No. 17-6943

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS DARIUS JONES, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

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

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****CAPITAL CASE****

****NO EXECUTION DATE SCHEDULED****

QUESTIONS PRESENTED

Julius Jones, an African American prisoner, was sentenced to death in the State of Oklahoma for the 1999 shooting-death of Paul Howell, a white male, in Edmond, Oklahoma.

In 2017, after the conclusion of Mr. Jones' state and federal collateral proceedings, the results of a statistical study on race and capital sentencing patterns in Oklahoma were first published. The study found that non-whites accused of killing white males are statistically more likely to receive a sentence of death in Oklahoma on that basis alone, and controlling for other aggravating circumstances.

Under Oklahoma's post-conviction statute, a death-sentenced prisoner has just sixty days to file a successor post-conviction application based upon newly-discovered evidence. In compliance with this rule, Mr. Jones filed a post-conviction application in the Oklahoma Court of Criminal Appeals ("OCCA") wherein he argued that this study constituted newly-discovered evidence that he was convicted and sentenced to death in violation of his rights under the Oklahoma Constitution, as well as under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The OCCA denied Mr. Jones' successor application on the basis of a state procedural bar.

The questions presented by this case are the following:

1. Whether a complex statistical study that indicates a risk that racial considerations enter into Oklahoma's capital sentencing determinations proves that Mr. Jones' death sentence is unconstitutional under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

2. Whether Oklahoma's capital post-conviction statute, specifically Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), and the Oklahoma Court of Criminal Appeals' application of the statute in Mr. Jones' case, denies Mr. Jones an adequate corrective process for the hearing and determination of his newly-available federal constitutional claim in violation of his rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption, *supra*. The petitioner is not a corporation.

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes and Constitutional Provisions

State Cases

State Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Julius Darius Jones, an Oklahoma death-row prisoner, respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals (alternatively, "OCCA") which denied his second application for post-conviction relief, along with his accompanying requests for discovery and an evidentiary hearing.

OPINIONS BELOW

The OCCA's order denying Mr. Jones' second application for post-conviction relief, along with his motions for discovery and an evidentiary hearing, are attached hereto in the Appendix at A-1. Also attached hereto in the Appendix at A-2 is the OCCA's order denying Mr. Jones' motion for leave to file a petition for rehearing from the OCCA's denial of his second post-conviction application.

STATEMENT OF JURISDICTION

The OCCA denied Mr. Jones' successor post-conviction application (A-1), and his motion for leave to file a petition for rehearing[1] from that denial (A-2). In compliance with Rule 13(1) of this Court's Rules, Mr. Jones now timely files his petition for a writ of certiorari to review the judgment of the OCCA within ninety

[1] Mr. Jones framed his request as a motion for leave to petition for rehearing due to the fact that the OCCA's rules prohibit post-conviction petitioners from petitioning for rehearing. Rule 3.14(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) (hereafter "OCCA Rules"); *see also* OCCA Rule 5.5 (explaining that once the OCCA has rendered its decision on a post-conviction appeal, "the petitioner's state remedies will be deemed exhausted" and "[a] petition for rehearing is not allowed and these issues may not be raised in any subsequent proceeding in a court of this State").

days after entry of that court's judgment. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Crime

Julius Jones, who is African American, turned nineteen years old three days before Paul Howell was shot in the driveway of his parents' home, located in Edmond, Oklahoma, on July 28, 1999. (See Tr. IV 135.) Mr. Howell's adult sister, Megan Tobey, and his two young children were with him at the time. (Tr. IV 97-102, 122-23.) They had just pulled into the driveway of the home belonging to Mr. Howell's parents, and were passengers in Mr. Howell's 1997 GMC Suburban. (Tr. IV 102, 104-05.) Mr. Howell turned off the car's engine and opened the driver-side door. (*Id.* at 104.) Ms. Tobey, meanwhile, gathered her belongings and instructed her nieces to do the same. (*Id.*) She opened the passenger-side door and stepped out of the vehicle when she heard a gunshot. (*Id.*) She also heard someone asking for the vehicle's keys. (*Id.*) According to Ms. Tobey, she "took a fast glance back" and saw a black man who she described as wearing jeans, a white t-shirt, a black stocking-cap, and a red bandana over his face. (Tr. IV 104, 108, 116-19.) Critically, Ms. Tobey also described the shooter as having half an inch of hair sticking out from underneath the stocking cap.[2]

[2] An official photograph of Mr. Jones taken on July 19, 1999, the week prior to Mr. Howell's death, but never shown to his jury, demonstrates that Mr. Jones had very short and closely cropped hair. *Jones v. Sirmons*, No. 5:07-CV-01290-D (W.D. Okla.), Dkt. 22-1 to 22-11, Appendix to Pet. for Writ of Habeas Corpus at 22-4, 11/3/2008. Mr. Jones' hair would not have been long enough to fit Ms. Tobey's description of the man who shot and killed her brother the subsequent week on July 28, 1999. Mr. Jones' co-defendant, however, a man named Christopher Jordan, did indeed fit Ms. Tobey's description. Both at the time of Mr. Howell's death and at the time of his arrest, Jordan's hair was substantially longer than Mr. Jones' and he wore it in corn rows. *Jones v. Sirmons*, No. 5:07-CV-01290-D (W.D. Okla.), Dkt. 22-1 to 22-11, Appendix to Pet. for Writ of Habeas Corpus at 22-2, 11/3/2008.

(Id.; PH I 22, Tr. IV 116-19.) He stood in the doorway of the driver's side of the vehicle, was bent over the steering wheel, and held keys in his left hand, Ms. Tobey recalled. (Tr. IV 104, 108, 117-18.) Ms. Tobey rushed her nieces towards the house, and heard the gunman yell "stop," along with another gunshot. (Tr. IV 104-06.) Mr. Howell died at approximately 1:45 a.m. the following morning. (Tr. IV 158-60, 212.)

Two confidential informants directed the police to Mr. Jones and to Christopher Jordan as the perpetrators of the Edmond shooting and car robbery. (*See* Tr. V 139-42, 144-46, 157-62, 164-65, 187-99, 200, 202.) Police arrested Jordan on the evening of July 30, 1999. (Tr. VII 186-87, 241-44, 248.) Jordan claimed that Mr. Jones had perpetrated Mr. Howell's murder.[3] (Tr. VIII 164-65, 167-70.) Mr. Jones was subsequently arrested on the morning of July 31, 1999 and charged with capital murder. (Tr. VII 197-98.)

