State*, 1991 OK CR 124, ¶ 4, 823 P.2d 370, 372. Claims which were raised and addressed in previous appeals are barred as *res judicata*. *Fowler*, 1995 OK CR 29 at ¶ 2, 896 P.2d at 569; *Walker v. State*, 1992 OK CR 10, ¶ 6, 826 P.2d 1002, 1004.

Johnson admits that the claims presented in his application for post-conviction relief were raised on direct appeal, but argues that appellate counsel did not fully develop the issues, failed to reference relevant testimony and bring the same to this Court's attention,

and with regard to at least one proposition argues that this Court's decision was erroneous claiming this Court did not consider all controlling authority. As indicated above, claims raised and addressed in previous appeals are barred from further consideration. We find nothing in Johnson's alleged claims of error espoused in his application for post-conviction relief that differs substantively from these same arguments which were presented on direct appeal.

As for Johnson's claims of ineffective assistance of appellate counsel, this claim may be raised for the first time on post-conviction as it is usually a petitioner's first opportunity to allege and argue the issue. As set forth in *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.3d 969, post-conviction claims of ineffective assistance of appellate counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Smith v. Robbins*, 528 U.S. 259, 289, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) ("[Petitioner] must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel."). Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-66. And we recognize that "[a] court considering a claim of ineffective assistance of counsel must apply a. 'strong presumption that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harring-*

ton v. Richter, 562 U.S. 86, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065).

While citing numerous statutes and criminal cases, Johnson cites no specific factual instances wherein appellate counsel failed to effectively represent his interests. Johnson's supplemental arguments to the issues raised on direct appeal notwithstanding, we find nothing in this record establishing that appellate counsel's performance was deficient or objectively unreasonable. The record does not support the claim that counsel's performance has resulted in prejudice. Johnson must show a reasonable probability that appellate counsel would have prevailed on direct appeal had he argued these propositions of error in the manner that counsel now presents them in this post-conviction appeal. We find no such error in appellate counsel's representation. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

As Petitioner has failed to establish that he is entitled to post-conviction relief, the order of the District Court of Tulsa County in Case No. CF-2009-2738, denying Petitioner's application for post-conviction relief is **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

The Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Tulsa County; the District Court of Tulsa County, the Honorable William D. LaFortune, District Judge; Petitioner and counsel of record.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of April, 2016.

/s/ Clancy Smith
Presiding Judge

/s/ Gary L. Lumpkin
Vice Presiding Judge

/s/ Arlene Johnson
Judge

/s/ David B. Lewis
Judge

/s/ Robert L. Hudson
Judge

ATTEST:

/s/ Michael S. Richie
Clerk

PA/F

ORDER OF THE TULSA COUNTY DISTRICT COURT DENYING POST-CONVICTION RELIEF (OCTOBER 6, 2015)

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Case No. CF-2009-2738

Before: William D. LAFORTUNE, Judge.

ORDER DENYING PETITIONER'S "APPLICATION FOR POST-CONVICTION RELIEF"

This matter comes on for consideration of the Petitioner's "Application for Post-Conviction Relief' filed July 16, 2015. The Court has reviewed the Petitioner's Application, the State's Response thereto, the mandate filed in this matter on the 24th day of July, 2014, and the docket sheet in this matter. The Court is satisfied, based on the application, the answer of the State, the docket sheet and the mandate affirming

the Petitioner's Judgment and Sentences, which comprises the record in this case, that the Petitioner is not entitled to post-conviction relief and no purpose would be served by any further proceedings. Therefore the Court declines to grant Petitioner an evidentiary hearing. 22 O.S. § 1083(B), *Fowler v. State*, 1995 OK CR 29, 896 P.2d 566 Additionally, the Court finds that based on the foregoing record, there are no genuine issues of material fact and the State of Oklahoma is entitled to judgment as a matter of law pursuant to 22 O.S. § 1083(C).

Consistent with 22 O.S. § 1083 (C), the following is this Court's findings of fact and conclusions of law in this matter.

HISTORY OF PETITIONER'S CASE

Petitioner, Alonzo Cortez Johnson, was tried by jury trial and convicted of Conspiracy to Commit Murder (Count IV) (21 O.S. 421), After Former Conviction of Two or More Felonies, and First Degree Murder (Count IX) (21 O.S. 701.7 (A) (2006)) in the District Court of Tulsa County, Case Number CF-2009-2738. The jury recommend as punishment imprisonment for life in Count IV and imprisonment for life and a $10,000.00 fine in Count IX. The trial court sentenced accordingly and ran the sentences consecutively.

From this judgment and sentence the Petitioner appealed to the Oklahoma Court of Criminal Appeals raising the following propositions of error in support of his appeal:

I. The prosecutor's use of peremptory challenges violated the equal protection and due process rights of Petitioner.

II. The dual commission of the District Attorney prohibited prosecution of this case.

III. The trial judge erred by admitting statements by alleged codefendants that occurred after the conspiracy had ended.

IV. The trial court erred by allowing the recorded statements of Terrico Bethel to be used at trial against Petitioner.

V. The trial judge erred by permitting information about "code" language to be presented.

VI. Petitioner's rights to Due Process of Law under the Fourteenth Amendment and his confrontation rights under the Sixth Amendment were violated when the trial court allowed the State to use the hearsay testimony of Allen Shields.

VII. The introduction of gruesome testimony and exhibits deprived Petitioner of a fair trial.

VIII. The evidence was insufficient for a conviction on either count,

IX. Evidence of other crimes denied Petitioner a fair trial.

X. Testimony regarding the white van that was found should not have been admitted due to spoliation of the evidence.

XI. Prosecutorial misconduct denied Petitioner a fair trial.

XII. The trial judge erred by failing to hold a hearing on the Motion for New Trial filed by defense counsel.

XIII. Jury misconduct deprived Petitioner of a fair trial.

XIV. Petitioner was deprived of his right to present a defense.

XV. The trial court erred by excluding evidence.

XVI. Evidentiary harpoons deprived Petitioner of a fair trial.

XVII. The sentence for conspiracy to commit murder was excessive, as well as the fact that the trial judge refused to run the sentences concurrently.

XVIII. Cumulative error deprived Petitioner of a fair hearing.

After a thorough consideration of these propositions and the entire record before them on appeal including the original records, transcripts, and briefs of the parties, the OCCA determined that neither reversal nor modification of the Petitioner's sentences was warranted under the law and the evidence and therefore, the Petitioner's Judgment and Sentences were affirmed.

The Petitioner has filed an "Application for Post-Conviction Relief" wherein he raises the following propositions of error:

1) Petitioner was denied Equal Protection of the law as guaranteed to the Petitioner by the Fourteenth Amendment to the Constitution of the United States.

2) Petitioner was denied the Right to confrontation, Due Process, and Equal Protection of the Law as guaranteed to the Petitioner herein by the Sixth and Fourteenth Amendment to the Constitution of the United States.

3) The Petitioner was denied the right to a trial free of structural error, Due Process of Law and Equal Protection of Law pursuant to the Fourteenth Amendment to the U.S. Constitution and in derogation of Article 2, Section 12, of the Oklahoma Constitution.

4) As stated in the Third Proposition a right to a trial free of structural error, Due Process of Law and Equal Protection of Law pursuant to the Fourteenth Amendment to the U.S. Constitution and in derogation of Article 2, Section 12, of the Oklahoma Constitution.

5) As stated in the prior Propositions a right to a trial free of structural error, Due Process of Law and Equal Protection of Law pursuant to the Sixth Amendment to the Constitution of the United States which preserves the right to a fair and impartial trial.

In support of his first proposition of error, the Petitioner asserts that "District Attorneys Tim Harris and Doug Drummond, jointly and severally, systematically used peremptory challenges to effective (sic) remove jurors of minority race from the trial venire men." The Petitioner claims that after Petitioner's counsel objected to the State's peremptory challenges, the trial judge *sua sponte* provided "race neutral" reasons for the stricken jurors. Additionally, the Petitioner argues that it was improper for the trial court

to provide its own "race neutral" reasons for the peremptory challenges after defense counsel's objection and was derogation of the process enumerated by the U.S. Supreme Court. Petitioner claims that the trial judge's actions effectively made him and advocate for one side and " . . . such abandonment of the arbiter role raises serious questions as to the final determination as to the sufficiency of the State's 'race neutral' reasons . . . " Petitioner argues that the failure by the trial court to find a *Batson* violation was clearly erroneous on the totality of the evidence and the statement by the Trial Court." The Petitioner concludes the foregoing argument by contending that " . . . [s]uch error affected the structure of the trial in this case."

To support his second proposition, the Petitioner argues that his right to confrontation was violated where:

1) Terrico Bethel made statements to Dolan Prejean that tended to implicate Petitioner and the Petitioner was unable to cross-examine Bethel due to Petitioner and Bethel being tried jointly.

2) The trial court permitted the transcript of the testimony of Allen Shields to be read to the jury over the objection of the defense.

3) The Petitioner was not allowed to attempt to discredit or impeach the testimony of Allen Shields as the trial court denied Petitioner the use of available recordings which in the Petitioner's view would have challenged the veracity of Shields' testimony.

4) Call recordings were admitted for which cross examination of the parties was not available and which denied the Petitioner the right to confrontation and Due Process of law.

5) The trial court failed to make the requisite findings of the existence of a conspiracy, the participation of the defendant in the conspiracy, the statements were made during the course of the conspiracy, and that the statements were made in furtherance of the conspiracy prior to admitting the "concon-spirator statements."

In support of his third proposition, the Petitioner argues that the prosecutors in Petitioner's case lacked legal authority to act on behalf of the State of Oklahoma as the prosecutors in his case vacated their state positions when they became Special Assistant United States Attorneys.

In support of his fourth proposition, the Petitioner claims that based upon the argument made in his third proposition Petitioner was denied the right to a trial free of structural error, Due Process of Law and Equal Protection of Law pursuant to the Fourteenth Amendment to the U.S. Constitution and in derogation of Article 2, Section 12, of the Oklahoma Constitution.

Additionally the Petitioner claims that the verdict in his case was not *de facto et de jure,* as the [sic] " . . . abuse of two jurors rendered their decision based on threats and intimidation by the more aggressive members of the panel and not upon the evidence presented by the State." The Petitioner argues that the verdict was " . . . therefore an invalid expression

of the panel and constituted structural error when accepted by the court."

In support of his fifth proposition, the Petitioner argues based upon the argument made "in the prior Propositios" [sic] that he was denied the right to a trial free of structural error, Due Process of Law and Equal Protection of Law pursuant to the Sixth Amendment to the Constitution of the United States which preserves the right to a fair and impartial trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Post-conviction review provides petitioners with very limited grounds upon which to base a collateral attack on their judgments. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973, as corrected (Feb. 28, 2013), citing 22 O.S.2001, § 1086. Post-conviction review is not a substitute for direct appeal. *Maines v. State*, 597 P.2d 774, 775-76 (Okl.Cr. 1979); *Fox v. State*, 880 P.2d 383, 384 (Okl.Cr. 1994). Nor was it designed or intended to provide applicants another direct appeal. *Id.* citing *Coddington v. State*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835 ("The post-conviction process is not a second appeal.")

The Oklahoma Court of Criminal Appeals has long held that issues that were previously raised and ruled by upon by the Oklahoma Court of Criminal Appeals are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973, as corrected (Feb. 28, 2013), citing 22 O.S.2001,

§ 1086; *King v. State*, 2001 OK CR 22, ¶ 4, 29 P.3d 1089, 1090; *Webb v. State*, 1992 OK CR 38, ¶ 6, 835 P.2d 115, 116, *overruled on other grounds, Neill v. State*, 1997 OK CR 41, ¶ 711.2, 943 P.2d 145, 148 n.2.

Additionally, the Post-Conviction Procedure Act further precludes claims that could have been raised " . . . in any other proceeding the applicant has taken to secure relief," which includes not only an applicant's direct appeal but also his or her prior post-conviction applications. 22 O.S. § 1086. *See also Berget v. State*, 1995 OK CR 66, ¶ 6, 907 P.2d 1078, 1081-82 (claims that could have been raised in a prior post-conviction application are waived).

In the instant case, each of the propositions raised in the Petitioner's "Application for Post-Conviction Relief' were raised on direct appeal, and therefore are procedurally barred from further review under the doctrine of *res judicata*. *Logan*, supra.

On appeal, the Petitioner in Proposition One, contended that the State systemically removed minorities from the jury contrary to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Finding that trial court did not abuse its discretion when it found that the State did not engage in systemic or specific discrimination the Oklahoma Court of Criminal Appeals (hereinafter "OCCA") denied relief.

In Petitioner's second proposition raised on appeal, the Petitioner argued that the Information filed against him should have been set aside because Tulsa County District Attorney, Tim Harris, ipso facto vacated his office when he became a Special Assistant United States Attorney. The OCCA found that Tim Harris' position as Special Assistant United States Attorney

was not a public office but instead was an employee of an official holding public office. Therefore, the OCCA denied relief on this claim.

In Petitioner's third proposition raised on appeal, Petitioner contended that the trial court committed error when it admitted several exhibits at trial that contained the recorded statements of his co-conspirators. He argued that the co-conspirator's statements failed to meet the requisite threshold of being made during the course and in furtherance of the conspiracy. The OCCA determined that the record revealed that the trial court did not admit any of the challenged exhibits under the co-conspirator non-hearsay provision in 12 O.S. 2801 (B)(2)(e) (2012). As the exhibits were otherwise admissible and their probative value was not substantially outweighed by the danger for unfair prejudice, the OCCA found that the trial court did not abuse its discretion in the admission of this evidence.

In Petitioner's fourth proposition raised on appeal, Petitioner contended that the trial court committed error when it admitted an audio recording containing co-conspirator, Terrico Bethel's, statements to fellow jail inmate, Dolan Prejean. Petitioner argued that Bethel's statements constituted hearsay and the admission of this evidence violated his right to confrontation. The OCCA found that the trial court did not abuse its discretion in the admission of this exhibit and therefore denied this claim.

In Petitioner's sixth proposition, Petitioner challenged the trial court's admission of the late Allen Shields' preliminary hearing testimony at trial. Petitioner conceded that Shields was unavailable but argued that he did not have an adequate opportunity to cross-examine him at preliminary hearing. Reviewing

the record, the OCCA found that the defense had an adequate opportunity to cross-examine Allen Shields at preliminary hearing consistent with the requirements of the Confrontation Clause.

In Propositions Twelve and Thirteen, Petitioner contended that juror misconduct deprived him of a fair trial and that the trial court erred when it failed to hold a hearing on his Motion for New Trial alleging these circumstances. The OCCA found that since Petitioner failed to file his motion within ten days from the trial court's imposition of his sentences, the trial court did not abuse its discretion when it refused to hold a hearing on the motion. The OCCA further found that the trial court did not abuse its discretion in denying Petitioner's motion and that the trial court properly refused to receive the juror's post-verdict letter and, later, the two jurors' affidavits asserting allegations concerning the motives, methods, and mental processes by which the jury reached its verdicts as the OCCA found that jurors are not permitted to impeach their verdicts. *Matthews*, 2002 OK CR 16,14, 45 P.3d at 915; *Weatherly v. State*, 1987 OK CR 28, 11-13, 733 P.2d 1331, 1335 12 O.S. 2606 (B) (2011). Since Petitioner failed to establish juror misconduct by clear and convincing evidence, the OCCA denied relief.

The Court finds that as each of the Petitioner's claims asserted in his Application for Post-Conviction Relief were raised in Petitioner's direct appeal, Petitioner's are procedurally barred, and the Court need not address the underlying merits of these claims, as courts need not consider issues that are barred by res judicata or waiver. *See Boyd v. State*, 1996 OK CR

12, ¶ 3, 915 P.2d 922; *Stiles* v. *State*, 1995 OK CR 51, ¶ 2, 902 P.2d 1104, 1105.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that based upon the foregoing, the Petitioner's "Application for Post-Conviction Relief' is hereby **DENIED**.

SO ORDERED this 30th day of September, 2015.

/s/ William D. LaFortune
Judge of the District Court

SUMMARY OPINION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS AFFIRMING JUDGMENTS AND SENTENCES (JULY 17, 2014)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2013-173

Before: David B. LEWIS, Presiding Judge, Clancy SMITH, Vice Presiding Judge, Gary L. LUMPKIN, Judge, Arlene JOHNSON, Judge, Charles JOHNSON, Judge.

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Alonzo Cortez Johnson, was tried by jury trial and convicted of Conspiracy to Commit Murder (Count IV) (21 O.S.2001, § 421), After Former Conviction of Two or More Felonies, and First Degree

Murder (Count IX) (21 O.S.Supp.2006, § 701.7(A)) in the District Court of Tulsa County, Case Number CF-2009-2738. The jury recommend as punishment imprisonment for life in Count IV and imprisonment for life and a $10,000.00 fine in Count IX.[1] The trial court sentenced accordingly and ran the sentences consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. The prosecutor's use of peremptory challenges violated the equal protection and due process rights of Appellant.

II. The dual commission of the District Attorney prohibited prosecution of this case.

III. The trial judge erred by admitting statements by alleged co-defendants that occurred after the conspiracy had ended.

IV. The trial court erred by allowing the recorded statements of Terrico Bethel to be used at trial against Appellant.

V. The trial judge erred by permitting information about "code" language to be presented.

VI. Appellant's rights to Due Process of Law under the Fourteenth Amendment and his confrontation rights under the Sixth Amendment were violated when the trial court allowed the State to use the hearsay testimony of Allen Shields.

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[1] Appellant will be required to serve 85% of his sentence in Count IX pursuant to 21 O.S.Supp.2002, § 13.1.

VII. The introduction of gruesome testimony and exhibits deprived Appellant of a fair trial.

VIII. The evidence was insufficient for a conviction on either count,

IX. Evidence of other crimes denied Appellant a fair trial.

X. Testimony regarding the white van that was found should not have been admitted due to spoliation of the evidence.

XI. Prosecutorial misconduct denied Appellant a fair trial.

XII. The trial judge erred by failing to hold a hearing on the Motion for New Trial filed by defense counsel.

XIII. Jury misconduct deprived Appellant of a fair trial.

XIV. Appellant was deprived of his right to present a defense.

XV. The trial court erred by excluding evidence.

XVI. Evidentiary harpoons deprived Appellant of a fair trial.

XVII. The sentence for conspiracy to commit murder was excessive, as well as the fact that the trial judge refused to run the sentences concurrently.

XVIII. Cumulative error deprived Appellant of a fair hearing.

After thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties,

we have determined that neither reversal nor modification of sentence is warranted under the law and the evidence.

In Proposition One, Appellant contends that the State systemically removed minorities from the jury contrary to *Batson v. Kentucky*, 476 U.S. 79, 106 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.E.d.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.

In Proposition Two, Appellant contends that the Information filed against him should be set aside be-

cause Tulsa County District Attorney, Tim Harris, *ipso facto* vacated his office when he became a Special Assistant United States Attorney. Article II, § 12 of the Oklahoma Constitution prohibits any member of Congress from this State, or person holding any office of trust or profit under the laws of any other State, or of the United States, from holding any office of trust or profit under the laws of this State. *Battiest v. State*, 1988 OK CR 95, ¶ 3, 755 P.2d 688, 689; *Nesbitt v. Apple*, 1995 OK 20, ¶ 23, 891 P.2d 1235, 1243. The record reflects that Harris' position as Special Assistant United States Attorney was unpaid, had minimal duties, and was limited to the investigation of one single case. As such, we find that his position as Special Assistant United States Attorney was not a public office but instead was an employee of an official holding public office. *Id.* Article II, § 12 of the Oklahoma Constitution is inapplicable to this case. *Id.* Proposition Two is denied.

In Proposition Three, Appellant contends that the trial court committed error when it admitted several exhibits at trial that contained the recorded statements of his co-conspirators.[2] He argues that the co-conspirator's statements failed to meet the requisite threshold of being made during the course and in furtherance of the conspiracy. *Powell v. State*, 2000 OK CR 5, § 71, 995 P.2d 510, 527 ("A statement which is offered against a party and made by his co-conspirator during the course and in furtherance of their conspiracy is admissible and is not hearsay.").

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[2] The record reflects that the State withdrew State's Exhibit No. 108 and substituted State's Exhibit No. 113 in its place. (Tr. 999-1000, 1119-20). Therefore, Appellant's challenge to State's Exhibit No. 108 is moot.

The record reveals that the trial court did not admit any of the challenged exhibits under the co-conspirator non-hearsay provision in 12 O.S.2011, § 2801(B)(2)(e). As the exhibits were otherwise admissible and their probative value was not substantially outweighed by the danger for unfair prejudice, we find that the trial court did not abuse its discretion in the admission of this evidence. *Goode v. State*, 2010 OK CR 10, ¶ 31, 236 P.3d 671, 678; *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310.

Appellant further challenges Mohammed Aziz's testimony at trial as failing to meet the requisite threshold of the co-conspirator non-hearsay provision. Aziz testified that, on the day of the murder, Appellant came to his convenience store, knocked on the bullet-proof glass and told him to "watch the news." Appellant did not raise a challenge to Aziz's testimony at trial. Therefore, we find that he has waived appellate review of his claim for all but plain error. *Mitchell v. State*, 2011 OK CR 26, ¶ 72, 270 P.3d 160, 179. We review Appellant's claim pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

> To be entitled to relief under the plain error doctrine, [an appellant] must prove: 1) the existence of an actual error (*i.e.*, deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *See Simpson v. State*, 1994 OK CR 40, ¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation

> of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (*citing United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993)); 20 O.S.2001, § 3001.1.