Represented by three public defenders—none of whom had ever before tried a

[3] Both Jordan and the informants benefitted from their testimony against Mr. Jones. Jordan pled guilty to first-degree murder (Count 1) and conspiracy to commit a felony (Count 3), and received a life sentence with all but the first thirty (30) years suspended. (Tr. VIII 94; *see also* Tr. X 117.) Mr. Jones' jury was told by prosecutor Sandra Elliott that, "Mr. Jordan has already entered a plea of guilty to the crime of Murder in the First Degree and has received a life sentence *except only the first 35 years of that life sentence has to be served*." (Tr. IV 51-52 (emphasis added); *see also* Tr. X 51.) Counsel for Mr. Jones has learned, however, that Jordan was released from prison in December 2014 after serving just fifteen (15) years of his life sentence. Additionally, a larceny charge against Jordan was dismissed. (Tr. VIII 191-92.) Meanwhile, one of the informants, Ladell King, was not prosecuted in connection with this offense notwithstanding his admitted involvement. He furthermore received less than the statutorily mandated sentence for habitual offenders, like himself, of twenty (20) years imprisonment on a bogus check charge filed against him in August of 2001. (*See* Tr. VI 74-76, 82, 86-88); *see also* Okla. Stat. tit. 21, § 51.1.) The other informant, Kermit Lottie, received a four-year downward departure on a federal drug conviction, for which his sentencing was postponed until after Mr. Jones was sentenced to death, due to his cooperation in the prosecution against Mr. Jones. (Tr. 04/19/2002 37-38.)

capital case, and who failed to put on a *single* witness in Mr. Jones' defense during the guilt-stage—Mr. Jones was convicted of capital murder and sentenced to death in April 2002. Since that time, Mr. Jones has maintained his innocence.

B. The Invidious Presence of Race

Mr. Jones' case was extensively covered in the local media throughout the time leading up to his capital murder trial in 2002. Such was the coverage that his defense lawyers argued for a change of venue due to the fact that "[t]he minds of the inhabitants of Oklahoma County, Oklahoma are prejudiced against this Defendant and [residents] possess such fixed opinions as to the guilt of the defendant that a fair and impartial trial cannot be conducted herein." (ORI 0991.) In support of their change-of-venue motion, defense counsel attached fifty-two affidavits from Oklahoma County residents demonstrating that community attitudes had been unduly prejudiced against Mr. Jones, precluding the possibility of a fair trial in that county.[4] (*Id.*) The motion was subsequently denied. (M. Tr. 2/4/2002 at 56.)

Even before charges were formally filed against Mr. Jones, then-District

[4] Trial counsels' concern about prospective jurors developing a fixed opinion against Mr. Jones prior to his trial was later proven correct. During the aggravation phase, Juror Armstrong informed the trial court that "[i]n the jury room on the first break earlier when I went up the stairs there was [another juror,] Mr. Brown[,] who made a comment that they should place him in a box in the ground for what he has done. And I just felt that that was a little bit quick and not quite impartial enough." (Tr. XII 95-96, 106.) Juror Armstrong stated definitively that she heard Juror Brown make this statement prior to the close of evidence. (Tr. XIII 76.) However the trial court, concluding that "Mr. Brown could have been talking about Osama bin Laden" and "[w]e don't know who he was talking about," denied defense counsel's request to remove Juror Brown for-cause, as well as defense counsel's motion for a mistrial. (Tr. XIII 77, 83-91.)

Attorney Bob Macy[5] announced to the media that he would seek the death penalty against him. Bobby Ross Jr., Ed Godfrey, Melissa Nelson, & Jessica Carter, DA to Seek Death in Edmond Slaying Suspect Innocent, Father Protests, NewsOK, Aug. 3, 1999, http://newsok.com/article/2662577; *see also* Ed Godfrey, Murder Counts Filed in Edmond Shooting Case, NewsOK, Aug. 5, 1999, http://newsok.com/article/2662780. Macy told the press that Mr. Jones deserved to die because the crime that he allegedly perpetrated occurred "in what should be a *safe neighborhood*" and "happened for the worst of reasons, *to get money to go buy drugs.*" Macy's remarks were not without highly racialized meaning.[6] For Bob Macy's extrajudicial statements reminded the public of the victim's white identity and perpetuated the idea that Mr. Jones, a black youth barely nineteen years old at the time, deserved to die because the crime that he allegedly committed had occurred in a white neighborhood. Edmond City

[5] Bob Macy, infamous for his voracious pursuit of death sentences and misconduct throughout his tenure as District Attorney, sent fifty-four people to death row, which earned him the title of one of America's deadliest prosecutors, according to a 2016 report by Harvard University's Fair Punishment Project. Harvard University, Fair Punishment Project, *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty* (June 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf; *see also* Harvard University, Fair Punishment Project, *Deadly Prosecutors Show us the Dark Side of American Justice* (July 1, 2016), http://fairpunishment.org/deadly-prosecutors-show-us-the-dark-side-of-american-justice/.

[6] Anthropologist Rich Benjamin explains in his book, Searching for Whitopia that:

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

Rich Benjamin, Searching for Whitopia: An Improbable Journey to the Heart of White America, 185 (2009) (emphasis added).

Councilman Steve Knox reinforced this very same idea, telling the media that Edmond was "an all-American neighborhood." Bobby Ross Jr. & Melissa Nelson, Clues Sought in Edmond Killing, NewsOK, July 30, 1999, http://newsok.com/article/2662085. Likewise, Bob Macy's reference to "drugs" as Mr. Jones' alleged motive—notwithstanding the fact that *no evidence whatsoever* supported this allegation—appealed to vicious racial stereotypes associating black people with drug use.[7]

In the wake of Bob Macy's extrajudicial remarks, the print media echoed his call for the death penalty for Mr. Jones, reporting that, "[t]o his credit, District Attorney Bob Macy has already decided to seek the death penalty, which this crime certainly deserves." Editorial, Searching for Restraint, Daily Oklahoman, Aug. 5, 1999.

Judge Ray Elliott, who presided over and denied Mr. Jones' pre-trial motion to suppress evidence illegally seized by the police from his parents' home, harbored

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[7] Professor and author Michelle Alexander explains in her book, The New Jim Crow, that:

> A survey was conducted in 1995 asking the following question: "Would you close your eyes for a second, envision a drug user, and describe that person to me?" The startling results were published in the *Journal of Alcohol and Drug Education*. Ninety-five percent of respondents pictures a black drug user, while only 5 percent imagined other racial groups. These results contrast sharply with the reality of drug crime in America. African Americans constituted only 15 percent of current drug users in 1995, and they constitute roughly the same percentage today.

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

troubling attitudes towards people of color which came to light in 2011. Nolan Clay, Attorney's affidavit expands on claims of unfairness against judge in Ersland case, NewsOK (Jan. 7, 2011), http://newsok.com/article/3530111 (noting Elliott was overheard referring to Mexicans as "filthy animals"); *see also* Nolan Clay, Judge in OKC pharmacist's case to announce ruling Monday, NewsOK (Dec. 8, 2010), http://newsok.com/article/3521788 (noting that Elliott's former clerk testified that made derogatory remarks about Hispanics); *id.* (Elliott admitting to calling Mexicans "wetbacks"); *see also* American Bar Association Journal, Okla. Judge Admits 'Wetback' Comment, But Denies Calling Workers 'Filthy Animals' (Jan. 7, 2011).

Lead prosecutor Sandra Elliott, Judge Ray Elliott's wife, opened Mr. Jones' capital murder trial by explicitly calling the jury's attention to Mr. Howell's physical appearance, describing him as "tall, handsome, athletic." She informed jurors that, in addition to being physically attractive, the victim in this case "owned his own insurance agency in Edmond." While Elliott's opening remarks, understood superficially, appeared to simply recount information pertaining to the case at hand, a closer examination of the context in which her words were delivered, and the carefully-selected audience upon whose ears her words fell, lays bare the racialized meaning with which Elliott's remarks were imbued. Not unknown either to prosecutors or to jurors—all of whom, save one, were white[8]—at the outset of Mr.

[8] Only one African American served on Mr. Jones' jury. An alternate juror was Hispanic. *See* Rule 3.11 Motion to Supplement Direct Appeal Record, Ex. 7 K 31.

Jones' capital trial was the fact that the victim in this case was also white. And by pointing out to jurors the seemingly irrelevant detail that the victim was "handsome," prosecutor Elliott effectively reminded them that Mr. Jones—a black youth on trial for his life—stood accused of killing a white man.

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

Not only did prosecutors put the victim's race at the forefront of jurors' minds, but they also took every opportunity to racialize Mr. Jones by appealing to the deeply entrenched and stereotypical association between blackness and dangerousness. *See Brief for the Nat'l Black Law Students Ass'n as Amicus Curiae in Support of Petitioner*, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), at 2 ("[P]resented with a criminal defendant, even well-meaning people fall prey to the stereotype that,

whether for reason of biology or culture, Black people are inherently violent and dangerous."). For example, in urging jurors to sentence Mr. Jones to death, prosecutors argued that Mr. Jones was a "continuing threat"[9] because he was "out prowling the streets"[10] engaging in criminality. This is despite the fact that at the time of his prosecution in this case, Mr. Jones had *no prior violent felony convictions*.

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

C. The Study

On April 25, 2017, the preliminary draft of an independent study of capital sentencing patterns in Oklahoma, entitled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012" (hereafter "the Study"), was first published. Okla. Death

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[9] The "continuing threat" aggravating circumstance was one of just two aggravators used by prosecutors to seek the death penalty against Mr. Jones. Jurors ultimately found that Mr. Jones was, in fact, a continuing threat to society and sentenced him to death in part on that basis.

[10] The Oxford English Dictionary defines "prowl" as follows:

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

Oxford English Dictionary, https:/en.oxforddictionaries.com/definition/prowl (emphasis added).

Penalty Review Comm'n, The Report of the Okla. Death Penalty Review Comm'n, The Constitution Project, 211-22 (Apr. 25, 2017), http://okdeathpenaltyreview.org/the-report/ (last visited Nov. 22, 2017) [hereinafter cited as "Report"]. The central question that researchers Pierce, Radelet, and Sharp set out to answer was whether race—either of homicide defendants and/or victims—"affects who ends up on death row" in Oklahoma. (*Id.* at 212.) In order to answer this question, they studied all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012.[11] (*Id.*) They then compared these cases to the subset of cases that resulted in the death penalty being imposed.[12] (*Id.*) Importantly, the data set used by researchers included, in addition to the race of the victim, information on "the number of homicide victims in each case" as well as "what additional felonies, if any, occurred at the same time as the homicides." (*Id.* at 216.) Researchers explained that "[t]hese variables are key" to the Study's analysis and conclusions. (*Id.*)

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

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

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

white victims resulted in death sentences compared to just 1.88 percent of homicides that involved nonwhite victims. (*Id.*) In other words, a criminal defendant in Oklahoma is over *two times* more likely to receive a sentence of death if the victim he is accused of killing is white than if the victim is nonwhite.[13]

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

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

(*Id.* at 219.) In other words, nonwhites, like Mr. Jones, are nearly *three times* more likely to receive a sentence of death where the victim who they are accused of killing is white than if the victim is nonwhite; furthermore, nonwhites like Mr. Jones are *two times* more likely to receive a death sentence where their alleged victim is white

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

than are white defendants accused of killing white victims.

Even where researchers controlled for aggravating factors such as "the presence of additional felony circumstances and the presence of multiple victims," they found that cases like Mr. Jones', which involve a white male victim, "are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims." (*Id.* at 221-22.)

D. The Proceedings Below

On June 23, 2017, Mr. Jones timely filed a second application for post-conviction relief in the Oklahoma Court of Criminal Appeals. Therein, he argued that the Study constituted newly discovered evidence that, in Oklahoma, the race of the victim who he was accused and convicted of killing, combined with his own race, increased the likelihood that he would be sentenced to death in violation of his rights under the Oklahoma Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. He argued that if the imposition of a death sentence is indeed supposed to reflect a "community's outrage" at the crime that a defendant stands accused of committing, *Furman v. Georgia*, 408 U.S. 238, 303 (1972) (Brennan, J., concurring), then this Study demonstrates that communities in Oklahoma—a majority-white state[14]—are significantly more outraged when white

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

lives are lost than when nonwhite lives are forfeited. He maintained that this is precisely the kind of race-based discrepancy in meting out death that is repugnant to both modern societal mores and to the United States Constitution. *McCleskey v. Kemp*, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting) (noting that racial disparity in capital sentencing is "constitutionally intolerable"). In light of this, Mr. Jones argued, his death sentence could not stand.