Id., 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that Appellant has not shown the existence of an actual error. The challenged statement was not the out-of-court statement of a co-conspirator but was instead Appellant's own statement offered against him. 12 O.S.2011, § 2801(B)(2)(a). As the statement tended to establish that Appellant was a participant in the conspiracy, the statement's probative value was not substantially outweighed by its danger for unfair prejudice. *Goode*, 2010 OK CR 10, ¶ 31, 236 P.3d at 678. Plain error did not occur. Proposition Three is denied.

In Proposition Four, Appellant contends that the trial court committed error when it admitted an audio recording containing co-conspirator, Terrico Bethel's, statements to fellow jail inmate, Dolan Prejean. He argues that Bethel's statements constituted hearsay and the admission of this evidence violated his right to confrontation. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). We find that the trial court did not abuse its discretion in the admission of this exhibit. *Goode*, 2010 OK CR 10, ¶ 44, 236 P.3d at 680. Bethel confessed the conspiracy and murder to Prejean in detail on the recording. As the State redacted all of Bethel's statements that expressly referenced Appellant, Bethel's statements on the recording met the hearsay exception found within 12 O.S.2011, § 2804(B)(3) and did not violate Appel-

lant's right to confrontation. *Davis v. Washington*, 547 U.S. 813, 825, 126 S.Ct. 2266, 2275, 165 L.Ed.2d 224 (2006) (recognizing statements which are made from one prisoner to another or made unwittingly to government informant are nontestimonial); *Richardson v. Marsh*, 481 U.S. 200, 208-09, 107 S.Ct. 1702, 1707-08, 95 L.Ed.2d 176 (1987) (finding State may comply with the rule announced in *Bruton*, through redaction of any facially incriminating statements within codefendant's confession); *Miller v. State*, 2004 OK CR 29, ¶ 34, 98 P.3d 738, 745.

Appellant further argues that he was prejudiced because the jurors received a copy of the transcript of the audio recording that had the redacted portions in large, blacked-out blocks. Appellant did not challenge the jury's receipt of this aid at trial. Therefore, we find that he has waived appellate review of this issue for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 11, 23, 876 P.2d 690, 694-95, 698-99. Reviewing Appellant's claim for plain error under the test set forth in *Hogan* we find that Appellant has not shown the existence of an actual error (*i.e.*, deviation from a legal rule). *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. The trial court properly instructed the jurors concerning their consideration of the evidence in the case and the court's rulings upon the admissibility of evidence and we presume that the jury followed those instructions. *Mitchell*, 2011 OK CR 26, ¶ 124, 270 P.3d at 187; Inst. Nos. 9-1, 10-1, 10-9, OUJI-CR(2d)(Supp.2012). Plain error did not occur. Proposition Four is denied.

In Proposition Five, we find that the trial court did not abuse its discretion by allowing Detective Regalado to testify about the meanings of certain words

and phrases Appellant and his associates used in the audio recorded telephone calls. As Regalado's interpretations were rationally based upon his personal observations and experience as a police officer, were helpful to the jury, did not improperly tell the jury who or what to believe, and were subjected to cross-examination, we find that the trial court properly allowed Regalado's testimony on the subject. *Carter v. State*, 2008 OK CR 2, ¶ 11, 177 P.3d 572, 575; *Andrew v. State*, 2007 OK CR 23, ¶ 73, 164 P.3d 176, 195; *Evans v. State*, 2007 OK CR 13, ¶ 5, 157 P.3d 139, 142.

In a single sentence within this proposition, Appellant asserts that the prosecutor had no expertise to support his own speculative interpretation of the language. As Appellant failed to set this claim out as separate proposition of error as required by Rule 3.5 (A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), we find that Appellant has waived review of the issue. *Murphy v. State*, 2012 OK CR 8, ¶ 23, 281 P.3d 1283, 1291. Proposition Five is denied.

In Proposition Six, Appellant challenges the trial court's admission of the late Allen Shields' preliminary hearing testimony at trial. Appellant concedes that Shields was unavailable but argues that he did not have an adequate opportunity to cross-examine him at preliminary hearing. Reviewing the record, we find that the defense had an adequate opportunity to cross-examine Allen Shields at preliminary hearing consistent with the requirements of the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004); *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed .2d 15 (1985); *Mancusi v. Stubbs*, 408 U.S. 204, 216,

92 S.Ct. 2308, 2315, 33 L.Ed.2d 293 (1972); *California v. Green*, 399 U.S. 149, 165, 90 S.Ct. 1930, 1938-39, 26 L.Ed.2d 489 (1970). The discovery of potentially new grounds for impeachment of Allen Shields following preliminary hearing did not render the defense's prior opportunity to cross-examine Shields constitutionally inadequate. *Hanson v. State*, 2009 OK CR 13, ¶¶ 9-10, 206 P.3d 1020, 1026; *Howell v. State*, 1994 OK CR 62, ¶ 18-19, 882 P.2d 1086, 1091. Accordingly, we find that the trial court did not abuse its discretion when it determined that the transcript of Shields' preliminary hearing testimony was admissible at trial. *Thompson v. State*, 2007 OK CR 38, ¶ 26, 169 P.3d 1198, 1207. Proposition Six is denied.

As to Proposition Seven, we find that the trial court did not abuse its discretion when it admitted the testimony and photographs depicting the crime scene and the nature, extent and location of the victim's injury. *Davis v. State*, 2011 OK CR 29, ¶ 89, 268 P.3d 86, 113 (holding Appellant's failure to contest that victim died due to shot he fired did not cause crime scene photographs to be unduly prejudicial); *Warner v. State*, 2006 OK CR 40, ¶ 167, 144 P.3d 838, 887 ("Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect."); *Smallwood v. State*, 1995 OK CR 60, ¶ 33, 907 P.2d 217, 228 ("Appellant's willingness to concede that there is no dispute over the identity of the victim or the injuries sustained is not determinative of the photographs' admissibility."). Proposition Seven is denied.

In Proposition Eight, Appellant challenges the sufficiency of the evidence supporting his convictions. Reviewing the evidence in the light most favorable to

the prosecution, we find that any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt." *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; Inst. Nos. 2-17, 4-61, OUJI-CR(2d)(Supp. 2012). The jury could have rationally concluded that Appellant became a party to the conspiracy to murder the victim, committed an overt act in furtherance of that agreement and was criminally responsible for the victim's unlawful death. *Littlejohn v. State*, 2008 OK CR 12, ¶¶ 13-14, 181 P.3d 736, 741; *Hancock v. State*, 2007 OK CR 9, ¶ 67, 155 P.3d 796, 812; *Conover v.* State, 1997 OK CR 6, ¶ 18, 933 P.2d 904, 9104-11; *Hackney v. State*, 1994 OK CR 29, ¶¶ 6, 8, 874 P.2d 810, 813-14. Proposition Eight is denied.

As to Proposition Nine, we find that the trial court did not abuse its discretion in admitting other crimes evidence. *Glossip v. State*, 2007 OK CR 12, ¶ 80, 157 P.3d 143, 157. Agent Petrie did not make a specific reference to Appellant's involvement in another offense, therefore, we find that it did not constitute prohibited other crimes evidence. *Nuckols v. State*, 1984 OK CR 92, ¶ 39, 690 P.2d 463, 470-71. Detective Regalado's testimony revealed Appellant's consciousness of guilt through his post-offense conduct and did not constitute prohibited other crimes evidence. *Andrew*, 2007 OK CR 23, ¶ 58, 164 P.3d at 193; *Dodd v. State*, 2004 OK CR 31, ¶¶ 33-34, 100 P.3d 1017, 1031. Proposition Nine is denied.

As to Proposition Ten, Appellant challenges the testimony concerning the white van that the Tulsa Police Department lost. Although Appellant filed a pretrial motion seeking to exclude any evidence con-

cerning the van due to spoliation, he failed to renew this specific challenge at trial and thus waived appellate review of this issue for all but plain error. *Conover*, 1997 OK CR 6, ¶ 24, 933 P.2d at, 911; *Short v. State*, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094. We review Appellant's claim for plain error pursuant to the test set forth in *Hogan* and first determine whether Appellant has shown the existence of an actual error (*i.e.*, deviation from a legal rule). *Hogan*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d at 923. The record reveals that the police inadvertently sold the van at public auction and was sued for the loss by the owner. As Appellant has not shown that the police acted in bad faith, the loss of the evidence did not constitute a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988); *Hogan v. State*, 1994 OK CR 41, ¶ 18, 877 P.2d 1157, 1161. Accordingly, we find that Appellant has not shown the existence of an actual error. Plain error did not occur. Proposition Ten is denied.

In Proposition Eleven, Appellant contends that prosecutorial misconduct deprived him of a fundamentally fair trial. He first argues that the prosecutor misstated facts in opening argument when he stated that the five alleged conspirators had gotten together behind closed doors and secretly planned to kill the victim. Appellant did not timely challenge the prosecutor's comment at trial and thus waived appellate review of this claim for all but plain error. *Malone v. State,* 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211-12. We review Appellant's claim for plain error pursuant to the test set forth in *Hogan* and first determine whether Appellant has shown the existence of an actual error (*i.e.*, deviation from a legal

rule). *Hogan*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d at 923. We first determine whether Appellant has shown the existence of an actual error. Although the five conspirators never assembled all together at the same time, the evidence revealed that the men met in small groups at different times and planned to kill the victim. As Appellant has not shown a variance between the State's recitation of facts and the actual evidence, we find that Appellant has not shown the existence of an actual error. *Bland*, 2000 OK CR 11, ¶ 101, 4 P.3d at 728. Plain error did not occur.

Second, Appellant argues that the prosecutor misrepresented the evidence to the jury during closing arguments when he held up a piece of paper on which he had written Appellant's purported agreement to join the plan to kill the victim and Appellant's signature. The prosecutor's argument properly highlighted the problems associated with proving a conspiracy, including their secretive nature. *Grissom v. State*, 2011 OK CR 3, ¶ 67, 253 P.3d 969, 992; *Davis v. State*, 1990 OK CR 20, ¶ 8, 792 P.2d 76, 81. As the prosecutor clearly informed the jury that no such document existed but that the document contained the prosecutor's handwriting and he was just using it as an illustration, we find that the prosecutor's argument was not so grossly improper and unwarranted as to affect Appellant's rights. *Ball v. State*, 2007 OK CR 42, ¶ 57, 173 P.3d 81, 95.

Third, Appellant argues that the prosecutor misstated the law concerning co-conspirator liability in closing argument. We find that the prosecutor's comments did not misstate the law or mislead the jury concerning co-conspirator liability. *Florez v. State*, 2010 OK CR 21, ¶ 6, 239 P.3d 156, 158; *Littlejohn*, 2008

OK CR 12, ¶¶ 13-14, 181 P.3d at 741. Reviewing the entire record, we find that the cumulative effect of the prosecutor's comments did not deprive Appellant of a fair trial. *Warner*, 2006 OK CR 40, ¶ 197, 144 P.3d at 891. Proposition Eleven is denied.

In Propositions Twelve and Thirteen, Appellant contends that juror misconduct deprived him of a fair trial and that the trial court erred when it failed to hold a hearing on his Motion for New Trial alleging these circumstances. Rule 2.1(A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), requires the District Court to hold a hearing "[i]f a motion for new trial is filed within ten (10) days from the imposition of Judgment and Sentence in open court . . . within thirty (30) days from the date the motion is filed." As Appellant failed to file his motion within ten days from the trial court's imposition of his sentences, we find that the trial court did not abuse its discretion when it refused to hold a hearing on the motion. *Woodruff v. State*, 1993 OK CR 7, ¶ 15, 846 P.2d 1124, 1132 ("Whether or not to hold an evidentiary hearing was within the discretion of the trial court.").

We further find that the trial court did not abuse its discretion in denying Appellant's motion. *Jackson v. State*, 2006 OK CR 45, ¶¶ 11-12, 146 P.3d 1149, 1156; *Matthews v. State*, 2002 OK CR 16, ¶ 3, 45 P.3d 907, 912. The trial court properly refused to receive the juror's post-verdict letter and, later, the two jurors' affidavits asserting allegations concerning the motives, methods, and mental processes by which the jury reached its verdicts because jurors are not permitted to impeach their verdicts. *Matthews*, 2002 OK CR 16, ¶ 14, 45 P.3d at 915; *Weatherly v. State*,

1987 OK CR 28, ¶¶ 11-13, 733 P.2d 1331, 1335 12 O.S. 2011, § 2606(B). Appellant, otherwise, failed to establish juror misconduct by clear and convincing evidence. *Coddington v. State*, 2006 OK CR 34, ¶ 25, 142 P.3d 437, 446; *Woodruff*, 1993 OK CR 7, ¶¶ 12-14, 846 P.2d at 1132 (holding mere speculation that juror had knowledge of facts and circumstances involving the case insufficient to establish juror misconduct); *Keller v. State*, 1982 OK CR 59, ¶¶ 17-20, 651 P.2d 1339, 1342-43 (denying appellant's claim verdict affected by outside influence on jurors where juror explained she was tired, gave up and voted with rest of jurors even though it was not right); *Randleman v. State*, 1976 OK CR 160, ¶ 21, 552 P.2d 90, 93 (rejecting juror misconduct claim based on single affidavit where there was no evidence trial judge observed any juror sleeping during trial). Propositions Twelve and Thirteen are denied.

In Proposition Fourteen, Appellant contends that he was deprived of his right to present a complete defense in two separate instances. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986). He first challenges the trial court's ruling concerning statements within Bethel's confession to Prejean that he believed were exculpatory but that the State had redacted because they expressly implicated Appellant contrary to *Bruton*. Appellant sought to have his name redacted but to leave in Bethel's directions to Appellant's house, which was in-fact Allen Shields' home. The trial court gave Appellant the option of leaving in both his name and Bethel's erroneous conclusion as to Appellant's home or redacting both the name and Bethel's erroneous conclusion. Appellant chose to have both his name and the erroneous con-

clusion redacted. We find that Appellant's request to redact his name but leave the erroneous conclusion would have been confusing, misleading and not assure the fair and reliable ascertainment of guilt or innocence. *Postelle v. State*, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131; *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275; 12 O.S.2011, § 2403. As the evidence was inadmissible, we find that the trial court did not abuse its discretion in limiting Appellant's introduction of evidence. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 (1998); *Simpson v. State*, 2010 OK CR 6, ¶¶ 9-11, 230 P.3d 888, 895.

Second, Appellant challenges the trial court's refusal to permit him to publish to the jury Detective Regalado's report concerning his interview of co-conspirator, Mohammed Aziz. We find that Appellant's claim is not supported by the record. Appellant never sought to admit the law enforcement report into evidence, therefore, we find that Appellant was not denied his right to present a complete defense. As both Regalado and Aziz admitted the statement which Appellant wanted to show the jury and the report was otherwise inadmissible, we find that the trial court did not abuse its discretion when it limited Appellant's cross-examination of Regalado by refusing him permission to publish the report to the jury. *Mitchell*, 2011 OK CR 26, ¶¶ 58, 69, 270 P.3d at 177-78; 12 O.S.2011, § 2803(8)(a). Proposition Fourteen is denied.

In Proposition Fifteen, Appellant contends that the trial court committed error when it excluded evidence as to the outcome of Allen Shields' polygraph test despite the fact that the State presented evidence concerning the outcome of Fred Shields' polygraph test. Appellant did not seek to introduce the outcome

of Allen Shields' polygraph test based upon this ground at trial. He failed to make any offer of proof concerning the excluded evidence. As such, we find that he waived appellate review of this issue for all but plain error. *Mitchell*, 2011 OK CR 26, ¶ 72, 270 P.3d 179. We review Appellant's claim for plain error pursuant to the test set forth in *Hogan* and first determine whether Appellant has shown the existence of an actual error (*i.e.*, deviation from a legal rule). *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that the trial court properly excluded the outcome of Allen Shields' polygraph examination. This Court has repeatedly held that "the results of polygraph tests are not admissible for any purpose." *Matthews v. State*, 1998 OK CR 3, ¶ 18, 95 P.2d 336, 343; *Paxton v. State*, 1993 OK R 59, ¶ 42, 867 P.2d 1309, 1323; *Birdsong v. State*, 1982 OK CR 120, ¶ 8, 649 P.2d 786, 788; *Fulton v. State*, 1975 OK CR 200, ¶ 3, 541 P.2d 871, 871. The United States Supreme Court has recognized that the *per se* exclusion of polygraph evidence as unreliable does not deny a defendant the ability to present his defense. *Scheffer*, 523 U.S. at 309, 118 S.Ct. at 1265. Appellant did not challenge the State's introduction of the outcome of Fred Shields' polygraph test. The outcome of Allen Shields' polygraph examination did not rebut the State's evidence concerning the outcome of Fred Shields' polygraph test, thus we find that the State did not open the door to Appellant's admission of this unreliable evidence. *See Hogan*, 2006 OK CR 19, ¶¶ 68-69, 139 P.3d at 931-32; *Davis*, 2011 OK CR 29, ¶ 165, 268 P.3d at 127. Accordingly, we find that Appellant has not shown the existence of an actual error. Plain error did not occur. Proposition Fifteen is denied.

In Proposition Sixteen, Appellant contends that he was deprived of a fair trial by evidentiary harpoons. Neither Regalado nor Petrie willfully jabbed information indicating Appellant's involvement in other crimes, therefore, we find that the officers' testimony did not constitute an evidentiary harpoon. *Anderson v. State*, 1999 OK CR 44, ¶ 36, 992 P.2d 409, 421. As the trial court sustained Appellant's general objection and took curative measures, we find that any error was cured. *Powell*, 2000 OK CR 5, ¶ 103, 995 P.2d at 533; *Rogers v. State*, 1995 OK CR 8, ¶ 22, 890 P.2d 959, 972. Proposition Sixteen is denied.

As to Proposition Seventeen, we find that Appellant's sentence for Conspiracy to Commit Murder is within the applicable statutory range and when considered under all the facts and circumstances of the case, is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291; *Lamb v. State*, 1988 OK CR 106, ¶ 12, 756 P.2d 1236, 1238. The trial court did not abuse its discretion when it ran Appellant's sentences consecutively. *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535; *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09. Proposition Seventeen is denied.

As to Proposition Eighteen, we find that Appellant was not denied a fair sentencing trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. Proposition Eighteen is denied.

DECISION

The judgment and sentence is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, THE HONORABLE
TOM C. GILLERT, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.

LEWIS, P.J.: CONCUR
SMITH, V.P.J..: RECUSE
C. JOHNSON, J.: RECUSE
A. JOHNSON, J.: CONCUR

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TRANSCRIPT OF VOIR DIRE AND JURY SELECTION, RELEVANT EXCERPTS (DECEMBER 4, 2012)

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

ALONZO CORTEZ JOHNSON,

Defendant.

No. F-2013-173

Case No. CF-09-2738

Before: Hon. Tom C. GILLERT, Judge.

[Voir Dire Transcript, pp. 48-53]

. . . trying to embarrass, we're not trying to pry into your private lives. But in your experience, Mr. Spitzer, if I were to say the socially acceptable answer, how would you define that for me?

JUROR SPITZER: It sounds like you're saying it would be politically correct, it would be what society expects you to believe.

MR. HARRIS: That's right. I'm not looking for those answers; all right? It may sound good because

we're in a public forum in a courtroom on the fourth floor of the Tulsa County courthouse, but the reason you took that oath is I want to know what your personal opinion is whether it sounds good and whether it's socially acceptable or even what you think I want to hear; right? I don't want to hear anything other than what your personal opinion is. And each and every one of you, does that all make sense to you; right? The system breaks down if you say, well, you know, that sounded really good, if he asks me that I'm going to say that too; okay? No, we're asking you to kind of pause, slow the system down, and ask yourself, well, that's interesting, I never really quite thought about that, what is my opinion about that. And then whether it's the same or different we're asking that you would give us that; okay?

Mr. Perez, I'm not picking on you, you've been in the restaurant business with your wife, but just from your accent I'm going to ask you this, is English your first or your second language?

JUROR PEREZ: Second.

MR. HARRIS: And, again, not to embarrass you in any manner, but is there anything about the English language that is confusing to you or puts you at a disadvantage listening to sworn testimony in this case?

JUROR PEREZ: Yes, it might be. It might be words that I don't understand quite right, and, yeah, it might be a disadvantage to everything.

MR. HARRIS: Okay. How long have you been speaking English?

JUROR PEREZ: Over 30 years.

MR. HARRIS: Okay. Long time.

JUROR PEREZ: Yes. But I might say that I have words that I don't understand a hundred percent what do they mean, so . . .

MR. HARRIS: Okay. If we run into a situation like that, I don't know that that disqualifies you to be able to sit as a juror in this case, but you actively would then have to say, Your Honor, I didn't understand that or what does that mean or you'd have to actively be involved and say, whoa, stop, I didn't quite understand that; okay? So, again, you know, I appreciate your service and the time you're giving us. I don't want to create a situation for you that is insurmountable; okay? Do you understand that?

JUROR PEREZ: Yes.

MR. HARRIS: Is there anything that either the judge has previously talked about yesterday or even in my short statements this morning that you haven't understood in the English language?

JUROR PEREZ: No, not really. I think I got it pretty much.

MR. HARRIS: Okay. Again, if, in fact, we cross that bridge, please get our attention, get the judge's attention, we'll do our very best to maybe redefine that or use a synonym or another word that is understandable to you, but we want to make sure you understand everything that's going on; okay?

Ms. Aramburo de Wassom; is that pretty close?

JUROR ARAMBURO DE WASSOM: Yes.

MR. HARRIS: I'm trying, honest I'm trying. Over each one of those syllables yesterday I put kind of a long, you know, and so I'm going to ask you some of the same questions that I asked Mr. Perez. Is English your first language?

JUROR ARAMBURO DE WASSOM: No, my second.

MR. HARRIS: Second language. What is your first language?

JUROR ARAMBURO DE WASSOM: Spanish.

MR. HARRIS: And how long have you been speaking English?

JUROR ARAMBURO DE WASSOM: Like 15 years.

MR. HARRIS: Fifteen, okay. Same question I asked Mr. Perez. Is there anything at least so far that you think you've been placed at a disadvantage because you didn't understand the meanings of the English words that were being used?

JUROR ARAMBURO DE WASSOM: Well, yeah, some words I don't understand really, and I don't feel comfortable with that because I don't speak really good English.

MR. HARRIS: Okay. I didn't catch the last phrase. You don't feel you speak really good English or you do believe you speak really good English?

JUROR ARAMBURO DE WASSOM: I don't believe.

MR. HARRIS: You don't believe. So you think it puts you at a disadvantage then to be able to understand?

JUROR ARAMBURO DE WASSOM: Yes.

MR. HARRIS: Judge, at this time I would move to excuse this juror because of that issue, the English language.

THE COURT: Let me ask you again, ma'am, because he asked you a question and I'm not sure, and maybe it's the answer to the question. But is there anything that I said yesterday or anything that Mr. Harris has said so far that you did not understand?

JUROR ARAMBURO DE WASSOM: Yes, I understand, but don't feel comfortable right here because this is my first time.

THE COURT: Well, I think if we had a poll on that and we voted, we would probably have everybody kind of be raising their hands. And so really the question for you is this, I don't think that you're going to hear spoken English that's all that complicated. And as Mr. Harris said before, if you hear something that you don't understand, to just raise your hand. And do you think understanding that, you're not going to get technical language and stuff like that, if we did that, everybody, we all have limitations in our vocabulary, but do you believe that you would be able to understand spoken English if it were conversational English?

JUROR ARAMBURO DE WASSOM: Yes.

MR. HARRIS: Thank you, Judge.

THE COURT: That's essentially what you're going to have in this case by and large; all right? And, again, if you do have any problems, as he said tell

us and we'll have the witness repeat it or try to figure out what that word was; all right?

JUROR ARAMBURO DE WASSOM: Thank you.

MR. HARRIS: Judge, thank you, I appreciate that.

Is there anybody else that puts themselves maybe in that same area that we're talking about, that English may not be your first language that I maybe missed?

JUROR CARRANZA: Yes.

MR. HARRIS: Okay, Ms. Nichols. How do you feel about the questions I asked Mr. Perez and–

THE COURT: It's actually Ms. Carranza.

MR. HARRIS: Carranza, I apologize. Talk to me about that. How do you feel about that?

JUROR CARRANZA: I'm okay. I understood, you know, whatever we were told yesterday.

MR. HARRIS: Did you understand all the questions that the judge asked?

JUROR CARRANZA: Right now?

MR. HARRIS: Yesterday.

JUROR CARRANZA: Oh, yes.

MR. HARRIS: And all the questions he asked right now?

JUROR CARRANZA: Yes.

MR. HARRIS: Everything that I've asked so far and we've just gotten into this, did you have any problem understanding that?

JUROR CARRANZA: No.

MR. HARRIS: Same kind of rules; right? If there's something that is said that you don't understand–

JUROR CARRANZA: I'll raise my hand.

MR. HARRIS: Thank you. I appreciate that…

[Voir Dire Transcript, pp. 84-90]

MR. HARRIS: Prosecuted by the office Mr. Drummond and I represent?

JUROR LAURA WILSON: By the D.A.'s Office.

MR. HARRIS: Okay. Anything about those experiences that—again, I talked about good and bad experiences. Is there anything about that experience that will not allow you to be the kind of juror that both sides are looking for in this case?

JUROR LAURA WILSON: I don't think so. No.

MR. HARRIS: Do you think he was treated fairly?

JUROR LAURA WILSON: Yes.

MR. HARRIS: Okay. Anybody else on the first row? How about row 3? Anybody on row 3, the second row closer to the rail, anybody know anybody who was charged with a crime?

Okay. Ms. Martinez, can you tell me a little bit about that?

JUROR MARTINEZ: My brother. He spent a year in jail for drunk driving.

MR. HARRIS: Here in Tulsa County?

JUROR MARTINEZ: Washington.

MR. HARRIS: Washington County. Okay. Anything about that experience—was he treated fairly in your opinion?

JUROR MARTINEZ: Yes.

MR. HARRIS: Okay. A little bit of pause thinking about that. Anything about that pause that indicates that you don't think he was treated fairly by the criminal justice system?

JUROR MARTINEZ: No, I mean just jail really wasn't the answer.

MR. HARRIS: Okay. Is he an alcoholic?

JUROR MARTINEZ: Uh-huh.

MR. HARRIS: Has he gotten treatment?

JUROR MARTINEZ: Never know.

MR. HARRIS: Okay. So you didn't think jail was the answer to that. Did you think further treatment was the answer?

JUROR MARTINEZ: (Nods head)

MR. HARRIS: Did you feel like the criminal justice system didn't give him that option; is that the hesitancy or the pause?

JUROR MARTINEZ: I think so.

MR. HARRIS: You think so; okay. Ma'am, you're a work planner for American Airlines. Can you tell me a little bit about what your workday looks like?

JUROR MARTINEZ: I'm a work planner but I had just started the job a week before Thanksgiving, so I'm still kind of in training on it.

MR. HARRIS: All right. Let's back up then a little bit. Before you got that job before Thanksgiving what did you do?

JUROR MARTINEZ: I was still at American Airlines. I was a dock clerk down at the dock. Did the paperwork.

MR. HARRIS: Okay. Thank you, ma'am.

Ms. Dinneen, did I pronounce that correctly?

JUROR DINNEEN: Yes.

MR. HARRIS: You're an office manager for a nonprofit. Is that here in Tulsa?

JUROR DINNEEN: For a private foundation here in Tulsa.

MR. HARRIS: And how long have you been involved in that kind of work?

JUROR DINNEEN: A year and a half.

MR. HARRIS: Is that a paid position, is it a volunteer position?

JUROR DINNEEN: It's a paid position.

MR. HARRIS: Okay. What exactly do you do?

JUROR DINNEEN: Open the mail, answer phone calls, accept grant applications, just process the bills monthly.

MR. HARRIS: Okay.

JUROR DINNEEN: It's a small office. I'm the only one in the office.

MR. HARRIS: What kind of daily decisions do you have to make?

JUROR DINNEEN: In that job?

MR. HARRIS: Yes.

JUROR DINNEEN: Not many. It's not extremely brain-taxing work.

MR. HARRIS: When I asked you that question, you responded "in that job." Is there another type of job that you also work?

JUROR DINNEEN: Yes. I publish a newsletter for a nonprofit also, but I do it from home.

MR. HARRIS: So those are separate?

JUROR DINNEEN: Yes.

MR. HARRIS: And so that newsletter goes out to whom? Prior benefactors or the Tulsa community?

JUROR DINNEEN: No, the newsletter is not related to the foundation job. I publish that for a nonprofit, aircraft rescue fire fighters. It's an international publication.

MR. HARRIS: And so if I throw that question back at you regarding the newsletter about decision making, what kind of decision making are you involved in in preparing the newsletter?

JUROR DINNEEN: Decision making. Well, I mean I just lay out the magazine, I have interaction with the authors, I have it printed and mail it. I mean it's routine work.

MR. HARRIS: Okay. Ms. Dinneen, what was your reaction when you got the letter in the mail asking you to come down and be a juror?

JUROR DINNEEN: Just a time scheduling concern. We all have busy lives and there's a lot to do.

MR. HARRIS: Okay. Can you give us a hundred percent of your attention for the next week or week and a half if it takes that long?

JUROR DINNEEN: I will try my best, yes.

MR. HARRIS: That's all we can ask; right?

JUROR DINNEEN: Yes.

MR. HARRIS: But it's a challenge, isn't it?

JUROR DINNEEN: It is, yes. I haven't had to sit for eight hours a day in a long time. So, yes, it's a challenge.

MR. HARRIS: Okay. Ms. Nichols, good morning. How are you?

JUROR NICHOLS: Fine.

MR. HARRIS: You're a retired nurse. What kind of nurse were you before you retired?

JUROR NICHOLS: I cared for geriatric nursing home people. Also gave vaccinations for babies and kids going to school.

MR. HARRIS: And how long were you out working as a nurse before you retired?

JUROR NICHOLS: Twenty-eight years.

MR. HARRIS: A long time. Okay. My pen skipped.

Did you have any prior jury experience?

JUROR NICHOLS: I was called but I was never up in here.

MR. HARRIS: Maybe that's why my pen skipped. I was getting ready to put that down. So you've gone through this process but you didn't get picked.

JUROR NICHOLS: Yes.

MR. HARRIS: What were your thoughts when Judge Gillert informed you that this is a murder case and a conspiracy to commit murder case? Can you tell me what your first thoughts were?

JUROR NICHOLS: This will be a hard one to decide picking out what's right, what's wrong, just trying to figure out the pros and cons of everything going on.

MR. HARRIS: Okay. Ms. Dinneen, back to you. What was your thought when the judge told you the kind of charges that are going to be litigated?

JUROR DINNEEN: That it was a very serious and heavy responsibility.

MR. HARRIS: Okay. Ms. Martinez, same question that Ms. Dinneen just answered for me. What was your reaction when you heard the charges?

JUROR MARTINEZ: That I really didn't want to do this.

MR. HARRIS: Okay. Why?

JUROR MARTINEZ: I don't like to have to decide something like that.

MR. HARRIS: Okay. It's extremely serious, isn't it, Ms. Martinez?

JUROR MARTINEZ: Yes, it is.

MR. HARRIS: Okay. Now, it's a weird dynamic, I'm not saying it's going to be easy or you're even going to enjoy it or like it; okay? But is it a civic duty that you can take on, Ms. Martinez, and

perform that duty? Do you think you can take that responsibility on?

JUROR MARTINEZ: I'll do the best I can.

MR. HARRIS: Okay. Ms. Carranza, how about you? When you found out that this was a murder case, very serious, and conspiracy to commit murder, what were your initial thoughts?

JUROR CARRANZA: Well, it's a really serious deal and I will try my best.

MR. HARRIS: Okay. Ms. Petersen, how about you? Good morning.

JUROR PETERSEN: Good morning.

MR. HARRIS: I haven't had a chance to chat with you at all.

JUROR PETERSEN: I know. I was waiting. I was actually hoping you would talk to me first. At the time that this apparently happened, I worked for TPD dispatch. I worked there for eight years. I've been subpoenaed many times. I don't know anything about this case, I don't know if I was on . . . .

[Voir Dire Transcript, pp. 113-18]

JUROR MESSICK: Yes.

MR. HARRIS: What does that entail?

JUROR MESSICK: Well, a little bit of everything, membership, newsletter, bulletins, working with the pastors, working with the different members that come in.

MR. HARRIS: And the denomination?

JUROR MESSICK: United Methodist.

MR. HARRIS: And how long have you served in that kind of capacity?

JUROR MESSICK: I've worked there for about 11 years.

MR. HARRIS: Okay. Long time. The questions that I've posed, corroborative evidence and circumstantial evidence and direct evidence, were those concepts that you had heard before you came in?

JUROR MESSICK: Yes.

MR. HARRIS: You understand them all?

JUROR MESSICK: Yes.

MR. HARRIS: Anything that we've talked about that that would get in the way of you serving?

JUROR MESSICK: No.

MR. HARRIS: How about—well, since I'm on that, Ms. Williams, good morning.

JUROR WILLIAMS: Good morning.

MR. HARRIS: You're a pastor. How long have you been a pastor?

JUROR WILLIAMS: Fifteen years.

MR. HARRIS: Long time. A local church?

JUROR WILLIAMS: Yes.

MR. HARRIS: And a denomination?

JUROR WILLIAMS: Not a denomination.

MR. HARRIS: Not a denomination. And what kind of background do you have that prepares you to be a pastor?

JUROR WILLIAMS: I guess I don't have a background for a pastor. I went to school but not for pastoring.

MR. HARRIS: What did you go to school for? What did you study?

JUROR WILLIAMS: Sociology. I have a sociology degree. I have a BA.

MR. HARRIS: And then how did that lead you to the pastoring?

JUROR WILLIAMS: It did not lead me to the pastoring. No, it did not.

MR. HARRIS: What led you to be a pastor then?

JUROR WILLIAMS: Just helping people. I was already a counselor for drug addicts for Palmer Drug Abuse Program, and I've been a counselor different places. So I was already doing that and just gave my life to the Lord and then I started helping people outside of Palmer.

MR. HARRIS: So you worked at Palmer?

JUROR WILLIAMS: Uh-huh.

MR. HARRIS: Did any of those counselees have problems with the criminal justice system and with law enforcement regarding their either drug habits, addictions, or any other issues that brought them to you?

JUROR WILLIAMS: I'm pretty sure they did. It's been awhile, sir, but usually, yes, they would usually come to us through you guys because they have to.

MR. HARRIS: Through the court system?

JUROR WILLIAMS: Yeah.

MR. HARRIS: Did they talk to you about their criminal cases?

JUROR WILLIAMS: Sometimes, yes. But can I remember them, no.

MR. HARRIS: Without specifics how would you say that that has affected you regarding the stories and the incidences that they've shared with you about forming any kind of opinion regarding the criminal justice system? Did you come away with any feelings that it was fair, unfair, or any other opinion that I may not have suggested?

JUROR WILLIAMS: Probably both in certain situations. You know, probably had a little bit of both. I'm pretty sure I have, you know, over the years. Like maybe some people needed to be locked up for, you know, drug treatment instead of locked up, kind of like what the other lady was saying earlier. But outside of that.

MR. HARRIS: What was your reaction, Ms. Williams, when you heard the charges of murder and conspiracy to commit murder?

JUROR WILLIAMS: Fear. That's scary to me.

MR. HARRIS: Okay. What causes the reaction of fear when you hear that?

JUROR WILLIAMS: Just wondering how could somebody take somebody else's life.

MR. HARRIS: Okay. You understand that the defendant, Alonzo Cortez Johnson, is presumed innocent under the law?

JUROR WILLIAMS: Right.

MR. HARRIS: You understand that?

JUROR WILLIAMS: Yes.

MR. HARRIS: And you know the State of Oklahoma is alleging that at least by the charges of murder in the first degree and conspiracy to commit murder we're making the allegation that that's exactly what he did; you understand that?

JUROR WILLIAMS: Yes.

MR. HARRIS: And we have to prove that to you beyond a reasonable doubt.

JUROR WILLIAMS: Yes.

MR. HARRIS: Okay. Based on your reactions can you sit in this case?

JUROR WILLIAMS: Yes.

MR. HARRIS: Okay. Is that with some reluctance or just because of the gravity of what we're about?

JUROR WILLIAMS: Because of the sincerity of it.

MR. HARRIS: The sincerity of it.

JUROR WILLIAMS: Yes.

MR. HARRIS: I should have maybe done a tick mark when people raised their hands. Were you aware of the two-step process under Oklahoma law that jurors take on in criminal cases, and that is they have to decide whether somebody is guilty or not guilty beyond a reasonable doubt, but if they decide based on the evidence that an individual is guilty beyond a reasonable doubt, it's up to them to assess punishment? I'm not sure that I remember your hand going up or not. Did you know that before you came in?

JUROR WILLIAMS: No, not the depth of it, I did not.

MR. HARRIS: What is your reaction to the fact that you now know that that would be a duty and a responsibility should you find yourself in that position?

JUROR WILLIAMS: That, yeah, I can do that.

MR. HARRIS: Can you do that?

JUROR WILLIAMS: Sure.

MR. HARRIS: Is there a difference in your opinion, ma'am, between judging a person and judging a person's actions?

JUROR WILLIAMS: Yes.

MR. HARRIS: There is a difference?

JUROR WILLIAMS: Yes.

MR. HARRIS: What is that difference?

JUROR WILLIAMS: The person is who they are and their actions is coming from a behavior.

MR. HARRIS: Okay. Ms. Aramburo de Wassom, I'm trying the best that I can, regarding Ms. Williams' comments about judgment and judgment of a person being different than judging a person's actions, can you tell me what your opinion is about that?

JUROR ARAMBURO DE WASSOM: Well, when you see some people, you see the actions they have, you never know what they tried to act in.

MR. HARRIS: Okay. What does that mean to you then?

JUROR ARAMBURO DE WASSOM: Well, when you see other people you never think why they think. You need to listen and see why the action they have.

MR. HARRIS: Okay. Do you do that in everyday life, kind of watch people, listen to them, and try and figure out why they did something or why they didn't do something? Do you do that?

JUROR ARAMBURO DE WASSOM: Normally, yes.

MR. HARRIS: We all do that, don't we? That will be part of your responsibility should you be chosen to sit as a . . . .

[Voir Dire Transcript, p. 128]

Now, the defendant is also charged with the murder of Neal Sweeney. So, Ms. Sweet, the State of Oklahoma has to prove to you that Mr. Sweeney got killed, he was murdered. This isn't going to be very pleasant evidence; okay? I'm sure of that. Can you take the responsibility on to listen to that kind of evidence and determine what you believe it is beyond a reasonable doubt? Can you do that?

JUROR SWEET: Yes.

MR. HARRIS: Now, Mr. Perez, I haven't spent as much time with you on some of these concepts. Is there anything that I've talked about so far that is unclear to you or you don't understand?

JUROR PEREZ: No, I think I got everything.

MR. HARRIS: So you're tracking with us?

JUROR PEREZ: Yes, trying to.

MR. HARRIS: Excellent. Ms. Carranza, same question to you. Anything that we've talked about so far that has been confusing to you and if it is, I take full responsibility for that but I need to know that you're tracking with us.

JUROR CARRANZA: I'm tracking so far.

MR. HARRIS: And Ms. Aramburo de Wassom?

JUROR ARAMBURO DE WASSOM: I'm trying too.

MR. HARRIS: You're trying to hang.

JUROR ARAMBURO DE WASSOM: Yes.

MR. HARRIS: Mr. Freese, when we talk about. . . .

[Voir Dire Transcript, pp. 152-60]

. . . subpoena?

JUROR ARY: Yes.

MR. HARRIS: Did everybody know that? Does that make sense to everybody? Based on the time, place, circumstance, and, you know, I'm anticipating that you will have business associates, you will have investigators, you will have co-employees of Mr. Sweeney, you will have a raft of different categories of witnesses. And also there will be some witnesses who are reluctant and do not want to be here that are being forced to be here under subpoena by the State of Oklahoma.

Ms. Steiner, you're shaking your head yes. Does that make sense to you?

JUROR STEINER: Yes.

MR. HARRIS: Ms. Huff, how about you? Have you ever thought about that?

JUROR HUFF: Yes.

MR. HARRIS: Professor Dickens, you have a doctorate so that implies to me you wrote a thesis and had to sit in oral boards and defend that. Am I correct in that assumption?

JUROR DICKENS: That is correct. A dissertation.

MR. HARRIS: What was your dissertation on?

JUROR DICKENS: It was on African American male persistence in community colleges.

MR. HARRIS: And what caused you to be interested in English to the point where you're at the level of a college professor? How did that pique your interest?

JUROR DICKENS: The first part would be having an inclination for the usage of English, but also the ability of helping others write and read critically for communication purposes.

MR. HARRIS: Okay. Is that what you do at the level that you're teaching college right now is reading and writing proficiency at that college level?

JUROR DICKENS: I do reading, writing, and student success priority-type classes as well as—essentially those are the classes, but I see them more as a vehicle for helping individuals identify their purpose in life. So it's a vehicle as opposed to a content.

MR. HARRIS: Okay. I have thrown out numerous times without following up on this, without much discussion, the thought of what we call common sense. Could you give me a definition in your opinion as to what that means?

JUROR DICKENS: For individuals common sense would be a general line of reasoning for that individual to make a presumption or a determination of what is real to that individual. And common sense for larger groups of people would be a common set of shared expectations of what is considered normal or acceptable or respectful for the society at large.

MR. HARRIS: Okay. Do you think that common sense is something that has a maturation process over time?

JUROR DICKENS: It does evolve, yes, I do think so.

MR. HARRIS: When I was 16, I thought I had a lot of common sense and I didn't think my dad had much until I turned 30, and then I realized it wasn't quite the way I thought it was. Does that make sense in your experience also?

JUROR DICKENS: Yes, it does.

MR. HARRIS: How about the rest of you?

ALL JURORS: Yes.

MR. HARRIS: Professor Dickens, when I was discussing circumstantial evidence, I think with Ms. Fletcher and Mr. Squires, did that--and it might not have been the best example that I gave about, you know, waking up in the winter wonderland of Wisconsin and saying it snowed out. But do you use circumstantial evidence every day in your life?

JUROR DICKENS: Yes, I do.

MR. HARRIS: Okay. And do you rely on that kind of evidence to help you make decisions?

JUROR DICKENS: It typically will start out as an instinct. Circumstantial evidence points to something so it catches my attention to a possibility of a meaning. But I would be looking for multiple instances or suggestions of that meaning in order to more heavily rely on that, those multiple instances of the instinct.

MR. HARRIS: Okay. So in my wintertime wonderland example somebody could potentially have put on a sprinkler system and it all froze over as an option, but then I'd have to work that through to see if that made more sense versus what other observations tend to support.

JUROR DICKENS: True. You may hear things in your house that would suggest your winter wonderland experience, looking out the window, opening the door would make it more concrete, more where, you know, I think this is a winter wonderland.