Mr. Jones also set out in considerable detail why he overcame Oklahoma's successor post-conviction procedural bar,[15] explaining that he could not have raised this claim previously either on direct appeal or in his initial post-conviction application because its factual basis became available only on April 25, 2017 with the publication of the Study. Mr. Jones argued further that the facts underlying his claim

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[15] Okla. Stat. Ann. tit. 22, § 1089, which governs post-conviction applications in capital cases and, by its express terms, was intended to "expedite" them, provides that the OCCA "may not consider the merits or grant relief" based on a subsequent post-conviction application unless:

> (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application … because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
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> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Notably, Okla. Stat. Ann. tit. 22, § 1086, which governs *non*-capital post-conviction applications, imposes no such limitations on subsequent post-conviction applications, providing only that "[a]ny ground finally adjudicated or not so raised … may not be the basis for a subsequent application, unless the court finds a ground for relief asserted *which for sufficient reason was not asserted* or was inadequately raised in the prior application." Okla. Stat. Ann. tit. 22, § 1086 (emphasis added).

were sufficient to establish that but for the fact that the victim who he, as a black defendant, stood accused of killing was white, he stood a far greater likelihood of having his life spared. While he maintained that he was entitled to sentencing relief on the record before the OCCA, Mr. Jones asked the OCCA to grant his requests for discovery and an evidentiary hearing if that court "determine[d] that further factual development is necessary."

In a four-page order, the OCCA denied Mr. Jones' second application for post-conviction relief, along with his related motions for discovery and an evidentiary hearing. (A-1.) The OCCA reasoned that its denial of a successor post-conviction application in a case decided only days earlier, *Sanchez v. State*, No. PCD-2017-666, 2017 WL 3613846, 2017 OK CR 22, __P.3d__ (Okla. Crim. App. Aug. 22, 2017), "is dispositive and controls our decision in this case." (*Id.* at 3.) "For the reasons explained in *Sanchez*,"[16] the court stated, "we find Jones's claim is procedurally barred." (*Id.*)

Subsequently, Mr. Jones filed in the OCCA a motion for leave to petition for rehearing, along with a proposed petition for rehearing, wherein he argued that rehearing was necessary because the OCCA's denial of his successor application had overlooked issues dispositive of the matter before it, and was premised upon erroneous factual and legal determinations. (A-3.) The OCCA denied Mr. Jones'

[16] *See infra* at 25-30 for a discussion of *Sanchez*.

request to petition for rehearing (A-2), and this petition for a writ of certiorari follows.

REASONS FOR GRANTING CERTIORARI

I. Compelling evidence demonstrates that Mr. Jones faced a statistically greater risk of being sentenced to die by the mere happenstance that the victim who he was accused of killing was white, and that he is black, in direct contravention of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This Court has long recognized that race is among the factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *see also Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice."). Indeed, this Court recently reaffirmed a "basic premise of our criminal justice system," which is that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). For "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice").

In *McCleskey*, this Court entertained an Eighth and Fourteenth Amendment challenge to a death sentence brought by Warren McCleskey—an African-American prisoner on death row in Georgia at the time. 481 U.S. at 279. The central question before the Court was "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that

petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." *Id.* at 282-83.

In support of his constitutional challenges, Mr. McCleskey put forth a statistical study (hereafter, "the Baldus study") that demonstrated a stark disparity in the imposition of death sentences in Georgia "based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. On the basis of this study, Mr. McCleskey challenged the constitutionality of Georgia's capital sentencing statute both generally, *id.* at 291, and as applied to him.

The Court rejected Mr. McCleskey's argument that the Baldus study, standing alone, "compel[led] an inference that his sentence rest[ed] on purposeful discrimination." *Id.* at 293. It also rejected Mr. McCleskey's argument that "the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment." *Id.* at 299. In the Court's view, the statistics that Mr. McCleskey had put forward "[a]t most … indicate[ ] a discrepancy that appears to correlate with race." *Id.* at 312. And rather than creating a constitutionally significant risk of racial prejudice influencing Georgia's capital sentencing scheme, this race-based discrepancy in sentencing is "an inevitable part of our criminal justice system," this Court pronounced. *Id.*

In the thirty years since *McCleskey* was decided, growing support has emerged for the principle that racial disparities are not simply "an inevitable part" of the United States' criminal justice system. Rather, these disparities persist so long as our

society and institutions are willing to condone them. Indeed, this Court has begun to repudiate the "inevitability of racism" line of thinking stemming from *McCleskey* in its recent jurisprudence. In *Peña-Rodriguez v. Colorado*, for example, this Court emphasized that "[r]acial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." 137 S. Ct. 855, 868 (2017) (internal quotation marks omitted). Likewise, in *Buck*, 137 S. Ct. at 778, this Court reversed a death sentence due to the invidious role that race "may" have played in its imposition. The Court explained that "departure[s] from [the] basic premise of our criminal justice system"—that "[o]ur law punishes people for what they do, not who they are"—are "exacerbated" where "it concern[s] race." *Id.* The time has come for this Court to recognize that the federal constitution cannot tolerate, nor treat as "inevitable," racial disparities—or *any* risk of racial bias—in the imposition of "the most awesome act that a State can perform"—that is, the deliberate taking of another human life. *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting).[17] *McCleskey* must therefore be overruled.

Even under *McCleskey*, however, Mr. Jones is entitled to relief. For unlike the petitioner in *McCleskey* who relied on statistical evidence of racial disparities in Georgia's capital sentencing system *alone* to establish a violation of his rights under

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

the Eighth and Fourteenth Amendments, Mr. Jones is relying not just upon the new statistical study demonstrating how race dictates capital sentencing outcomes in Oklahoma. Rather, in addition to this new evidence, Mr. Jones is also relying upon the ways in which "the decisionmakers in *his* case"—from prosecutors and judges, to the jurors who ultimately sentenced him to die—"acted with discriminatory purpose." *McCleskey*, 481 U.S. at 293. Indeed, Mr. Jones has set out in great detail above how race both infected and "cast[ ] a large shadow," *id.* at 321-22 (Brennan, J., dissenting), over his case from the very earliest stages—even prior to his arrest—and continued to do so throughout his trial and sentencing proceedings. *See supra*, 5-10.

This Court's decisions since *Furman* have delimited "a constitutionally permissible range of discretion in imposing the death penalty," *McCleskey*, 481 U.S. at 305, that is consistent with the Eighth Amendment guarantee against cruel and unusual punishment. First, this Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner.") Second, this Court has prohibited states from limiting a sentencer's ability to consider "relevant facets of the character and record of the

individual offender or the circumstances of the particular offense" that might warrant a sentence less than death. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

While, in all of these cases, this Court has upheld the propriety of a capital sentencer's discretion to impose a death sentence under the appropriate circumstances, it has unequivocally condemned race playing any role in a sentencer's exercise of that discretion. *Zant*, 462 U.S. at 885 (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck*, 137 S. Ct. at 778; *Mitchell*, 443 U.S. at 555 ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital sentencing determinations are rendered "arbitrary and capricious" in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

The risk that racial considerations impacted both prosecutors' decision to seek the death penalty against Mr. Jones in the first instance, and jurors' decision to

condemn Mr. Jones to die is "constitutionally unacceptable." *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986); *see also McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one"); *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (observing that a sentence of death cannot withstand constitutional muster whenever the circumstances under which it has been rendered "creat[e] an unacceptable risk that 'the penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).

Under the Sixth Amendment to the United States Constitution, a criminal defendant is guaranteed the right to an impartial jury. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…"); *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair and impartial jury as "a basic requirement of due process" (internal quotation marks omitted)). However as set forth *supra*, Mr. Jones' race and that of the man who he stood accused of killing infected his capital prosecution from the very earliest stages and unconstitutionally compromised the partiality of the nearly all-white jury that ultimately sentenced him to death.

A jury is "impartial" within the meaning of the Sixth Amendment guarantee where each member of the jury does not favor a party or an individual, but rather

enters jury service "indifferent." *Irvin*, 366 U.S. at 722 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). This Court has emphasized that special care is required to safeguard jurors' impartiality, particularly in capital cases, and to guard against the operation of racial bias. "Racial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S. Ct. at 868 (internal quotation marks omitted). "Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Id.*

In *Turner*, this Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36-37. In reaching this conclusion, four justices recognized that, "because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Id.* at 35) (plurality opinion of White, J., joined by Blackmun, Stevens, and O'Connor, JJ.). Moreover, "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." (*Id.*) Justice Brennan similarly concluded that "[t]he reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal

conduct that is often terrifying and abhorrent." (*Id.* at 39) (Brennan, J., concurring in part and dissenting in part) (explaining that he would go further than the majority and vacate the conviction as well).

While the Court in *Turner* expressed the hope that the individual questioning of jurors during voir dire could help to eliminate the risk of racial prejudice influencing trial and sentencing outcomes, the study of death-sentencing patterns in Oklahoma for the time period in which Mr. Jones was sentenced to die demonstrates that racial prejudice continues to play a statistically significant role in shaping capital-sentencing outcomes in Oklahoma. That is, the Study demonstrates that capital juries in Oklahoma impose death sentences far more often on nonwhite defendants, like Mr. Jones, who are accused of killing white men.

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

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

Oklahoma for those accused of killing a white person, surpasses the constitutionally acceptable tipping point. (Report at 222.) Where Mr. Jones' jury was *two times* more likely to sentence him to death based on the race of his alleged victim *alone*, and *three times* more likely to do so simply because Mr. Jones is also black[18] (*id.*), his right to that impartial jury guaranteed to all criminal defendants, particularly those on trial for their life, has been transgressed. *Turner*, 476 U.S. at 35 (explaining that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence[,]" and "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" (internal quotations omitted)). Furthermore, the record evidence that at least one juror in Mr. Jones' case expressed the view that he deserved to be put "in a box in the ground" (Tr. XII 95-96, 106), even before the close of evidence further indicates that racial biases tangibly tainted the fairness of Mr. Jones' trial and sentencing proceeding. *Turner*, 476 U.S. at 41 (Marshall, J., concurring in judgment and dissenting in part) ("[T]he opportunity for racial bias to taint the jury process is not 'uniquely' present at a sentencing hearing, but is equally a factor at the guilt phase of a bifurcated capital trial."). The Sixth Amendment guaranteed to Mr. Jones a jury comprised of men and

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

women whose minds were open, rather than whose attitudes were tainted by racial prejudice. Mr. Jones was denied this most elemental right, rendering his death sentence a violation of the United States Constitution.

II. The OCCA's rejection of Mr. Jones' successor post-conviction application does not rest upon an adequate or independent state procedural bar.

In its four-page order denying Mr. Jones relief, the OCCA found the claims in his second post-conviction application defaulted on state-procedural grounds, reasoning that its denial of a successor post-conviction application in an earlier case, *Sanchez v. State*, No. PCD-2017-666, 2017 OK CR 22, __P.3d__ (Okla. Crim. App. Aug. 22, 2017), "is dispositive and controls our decision in this case." (A-1 at 3.) The OCCA denied Sanchez's successor application on several grounds. First, the OCCA concluded that Sanchez "has not shown sufficient specific facts to establish that the identified patterns of race and gender disparity were not ascertainable through the exercise of reasonable diligence on or before his original post-conviction application in 2009." (A-4 at 4 (internal quotations omitted).) "Post-conviction relief on this claim is therefore procedurally barred." (*Id.*) Second, the OCCA determined that Sanchez's "proffered evidence, even 'if proven and viewed in light of the evidence as a whole,' is insufficient 'to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death,' as required for post-conviction review under 22 O.S. 2011, § 1089(D)(8)(b)(2)." (*Id.* at 4-5.) Citing this

Court's decision in *McCleskey*, the OCCA found that "[c]urrent research, indicating rather large disparities in the odds of a death sentence that correlated with the gender and race of the victim in Oklahoma homicides generally over the last two decades, is simply *not* clear and convincing evidence that the prosecutors who sought, or the jury that imposed, this death sentence improperly considered race and/or gender in making complex discretionary decisions." (*Id.* at 5.) "[Petitioner's] claim is therefore procedurally barred under 22 O.S. 2011, § 1089(D)(8)(b)(2)." (*Id.* at 5-6.) In Mr. Jones' case, the OCCA stated that "[f]or the reasons explained in *Sanchez*, we find Jones's claim is procedurally barred." (A-1 at 3.) For reasons detailed more fully below, the state procedural law that the OCCA relied upon in Mr. Jones' case is neither adequate nor independent, and therefore does not bar this Court's consideration of the merits of his claims.