MR. HARRIS: Okay. Dr. Tawil, when you hear Professor Dickens' explanations of circumstantial evidence, same question to you. Do you use circumstantial evidence in your life?

JUROR TAWIL: Probably something similar I do every day. When I investigate a patient going through the intensive care unit, what's going on, and we need to know why this is happening.

MR. HARRIS: Ms. Rap, how about you? Do you use circumstantial evidence?

JUROR RAP: Do I use it or do I base anything on it when I hear it?

MR. HARRIS: True. Both.

JUROR RAP: If there were puddles outside, I wouldn't go telling everyone it rained. I would ask someone did it rain.

MR. HARRIS: Okay. So you want to ask the next right question; right?

JUROR RAP: Yeah, because if I didn't hear it or see it, then someone could have sprayed water out on the road.

MR. HARRIS: And so after you asked all those questions, do you in everyday life come to some kind of a conclusion?

JUROR RAP: If it warrants to come to it.

MR. HARRIS: If it warrants? Okay. If the law allows you to draw logical inferences from circumstantial evidence, will you break that down and work that through with the help of other jurors if you believe circumstantial evidence has been presented? Do you want me to repeat that?

JUROR RAP: I'm just not good at this sort of deduction.

MR. HARRIS: Okay. What does common sense mean to you?

JUROR RAP: It means basing your actions on logical, scientific proof to lead you to a good outcome.

MR. HARRIS: Okay. And has your common sense maturated in your lifetime?

JUROR RAP: I hope.

MR. HARRIS: Mr. Bluhm, how about you? What does common sense mean to you, sir?

JUROR BLUHM: Common sense to me is something that you have grown up with, that you've been taught, explained, things you've picked up over time just between right and wrong. And, yeah, that's what I would say.

MR. HARRIS: Okay. Mr. Bluhm, we're asking all jurors to use their common sense and their life experiences to aid them to be able to be a juror. Does that make sense to you?

JUROR BLUHM: Yes, it does.

MR. HARRIS: Does that make sense to everybody? I'm not trying to create robots out of you to come in here doing something that is outside of your experience, although some of the legal concepts may be new, the ability to listen and determine credibility.

Mr. Perez, when I throw out the word "credibility," what does that mean to you? Do you understand that word?

JUROR PEREZ: Yes.

MR. HARRIS: What does that mean to you?

JUROR PEREZ: Something that you have to believe.

MR. HARRIS: Okay. Mr. Simmons, how about you? What does credibility mean to you?

JUROR SIMMONS: Well, I look at it like can they be telling the truth, can you believe them, is it believable, is it truthful, can you use it.

MR. HARRIS: Okay. I talked about plea negotiations with some of the co-defendants, co-conspirators in this case. There are other individuals that have felony convictions or even pending felony

charges without any deal with the State of Oklahoma. Do you understand that? That's something else that you're going to have to factor in in determining their credibility. Does that make sense to you? You're shaking your head yes.

It just so happens that some of the witnesses are charged by the very office Mr. Drummond and I represent. They're charged by the D.A.'s Office with a separate and distinct crime having nothing to do with this murder case and they happen to be a witness in this case. And there's no negotiated plea or agreement on punishment; okay? How is that going to affect your ability to listen to their testimony?

JUROR SIMMONS: Well, I'm just going to have to evaluate the evidence and just see their attitude, just see if they act like they're telling the truth—

MR. HARRIS: Mr. Spitzer, how—

JUROR SIMMONS: Just going to have to—

MR. HARRIS: I'm sorry. I didn't mean to cut you off.

JUROR SIMMONS: Each person you're going to have to look at individually, got to look at them individually and make your own judgment.

MR. HARRIS: Okay. You know, it's not that I'm asking you to like these people or accept their lifestyle or their choices. But I am asking you that you're going to have to use all your common sense and all your faculties to determine whether they are credible, whether they're telling you the truth about the things that they're going to testify about. The fact that they have a pending criminal

charge may well affect that. Are you tracking with me?

JUROR SIMMONS: Uh-huh.

MR. HARRIS: Mr. Spitzer, how about you? How are you going to determine people's credibility if they're charged by our office?

JUROR SPITZER: I will listen to their answers, make a determination as to whether those answers match the evidence that's presented.

MR. HARRIS: Professor Dickens, how about you? If you find yourself in that same position and you find out through direct and cross-examination that people are charged by our office in a separate and distinct allegation of a crime, how is that going to affect your ability to determine credibility?

JUROR DICKENS: Well, I would be interested in why they felt compelled, I would be interested in their rationale for being compelled to speak on behalf of the State. I think that would be important because it could indicate motive maybe. It could also perhaps shape their understanding of the benefits that they see for themselves. And it may also be pertinent to know their relationship with whomever they're testifying against or for, just to know if they got along with the person, did not get along with the person, what are the benefits and disadvantages. I would be interested in knowing that because that would shape my understanding of their credibility.

MR. HARRIS: Okay. And that's fair enough because I think all of the things that you've just broken

down is what we're going. to ask you along with everybody else to do. Did everybody hear Professor Dickens? What does this mean? What motive might that create for them? How does that affect their ability to tell the truth? Are they getting something in return for telling the truth?

Ms. Williams, are you tracking on this conversation about individuals who might have pending criminal charges with the office of the D.A.?

JUROR WILLIAMS: Yes.

MR. HARRIS: Yes?

JUROR ZIEGLER: How do we know when a witness comes forward what their background is or like the situations you've described?

MR. HARRIS: I'll be asking them.

JUROR ZIEGLER: Okay.

MR. HARRIS: Or Mr. Lyons representing Mr. Johnson . . . .

[Voir Dire Transcript, p. 179]

doctor? What is your preference, please, Mr. Dickens?

JUROR DICKENS: Either of them.

MR. LYONS: Okay. Professor Dickens, to me it's a little unusual, it's a little bit of a happenstance, a coincidence that you have the name of famous literary people and you too teach English. Charles Dickens, Emily Dickens, Professor Dickens. But there's a reason for that, isn't there, that you chose the profession you did; correct?

JUROR DICKENS: Correct.

MR. LYONS: There's an explanation for it. In the law we might call that a motive; fair enough?

JUROR DICKENS: Okay.

MR. LYONS: Okay. Ms. Williams, is it just happenstance you are named Faith as a pastor or is there a reason that you became a pastor that's not connected to your name?

JUROR WILLIAMS: Right.

MR. LYONS: Okay. But there's an explanation for that coincidental fact that you happen to have the name of Faith while you're a pastor; right?

JUROR WILLIAMS: Right.

MR. LYONS: I knew a doctor here in town once, Jerry Pulse. Maybe Dr. Tawil—

JUROR TAWIL: Polst, P-O-L-S-T.

MR. LYONS: P-U-L-S-E.

[Voir Dire Transcript, pp. 219-26]

. . . and then followed by Ms. Sweet.

My point about that is, as you know, you get nine challenges randomly and then you each have a challenge to the alternate but then it would be limited to that person. If you get confused along the way and you get to the eighth or ninth challenge and you're wondering where we are in that list, please tell me and I'll say, gee, I think it's so and so. So at least as you make that last challenge you'll know where you are in reference to the alternate; okay?

MR. LYONS: Very good. May I have a few minutes here?

THE COURT: Absolutely. I'm just trying to give you kind of the local rule so that we're not confused about ground rule doubles and that sort of thing. I'll be back in in about five minutes and then you guys can let me know who's going.

(Recess)

THE COURT: Let's go back on the record. This is a hearing held outside the presence of the jury for the parties to exercise their challenges. Again, if you get down to the last one and are confused about the alternate, please let me know.

So on behalf of the State of Oklahoma your first challenge.

MR. HARRIS: Box 5, Dr. Tawil.

THE COURT: On behalf of the defense.

MR. LYONS: Mr. Freese, Your Honor.

THE COURT: I'm sure he'll be delighted.

Second by the State.

MR. HARRIS: Professor Dickens.

THE COURT: Your race neutral reason?

MR. DRUMMOND: Judge, he has a Ph. D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people, Ph.D.s in liberal arts, on the jury. We think they're too exacting at times, too liberal.

THE COURT: Well, I'll determine there's a race neutral reason. There are other prospective African Americans on the jury.

Second by the defense.

MR. LYONS: Ms. Rap.

THE COURT: Ms. Rap.

Third by the State.

MR. HARRIS: Judge, Box 24, Aramburo de Wassom.

THE COURT: Okay. Kind of hoping you all would keep her on so I wouldn't have to pronounce her name. Ms. De Wassom I think is right.

But anyway, third by the defense.

MR. LYONS: Mr. Bluhm.

THE COURT: Mr. Bluhm.

Fourth by the State.

MR. HARRIS: Ms. Wilson, Laura Wilson.

THE COURT: Laura Wilson.

MR. HARRIS: Yes, Your Honor.

THE COURT: Fourth for Mr. Johnson.

MR. LYONS: Dr. Wilson.

THE COURT: Fifth by the State.

MR. HARRIS: Ms. Carranza, Box 21.

THE COURT: Ms. Carranza.

Fifth for the defense.

MR. LYONS: Ms. Ziegler.

THE COURT: Ms. Ziegler.

Sixth for the State.

MR. HARRIS: Ms. Martinez in Box 18.

THE COURT: Sixth for the defense.

MR. LYONS: Your Honor, I'd like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.

THE COURT: Well, I don't think that this establishes a pattern. Again, in terms of—Ms. Martinez, I won't state their reasons for them, but Ms. Martinez was patently—she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here. And we'll note your exception.

Sixth on behalf of the defense.

MR. LYONS: Ms. Steiner.

THE COURT: Ms. Steiner.

Seventh by the State.

MR. HARRIS: State waives its seventh challenge, Your Honor.

THE COURT: All right. Seventh by the defense.

MR. LYONS: I'm confused, Judge. What–

THE COURT: Well, what that essentially does is it gives you an extra alternate. In other words, right now—let me see if I've got this right. Right now Ms. Malsam is your last alternate and then you have an additional alternate. It really kind of moves Ms. Sweet up in the process.

Seventh by the defense.

MR. LYONS: Mr. Parks.

THE COURT: Mr. Parks.

Eighth for the State.

MR. DRUMMOND: Judge, just so I'm tracking who's the 12 right now as we speak?

THE COURT: Let's see. We have Huff, Ary, Barlow, Cavender, it's one, two, three, four. Five is Sweet —not Sweet, Simmons, sorry.

MR. DRUMMOND: Is Mr. Perez still in there?

THE COURT: I missed Perez. Let me count them again. One, two, three, four, five is Perez, six is Simmons, seven is Spitzer, eight is McDaniels, nine is Dinneen, ten is Nichols, 11 is Petersen, 12 is Williams.

MR. HARRIS: I'm sorry, Judge. Is Ms. Brown gone?

THE COURT: Malsam rather, Malsam is 12 and then Williams is 13 and then on it goes and then back to Ms. Sweet. Actually it's Sweet before Malsam. Malsam is the end.

Let me do that again. It goes in regular order all the way through Petersen, Faith Williams, Fletcher, Squires, Messick, and then it is Sweet and then it is Malsam. Everybody that's in the line is regular order. And then you go to Sweet and then to Malsam at the end.

So eighth challenge for the State.

MR. HARRIS: Judge, the State of Oklahoma would excuse Ms. Williams. I understand she's African American, but our race neutral reason for her is

she's a pastor. I think pastors traditionally are very, very forgiving, have trouble with judgment. She's worked with drug addicts and counseled them in the past showing the State of Oklahoma a propensity towards treatment rather than judgment. For those reasons–

THE COURT: Well, you would have effectively eliminated all the African Americans and I'm not going to do that.

MR. HARRIS: Okay.

THE COURT: So you can exercise some other challenge if you choose.

MR. HARRIS: Ms. Nichols in Box 20.

THE COURT: Eighth challenge for the defense.

MR. LYONS: Ms. Fletcher.

THE COURT: Ms. Fletcher. I've got her. I finally found her.

Ninth challenge for the State. Again, am I right that it is Malsam as the alternate at this point?

MR. LYONS: Yes.

THE COURT: We could conceivably have two as a result of that, Malsam and Sweet.

MR. HARRIS: We'll waive number 9, Judge.

THE COURT: Ninth challenge for the defense.

MR. LYONS: Ms. Dinneen.

THE COURT: Dinneen?

MR. LYONS: Yes.

THE COURT: Let's go ahead and keep both the alternates then because the alternates will be Sweet and Malsam, with Sweet being the first alternate and Malsam the second alternate. Isn't that right? Let me see. I'll have to write it down just a second. We lose Malsam. Then it's Ismert and Sweet then in that order. That's it. So we lose Ismert. There's no reason to have more than two.

Once I bring them in, are you all ready to go?

MR. DRUMMOND: Who are the alternates?

THE COURT: Your alternates are Ismert and Sweet.

MR. DRUMMOND: Do we have a challenge to the alternate?

THE COURT: Yes. Go ahead.

MR. HARRIS: Then we'll exercise our challenge to Ms. Ismert.

THE COURT: Okay. A challenge on behalf of the defense.

MR. LYONS: Waive, Your Honor.

THE COURT: Do you get a challenge to each alternate? I can't remember. We have two alternates so rarely I don't know off the top of my head.

MR. DRUMMOND: I was thinking that we did.

THE COURT: Do you all want to exercise a challenge to the alternate?

MR. DRUMMOND: No.

THE COURT: Do you all want to challenge Ms. Sweet as the alternate?

MR. LYONS: No, Your Honor.

THE COURT: All right. Now, back to are we ready to go?

MR. HARRIS: Just so that I'm tracking, Judge, Huff, Ary, Barlow, Cavender, Perez, Simmons, Spitzer, McDaniels, Petersen, Williams, Squires, Messick, and then Ms. Sweet and Mrs. Malsam are the alternates.

THE COURT: Yes. Do you need a minute to get organized?

MR. DRUMMOND: Well, yeah, we're going to have to set up our equipment for opening, if that's what you're asking.

THE COURT: Let's go ahead and get that done so that once we get them in, we can shuffle them around and you all can go ahead into the opening.

MR. HARRIS: Yes, sir.

(Recess)

THE COURT: This is a hearing held outside the presence of the jury. Both parties have exercised their strikes and just about ready for the announcement of that to the jury and the opening statement.

And Mr. Harris on behalf of the State.

MR. HARRIS: Judge, comes now the State of Oklahoma and asks the Court to exercise its discretion pursuant to Oklahoma statute to allow the chief case agent to be allowed to sit at counsel table and not be a breach of the Rule of Sequestration. That agent would be designated by the State of Oklahoma as Detective Vic Regalado from the homicide division, come making that discretionary request of the Court.

THE COURT: Do you have any objection to his remaining here?

MR. LYONS: If he wasn't the lead case agent. . . .

[Voir Dire Transcript, p. 299]

MR. LYONS: Thank you.

No further questions.

THE COURT: Any redirect?

MR. HARRIS: No redirect.

THE COURT: You can step down. Thank you for being here.

Ladies and gentlemen, we're going to be in recess for this evening. I'll ask that you be back here at a quarter to nine tomorrow. Remember the admonition I've given you before about discussing the case, expressing, forming any opinion, don't. Again, avoid news accounts of what you've just seen here.

As I think I indicated to you yesterday, I'm not sure whether I did or not, you needn't check in with the jury clerk before you come up here. You may. At some point during the day you will want to do that.

Any questions about those instructions? If you'll be in the hall area, quarter to nine. See you tomorrow. We're in recess.

(End of Proceedings)

TRANSCRIPT OF FORMAL SENTENCING, RELEVANT EXCERPTS (JANUARY 4, 2013)

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

ALONZO CORTEZ JOHNSON,

Defendant.

No. F-2013-173

Case No. CF-09-2738

Before: Hon. Tom C. GILLERT, Judge.

[Sentencing Transcript, pp. 4-5]

> . . . to ask what was going on in her head that day. And, again, I assume that we had a juror by this name and other than receiving this letter, filing it, and sending to both counsel that has been the extent of what I have been involved in concerning that letter.

MR. HARRIS: Judge, do you have a cite on that second case?

THE COURT: Yes, I do. And it's 644 P.2d 568.

MR. HARRIS: Thank you.

THE COURT: I'd like to say it was because my legal research skills are so great, but if you'll just look at 22-915, the numbered sections 25 and 26, there are other cases that recite exactly the same thing. Again, this is not the first time that this sort of thing apparently has occurred. Whether it's the first time that someone blamed the legal system on their decision is another matter.

Also I wanted to comment concerning the voir dire. I probably made an error during the voir dire to the detriment, I say detriment, of the State when they requested to excuse, I believe, Ms. Williams.

MR. HARRIS: Yes, Your Honor.

THE COURT: Isn't that right? And their race neutral reason was that she was a minister. That is a race neutral reason. And the other objection—or the other strike was a race neutral reason. I said that that would leave this jury without a minority juror, a black juror. Although it's a slightly different issue and it really had to do with the judge refusing to strike a juror on a defense peremptory, a Court, not here but a Court in Vermont reminded the trial court there that that was not a basis to prevent a strike, that is to say that the result of the strike would be that there not be a minority. That there needed to be a finding that there was either systematic or specific discriminatory practice. And, again, since it was against the defendant in that case, that case was reversed. But I made an error. I think the record will be clear that when they exercised that challenge, what I said was, but that would leave

the panel without a minority, and that Mr. Johnson was of that same minority.

Okay. Anything else before I pronounce sentencing?

MR. HARRIS: No, Judge. The State of Oklahoma respectfully requests that Count 4, the conspiracy to commit murder, and Count 10, the murder in the first degree, we're asking the Court to consider running those sentences consecutive one to the other.

THE COURT: All right. Again, by my count, Count 10 was the murder in which the jury found the defendant guilty, life, and $10,000. Count 4 was the conspiracy, life without a fine. I will find Mr. Johnson guilty, sentence him to those terms.

BRIEF OF APPELLANT, ALONZO CORTEZ JOHNSON, TO THE OKLAHOMA COURT OF CRIMINAL APPEALS ON DIRECT REVIEW, RELEVANT EXCERPTS (OCTOBER 16, 2013)

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-2013-173

Appeal from the District Court of Tulsa County
Case No. CF-2009-2738

BRIEF OF APPELLANT

Lisbeth L. McCarty
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[Appellant's Brief, pp. 3-5]

PROPOSITION I: THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES VIOLATED THE EQUAL PROTECTION AND DUE PROCESS RIGHTS OF MR. JOHNSON.

STANDARD OF REVIEW: The equal protection clause of the United States Constitution prohibits exclusion of potential jurors based solely on race. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

The prosecutor's reason for challenging minority juror Dickens was, "Judge, he has a Ph.D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people, Ph.D.s in liberal arts, on this jury. We think they're too exacting at times, too liberal." (Tr. 220). Defense counsel objected, noting "every peremptory challenge by the state so far" except one had been of a minority. Counsel named Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens as the minorities the State had challenged, and urged that the State had established a pattern of striking all minorities. (Tr. 221) The trial court disagreed. (Tr. 221) Dr. Tawil, a physician, had promised to listen to all the facts before making a judgment. (Tr. 137, 168) Rena Carranza had no problem understanding questions, understood conspiracy, and said she would critically analyze the information presented. (Tr. 53, 123, 125, 187) Ms. de Wassom said she would be able to weigh the truthfulness of witnesses. (Tr. 207)

Later, when yet another African American was challenged by the prosecutor, the trial court rejected

the challenge, noting it "would have effectively eliminated all the African Americans and I'm not going to do that." (Tr. 223) At sentencing, the trial court addressed the matter again, stating, "the record will be clear that when they [the State] exercised that challenge [to excuse a minority], what I said was, but that would leave the panel without a minority, and that Mr. Johnson was of that same minority." (S Tr. 5) The trial court's statements reflect that the prosecutor was engaging in the systematic removal of minorities from Appellant's jury. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Mitchell v. State*, 270 P.3d 160, 173, (Okl. Cr. 2011) this Court stated, "The Equal Protection Clause forbids the prosecution from challenging potential jurors solely on account of their race." In *Day v. State*, 303 P.3d 291, 299 (Okl. Cr. 2013), this Court found a *Batson* claim required that (1) the defendant must make a *prima facie* showing that a prosecutor exercised a peremptory challenge on the basis of race; (2) the prosecutor must give a race-neutral reason for excusing the juror; and (3) the trial court determines whether the defendant carried his burden to prove purposeful discrimination.

The defense objection constituted a *prima facie* showing that challenges were exercised on the basis of race. The purported "race-neutral" reason for Dickens' excusal was untenable. Dickens had many qualities which would make him a good juror. Dickens understood questions about corroborative evidence, common sense and circumstantial evidence. (Tr. 79, 153-55; 159) Absent his race, Mr. Dickens would not have been excused for simply being educated.

Because the prosecutor systematically removed minorities from the jury, Appellant was deprived of a fair trial, equal protection, and due process of law. U.S. Const. amends. VI and, XIV; Okla. Const. art. II, §§ 7 and 20. Accordingly, the case must be reversed.

PROPOSITION II: THE DUAL COMMISSIONS OF THE DISTRICT ATTORNEY PROHIBITED PROSECUTION OF THIS CASE.

Standard of Review: Dual commissions are strictly prohibited by Oklahoma law. *See Nesbitt v. Apple*, 891 P.2d 1235, 1243 (Okla. 1995); OK Const. Art. 2, § 12.

District Attorney Tim Harris had a position as an assistant United States attorney. (7-13-12 M Tr. 2-3) He retained his position as Tulsa County District Attorney. This is prohibited in Oklahoma under OK Const. Art. 2, § 12, "No member of Congress from this State, or person holding any office of trust or profit under the laws of any other State, or of the United States, shall hold any office of trust or profit under the laws of this State."