In a motion seeking the OCCA's permission to petition for the rehearing of his post-conviction application, Mr. Jones argued that rehearing was necessary because the OCCA's order denying his successor application had overlooked issues dispositive of the matter before it, and was premised upon erroneous factual and legal determinations. (A-3.) More particularly, Mr. Jones outlined how the OCCA had failed to consider the ways in which his successor post-conviction application "differed from the successive application filed in *Sanchez* on its factual basis, argument, and in its procedural posture." (*Id.* at 2; *see also id.*, Attachment A at 2.) Included with Mr. Jones' request for rehearing were affidavits which illustrated the erroneousness

of the OCCA's factual determination that Mr. Jones had not shown that the evidence underlying the Study was previously unascertainable within the meaning of Oklahoma's successor post-conviction statute because Sanchez had failed to make the required showing that the raw data underlying the Study was unascertainable through the exercise of reasonable diligence at the time of *his* first post-conviction application in 2009—four years *after* Mr. Jones' first post-conviction application was filed. (A-3, Attachment A at 6; *see also id.*, Attachment A, Exs. A, B.) Thus, the OCCA's findings in *Sanchez* were largely irrelevant to Mr. Jones' case and not dispositive of whether Mr. Jones had demonstrated in *his* application that the data underlying the Study was unavailable to him in 2005 despite reasonable diligence. The OCCA denied Mr. Jones' request to petition for rehearing on October 4, 2017. (A-2.)

"In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Thus, this Court "has no power to review a state law determination that is sufficient to support the judgment" since that would render its "resolution of any independent federal ground for the decision … advisory" in violation of the Case or Controversy requirement found in Article III of the federal constitution. *Id.*; U.S. Const. art. III, § 2.

However, in order for a state procedural rule to constitute an adequate bar to this Court's review of a federal constitutional question, that rule "must have been

'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)); *Beard v. Kindler*, 558 U.S. 53, 59 (2009) (finding state procedural rule "not 'firmly established' and therefore [ ] not an independent and adequate procedural rule sufficient to bar [federal court] review of the merits" of federal claims).

A state procedural rule fails this requirement, thus giving this Court jurisdiction to review the state-court judgment as well as the merits of the federal constitutional question, where "discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law." *Walker v. Martin*, 562 U.S. 307, 320 (2011) (internal quotations omitted); *see also id.* (citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990) (noting that a state ground "applied infrequently, unexpectedly, or freakishly" may "discriminat[e] against the federal rights asserted" and therefore rank as "inadequate"). This is precisely what occurred in Mr. Jones' case, rendering the OCCA's rejection of his successor post-conviction application inadequate to shield its judgment from this Court's review.

Counsel for Mr. Jones has found not a *single* case from 2005, when Mr. Jones filed his first post-conviction application, or any cases since then, where the OCCA measured "fact[s] … not ascertainable through the exercise of reasonable diligence" *not* from the date of a timely filed initial post-conviction application, as required under Okla. Stat. Ann. tit. 22, §1089(D)(8)(b), but rather from a much later point in

time, as the OCCA did here. Indeed, in all of the cases that counsel for Mr. Jones has located in which the OCCA interprets § 1089(D)(8)(b)'s diligence requirement, the OCCA in every case has measured diligence from the time at which a petitioner's first post-conviction application was filed. *See, e.g.*, *Duvall v. Ward*, 957 P.2d 1190, 1191 (Okla. Crim. App. 1998); *Torres v. State*, 58 P.3d 214, 215 (Okla. Crim. App. 2002); *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010); *Smith v. State*, 245 P.3d 1233, 1236 (Okla. Crim. App. 2010). The OCCA's reliance on *Sanchez* to deny Mr. Jones' application, and its decision to gauge Mr. Jones' diligence for the purposes of § 1089(D)(8)(b) not from the date of his first post-conviction filing in 2005, but rather from the time that Sanchez's first post-conviction application was filed *four years later*, renders its ruling "unexpected" and "freakishly" applied and, thus, inadequate to bar this Court's review of Mr. Jones' federal constitutional claim. *Prihoda*, 910 F.2d at 1383.

As an additional matter, the OCCA's conclusion that the Study "is simply *not* clear and convincing evidence that the prosecutors who sought, or the jury that imposed, this death sentence improperly considered race and/or gender in making complex discretionary decision" (A-1 at 5), is not independent of federal constitutional questions. Where an ambiguous state-court decision "appears to rest primarily on federal law, *or to be interwoven with the federal law*," then this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S.

1032, 1040 (1983) (emphasis added). In such cases, this Court applies "a conclusive presumption of jurisdiction" due to the fact that the state procedural ground of decision cannot be said to be "independent" of federal law. *Coleman*, 501 U.S. at 733.

Here, the OCCA's rejection of Mr. Jones' successor post-conviction petition unambiguously rested upon a state procedural ground that, for the reasons detailed *supra*, are inadequate. That, alone, suffices to confer upon this Court jurisdiction to review the merits of Mr. Jones' federal constitutional claim. *Lee v. Kemna*, 534 U.S. 362 (2002) (reversing Court of Appeals' judgment finding petitioner's Due Process claim procedurally barred and remanding the case for merits review of the federal question based on determination that the state procedural bar was not adequate). However as explained in Section I, *supra*, and as will be explained more fully in Section IV *infra*, the OCCA's decision is not independent of federal law as it is "interwoven" with questions concerning the Eighth Amendment's prohibition on arbitrary considerations, like race, influencing capital sentencing outcomes, as well as the Fourteenth Amendment's Due Process and Equal Protection guarantees.

III. This case presents the question that this Court took up, but never answered, in *Case v. Nebraska*—that is, whether the Fourteenth Amendment requires that States afford prisoners some adequate corrective process for the hearing and determination of claims that their federal constitutional rights have been violated.

In *Case v. Nebraska*, 381 U.S. 336 (1965), this Court granted certiorari to decide "whether the Fourteenth Amendment requires that States afford state prisoners some adequate corrective process for the hearing and determination of

claims of violation of federal constitutional guarantees." *Case*, 381 U.S. at 337. This Court never answered that question, however, because while certiorari was pending, the Nebraska legislature enacted a statute that, facially, provided an avenue through which the petitioner in *Case* could have the merits of his federal constitutional claim heard by the courts of that state. *Id.* The intervening change in Nebraska law thus rendered the matter before this Court moot.

Nearly twenty years later, in *Superintendent v. Hill*, 472 U.S. 445 (1985), this Court recognized, but notably declined to reach, the open question of whether the Fourteenth Amendment's Due Process Clause requires state judicial review of state prisoners' federal constitutional claims. *Id.* at 450. In the more than thirty years since *Hill*, and the more than half-century since *Case*, the scope of states' obligation to provide collateral review of federal constitutional claims remains "shrouded in [ ] much uncertainty." *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). This Court should thus take up the important constitutional question presented by Mr. Jones' case that it has yet to address, but which its jurisprudence strongly suggests must be answered affirmatively.

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." *Mooney v. Holohan*, 294 U.S. 103, 113 (1935). The petitioner in *Mooney* argued before this Court, as Mr. Jones does here, that newly-discovered evidence established a violation of his constitutional rights, and that the State of California had violated his due process

rights by failing to provide any corrective judicial remedy whereby he could seek to have his federal claim heard and his conviction set aside. *Id.* at 110. This Court took up these "serious charges," *id.*, but ultimately denied the petition without prejudice because the petitioner had not shown "[t]hat corrective judicial process … to be unavailable." *Id.* at 115. More than a decade later, this Court, in *Carter v. Illinois*, 329 U.S. 173, 175 (1946), articulated the following principle: "[a] State must give one to whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface." This principle applies with even greater force where the deprivation that the State seeks to exact is one's life. *Id.* at 186 (Murphy, J., dissenting) ("When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society is here attempting to take away the life or liberty of one of its members. That attempt must be tested by the highest standards of justice and fairness that we know.").

Without squarely addressing the question presented here, this Court in *Young v. Ragen*, 337 U.S. 235 (1949), explained that there is a "requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights." *Id.* at 239. While recognizing "the difficulties" that States might confront in "adapting state procedures to [this] requirement," this Court nonetheless stated that "[this] requirement must be met." *Id.* Nearly twenty years later, when this Court took up—but failed to answer—this very question in *Case*, Justices

Brennan and Clark concurred, putting forth their view as to why the Constitution mandates full, fair, and adequate state post-conviction processes for the vindication of federal constitutional guarantees. *Case*, 381 U.S. at 338 (Clark, J., concurring) (declaring that the "wide variety" of then-current post-conviction techniques had proven "entirely inadequate" to vindicate federal rights, leading to a "tremendous increase" in federal habeas filings); *id.* at 344 (Brennan, J., concurring) ("Our federal system entrusts the States with *primary* responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well."); *id.* at 346-47 (arguing that "desirable attributes of a state postconviction procedure" include that they "be swift and simple and easily invoked," and "should be sufficiently comprehensive to embrace *all* federal constitutional claims" (emphasis added)). As will be explained in greater detail *infra*, Oklahoma's capital post-conviction statute, and the OCCA's application of that law in the instant matter, fails to provide Mr. Jones with *any* corrective judicial remedy whereby he may seek to have his newly-available federal constitutional claim heard before the State takes his life. Such a macabre state of affairs cannot be reconciled either with this Court's Eighth Amendment jurisprudence or the Fourteenth Amendment's Due Process guarantees.

IV. Oklahoma's capital post-conviction statute, specifically Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), and the OCCA's application of this statute in Mr. Jones' case, deprives Mr. Jones of an adequate corrective process for the hearing and determination of his newly-available federal constitutional claim in violation of his rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

This Court's jurisprudence makes it clear that "if a State establishes postconviction proceedings, [then] these proceedings must comport with due process." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 293 (1998) (Stevens, J., concurring); *see also Yates v. Aiken*, 484 U.S. 211, 217-18 (1988) (per curiam) (unanimous court making clear that state post-conviction proceedings are subject to due process protections). Likewise, this Court has recognized that Equal Protection guarantees extend to state collateral proceedings. *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) ("We repeat what has been so truly said of the federal writ [of habeas corpus]: 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution. When an equivalent right is granted by a State, financial hurdles must not be permitted to condition its exercise." (internal citation omitted)); *id.* at 714 ("Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each."); *see also Lane v. Brown*, 372 U.S. 477, 484 (1963) (noting that in *Smith*, the Supreme Court "made clear that [Equal Protection] principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings").

The question of "what process is due," *Woodard*, 523 U.S. at 293 n.3 (Stevens, J., concurring) (emphasis omitted), to state prisoners seeking to vindicate their federal rights, was answered, in part, by this Court in *Young v. Ragen*, 337 U.S. 235 (1949). There, this Court announced the requirement that states give prisoners "some clearly defined method by which they may raise claims of denial of federal rights." 337 U.S. at 239. "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois," this Court stated, "we wish to be advised of that fact upon remand of this case." *Id.* More generally, Due Process also requires, at *minimum*, that before the State can deprive a defendant of his life, a defendant must receive notice of the State's grounds for denying review of his federal constitutional claim, and an opportunity to be heard where those grounds turn out to be factually and materially incorrect. *See Woodard*, 523 U.S. at 290 (O'Connor, J., concurring) (recognizing that Due Process protections would be transgressed where capital petitioner failed to receive notice of a clemency hearing and an opportunity to participate in clemency interview prior to his execution, but finding no such transgression to have occurred); *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (due process requires "notice and an opportunity to be heard" before one is deprived of a constitutionally protected interest); *Woodard*, 523 U.S. at 291 (Stevens, J., concurring) ("There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.").