In *Wimberly v. Deacon*, 195 Okla. 561, 144 P.2d 447 (1943), this Court held the acceptance of the "second or prohibited office operates *ipso facto* to absolutely vacate the state office held first." In 2011 OK AG 16 (09/27/2011), the Attorney General opined that because District Attorney Rex Duncan had accepted a federal appointment, he had vacated his District Attorney Office. In this case at a hearing on the Motion to Disqualify, defense counsel stated, "[W]hen Mr. Johnson had charges filed against him by Tim Harris, the purported acting district attorney, it was of no effect. He can't be indicated—or, excuse

me, he can't have charges filed against him by someone who is not an officeholder." (7-13-2012 M Tr. 5) The State never denied that Harris was a specially-appointed assistant. . . .

[. . .]

[Appellant's Brief, p. 50]

CONCLUSION

Appellant respectfully requests his convictions be reversed. In the alternative, Appellant asks that his sentence for conspiracy be modified and the sentences be order to run concurrently.

Respectfully submitted,

ALONZO CORTEZ JOHNSON

By: Lisbeth L. McCarty
Appellate Defense Counsel
Oklahoma Bar No. 10896
P.O. Box 926
Norman, Oklahoma 73070
(405) 801-2727
Attorney for Appellant

PETITIONER ALONZO CORTEZ JOHNSON'S APPLICATION FOR POST-CONVICTION RELIEF TO THE TULSA COUNTY DISTRICT COURT, RELEVANT EXCERPTS (JULY 16, 2015)

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

STEVE KUNZWILER, DISTRICT ATTORNEY OF TULSA COUNTY, ex rel., STATE OF OKLAHOMA,

Respondent.

No. CF-2009-2738

[Application, pp. 1-7]

APPLICATION FOR POST-CONVICTION RELIEF

Part A

I, Alonzo Cortez Johnson, whose present address is Davis Correctional Facility, 6888 East 133rd Rd, Holdenville, OK, hereby apply for relief under the Post-Conviction Procedure Act, Section 1080 et seq. of Title 22.

The sentence from which I seek relief is as follows:

1.

(a) Court in which sentence was rendered:

District Court of Tulsa County

(b) Case Number:

CF-2009-2738

2. Date of sentence:

January 4, 2013.

3. Terms of sentence:

Ct. 4 life in prison and fine of $10,000.00.

Ct. 10 life in prison to be served consecutively.

4. Name of Presiding Judge:

Tom C. Gillert.

5. Are you now in custody serving this sentence?

Yes

Where?

Davis Correctional Facility, 6888 East 133rd Rd, Holdenville, OK

6. For what crime or crimes were you convicted?

Murder in the First Degree and Conspiracy to Commit Murder.

7. Check whether the finding of guilty was made:

After plea of not guilty

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

A jury

9. Name of lawyer who represented you in trial court:

Mark D. Lyons, Esq.

10. Was your lawyer hired by you or your family?

Yes

Appointed by the court?

No

11. Did you appeal the conviction?

Yes

To what court or courts?

Oklahoma Court of Criminal Appeals

12. Did a lawyer represent you for the appeal?

Yes

Was it the same lawyer as in No. 9 above?

No

If "no," what was this lawyer's name?

Lisbeth L. McCarty

Address?

OIDS NON-CAPITAL APPEALS, P.O. Box 926, Norman, OK 73070.

13. Was an opinion written by the appellate court?

Yes

If "yes," give citations if published:

_____

If not published, give appellate case no.:

F-2013-173

14. Did you seek any further review of or relief from your conviction at any other time in any court?

No

If "Yes," state when you did so, the nature of your claim and the result (include citations to any reported opinions.)

Part B

(If you have more than one proposition for relief, attach a separate sheet for each proposition. Answer the questions below as to each additional proposition, labeled SECOND PROPOSITION, THIRD PROPOSITION.)

I believe that I have FIVE propositions for relief from the conviction and sentence described in PART A. This is the first proposition.

1. Of what legal right or privilege do you believe you were deprived in your case?

Equal Protection of the law as guaranteed to the Petitioner herein by the Fourteenth Amendment to the Constitution of the United States.

2. In the facts of your case, what happened to deprive you of that legal right or privilege and who made the error of which you complain?

District Attorneys Tim Harris and Doug Drummond, jointly and severally, systematically used peremptory challenges to effective remove jurors of minority race from the trial venire men. (Tr. Vol. II, pp. 219-223). Defense Attorney Lyons, objected to the State's peremptory challenges by stating, "Your Honor, I would like to point out at

this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, [sic] and Mr. Dickens. And there's a pattern here, your Honor, of striking minorities off this jury." *Id.* at 221. To this objection the trial judge *sua sponte* provided "race neutral" reasons for the stricken jurors. This is clearly violative of the proper process. Yet, Judge Gillert states, at *Id.* p. 223, in rejecting the last minority juror peremptory challenge, "Well, you would have **effectively eliminated all the African-Americans** and I am not going to do that." [Bolding added.] The statement by the trial judge clearly reveals that he perceived a pattern of racial removal by the prosecution which belied the "race neutral" explanation. The District Attorney willfully committed the conduct which gave rise to the deprivation and was actively engaged in pursuing the effective elimination of all the African-American prospective jurors. It was an improper procedure for the trial court to provide its own "race neutral" reasons for the peremptory challenges after defense counsel's objection and was in derogation of the process enumerated by the U.S. Supreme Court. By so doing the trial judge became an advocate for one side and such abandonment of the arbiter role raises serious questions as to the final determination as to the sufficiency of the State's "race neutral" reasons. Further, this conduct was a flag to the prosecutor to start providing such "race neutral" reasons, which signal the prosecutor did not miss and commence to follow the Court's subtle suggestion. Judge Gillert erred by not

declaring a mis-trial, as he clearly identified the deprivation taking place and failed to take action to properly correct it. The failure to find a *Batson* violation was clearly erroneous on the totality of the evidence and the statement by the Trial Court. Such error affected the structure of the trial in this case.

3. List by name and citation any case or cases that are very close factually and legally to yours as examples of the error you believe occurred in your case.

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 694 (1986) [T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Pp. 88-89.

A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremp-

tory challenges to exclude the veniremen from the petit jury on account of their race. Pp. 96-98.

Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410, 162 L.Ed.2d 129 (2005). Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson,* 476 U.S., at 87; *see also Smith v. Texas,* 311 U.S. 128, 130 (1940). [P. 172].

In this case the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close,'" and on review, the California Supreme Court acknowledged that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury." 30 Cal. 4th, at 1307, 1326, 71 P.3d, at 273, 286. Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson.* [P. 173].

United States v. Vann, (Slip. Op. Jan. 16, 2015, 10th Cir.)

> We are concerned here only with the third step because each side concedes that its opponent met the burdens imposed at the first and second steps. The district court's obligation at step three is to consider "all of the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana,* 552 U.S. 472,478 (2008); *see also Miller-Elv. Dretke,* 545 U.S. 231, 251-52 (2005) ("(T]he rule in *Batson* . . . requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."). As our review of the district court's application of *Batson* is a matter of process, we cannot assume that the district court evaluated the prosecutor's credibility simply by virtue of its eventual ruling denying the *Batson* challenge. *Snyder,* 552 U.S. at 479. [Slip Op. P. 6].
>
> In light of those facts, the question we face is whether the district court committed legal error through its alleged failure to examine all of the circumstances surrounding the government's professed reasons to strike the only African-American member of the jury pool. As we have said, based on Supreme Court precedent, the judge is required to "assess the plausibility of [the government's nondiscriminatory] reason *in light of all evidence with a bearing on it." Miller-El,* 545 U.S. at 251-52 (emphasis added). [Slip Op. P. 8].

How do you think you could now prove the facts youhave stated in answer to Question No. 2, above?

By review of the transcript of proceedings which are clear and convincing as to the process which was employed.

Attach supporting documentation.

Trial transcript, Vol. II pp 219-224 attached.

5. If you did not timely appeal the original conviction, set forth facts showing how you were denied a direct appeal through no fault of your own.

N/ A

6. Is this a proposition that could have been raised on Direct Appeal? Yes

Explain: This is a proposition which was raised, in part, on direct appeal. The improper intervention by the trial judge in the *Batson* "second step" was not raised on direct appeal and should have been. This failure raises an ineffective assistance of trial/appellate counsel issue.

[Application, pp. 37-44]

5. If you did not timely appeal the original conviction, set forth facts showing how you were denied a direct appeal through no fault of your own.

N/ A

6. Is this a proposition that could have been raised on Direct Appeal? Yes

Explain: This is a proposition which was raised on direct appeal. The decision as written is inconsistent with case and statutory law as well as contrary to both State and Federal Constitutional guarantees of a fair and impartial trial.

FIFTH PROPOSITION

1. Of what legal right or privilege do you believe you were deprived in your case?

As stated in the prior Propositions a right to a trial free of structural error, Due Process of Law and Equal Protection of Law pursuant to the Sixth Amendment to the Constitution of the United States which preserves the right to a fair and impartial trial.

2. In the facts of your case, what happened to deprive you of that legal right or privilege and who made the error of which you complain?

The pattern of exclusion of jurors based on their racial or ethnic origin in derogation of the Petitioner's Due Process and Equal protection rights constitutes structural error depriving him *ab initio* a fair trial. This right was further vitiated when the trial judge interjected himself into the role of the prosecutor by supplying "race neutral" reasons for the peremptory challenges which were then hastily adopted by the prosecutor.

The trial judge then demonstrated a consistent pro-prosecution bias on his evidentiary ruling throughout the trial, which as a legal matter is a bias against the defendant, and which deprived the defendant of a fair and impartial trial. The trial judge consistently denied the defense objections to the admission of testimony which could not be reasonably subjected to the defendant's guaranteed right to confrontation. These included the Terrico Bethel and Allen Shields transcripts. Further the trial judge permitted a "conga line" of witnesses to present cumulative testimony and

exhibits as to the gruesomeness of the offense, which was not a contested issue. The sole purpose for the offering of such "evidence" was to deny the defendant a fair trial by inflaming the passions and prejudices of the jury. Additionally the willful offering of evidence which the prosecution knew it could not prove, (*i.e.*, the vehicle used in the murder) due to spoliation was structural error. The sale of this purported vehicle denied this Petitioner the right to present a defense as to this critical piece of evidence because it could not be found to demonstrate that it was not same vehicle as used in the murder of Neal Sweeney. The admission of this innuendo masquerading as evidence demonstrated an unwarranted denial of this Petitioner's rights and was further exemplary of the bias and denial of a fair and impartial trial, creating structural error.

Additionally, refusal to conduct a hearing regarding the coercion and intimidation of jurors which rendered the verdict invalid because the verdict was not *de facto et de jure* the unanimous opinion of the entirety of the venire panel demonstrated bias. This is further demonstrated by the trial court ignoring the provision of 22 O.S. 952 which specifically notes, "A court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against a defendant by which his substantial rights have been prejudiced, upon his application in the following cases only:

> Fourth. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of the jury."

3. List by name and citation any case or cases that are very close factually and legally to yours as examples of the error you believe occurred in your case.

Mitchell v. State, 2006 OK CR 20 136 P.3d 671

> ¶ 103 This Court finds that the prosecutor in this case committed serious and potentially prejudicial misconduct. Although the specific impact of such conduct is difficult to gauge, we evaluate the significance of this misconduct within our discussion of Mitchell's cumulative error claim in Proposition XVI. We further find that the trial court's repeated refusal to condemn or ameliorate this misconduct suggests a disturbing lack of even-handedness that, though not properly raised as an independent claim of judicial bias, can be considered as we determine the appropriate remedy for the numerous other errors in this case.

Oxendine v. State, 958 OK CR 104 335 P.2d 940,

> ¶ 8 In the case at bar there was no reason for the introduction of the colored photo slides. There was no issue nor controversy as to the cause of death. The defendants admitted the crime in intricate detail. The photos could not possibly lend assistance in the determination of defendant's guilt. It was admitted_ Had there been a conflict as to the shooting or cause of death or location of the wounds, or an issue to which the photos were relevant, then and in that event, they would have been admissible had they been taken prior to the performance of the autopsy. . . . This court feels that the photos were wholly inadmissible in the form presented and their admission was an abuse of the trial

> court's discretion . . . .The whole procedure seems to have been so unnecessary and was highly prejudicial and forces a reversal. [Applicable to litany of State witnesses to wounds on Neal Sweeney].

Neder v. United States, 527 U.S. 1, 2, 119 S. Ct. 1827, 144 L.Ed.2d 35,

> . . . [W]e have recognized a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." *Arizona v. Fulminante,* 499 U.S. 279, 309 (1991); *see Chapman v. California,* 386 U.S. 18, 23 (1967). Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, "affect substantial rights") without regard to their effect on the outcome.
>
> . . . [W]e have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante,* supra, at 310. Such errors "infect the entire trial process," *Brecht v. Abrahamson,* 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose,* 478 U.S., at 577. Put another way, these 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." *Id.*, at 577 578. [527 U.S. at 3).

Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991)

Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced. The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama,* 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L.Ed.2d 242 (1960). *See also Culombe, supra,* 367 U.S., at 584, 81 S. Ct., at 1869; *Reck v. Pate,* 367 U.S. 433, 440-441, 81 S. Ct. 1541, 1546-1547, 6 L.Ed.2d 948 (1961); *Rogers v. Richmond,* 365 U.S. 534, 540, 81 S. Ct. 735, 739, 5 L.Ed.2d 760 (1961); *Payne v. Arkansas,* 356 U.S. 560, 561, 78 S. Ct. 844, 846, 2 L.Ed.2d 975 (1958); *Watts v. Indiana,* 338 U.S. 49, 52, 69 S. Ct. 1347 1349, 93 L.Ed. 1801 (1949). As in *Payne,* where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 U.S., at 564-565, 567, 78 S. Ct., at 848-849, 850, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to

> render his confession the product of coercion. [287-288].
>
> In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, ... This is a true coerced confession in every sense of the word. [286] [Applicable herein to Prejean-Bethel admission].

How do you think you could now prove the facts you have stated in answer to Question No. 2, above?

> By review of the transcript of proceedings which are clear and convincing. By applying the appropriate case law to these facts.

Attach supporting documentation.

> Attachments contained in prior propositions.

5. If you did not timely appeal the original conviction, set forth facts showing how you were denied a direct appeal through no fault of your own.

> N/A

6. Is this a proposition that could have been raised on Direct Appeal?

> Yes

Explain:

> This is a proposition which was raised indirectly on direct appeal. Because of the oblique direct appeal inclusion this was not addressed by the appeals court.

Part C

I understand that I have an absolute right to appeal to the Court of Criminal Appeals from the trial court's order entered in this case, but unless I do so within thirty (30) days after the entry of the trial judge's order, I will have waived my right to appeal as provided by Section 1087 of Title 22.

Part D

I have read the foregoing application and assignment(s) of error and hereby state under oath that there are no other grounds upon which I wish to attack the judgment and sentence under which I am presently convicted. I realize that I cannot later raise or assert any reason or ground known to me at this time or which could have been discovered by me by the exercise of reasonable diligence. I further realize that I am not entitled to file a second or subsequent application for post-conviction relief based upon facts within my knowledge or which I could discover with reasonable diligence at this time.

Part E (As Applicable)

I hereby apply to have counsel appointed to represent me. I believe I am entitled to relief. I do not possess any money or property except the following: (If none, state "None"). Not Applicable

_____

Signature

Date 16 July 2015

STATE OF OKLAHOMA)
COUNTY OF HUGHES)

Cortez Johnson, being first sworn under oath, states that he/she signed the above application and that the statements therein are true to the best of his/her knowledge and belief.

/s/ Alonzo Cortez Johnson

Subscribed and sworn to before me this 16th day of July 2015 .

/s/ Carla Hoover
Notary Public

My Commission Expires: 4-15-2019

PETITIONER ALONZO CORTEZ JOHNSON'S PETITION IN ERROR AND BRIEF IN SUPPORT TO THE OKLAHOMA COURT OF CRIMINAL APPEALS ON POST-CONVICTION REVIEW, RELEVANT EXCERPTS (OCTOBER 21, 2015)

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

STEVE KUNZWILER, DISTRICT ATTORNEY OF TULSA COUNTY, EX REL., STATE OF OKLAHOMA,

Respondent.

Appellate Case No. PC-2015-923

No. CF-2009-2738

[Petition in Error and Brief, pp. 1-7]

PURSUANT to the *Rules of the Court of Criminal Appeals Article 5, Section 5.2,* Petitioner Alonzo Cortez Johnson, hereby submits his Petition in Error from the District Court of Tulsa County, Order denying his Application for Post-Conviction Relief, dated October 6, 2015. A certified copy of said Order is attached hereto. The Petitioner, having duly and timely filed

his Notice of Intent to Appeal as required by the above stated rules, on the 16th day of October, 2015, herein perfects this appeal pursuant to *Rule* 5.2(C).

The Petitioner herein prays this Court review his Petition in Error and Brief in Support and upon due deliberation reverse the denial of the District Court of Tulsa County and remand this matter with such instructions to that Court which this Court deems most equitable and just, including but not limited to directions to dismiss the case against the Petitioner, or in the alternative to provide him with a new trial which is free of the errors observed in this Court's deliberations and determination.

BRIEF IN SUPPORT

Petitioner Alonzo Cortez Johnson raised the following issues in his Application for Post Conviction Relief in the District Court of Tulsa County.

1. The Petitioner was denied Equal Protection under the 14th Amendment to the Constitution of the United States, through Batson errors.

2. The Petitioner was denied the Right to Confrontation, Due Process and Equal Protection as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, through Bruton and Crawford errors.

3. The Petitioner was denied the right to a trial free of structural error, Due Process of law and Equal Protection pursuant to the Fourteenth Amendment to the Constitution of the United States and Article 2, Section

12 of the Constitution of the State of Oklahoma.

4. The Petitioner was denied the right to a trial free of structural error, Due Process of law and Equal Protection pursuant to the Fourteenth Amendment to the Constitution of the United States, due to the verdict being a product of juror misconduct and juror intimidation rather than a determination of the sufficiency of the evidence to convict.

5. The Petitioner was denied the right to a trial free of structural error, Due Process of Law and Equal Protection of Law pursuant to the Sixth Amendment to the Constitution of the United States which preserves the right to a fair and impartial trial; when during the Batson objections the trial judge altered the Supreme Court defined process and provided *sua sponte* "race neutral" explanations for the benefit of the prosecution. Such pro-prosecution advocacy was evident throughout the proceedings and rendered the entire trial both unfair and unduly prejudicial relative to this Petitioner.

From these post conviction propositions the District Court of Tulsa County, in a lengthy unpaginated order, noting that it reviewed the Petitioner's Application, the States's Response, the [Appeal Court] mandate and the docket sheet, denied the Petitioner a hearing, a review of the merits or any relief.

While not specifically citing to this Court's opinion in the Petitioner's direct appeal the District Court reference the fact of the issues raised therein and

declined relief citing 22 O.S. § 1083(B) and, in turn, § 1083(C)[1] The District Court then entered its findings of fact and conclusions of law. These findings consist mainly of stating the similar issue was raised on "direct appeal. The District court then notes the appellate court disposed of the issue. It concludes as a matter of law that no relief is thereby available from the State Court under the doctrine of *res judicata.*

From that Order, the Petitioner present this brief in support of his claim for post conviction relief.

Proposition 1 The *Batson* Issue

As noted in the Application filed in the District Court, District Attorneys Tim Harris and Doug

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[1] 22 O.S. 1083

> B. When a court is satisfied, on the basis of the application, the answer or motion of respondent, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may order the application dismissed or grant leave to file an amended application. Disposition on the pleadings and record is not proper if there exists a material issue of fact. The judge assigned to the case should not dispose of it on the basis of information within his personal knowledge not made a part of the record.
>
> C. The court may grant a motion by either party for summary disposition of the application when it appears from the response and pleadings that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An order disposing of an application without a hearing shall state the court's findings and conclusions regarding the issues presented.

Drummond, jointly and severally, systematically used peremptory challenges to effective remove jurors of minority race from the trial venire men. (Tr. Vol. II, pp. 219-223). Defense Attorney Lyons, objected to the State's peremptory challenges by stating, "Your Honor, I would like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, [sic] and Mr. Dickens. And there's a pattern here, your honor, of striking minorities off this jury." *Id.* at 221. To this objection the trial judge *sua sponte* provided "race neutral" reasons for the stricken jurors. This clearly violates the proper procedural process. Yet, Judge Gillert states, at *Id.* p. 223, in rejecting the last minority juror peremptory challenge, "Well, you would have **effectively eliminated all the African-Americans** and I am not going to do that." [Bolding added.] The statement by the trial judge clearly reveals that he perceived a pattern of racial removal by the prosecution which belied the "race neutral" explanation. The District Attorney willfully committed the conduct which gave rise to the deprivation and was actively engaged in pursuing the effective elimination of all the African-American prospective jurors.

This colloquy was not provided in the Petitioner's Brief in Chief on direct appeal. It provides a more stark depiction of the jury selection and clearly demonstrates the trial judge's awareness of the implications of the jurors being peremptorily challenged. It was further improper for the trial judge to tell the District Attorney what the "race neutral" reasons were for the peremptory challenges. That was the task, exclu-

sively, for the prosecutor making the challenge to know; not to be coached by the court as to those reasons.

The case law in this area is well known and clear. *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1112, 90 L.Ed.2d 694 (1986)

> [T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. pp. 88-89.

Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410, 162 L.Ed.2d 129 (2005).

> Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson,* 476 U.S., at 87; *see also Smith v. Texas,* 31 1 U.S. 128, 130 (1940). [P. 172]

In *Miller-El v. Dretke,* 545 U.S. 231, 251-52 (2005)

> ("[T]he rule in Batson . . . requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."). As our review of the district court's application

> of *Batson* is a matter of process, we cannot assume that the district court evaluated the prosecutor's credibility simply by virtue of its eventual ruling denying the *Batson* challenge.

This raises the question in the instant case, "How can the judge evaluate the credibility of the prosecutor's reason when the court is providing the reason for the prosecutor to provide?"

Proposition 2 The *Crawford* and *Bruton* Issues

The State solicited one Dolan Prejean, a jail informant looking to better his own fortunes, to obtain incriminating statements from Terrico Bethel, which he did through coercive tactics while both were incarcerated. The transcript of these recorded sessions was introduced at trial. While the statements were made by Bethel they tended to implicate this Petitioner who could not cross-examine Bethel due to both being in trial together. The transcript should have been inadmissible due to the coercion and thereby inadmissible against this Petitioner due to the inability to confront the accuser.

Additionally, the trial court permitted the transcript of the testimony of Allen Shields to be read to the jury over the objection of the defense. The defense noted there were numerous issues which affected the credibility of the testimony. . . .

[. . .]

[Petition in Error and Brief in Support, pp. 20-27]

. . . once the intimidated juror feels safe from his/her oppressor? Many countries have efficient criminal judicial systems, but efficient is not the goal of our criminal justice system nor should it ever be. No juror should ever have to violate his or her conscience for fear of retribution just to arrive at a verdict. If that situation does arise, as it has herein, then the Court should be the first to take steps to remedy that wrong-not obfuscate to simply preserve a conviction.

5. General Structural Error, Denial of Due Process and Equal Protection

The pattern of exclusion of jurors based on their racial or ethnic origin in derogation of the Petitioner's Due Process and Equal protection rights constitutes structural error depriving him *ab initio* a fair trial. This right was further vitiated when the trial judge interjected himself into the role of the prosecutor by supplying "race neutral" reasons for the peremptory challenges which were then hastily adopted by the prosecutor. The trial judge then demonstrated a consistent pro-prosecution bias on his evidentiary ruling throughout the trial, which as a legal matter is a bias against the defendant, and which deprived the defendant of a fair and impartial trial. The trial judge consistently denied the defense objections to the admission of testimony which could not be reasonably subjected to the defendant's guaranteed right to confrontation. These included the Terrico Bethel and Allen Shields transcripts. Further the trial judge permitted a "conga line" of witnesses to present cumulative testimony and exhibits as to the gruesomeness

of the offense, which was not a contested issue. The sole purpose for the offering of such "evidence" was to deny the defendant a fair trial by inflaming the passions and prejudices of the jury. Autopsy photos would have been no less gruesome and yet they would have clearly been inadmissible. *Cole v. States*, 2007 OK CR 27, 164 P.3d 1089, ¶ 29:

> [P]ost-autopsy photographs have often been found to be inadmissible by this Court on the basis that their probative value was substantially outweighed by prejudicial effect due to their shocking nature and tendency to focus on the handiwork of the medical examiner, rather than the defendant. *See, e.g., Wilson v. State,* 1998 OK CR 73, ¶ 92, 983 P.2d 448, 468; *Sattayarak v. State,* 1 994 OK CR 64, ¶ 8, 887 P.2d 1326, 1330; *Oxendine v. State,* 1958 OK CR 104, ¶¶ 6-8, 335 P.2d 940, 942-43.

None of this testimony focused on anything done by this Defendant.

Additionally the willful offering of evidence which the prosecution knew it could not prove, (*i.e.*, the vehicle used in the murder) due to spoliation was structural error. The sale of this purported vehicle denied this Petitioner the right to present a defense as to this critical piece of evidence because it could not be found to demonstrate that it was not same vehicle as used in the murder of Neal Sweeney. The admission of this innuendo masquerading as evidence demonstrated an unwarranted denial of this Petitioner's rights and was further exemplary of the bias and denial of a fair and impartial trial, creating structural error.

Something horrifically odd seems to happen in a murder prosecution, the rush to judgment seems to outstrip the need for tangible evidence. Hard evidence seems less important than appearance or supposition, how else can the lack of evidence in a case such as this be explained?

Additionally, refusal to conduct a hearing regarding the coercion and intimidation of jurors which rendered the verdict invalid because the verdict was not *de facto et de jure* the unanimous opinion of the entirety of the venire panel demonstrated bias. This is further demonstrated by the trial court ignoring the provision of 22 O.S. 952 which specifically notes, "A court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against a defendant by which his substantial rights have been prejudiced, upon his application in the following cases only:

> Fourth. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of the jury."

Mitchell v. State, 2006 OK CR 20 136 P.3d 671

> ¶ 103 This Court finds that the prosecutor in this case committed serious and potentially prejudicial misconduct. Although the specific impact of such conduct is difficult to gauge, we evaluate the significance of this misconduct within our discussion of Mitchell's cumulative error claim in Proposition XVI. We further find that the trail court's repeated refusal to condemn or ameliorate this misconduct suggests a disturbing lack of even-handedness that, though not properly raised

> as an independent claim of judicial bias, can be considered as we determine the appropriate remedy for the numerous other errors in this case.

Oxendine v. State, 958 OK CR 104 335 P.2d 940,

> ¶ 8 In the case at bar there was no reason for the introduction of the colored photo slides. There was no issue nor controversy as to the cause of death. The defendants admitted the crime in intricate detail. The photos could not possibly lend assistance in the determination of defendant's guilt. It was admitted. Had there been a conflict as to the shooting or cause of death or location of the wounds, or an issue to which the photos were relevant, then and in that event, they would have been admissible had they been taken prior to the performance of the autopsy. . . . This court feels that the photos were wholly inadmissible in the form presented and their admission was an abuse of the trial court's discretion. . . . The whole procedure seems to have been so unnecessary and was highly prejudicial and forces a reversal. [Applicable to litany of State witnesses to wounds on Neal Sweeney].

Neder v. United States, 527 U.S. 1, 2, 119 S. Ct. 1827, 144 L.Ed.2d 35,

> . . . [W]e have recognized a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." *Arizona v. Fulminante,* 499 U.S. 279, 309 (1991); *see Chapman v. California,* 386 U.S.

> 18, 23 (1967). Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, "affect substantial rights") without regard to their effect on the outcome.
>
> . . . [W]e have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante, supra*, at 310. Such errors "infect the entire trial process," *Brecht v. Abrahamson,* 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose,* 478 U.S., at 577. Put another way, these 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." *Id.*, at 577 578. [527 U.S. at 3].

Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991)

> Although the question is a close one, we agree with the Arizona Supreme Court's-conclusion that Fulminante's confession was coerced. The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional

inquisition." *Blackburn v. Alabama,* 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L.Ed.2d 242 (1960). *See also Culombe, supra,* 367 U.S., at 584, 81 S. Ct., at 1869; *Reck v. Pate,* 367 U.S. 433, 440-441, 81 S. Ct. 1541, 1546-1547, 6 L.Ed.2d 948 (1961); *Rogers v. Richmond,* 365 U.S. 534, 540, 81 S. Ct. 735, 739, 5 L.Ed.2d 760 (1961); *Payne v. Arkansas,* 356 U.S. 560, 561, 78 S. Ct. 844, 846, 2 L.Ed.2d 975 (1958); *Watts v. Indiana,* 338 U.S. 49, 52, 69 S. Ct. 1347 1349, 93 L.Ed. 1801 (1949). As in *Payne,* where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 U.S., at 564-565, 567, 78 S. Ct., at 848-849, 850, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) *Sarivola*, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion. [287-288].

In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, ... This is a true coerced confession in every sense of the word.

[286] [Applicable herein to Prejean-Bethel admission].

Conclusion

From the outset this Defendant's fate seems sealed, the jury selection issues and the trial judge assisting the prosecution with reasons which the judge then found valid. The phantom evidence, the lack of procedural ability to confront witnesses all of the structural and trial errors combined to insure a result and that result was–it seems–never intended to be not guilty, even if it required permitting the psychological bludgeoning of jurors.

The Appellant has demonstrated numerous reasons and legal bases for the overturning of his convictions and, at a minimum, his entitlement to a new trial, as well as such other and additional relief as to this court seems equitable and just.

Respectfully Submitted,

/s/ William H. Campbell
OBA #1454
Attorney for Defendant
925 NW Sixth St.
Oklahoma City, OK 73106
(405) 232-2953

PETITIONER ALONZO CORTEZ JOHNSON'S PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY, RELEVANT EXCERPTS (JULY 5, 2016)

[Petition Under 28 U.S.C § 2254, pp. 1-7]

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court
Northern District of Oklahoma
Case No.: 16-cv-433-JED-FHM

Name (under which you were convicted):

ALONZO CORTEZ JOHNSON

Place of Confinement:

DAVIS CORRECTIONAL FACILITY
HOLDENVILLE, OK

Prisoner No.:

194578

Petitioner:

ALONZO CORTEZ JOHNSON

Respondent:

Tim Wilkinson, Warden

The Attorney General of the
State of OKLAHOMA

PETITION

1.

(a) Name and location of court that entered the judgment of conviction you are challenging:

DISTRICT COURT OF TULSA COUNTY, TULSA, OKLAHOMA

(b) Criminal docket or case number (if you know):

CF-2009-2738

2.

(a) Date of the judgment of conviction (if you know):

12/14/2012

(b) Date of sentencing:

2/19/2014

3. Length of sentence:

Life Imprisonment

4. In this case, were you convicted on more than one count or of more than one crime?

Yes

5. Identify all crimes of which you were convicted and sentenced in this case:

Conspiracy to Commit Murder
First Degree Murder
Both counts to run consecutively

6.

(a) What was your plea? (Check one)

Not guilty

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

No

8. Did you appeal from the judgment of conviction?

Yes

9. If you did appeal, answer the following:

(a) Name of court:

Oklahoma Court of Criminal Appeals

(b) Docket or case number (if you know):

F-2013-173

(c) Result:

Affirmed

(d) Date of result (if you know):

7/17/2014

(e) Citation to the case (if you know):

Johnson v. State, No. F-2013-173
(unpublished)

(f) Grounds raised:

1. The prosecutor's use of peremptory challenges violated the equal protection and due process rights of Appellant.
2. The dual commission of the District Attorney prohibited prosecution of this case.
3. The trial judge erred by admitting statements by alleged co-defendants that occurred after the conspiracy had ended.
4. The trial court erred by allowing the recorded statements of Terrico Bethel to be used at trial against Appellant.
5. The trial judge erred by permitting information about "code" language to be presented. (Continued on attached sheet)

(g) Did you seek further review by a higher state court?

Yes

If yes, answer the following:

(1) Name of court:

Oklahoma Court of Criminal Appeals

(2) Docket or case number (if you know):

PC-2015-923

(3) Result:

Affirmed

(4) Date of result (if you know):

4/7/2016

(5) Citation to the case (if you know):

Johnson v. State, No. PC-2015-923

(6) Grounds raised:

1. Denial of Equal Protection under the Fourteenth Amendment through Batson error.
2. Denial of Confrontation, Due Process and Equal Protection through Bruton and Crawfor [sic] errors.
3. Denial of right to fair trial, Due Process and Equal Protection.
4. Denial of Due Process via juror misconduct and intimidation.
5. Denial of Equal Protection via Batson error when the trial court provided explanations.

(h) Did you file a petition for certiorari in the United States Supreme Court?

No

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

N/A

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court:

N/A

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition:

Yes

(2) Second petition:

Yes

(3) Third petition:

[No Selection]

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

The State systematically removed minorities from the jury in violation of Batson v. Kentucky, 476 U.S. 79 (1986).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The trial court's determination that the State's explanation for excusing each minority jurors were not legitimate race-neutral reasons.

(b) If you did not exhaust your state remedies on Ground One, explain why:

N/A

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Post-conviction application.

Name and location of the court where the motion or petition was filed:

Oklahoma Court of Criminal Appeals

Docket or case number (if you know):

PC-2015-923

Date of the court's decision:

4/7/2016

Result (attach a copy of the court's opinion or order, if available):

Affirmed (Order Attached).

(3) Did you receive a hearing on your motion or petition?

No

(4) Did you appeal from the denial of your motion or petition?

[No Selection]

[. . .]

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

N/A

GROUND TWO:

Johnson was denied right to Confrontation, Due Process, and Equal Protection through Bruton and Crawford errors.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The trial court admitted erroneously several exhibits at trial that contained the recorded statements of his alleged co-conspirators.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

N/A

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[No selection]

[. . .]

[Petition Under 28 U.S.C § 2254, pp. 12-15]

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

Yes

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

N/A

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?

No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging?

No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the raised.

N/A

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

[. . .]

(c) At trial:

Mark D. Lyons, 616 S. Main, Suite 201, Tulsa, OK 74119

[. . .]

(e) On appeal:

Lisbeth L. McCarty, Oklahoma Indigent Defense System, P.O. Box 926, Norman, OK 73070

(f) In any post-conviction proceeding:

William H. Campbell, 925 N.W. 6th St., Oklahoma City, OK 73106

[. . .]

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as

contained in 28 U.S.C. § 2244(d) does not bar your petition.*

The Petition is timely.

Therefore, petitioner asks that the Court grant the following relief:

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Grant a writ of habeas corpus and order the immediate release of the Petitioner.

or any other relief to which petitioner may be entitled.

/s/ James L. Hankins, OBA #15506
Signature of Attorney (if any)

PETITIONER ALONZO CORTEZ JOHNSON'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254, RELEVANT EXCERPTS (OCTOBER 3, 2016)

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

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

TIM WILKINSON, Warden,

Respondent.

Case No. 16-cv-433-JED-FHM

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

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Counsel for Petitioner

[Brief in Support of Habeas Corpus Pet., pp. 13-17]

IV. LEGAL CLAIMS

Ground I—The State Systematically Used Its Peremptory Challenges to Exclude Racial Minorities from the Jury

A. Exhaustion

This claim was raised, and denied, on direct appeal. *See Johnson v. State*, No. F-2013-173 (Okl.Cr., July 17, 2014), *slip op.* 3. Johnson also raised the claim in more detail during post-conviction proceedings. *See Petition in Error and Brief in Support* filed in PC-2015-823, at page 4-5.

B. Merits

Johnson is an African-American. During jury selection, the prosecutors in this case utilized the State's peremptory challenges to kick off as many minorities as they could. Defense counsel watched this, and let some of it go, until it came time for the prosecutor to use a peremptory challenge against venireman Prof. Wayne Dickens.

According to the prosecutor, Prof. Dickens "has a Ph.D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people[.]" Tr. 220. The trial judge accepted this explanation as race-neutral, at which point defense counsel made the following observation:

> MR. LYONS: Your Honor, I'd like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil,

> Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.

Tr. 221. The trial court disagreed that this constituted a pattern. *Id.*

However, the trial court was clearly concerned about it, because rather than asking the prosecution to offer race-neutral explanations for excusing minorities with every peremptory challenge, the trial court itself provided *sua sponte* explanations of the State's behavior. Tr. 221-22 (Ms. Martinez was "hardly involved in the process"; Ms. Carranza had difficulty with English; so did Ms. Aramburo de Wassom).

But, in case there was any doubt, when the State exercised its eighth peremptory challenge to excuse Ms. Williams—the last African-American left on the panel—even the trial judge noticed that doing so would "effectively eliminate all the African-Americans and I'm not going to do that." Tr. 223. The trial court refused to allow the State to strike Ms. Williams. Tr. 223. The State picked up on this cue from the trial judge and waived exercise of its ninth and final peremptory challenge. Tr. 224.

Thus, we have a situation where the prosecutors were excusing one African-American after the other with peremptory challenges, defense counsel noticed the pattern, objected to it, the trial court failed to direct the State to proffer race-neural explanations, choosing instead to offer its own, and when the State attempted to kick the last African-American off the panel, the trial judge refused to let them do it—even

though the prosecutor offered another lame reason (that she was a pastor). Tr. 223.

The others that were excused by the State were clearly qualified to serve as jurors. Dr. Tawil was a physician, and had promised to listen to all the facts before making a judgment. Tr. 137, 168. Rena Carranza understood the process, answered appropriately regarding her opinion of the crime of conspiracy, and stated that she would be able to analyze the evidence presented. Tr. 53, 123, 125, 187. Ms. De Wassom had no trouble weighing the truthfulness of the witnesses. Tr. 207.

Nor did Prof. Dickens have any trouble with any aspect of the trial procedure; nor did Ms. Williams, other than being "a pastor." Particularly instructive is the background of Prof. Dickens, who had a sister who had been a detective on the Tulsa Police Department, and his own father had been a police officer. Tr. 77. This educated man would seem to be an ideal juror for the State.

All of this points to a clear pattern of racial discrimination by the State to use peremptory challenges to exclude African-American jurors from the panel in a case where an African-American male was on trial for murder. This was a violation of the clearly established rule of *Batson v. Kentucky*, 476 U.S. 79 (1986) (the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on the basis of race).

Batson requires a three-part analysis: 1) the defendant must make *a prima facie* showing that the prosecutor exercised peremptory challenges on the basis of race; 2) after the requisite showing is made,

the burden shifts to the prosecutor to articulate a race-neutral reason related to the case for striking jurors in question; and 3) the trial court must then determine whether the defendant carried his burden of proving deliberate discrimination. *Id.* 93-94, 97-98; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) *(per curiam).*

The first step simply requires the defendant to produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *See Johnson v. California*, 545 U.S. 162, 169 (2005). This is a very low threshold showing, even lower than a "more likely than not" burden. *Id.* This first step was clearly met in this case.

Defense counsel below did his part by bringing it to the attention of the trial judge that the State had used its peremptory challenges to strike African-Americans. *See Batson*, 476 U.S. at 97 (a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination). In fact, the pattern here is more stark because the prosecutor actually wanted to strike them all, and attempted to do so with its eighth peremptory challenge, but was prevented from doing so by the trial court who noticed that striking Ms. Williams would eliminate all African-Americans from the panel. Thus, Johnson has met his burden of showing a pattern of purposeful, racial discrimination in the use of peremptory challenges by the State.

The second step required the trial court to inquire of the State the race-neutral reasons for the strikes. However, the trial court did not conduct this step of the *Batson* inquiry, choosing instead to imagine on its own what the race-neutral reasons might have

been. This violates the second step of the *Batson* inquiry, and also the third, since the trial court cannot consider the adequacy of race-neutral reasons that it made up on its own.

On direct appeal, the Oklahoma Court of Criminal Appeals [hereinafter the "OCCA"] held 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." *Johnson, slip op.* 3. This conclusion is clearly erroneous, that is, an unreasonable application of *Batson* and the facts, on two grounds.

First, the trial judge did not examine explanations *provided by the prosecutors*; rather, it examined *its own* explanations. The trial court made no inquiry of the prosecutors as to race-neutral reasons for their strikes. It merely imagined some race-neutral reasons that might exist. The OCCA applied unreasonably the *Batson* holding by finding that the second step was met when it clearly was not.

Second, the OCCA interpreted unreasonably the facts of the case by finding that the trial court made any determination of the race-neutral reasons of the prosecutors. There were no race-neutral reasons provided by the prosecutors. Any such reasons were provided by the trial court.

Thus, the OCCA decided this issue *via* an unreasonable application of *Batson*, and also an unreasonable determination of the facts. Under these circumstances, this Court must grant the writ of habeas corpus and order Johnson released. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting habeas relief

under the AEDPA on a *Batson* claim where the prosecutor used peremptory strikes on 10 out of 11 qualified African-American veniremen).

[. . .]

[Brief in Support of Habeas Corpus Pet., p. 38]

CONCLUSION

For the foregoing reasons, Petitioner Alonzo Johnson requests: 1) a full and fair evidentiary hearing as to any issues which involve facts disputed by the State; 2) that the Court issue a writ of habeas corpus to have Petitioner brought before it so he may have discharged from his unconstitutional confinement; and 3) that the Court grant such other relief as may be appropriate as to dispose of the matter as law and justice require.

/s/ James L. Hankins
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Counsel for Petitioner

PETITIONER ALONZO CORTEZ JOHNSON'S REPLY BRIEF TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA, RELEVANT EXCERPTS (JANUARY 24, 2017)

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

ALONZO CORTEZ JOHNSON,

Petitioner,

v.

TIM WILKINSON, Warden,

Respondent.

Case No. 16-cv-433-JED-FHM

REPLY BRIEF OF THE PETITIONER

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Counsel for Petitioner

[Reply Brief of Petitioner, pp. 6-9]

Petitioner, Alonzo Cortez Johnson, hereby replies to the State as follows:

Reply to Ground I—The State Systematically Used Its Peremptory Challenges to Exclude Racial Minorities from the Jury

As the Court will recall, Johnson is an African-American. He showed by citation to the record that, during jury selection, the prosecutors in this case utilized the State's peremptory challenges to kick off as many minorities as they could through purposeful racial discrimination. Things came to a head when the prosecutor struck venireman Prof. Wayne Dickens.

According to the prosecutor, Prof. Dickens "has a Ph.D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people[.]" Tr. 220.

The trial judge accepted this explanation as race-neutral, at which point defense counsel made the following observation:

> MR. LYONS: Your Honor, I'd like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.