In light of these controlling principles, Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b),

by its express terms and through its application by the OCCA in Mr. Jones' case, violates Mr. Jones' rights under the Due Process Clause. First, under this statutory provision, which Oklahoma reserves only for those who it seeks to execute, Mr. Jones has no "clearly defined method" by which to raise his newly-available federal constitutional claim that the race of his alleged victim, and his own race, predisposed him to receiving a sentence of death. *Young*, 337 U.S. at 239. This is because § 1089(D)(8)(b), unlike its non-capital counterpart, *see* Okla. Stat. Ann. tit. 22, § 1086, limits the types of claims that a capital defendant can bring in a successor post-conviction application to those with underlying facts that "would be sufficient to establish by clear and convincing evidence that, but for the alleged error, *no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death*." § 1089(D)(8)(b)(2) (emphasis added). Thus, Mr. Jones' newly-available federal constitutional challenge to his sentence of death, which is based on the invidious role that race played in its imposition, is simply not cognizable under Oklahoma law, which erects a standard different from, and in fact higher than, that required to establish a violation of the federal constitution. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (referring to the "unacceptable *risk* that 'the [death] penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis added)); *see also McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the

imposition of an arbitrary sentence, rather than the proven fact of one" (emphasis in original)). And the OCCA so held in denying Mr. Jones' successor application for relief. (*See* A-1 at 3 (holding that Sanchez, and thus Mr. Jones, failed to show that the factual basis of his federal constitutional claim "would be sufficient to establish by clear and convincing evidence that, but for the improper influence of race and/or gender discrimination, no reasonable fact finder would have found him guilty or rendered the penalty of death").)

Second, the OCCA's denial of Mr. Jones' successor application deprived Mr. Jones of notice of the grounds that the court would invoke to deny review of his federal constitutional claim. As explained in greater detail above, *see supra* at 25-30, Mr. Jones could not have anticipated, based on the express language of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and the OCCA's application of this provision, that the court would rely on *Sanchez*, and not on the particularized facts and arguments that Mr. Jones put forth in his application, to deny review of his federal constitutional claim.

Furthermore, the OCCA's denial of Mr. Jones' motion for leave to file a petition for rehearing—and, in particular, the OCCA's rules precluding post-conviction petitioners from *ever* petitioning for rehearing from a decision of that court—denied Mr. Jones the opportunity to be heard and, in particular, to correct the materially incorrect factual and legal conclusions that the OCCA unforeseeably invoked to deny review of his federal constitutional claim. (A-2.)

The OCCA's rejection of Mr. Jones' successor application violated his

constitutional rights in yet another way. The OCCA reasoned that Sanchez, and thus Mr. Jones, failed to show "that the factual basis for his claim was unascertainable through the exercise of reasonable diligence on or before the filing of his original post-conviction application." (A-1 at 3.) In other words, the OCCA's decision to deny Mr. Jones a forum within which to press his federal constitutional challenge to his death sentence was based upon its view that Mr. Jones, an indigent death-row prisoner, should have marshalled the resources to put this study together back in 2009.[19] But, as Mr. Jones set out at length in his motion for leave to file a petition for rehearing, this was financially and institutionally impossible for him to undertake at the time of his first post-conviction filing. (A-3 at 1-9); *see also State v. Behn*, 375 N.J. Super. 409, 428 (App. Div. 2005) (explaining that "reasonable diligence" does not mean "totally exhaustive or superhuman effort").

As an indigent prisoner, Mr. Jones was represented throughout his post-conviction proceedings by the Oklahoma Indigent Defense System (hereafter, "OIDS"). (*Id.* at 8.) At that time, the agency experienced a severe budget crisis that required an extensive reduction in its workforce as well as furlough days for employees who remained on staff. (*Id.*) OIDS did not have the institutional or the financial resources to pay experts upwards of $50,000—the estimated cost of the

[19] As explained above, Oklahoma law required the OCCA to ask whether the new evidence that Mr. Jones put forward in support of his claim was unascertainable through the exercise of reasonable diligence at the time of *his* first post-conviction filing, which occurred in 2005, rather than at the time of Sanchez's first post-conviction filing four years later, in 2009. *See supra* at 25-30.

Study—to commission the Study back in 2004. (*Id.*) Furthermore, Mr. Jones' post-conviction lawyer lacked the specialized training, time, resources and physical well-being necessary to undertake such an endeavor herself. (*Id.* at 8-9.) Tragically, she was diagnosed with breast cancer during her post-conviction representation of Mr. Jones and made her inability to effectively represent Mr. Jones during those proceedings due to her life-threatening illness known to the OCCA. (*Id.* at 9.)

In light of the foregoing, the OCCA's conclusion that Mr. Jones, had he been diligent, would have marshalled the evidence forming the basis of the Study back at the time of his first post-conviction filing discriminates against him on account of his poverty in violation of his rights under the Fourteenth Amendment's Equal Protection Clause. *Draper v. Washington*, 372 U.S. 487, 496 (1963) ("[T]he State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions"); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974) ("Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty"); *see also Burns v. Ohio*, 360 U.S. 252, 257 (1959) (states "may not foreclose indigence from access to *any phase* of [their criminal review] procedure because of their poverty" (emphasis added)); *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) ("It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.").

As Justice Murphy observed in *Carter v. Illinois*, "[w]hen the life of a man hangs in the balance, we should insist upon the fullest measure of due process" and the Constitution's Equal Protection guarantees. 329 U.S. 173, 186 (1946) (Murphy, J., dissenting). The State of Oklahoma "is here attempting to take away the life [ ] of one of its members." *Id.* This attempt "must be tested by the highest standards of justice and fairness that we know." *Id.*

CONCLUSION

For these reasons, Mr. Jones asks that this court grant his petition for a writ of certiorari.

Respectfully submitted: November 27, 2017.

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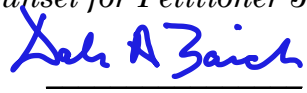

Counsel of Record

No._____

IN THE SUPREME COURT OF THE UNITED STATES

Julius Darius Jones, Petitioner,

vs.

State of Oklahoma, Respondent

CERTIFICATE OF SERVICE

I, Dale A. Baich, a member of the bar of this Court, hereby certify that on November 27, 2017, this Petition for Writ of Certiorari and supporting documents were electronically filed in this Court. I also certify that on November 28, 2017 the original and 10 copies of this Petition for Writ of Certiorari and supporting documents will be sent by Federal Express, postage prepaid, to the Clerk of Court, 1 First Street NE, Washington DC 20543. I certify that one copy of these documents will be mailed first-class mail to Jennifer Crabb, at 313 NE 21st, Oklahoma City, OK 73105.

I further certify that all parties required to be served have been served.

Respectfully submitted: November 27, 2017.

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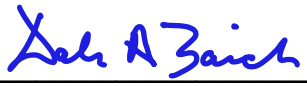

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