Tr. 221. Although the trial court disagreed that this constituted a pattern, the court was clearly concerned about it because, rather than asking the prosecution to offer race-neutral explanations for excusing minor-

ities with every peremptory challenge, the trial court itself provided *sua sponte* explanations of the State's behavior. Tr. 221-22 (Ms. Martinez was "hardly involved in the process"; Ms. Carranza had difficulty with English; so did Ms. Aramburo de Wassom).

The pattern was exposed with certainty when the State exercised its eighth peremptory challenge to excuse Ms. Williams—the *last* African-American left on the panel—when even the trial judge noticed that doing so would "effectively eliminate all the African-Americans and I'm not going to do that." Tr. 223. The trial court refused to allow the State to strike Ms. Williams. Tr. 223. Thus, we have a situation where the prosecutors were excusing one African-American after the other with peremptory challenges, defense counsel noticed the pattern, objected to it, the trial court failed to direct the State to proffer race-neural explanations, choosing instead to offer its own, and when the State attempted to kick the last African-American off the panel, the trial judge refused to let them do it—even though the prosecutor offered another lame reason (that she was a pastor). Tr. 223. This was a violation of the clearly established rule of *Batson v. Kentucky*, 476 U.S. 79 (1986) (the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on the basis of race).

In response, the State simply argues that the decision of the Oklahoma Court of Criminal Appeals on direct appeal was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. State's Response Brief at 13-14. The State relies upon the opinion of the OCCA which held 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." *Johnson, slip op.* 3.

However, as Johnson pointed out in his Brief-in-Chief, this conclusion is clearly erroneous, that is, an unreasonable application of *Batson* and the facts, on two grounds, neither of which the State addresses or refutes with any significant effort.

First, the trial judge did not examine explanations *provided by the prosecutors*; rather, it examined *its own* explanations. The trial court made no inquiry *of the prosecutors* as to race-neutral reasons for their strikes. It merely imagined some race-neutral reasons that might exist. The OCCA applied unreasonably the *Batson* holding by finding that the second step was met when it clearly was not. The State responds that the prosecutor replied with a race-neutral explanation (of one potential juror, Prof Dickens) *when asked* by the trial court. State's Response Brief at 19.

But, that is not the legal standard demanded by the Supreme Court in *Batson* and its progeny. Prosecutors must offer race-neutral explanations, not merely stand at the ready and be able to do so. The prosecutor should have known that and could have supplied the record with explanations, but failed to do so, and the State provides no excuse for this failure, or for the trial court assuming the role of a prosecutor and offering its own race-neutral reasons. This process does not resemble the way in which these claims must be addressed in the trial court, which makes the application of *Batson* by the trial court and the OCCA unreasonable.

Second, the OCCA interpreted unreasonably the facts of the case by finding that the trial court made any determination of the race-neutral reasons of the prosecutors. There were no race-neutral reasons provided by the *prosecutors* (with the lone exception of Prof. Dickens); rather, any such reasons were provided by the *trial court*, who could not know what reasons lurked inside the mind of the prosecutor.

Thus, the OCCA decided this issue *via* an unreasonable application of *Batson,* and also an unreasonable determination of the facts. Under these circumstances, this Court must grant the writ of habeas corpus and order Johnson released. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting habeas relief under the AEDPA on a *Batson* claim where the prosecutor used peremptory strikes on 10 out of 11 qualified African-American veniremen).

The State notes that it is the burden of the Petitioner to show purposeful discrimination. *See* State's Response Brief at 20 *(citing Rice v. Collins*, 546 U.S. 333, 338 (2006)). Johnson has met his burden. The record shows this by defense counsel making a record that the prosecutor had used all but one of its peremptory challenges to strike minorities, including all of the African-Americans, and in fact the prosecutor fully intended to strike *all* of the African-Americans on the panel, but was prevented from doing so by the trial judge, who then supplied his own race-neutral reasons that he imagined the prosecutor might have stated, rather than inquiring of the prosecutor, who never explained his actions which is required by *Batson*, even though he could have done so at trial.

Rare is the case where a Petitioner can produce notes from the prosecutor's file stating "our strategy

is to use peremptory challenges to strike all of the African-American jurors in this case"; so, we must look to the record to support a *Batson* claim. The record in this case showing purposeful racial discrimination is clear and strong, and the procedures under *Batson* were not followed; thus, habeas relief is required. . .

[. . .]

[Reply Brief of Petitioner, p. 22]

CONCLUSION

For the foregoing reasons, Petitioner Alonzo Johnson requests: 1) a full and fair evidentiary hearing as to any issues which involve facts disputed by the State; 2) that the Court issue a writ of habeas corpus to have Petitioner brought before it so he may have discharged from his unconstitutional confinement; and 3) that the Court grant such other relief as may be appropriate as to dispose of the matter as law and justice require.

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PETITIONER ALONZO CORTEZ JOHNSON'S MOTION FOR CERTIFICATE OF APPEALABILITY AND BRIEF IN SUPPORT TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, RELEVANT EXCERPTS (JANUARY 16, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner/Appellant,

v.

JIMMY MARTIN, Warden,

Respondent/Appellee.

No. 19-5091

On Appeal from the United States District Court for the Northern District of Oklahoma The Honorable John F. Dowdell, United States District Judge, District Court No. 16-CV-433-JED-FHM

MOTION OF APPELLANT ALONZO CORTEZ JOHNSON for a Certificate of Appealability and Brief in Support
(Oral Argument is not requested)
(scanned PDF documents attached)

Submitted by

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[. . .]

[Motion of Appellant, pp. 17-27]

SUMMARY OF ARGUMENT

The legal claims raised by Johnson are debatable.

Johnson is an African-American. The prosecution used peremptory challenges to strike as man African-Americans as it could—and literally tried to strike the last remaining one but was prevented from doing so by the trial judge, who then proceeded to make up his own reasons for the State's conduct rather than have the prosecutors do it.

Once the illegitimate jury was empaneled, the trial proceeded where the State was allowed to use non-testifying co-defendant hearsay as substantive evidence of guilt, allowed to prejudice the jury with unduly gruesome testimony and images of the murder scene, Johnson was denied his right to present evidence in his defense, and a juror who voted to acquit complained about being bullied and coerced by other jurors during deliberations to change her vote through the use of extra judicial information.

The errors here were significant, of a constitutional nature, and resulted in actual prejudice to Johnson.

ARGUMENT

Proposition I (Motion for COA)—The District Court Erred By Not Issuing a Certificate of Appealability and This Court Must Issue a COA So That Johnson May Challenge His Convictions and Sentences on the Merits

A. Decision Below

The District Court denied a Certificate of Appealability in its Opinion and Order. Appx. 24.

B. Standard of Review

The question of whether Johnson is entitled to a Certificate of Appealability is a legal issue reviewed by this Court *de novo*. *See Slack v. McDaniel*, 529 U.S. 473, 481 (2000) ("when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims").

C. Merits

Johnson seeks a Certificate of Appealability on his claims addressed by the District Court in its Opinion and Order denying his 2254 Petition. The United States Supreme Court has addressed the appropriate standard governing the issuance of COA's:

> Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only

> demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. s 2253(c)(2). A petitioner satisfies this standard by demonstrating 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.

Miller-El v. Cockrell, 537 U.S. 322 (2003). The Supreme Court reiterated that "we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Id. (citing Slack v. McDaniel*, 529 U.S. 473, 481 (2000)).

In addition, any doubts must be resolved in favor of Johnson with respect to the granting of a Certificate of Appealability. *See Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997); *Miller v. Champion*, 161 F.3d 1249, 1251 (10th Cir. 1998); *see also Habteselassie v. Novack*, 209 F.3d 1208, 1209 (10th Cir. 2000) (COA denied by the District Court but granted by the Tenth Circuit).

It is also proper for this Court to consider the severity of the sentence in making this determination—which in this case is two life sentences running consecutively. *Fuller*, 114 F.3d at 495.

Finally, the Supreme Court has recently cautioned the lower courts that the question of prejudice is not the only consideration relevant to the broader inquiry whether a Petitioner is entitled to a COA. *Tharpe v. Sellers*, 583 U.S. ___ (2018). The Court held that a

COA should not be denied on the ground that it was indisputable among reasonable jurists that the Petitioner suffered no prejudice. *Id.*

Accordingly, Johnson requests a Certificate of Appealability with respect to the following issues:

Issue I—The State Systematically Used Its Peremptory Challenges to Exclude Racial Minorities from the Jury

A. Decision Below

This claim was raised by Johnson in the state courts and ruled upon by the Oklahoma Court of Criminal Appeals in an unpublished Summary Opinion in *Alonzo Cortez Johnson v. State*, No. F-2013-173 (Okl.Cr., July 17, 2014) (unpublished). Appx. 30. The federal district court below denied relief. Appx. 10-12.

B. Merits

Johnson is an African-American.

During jury selection, the prosecutors in this case utilized the State's peremptory challenges to kick off as many minorities as they could. Defense counsel watched this, and let some of it go, until it came time for the prosecutor to use a peremptory challenge against venireman Prof. Wayne Dickens.

According to the prosecutor, Prof. Dickens "has a Ph.D., we're concerned about him being a professor of liberal arts. It's been my practice to not keep those type of educated people[.]" Tr. 220. The trial judge accepted this explanation as race-neutral, at which

point defense counsel made the following observation on the record:

> MR. LYONS: Your Honor, I'd like to point out at this point that I think every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, Ms. Carranza, Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury.

Tr. 221. The trial court disagreed that this constituted a pattern. *Id.*

However, the trial court was clearly concerned about it, because rather than asking the prosecution to offer race-neutral explanations for excusing minorities with every peremptory challenge, the trial court itself provided *sua sponte* explanations of the State's behavior. Tr. 221-22 (Ms. Martinez was "hardly involved in the process"; Ms. Carranza had difficulty with English; so did Ms. Aramburo de Wassom).

But, in case there was any doubt, when the State exercised its eighth peremptory challenge to excuse Ms. Williams—the *last* African-American left on the panel— even the trial judge noticed that doing so would "effectively eliminate all the African-Americans and I'm not going to do that." Tr. 223. The trial court refused to allow the State to strike Ms. Williams. Tr. 223. The State picked up on this cue from the trial judge and waived exercise of its ninth and final peremptory challenge. Tr. 224.

Thus, we have a situation where the prosecutors were excusing one African-American after the other with peremptory challenges, defense counsel noticed

the pattern, objected to it, the trial court failed to direct the State to proffer race-neural explanations, choosing instead to offer its own, and when the State attempted to kick the last African-American off the panel, the trial judge refused to let them do it—even though the prosecutor offered another nonsensical reason (that she was a pastor). Tr. 223.

The other African-Americans that were excused by the State were clearly qualified to serve as jurors. Dr. Tawil was a physician, and had promised to listen to all the facts before making a judgment. Tr. 137, 168. Rena Carranza understood the process, answered appropriately regarding her opinion of the crime of conspiracy, and stated that she would be able to analyze the evidence presented. Tr. 53, 123, 125, 187. Ms. De Wassom had no trouble weighing the truthfulness of the witnesses. Tr. 207.

Nor did Prof. Dickens have any trouble with any aspect of the trial procedure; nor did Ms. Williams, other than being "a pastor." Particularly instructive is the background of Prof. Dickens, who had a sister who had been a detective on the Tulsa Police Department, and his own father had been a police officer. Tr. 77. This educated man would seem to be an ideal juror for the State.

All of this points to a clear pattern of racial discrimination by the State to use peremptory challenges to exclude African-American jurors from the panel in a case where an African-American male was on trial for murder.

As Johnson argued below, this was a violation of the clearly established rule of *Batson v. Kentucky*, 476 U.S. 79 (1986) (the Equal Protection Clause forbids

the prosecutor to challenge potential jurors solely on the basis of race).

Batson requires a three-part analysis of these claims: 1) the defendant must make *a prima facie* showing that the prosecutor exercised peremptory challenges on the basis of race; 2) after the requisite showing is made, the burden shifts to the prosecutor to articulate a race-neutral reason related to the case for striking jurors in question; and 3) the trial court must then determine whether the defendant carried his burden of proving deliberate discrimination. *Id.* 93-94, 97-98; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) *(per curiam).*

The first step simply requires the defendant to produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *See Johnson v. California*, 545 U.S. 162, 169 (2005). This is a very low threshold showing, even lower than a "more likely than not" burden. *Id.* This first step was clearly met in this case.

Defense counsel below did his part by bringing it to the attention of the trial judge that the State had used its peremptory challenges to strike African-Americans. *See Batson*, 476 U.S. at 97 (a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination).

In fact, the pattern here is more stark because the prosecutor actually wanted to strike them *all*, and attempted to do so with its eighth peremptory challenge, but was prevented from doing so by the trial court who noticed that striking Ms. Williams would eliminate *all* African-Americans from the panel. Thus, Johnson has met his burden of showing a

pattern of purposeful, racial discrimination in the use of peremptory challenges by the State.

The second step required the trial court to inquire *of the State* the race-neutral reasons for the strikes. However, the trial court did *not* conduct this step of the *Batson* inquiry, choosing instead to imagine on its own what the race-neutral reasons might have been. This violates the second step of the *Batson* inquiry, and also the third, since the trial court cannot consider the adequacy of race-neutral reasons that it made up on its own.

On direct appeal, the Oklahoma Court of Criminal Appeals [hereinafter the "OCCA"] held 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." Appx. 30. This conclusion is clearly erroneous, that is, an unreasonable application of *Batson* and the facts, on two grounds.

First, the trial judge did not examine explanations *provided by the prosecutors*; rather, it examined *its own* explanations. The trial court made no inquiry of the prosecutors as to race-neutral reasons for their strikes. It merely imagined some race-neutral reasons that might exist. The OCCA applied unreasonably the *Batson* holding by finding that the second step was met when it clearly was not.

Second, the OCCA interpreted unreasonably the facts of the case by finding that the trial court made any determination of the race-neutral reasons of the prosecutors. There were no race-neutral reasons provided by the prosecutors. Any such reasons were provided by the trial court.

Thus, the OCCA decided this issue *via* an unreasonable application *of Batson,* and also an unreasonable determination of the facts. Under these circumstances, this Court must grant the writ of habeas corpus and order Johnson released. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting habeas relief under the AEDPA on a *Batson* claim where the prosecutor used peremptory strikes on 10 out of 11 qualified African-American veniremen).

The district court does not appear to have addressed these problems, choosing instead to frame the issue as one requiring Johnson to show "exceptional circumstances" that would allow the court to not defer to the finding of no racial motivation by the trial court. Appx. 11 (*citing Black v. Workman*, 682 F.3d 880, 897 (10th Cir. 2012) (*quoting Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)).

As argued, *supra,* this seems like an odd mode of analysis by the district court because the trial court made no determination of no racial discrimination by the prosecutors because the trial court made up its own reasons. Thus, Johnson does not see how anything in *Black* or *Snyder* applies here.

Moreover, the proper analysis in federal habeas for reviewing the decision of a state court is to identify the clearly established federal law *(Batson* and its progeny in this case) and then determine whether that law was applied reasonably under the AEDPA. The district court did not do that in this case, choosing to ignore the fact that there was not compliance with the second and third steps of *Batson* by the trial court; thus a COA is warranted.

[. . .]

[Motion of Appellant, p. 60]

CONCLUSION

For the foregoing reasons, Johnson requests this Court grant a Certificate of Appealability, reverse the judgment of the District Court below, and grant him habeas relief on the merits of his claim as outlined above.

DATED this 16th day of January, 2020.

Respectfully submitted,

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RESPONDENT-APPELLEE'S (JIMMY MARTIN) ANSWER BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, RELEVANT EXCERPTS (SEPTEMBER 4, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner/Appellant,

v.

JIMMY MARTIN, Warden,

Respondent/Appellee.

No. 19-5091

On Appeal from the United States District Court For the Northern District of Oklahoma (D.C. No. 16-CV-433-JED-FHM) The Honorable John E. Dowdell, United States District Judge

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RESPONDENT-APPELLEE'S ANSWER BRIEF

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[. . .]

[Respondent – Appellee's Answer Brief, pp. 21-36]

. . . Petitioner spoke on his wiretapped calls made after the crime corroborated his involvement in the murder (State's Ex. 112-113).

While Mr. Aziz and Petitioner never spoke about the agreement to kill Mr. Sweeney, Petitioner spoke with and met Fred and Allen Shields and Mr. Bethel (Court's Ex. 4 at 44-70; State's Ex. 91, 93-94). He rode to Muskogee with Fred Shields to obtain transportation, provided that transportation to Mr. Bethel, made sure Mr. Aziz was going to pay the agreed price for the murder, and received money from Allen Shields after the murder was complete (Tr. V 827-835; Court's Ex. 4 at 44-70; State's Ex. 77). Additional facts will be presented below as they relate to the issues on appeal.

SUMMARY OF ARGUMENT

In Issue 1, Petitioner claims the State used peremptory challenges to unfairly exclude racial minorities from the jury in violation of the Equal Protection Clause and Batson. The OCCA found Petitioner failed to establish an equal protection violation in contravention of Batson. Petitioner fails to show this conclusion was contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of fact.

In Issue 4, Petitioner claims the admission of gruesome testimony and photographs deprived him of a fundamentally fair trial. The OCCA ruled the evidence was properly admitted. Petitioner's claim challenging the admission of evidence is solely a matter of state law, and he has not pointed to any clearly established federal law. Even assuming this Court's fundamental fairness jurisprudence applies, Petitioner's claim does not satisfy AEDPA. Petitioner cannot show he was denied a fundamentally fair trial.

In Issue 5, Petitioner claims juror misconduct denied him a fundamentally fair trial. The OCCA determined Petitioner failed to present evidence to support his allegation of juror misconduct. Petitioner's claim fails to satisfy AEDPA.

In Issue 7, Petitioner claims the cumulative effect of errors at trial denied him a fundamentally fair trial. The OCCA reasonably rejected this claim.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas relief with respect to a claim adjudicated on the merits by a state court only if the adjudication of the claim:

> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the

> facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The threshold question for this Court on habeas review is whether Petitioner seeks to apply a rule of law that was "clearly established" by the Supreme Court at the time of the state court's decision. *House v. Hatch*, 527 F.3d 1010, 1018 (10th Cir. 2008). Clearly established federal law refers only to the holdings, and not the dicta, of the U.S. Supreme Court at the time of the state court decision. *Id.* at 1015. Supreme Court holdings "must be construed narrowly and consist of only something akin to on-point holdings." *Id.* Furthermore, the holdings must be from Supreme Court "cases where the facts are at least closely-related or similar to the case sub judice." *Id.* at 1018. Where there is no clearly established federal law, this Court's inquiry must end. *See id.*

If a clearly established rule of federal law is implicated, then this Court must decide whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See id.* A state court decision is contrary to clearly established federal law, as determined by the Supreme Court, when it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court decision involves an unreasonable application of clearly established federal law as deter-

mined by the Supreme Court when the state court correctly identifies the governing legal principle but applies it to the facts of the particular case in an unreasonable manner. *Valdez v. Bravo*, 373 F.3d 1093, 1096 (10th Cir. 2004). To implicate § 2254(d)(1), a state court's decision must not only apply federal law "erroneously" or "incorrectly," but it must apply such law unreasonably. *Williams*, 529 U.S. at 411.

The Supreme Court has further held that "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Pursuant to *Dunn v. Madison*, the Richter standard applies to all three AEDPA inquiries. S*ee Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) ("[T]he state court's determinations of law and fact were not 'so lacking in justification' as to give rise to error 'beyond any possibility for fairminded disagreement.'").

In addition, state court determinations of fact "shall be presumed correct" unless Petitioner rebuts the presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Thus, a state court's decision cannot be said to be based on an unreasonable determination of the facts until a petitioner has shown by clear and convincing evidence that the state court's factual determination was incorrect. *Black v. Workman*, 682 F.3d 880, 896-97 (10th Cir. 2012) (refusing to grant relief under § 2254(d)(2) because the petitioner had failed to present clear and convincing evidence to rebut a state court's factual finding); *but see Wood v. Allen*, 558 U.S. 290, 300-01 (2010) (declining to

decide the relationship between § 2254(d)(2) and § 2254 (e)(1)); *Grant v. Trammell*, 727 F.3d 1006, 1024 n.6 (10th Cir. 2013) (same).

ARGUMENT AND AUTHORITY

Issue 1—The OCCA's Determination that No Equal Protection or Batson Violation Occurred Was Not Contrary to, or an Unreasonable Application of, Clearly Established Federal Law, or Based on an Unreasonable Determination of Fact

Petitioner claims the State used peremptory challenges to unfairly remove racial minorities from the jury in violation of the Equal Protection Clause and *Batson*. Petitioner failed to carry his burden of showing any racial motivation on the part of the prosecution in exercising peremptory challenges, and the OCCA reasonably rejected this claim. Relief must be denied.

A. Jury Selection

At the conclusion of *voir dire*, the State exercised its first peremptory challenge to excuse prospective juror G.T., a doctor[3] (Tr. II 56-58, 219).[4] The State's second peremptory challenge excused prospective juror M.D., an African American college professor who held a doctorate in social sciences (Tr. I 31; Tr. II 77-

[3] The record does not indicate prospective juror G.T.'s race.

[4] Oklahoma law prohibits the disclosure of jurors's names to the public and directs counsel to protect the confidentiality of the jurors's information. OKLA. STAT. tit. 38, § 36 (Supp. 2015). Therefore, undersigned counsel will refer to the prospective jurors and jurors discussed in this brief by their initials.

79, 152-155, 159-160).[5] While defense counsel did not object to the challenge, the court *sua sponte* asked the prosecutor to state his "race neutral reason" (Tr. II 220). The prosecutor expressed his concern that M.D. was a professor of liberal arts, and based on his experience, would be "too exacting" and "too liberal" (Tr. II 220). The court found the response was sufficiently race-neutral and noted other African Americans remained on the jury (Tr. II 220).

Thereafter, the State exercised peremptory challenges to excuse prospective jurors L.A., L.W., R.C., and K.M. (Tr. II 220-221).[6] After the State struck K.M., defense counsel commented that the State's challenges revealed a "pattern" of striking minorities from the jury (Tr. II 221). The court disagreed and explained no lawful pattern had been established given that K.M. was "hardly involved in the process" and both R.C. and L.A. had "difficulty" understanding the English language (Tr. II 221-222). The court's observations are sufficiently supported by the record which reveals R.C. and L.A. both spoke English as a second language and K.M. stated her brother should not have been put in jail for drunk driving and she did not want to be a juror in this case (Tr. II 50-52, 84-85, 89, 128). Furthermore, prospective juror V.W., who was excused by defense counsel, had been prospective juror G.T.'s attending physician at one time (Tr. II 56-58, 221).

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[5] Based on the record, it can be presumed that prospective juror M.D.'s race was African American as the trial court noted after he was excused that other African Americans remained on the jury (Tr. II 220).

[6] The record does not indicate the races of the remaining excused prospective jurors that Petitioner challenges.

The State attempted to exercise its final strike to excuse prospective juror F.W., an African American pastor (Tr. II 113-114, 223). Without an objection from defense counsel, or inquiry by the court, the prosecutor explained the race-neutral reason for the strike was that F.W. was a pastor who had counseled drug addicts, and in the prosecutor's experience, pastors had trouble passing judgment as required (Tr. II 223). Although the prosecutor's reason was sufficiently race-neutral, the court refused to allow the State to exercise the strike because it "would have effectively eliminated all the African Americans" from the panel (Tr. II 223). During sentencing, however, the court acknowledged that its ruling on F.W.'s strike had been in "error" as 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).

B. The OCCA's Decision

The OCCA denied Petitioner's Batson claim on direct appeal.

> In Proposition One, Appellant contends that the State systematically removed minorities from the jury contrary to *Batson v. Kentucky*, 476 U.S. 79, 106 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 a 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 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.

12/5/16 Resp. Ex. 4 at 3.

C. Clearly Established Federal Law

In *Batson*, 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 peremptory challenge on the basis of race. *Batson*, 476 U.S. at 95-96. To carry his burden of demonstrating an equal protection violation, a defendant must first make a prima facie showing that a peremptory challenge was exercised on the basis of race. *Id.* If a prima facie showing is made, the prosecution must offer a "neutral" explan-

ation "related" to the case for striking the prospective juror. *Id.* at 97. In light of the parties's submissions on the issue, the trial court must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 97-98.

AEDPA deference unquestionably applies to the state court's adjudication of a *Batson* claim. *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004). "The disposition of a Batson claim is a question of fact subjected to the standard enunciated in 28 U.S.C. § 2254 (d)(2)." *Id.* at 1175 (quoting *Sallahdin v. Gibson*, 275 F.3d 1211, 1225 (10th Cir. 2002)). Under such a deferential standard, this court focuses on the result of the state court decision, not its reasoning. *Id.* at 1176 (quoting *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004)).

D. Petitioner's *Batson* Claim Fails

As demonstrated below, the OCCA reasonably rejected Petitioner's equal protection claim under *Batson*.

1. Prima Facie Case

After the State's second peremptory challenge was used to strike M.D., the court *sua sponte* inquired of the prosecutor, "Your race neutral reason?" (Tr. II 220). The effect of the court *sua sponte* asking the prosecution to provide a race-neutral reason for exercising the strike rendered Petitioner's burden of making a prima facie showing of discrimination moot. *See Saiz*, 392 F.3d at 1179 (explaining the requirement of a prima facie showing becomes moot when the trial court asks the state for race-neutral reasons for

strike); *United States v. Johnson*, 941 F.2d 1102, 1108 (10th Cir. 1991) (same).

Petitioner did not object to the State's third, fourth, or fifth peremptory challenges (Tr. II 220-221). After the State's sixth challenge was used to excuse K.M., defense counsel commented that the State's challenges revealed a "pattern" of striking minorities from the jury (Tr. II 221-222). The court disagreed and explained that no lawful pattern had been established given that K.M. was "hardly involved in the process" and both R.C. and L.A. had "difficulty" understanding the English language (Tr. II 221-222).

Petitioner argues that the OCCA unreasonably applied *Batson* as to the aforementioned jurors because the trial court did not examine race-neutral reasons provided by the prosecutor as to these jurors—"it examined *its own* explanations." Opening Br. at 16-17.[7] This argument does not warrant relief for a number of reasons. For starters, Petitioner did not make this argument to the OCCA on direct appeal. 12/5/16 Resp. Ex. 1 at 14-16. Accordingly, this Court should not consider this argument now, and to do so would be improper. *See Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (court of appeals improperly "considered arguments against the state court's decision that

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[7] The OCCA's decision did not address each complained-of peremptory challenge and the relevant *Batson* factor upon which the challenge was resolved. However, based on its citation to *Mitchell v. State*, 270 P.3d 160, 173 (Okla. Crim. App. 2011), the OCCA's decision can be interpreted as applying the third *Batson* step to resolve Petitioner's challenge to the excusal of prospective juror Dickens and the first *Batson* step to resolve Petitioner's excusal of the remaining challenged jurors.

Beaudreaux never even made in his state habeas petition").

Furthermore, contrary to Petitioner's claim, the trial court's response was not a race-neutral explanation for the State's peremptory strikes. Rather, the court's response, in conjunction with its decision not to proceed to the second step of *Batson* and ask the State to provide race-neutral reasons for the strikes, was an implicit ruling that Petitioner failed to make a prima facie showing that the State's use of peremptory challenges to remove G.T., K.M., R.C., and L.A. showed a pattern of discrimination. *See Saiz*, 392 F.3d at 1178 ("We may infer from the trial court's decision not to go on to step two of the *Batson* analysis (asking the prosecution to explain its peremptory strike) that it concluded that Saiz had failed to establish *a prima facie* case of discrimination in connection with the peremptory strike. . . . "). Petitioner failed to support his conclusory "pattern" of discrimination allegation with specific argument, supported by facts and relevant circumstances, showing that the State's peremptory challenges were based on race. *Cf.* Saiz, 392 F.3d at 1177-78 & n.16 (finding the petitioner failed to make a prima facie showing that the State's peremptory strikes discriminated against four women where the petitioner mentioned the four women but only made a specific argument, based on facts and relevant circumstances, concerning the race of two women).

Indeed, as previously indicated, the defense did not even make a record as to the races of prospective jurors L.A., G.T., R.C., and K.M. This is especially problematic for Petitioner because, while racial identity between the defendant and the excused prospective juror is not *necessary* for a Batson claim, racial identity

is still relevant to a defendant's *prima facie* case. *See Powers v. Ohio*, 499 U.S. 400, 416 (1991) (holding that *Batson* does not require racial identity between the defendant and the prospective juror but noting that racial identity "may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred"); *see also Held v. State*, 948 S.W.2d 45, 50 (Tex. App. 1997) ("[A]lthough racial identity between the challenger and the excused venire member is not required to raise a *Batson* challenge, the absence of such an identity can certainly impact the strength of the challenger's prima facie case of racial discrimination" (citing *Powers*, 499 U.S. at 416)). Therefore, while Petitioner claimed a discriminatory pattern of strikes based on the aforementioned prospective jurors, he did not make a record showing whether these jurors were all African American, instead referring to them only as unspecified minorities.

In addition, the trial court—who personally observed these prospective jurors—clearly determined that there were obvious reasons for their dismissal that prevented a prima facie showing. Petitioner points to no clearly established Supreme Court law that prohibited the trial court from finding Petitioner had not made his prima facie showing under such circumstances. In fact, some courts of appeals have indicated that an obvious neutral reason for the use of a peremptory challenge can prevent a prima facie showing. *See*, *e.g.*, *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996) (finding the defendant did not make a *prima facie* showing where, *inter alia*, "there was an obvious neutral reason for the challenge"); *Capers v. Singletary*, 989 F.2d 442, 446 (11th Cir. 1993)

("existence of plausible, racially neutral bases for the state's exercise of peremptory challenges, apparent on the record," including one juror's "limited understanding of English," "is sufficient to nullify any inference of discrimination"); *United States v. Dennis*, 804 F.2d 1208, 1211 (11th Cir. 1986) ("appellants were not entitled to any inquiry into the prosecutor's reasons for exercising his peremptory challenges" given reasons apparent on the record for excusing jurors). Here, it was apparent to the trial court that the excused jurors were dismissed for difficulty with the English language and, in the case of one juror, an express statement that she did not want to be a juror in this case (Tr. II 50-52, 84-85, 89, 128, 221-222).

For these reasons, Petitioner failed to satisfy the first Batson step as he did not "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). By finding that Petitioner failed to establish a prima facie case, the trial court was not required to inquire of the State's race-neutral reasons for exercising the strikes.

Petitioner does not rebut the court's finding by clear and convincing evidence or show that the OCCA unreasonably applied clearly established Supreme Court law in affirming this finding.

2. Prosecution's Race-Neutral Explanations

After the court *sua sponte* inquired of the prosecution about the race-neutral reason for striking M.D., the court found the State's race-neutral explanation was sufficient. *See United States v. Smith*, 534 F.3d 1211, 1226 (10th Cir. 2008) ("A race-neutral explanation

is simply an explanation, no matter how implausible, that is based on something other than the race of the juror.").

As for the remaining challenges to G.T., R.C., L.A., and K.M., because Petitioner did not establish a prima facie case of racial discrimination, the court was not required to proceed to the second *Batson* step and ask the State to provide race-neutral explanations for the strikes (Tr. II 221).

When the State attempted to exercise its eighth peremptory challenge on F.W., the prosecutor immediately provided a race-neutral explanation (Tr. II 223). The court's refusal to let the State exercise a strike to remove F.W. was error as the court later recognized (Tr. II 223). Based on these facts, the OCCA reasonably determined that the State's explanations were sufficiently race-neutral.

3. Determination as to Purposeful Discrimination

After the State provided a race-neutral reason for removing M.D., the trial court found the reason was sufficiently race-neutral (Tr. II 220). Because Petitioner provided the trial court with "no reasonable basis for questioning the government's credibility in offering its race-neutral reasons," he failed to meet his burden of showing discriminatory intent.[8] *Smith*, 534 F.3d at 1226 (quoting *United States v. Barrett*,

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[8] Petitioner makes much of the fact that only one African American was left on the jury. However, defense counsel did not make a record sufficient to show that this was the doing of the prosecutor, as the record does not indicate the race of the potential jurors discussed by Petitioner.

496 F.3d 1079, 1106). The trial court's finding is presumed correct, and Petitioner has failed to rebut this presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also Smith*, 534 F.3d at 1226 ("The district court's answer to the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal, because such a finding largely turns on the trial court's evaluation of the prosecutor's credibility." (quoting *United States v. Nelson*, 450 F.3d 1201, 1207 (10th Cir. 2006)). Additionally, the State used a peremptory challenge to strike L.W., a juror that defense counsel acknowledged was not a minority (Tr. II 221). Therefore, the trial court's ruling finding no discriminatory intent was not error, and the OCCA reasonably determined that Petitioner failed to prove the State's reasons were evidence of discriminatory intent.

E. Conclusion

The OCCA's finding that the State did not engage in purposeful discrimination in violation of *Batson* was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of fact. Petitioner cannot show "there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Relief must be denied.

Issue 4—The OCCA's Determination That Testimony and Photographs Depicting the Murder Scene Were Properly Admitted Was Not Contrary to, or an Unreasonable Application of, Clearly Established Federal Law, or Based on an Unreasonable Determination of Fact

Petitioner contends the admission of gruesome testimony and photographs denied him a fundamentally fair trial. Opening Br. 46-47. Relief is not warranted.

A. Admission of the Challenged Testimony and Exhibits

During trial, the State presented testimony from Christina Adams who worked as an accountant for Mr. Sweeney (Tr. III 304-305). After the shooting occurred, Ms. Adams went to check on Mr. Sweeney in his office (Tr. III 318). Inside, she saw "his chair up against the glass and he was in his chair kind of squeezed in between the credenza and the front office" (Tr. III 318-319). She recalled, "[T]here . . .

[. . .]

[Respondent – Appellee's Answer Brief, p. 65]

CONCLUSION

The district court's denial of federal habeas relief in this case should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested by Respondent.

Respectfully Submitted,

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PETITIONER ALONZO CORTEZ JOHNSON'S REPLY BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, RELEVANT EXCERPTS (SEPTEMBER 25, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALONZO CORTEZ JOHNSON,

Petitioner/Appellant,

v.

JIMMY MARTIN, Warden,

Respondent/Appellee.

No. 19-5091

On Appeal from the United States District Court for the Northern District of Oklahoma The Honorable John F. Dowdell, United States District Judge District Court No. 16-CV-433-JED-FHM

REPLY BRIEF OF APPELLANT ALONZO CORTEZ JOHNSON
(Oral Argument is not requested)

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[Appellant's Reply Brief, pp. 6-13]

Appellant Alonzo Cortez Johnson hereby replies to the State of Oklahoma as follows:

Reply to Issue I—The State Systematically Used Its Peremptory Challenges to Exclude Racial Minorities from the Jury

1. AEDPA Deference

The State asserts that AEDPA deference applies. State Brief at 11-14. Johnson disagrees. AEDPA deference applies only in situations where the lower state court decided the claim on the merits. *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999).

Here, the State recognizes there is a problem on page 19 in footnote 7 of its Brief, where the State admits that the OCCA did not even address each of the complained-of peremptory challenges and the relevant *Batson* factors. The State asserts that the decision of the OCCA "can be interpreted" as applying Batson's third step by citation to a state court case, but Johnson moves this Court to reject any such interpretation, refuse to speculate on whether the OCCA addressed the issue fully in the absence of any indication in its written opinion that it did, and to review this legal issue *de novo*.

2. Batson

The facts of this claim, disturbing for a modern criminal trial, show that the state engaged in purposeful racial discrimination during jury selection, but was stopped from implementing its plan completely—that is, striking every single African-American venireman—by the trial court, who noticed what the State was doing and put a stop to it.

Batson v. Kentucky, 476 U.S. 79 (1986), requires a showing of purposeful discrimination by the State—which is clearly highlighted here. The fact that the State got caught by the trial court and could not completely eliminate every African-American juror on the panel, as it clearly wished to do, or that the trial court provided race-neutral reasons that it imagined the prosecutor might proffer, does not mean that the constitutional violation has somehow been cured. *Batson* and its progeny are meant to curb the conduct of prosecutors, not trial judges.

Here, the record shows that the conduct of the prosecutors evidence purposeful racial discrimination during its exercise of peremptory challenges. *Batson* is important because it rejected the old rule of *Swain v. Alabama,* 380 U.S. 202 (1965), which saddled defendants with the evidentiary burden of showing systemic racial discrimination in the jurisdiction outside of a defendant's individual case. *Batson* allowed the defendant to show purposeful discrimination within the confines of a single trial, which is what happened here.

The peremptory challenges began on page 219 of the trial transcript. On page 220, the State moved to strike Prof. Dickens on the State's second strike,

which prompted the trial court to inquire as to a race-neutral reason (the reason was because the prosecutor did not like "educated people").

The strikes then continued until the trial court asked the defense for its sixth strike, at which time defense counsel observed that 5 out 6 strikes for the State at that point had been of a minority, and thus a pattern of purposeful discrimination. Tr. 221. Defense counsel did not make a record as to the minority status of these first 5 veniremen that the State struck, and this, according to the State is problematic for Johnson. State Brief at 21. It is not.

The trial court stated "I don't think this establishes a pattern" but neither the trial court, nor the State, disputed the assertion of defense counsel that 5 out of the 6 strikes by the State were of minorities; the trial court merely observed that striking 5 out of 6 minorities was not a pattern of discrimination, the trial court did not contest or comment on the fact that the State used 5 of its first 6 strikes on minority veniremen. Tr. 221.

Numbers matter in this regard, and 5 out of the first 6 strikes is indicative of a pattern. *Flowers v. Mississippi*, 588 U.S. ___, 139 S.Ct. 2228 (2019) *(Batson* claim found where State struck 5 out of 6 black veniremen); *see also Hooper v. Ryan*, 729 F.3d 782, 785 (7th Cir. 2013) (disproportionate exclusion of minority veniremen is itself evidence of intentional discrimination).

But, even giving the prosecutor the benefit of the doubt, and even if the fact that he used 5 of the first 6 State peremptory challenges to kick minorities cannot in some alternate reality be considered a pattern

of discrimination, all doubt was removed just two strikes later, when the State exercised its eighth peremptory challenge to excuse Ms. Williams—the *last* African-American left on the panel—and even the trial judge, who let 5 out of 6 minority strikes slide to that point, noticed that doing so would "effectively eliminate all the African-Americans and I'm not going to do that." Tr. 223.

Thus, the record shows not only a pattern, but clear intent that the State's goal was to strike all African-Americans from the panel—and it would have done so if not for the trial court refusing to let it happen. Tr. 223. The State picked up on this cue from the trial judge and waived exercise of its ninth and final peremptory challenge. Tr. 224.

How did the OCCA respond to this record? By claiming that the trial court erred to the *detriment of the State* when it "refused to permit the prosecutor to excuse any African-Americans." 12/5/16 Resp. Ex. 4 at 3. This perspective of the facts is not only irrational, it is incorrect and shows that the OCCA misconstrued the record: the trial court did allow the State to excuse African-Americans; just not the *last* one.

In a footnote, the State makes the claim that defense counsel did not make a record sufficient to show that it was the State that struck the African-Americans from the panel. State Brief at 24 n. 8. Johnson asserts the record is sufficient.

When defense counsel noted the pattern of racially-based strikes after the State had struck 5 out of 6 minorities, the trial court *sua sponte* began imagining reasons why the State might do this. Tr. 221-22. It is reasonable to conclude that the trial

court did this in light of *Batson,* and offered race-neutral reasons for this reason. No other explanation makes sense. If the defense was striking African-American jurors, the trial court would not have any legal reason to speculate about Jurors Martinez, Carranza, and de Wassom. Tr. 221-22.

Thus, we have a situation where the prosecutors were excusing one African-American after the other with peremptory challenges, defense counsel noticed the pattern, objected to it, the trial court failed to direct the State to proffer race-neural explanations, choosing instead to offer its own, and when the State attempted to kick the *last* African-American off the panel, the trial judge refused to let them do it—even though the prosecutor offered another nonsensical reason (that she was a pastor). Tr. 223.

As the record shows, the other African-Americans that were excused by the State were clearly qualified to serve as jurors. Dr. Tawil was a physician, and had promised to listen to all the facts before making a judgment. Tr. 137, 168. Rena Carranza understood the process, answered appropriately regarding her opinion of the crime of conspiracy, and stated that she would be able to analyze the evidence presented. Tr. 53, 123, 125, 187. Ms. De Wassom had no trouble weighing the truthfulness of the witnesses. Tr. 207.

Nor did Prof. Dickens have any trouble with any aspect of the trial procedure; nor did Ms. Williams, other than being "a pastor." As Johnson pointed out in the district court, particularly instructive is the background of Prof. Dickens, who had a sister who had been a detective on the Tulsa Police Department, and his own father had been a police officer. Tr. 77.

This educated man would seem to be an ideal juror for the State.

All of this points to a clear pattern of racial discrimination by the State to use peremptory challenges to exclude African-American jurors from the panel in a case where an African-American male was on trial for murder; and the trial court and the OCCA misapplied clearly established federal law (assuming, arguendo, that AEDPA deference applies) under *Batson* and its progeny in at least two ways.

First, the trial judge did not examine explanations provided *by the prosecutors*; rather, it examined *its own* explanations. The trial court made no inquiry of the prosecutors as to race-neutral reasons for their strikes. It merely imagined some race-neutral reasons that might exist. Tr. 221-22. The OCCA applied unreasonably the *Batson* holding by finding that the second step was met when it clearly was not.

Second, the OCCA interpreted unreasonably the facts of the case by finding that the trial court made any determination of the race-neutral reasons of the prosecutors. There were no race-neutral reasons provided by the prosecutors. Any such reasons were provided by the trial court.

Finally, as argued, *supra*, the OCCA also erred as a matter of fact by finding that the trial court erred to the detriment of the State by not allowing the State to excuse African-American veniremen. The State tried to excuse *all* of them—and was only stopped from doing so by the trial court who recognized, belatedly, what was happening.

Batson requires a showing of purposeful discrimination. The fact that the State got caught by the trial

court and could not completely eliminate every African-American juror does not mean that the constitutional violation has somehow been cured. *Foster v. Chatman*, 578 U.S. ___, 136 S.Ct. 1737 (2016) (strikes must not be motivated in substantial part by discriminatory intent).

Thus, the OCCA decided this issue *via* an unreasonable application *of Batson,* and also an unreasonable determination of the facts. Under these circumstances, this Court must grant the writ of habeas corpus and order Johnson released or re-tried within a reasonable time. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting habeas relief under the AEDPA on a *Batson* claim where the prosecutor used peremptory strikes on 10 out of 11 qualified African-American veniremen).

[. . . .]

[Appellant's Reply Brief, p. 28]

CONCLUSION

For the foregoing reasons, Johnson requests this Court reverse the judgment of the District Court below, and grant him habeas relief on the merits of his claim as outlined above.

DATED this 25th day of September, 2020.

Respectfully submitted,

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