IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PCD 2017 654

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

SECOND APPLICATION FOR POST-CONVICTION RELIEF

DEATH PENALTY CASE

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

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JULIUS DARIUS JONES
June 23, 2017

PART A: PROCEDURAL HISTORY

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

Death by Lethal Injection

1. Court in which sentence was rendered:

   A. District Court of Oklahoma County, State of Oklahoma

   B. Case No. CF-1999-4373

2. Date of sentence: April 19, 2002

3. Terms of sentence:

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

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

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

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

   A. If so, where? Not Applicable

   B. List charges: Not Applicable

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

A. If so, where? Not Applicable

B. List convictions and sentences: Not Applicable

I. CAPITAL OFFENSE INFORMATION

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

A. Murder in the First Degree

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

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

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

C. Mitigating factors listed in jury instructions:

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

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

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

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

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

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

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

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

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

j. Julius has never been a gang member.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

aa. Julius has brain damage.

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

cc. Julius does not use drugs or consume alcohol.

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

10. Check whether the finding of guilty was made:

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

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

Fifteen years.

B. Count III: Conspiracy to Commit a Felony;

Twenty-five years.

13. Check whether the finding of guilty was made:

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

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

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

III. CASE INFORMATION

15. Name and address of lawyer in trial court:

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

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

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

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

17. Was lead counsel appointed by the court?

Yes (X) No ( )

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

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

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

20. Date Response filed: July 2, 2004

21. Date Reply Brief filed: July 21, 2004

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

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

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

Yes (X) No ( )

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

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

Yes (X) No ( )

27. Name and address of lawyer for appeal?

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

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

28. Was an opinion written by the appellate court?

Yes (X) No ( )

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

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

29. Was further review sought?

Yes (X) No ( )

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

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

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

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

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

Issues raised in First Post-Conviction Application:

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

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

Issues raised in Habeas Petition:

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

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

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

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

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

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

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

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

PART B: GROUNDS FOR RELIEF

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

   Yes (X) No ( )

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

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

   If yes, specify what motions have been filed:

   Not Applicable.

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

   A. **PROPOSITION I: Newly discovered evidence establishes that the race of the victim who Julius was accused and convicted of killing increased the likelihood that he would be sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution.**

PART C: FACTS

I. Preliminary Matters

References to the record will be made as follows:

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

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

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

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

II. Pertinent Facts

A. The Crime

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

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

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

B. The Aftermath

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

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

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

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

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

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

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

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

Julius continues to maintain his innocence.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

Newly discovered evidence establishes that the race of the victim who Julius was accused and convicted of killing increased the likelihood that he would be sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution.

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

throughout Oklahoma.[8]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] Julius is African-American.

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

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

IV. Additional Relevant Facts

A. Media Coverage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The State's Theory at Trial

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

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

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

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

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

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

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

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

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

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

C. The Invidious Presence of Race

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Law & Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Jersey would not tolerate a system that condones disparate treatment

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

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

Marshall, 130 N.J. 109 at 214.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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Norman, Oklahoma 73070
405-364-8367
barrettlawoffice@gmail.com
ATTORNEY FOR PETITIONER

VERIFICATION OF COUNSEL

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

MARK BARRETT June 18, 2017

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the Attorney General of Oklahoma by *depositing a copy with the Clerk of the Court of Criminal* Appeals on the date that it was filed.

MARK BARRETT

Attachment 1

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

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

COURT OF CRIMINAL APPEALS FORM 13.11A

ORIGINAL APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

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

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

   (a) Oklahoma County District Court.

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

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

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

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

Count 2. Fifteen years.

Count 3. Twenty-five years.

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

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

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

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

If so, where? Oklahoma County District Court.

List charges:

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

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

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

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

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

I. CAPITAL OFFENSE INFORMATION

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

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

Aggravating factors alleged:

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

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

Aggravating factors found:

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

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

Mitigating factors listed in jury instructions:

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

INSTRUCTION NUMBER 11

Evidence has been introduced as to the following mitigating circumstances:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

American High School Students."

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

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

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

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

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

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

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

27. Julius Darius Jones has brain damage.

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

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

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

7. Check whether the finding of guilty was made:

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

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

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

11. Check whether the finding of guilty was made:

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

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

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

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

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

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

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

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

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

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

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

Date Brief In Chief filed: March 8, 2004.

Date Response filed: July 2, 2004.

Date Reply Brief filed: July 21, 2004.

Date of Oral Argument: January 11, 2004.

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

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

Date of Remand: February 22, 2005

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

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

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

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

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

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

If "yes," give citations if published:

If not published, give appellate case no.:

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

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

PART B: GROUNDS FOR RELIEF

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

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

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

If yes, specify what motions have been filed:

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

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

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

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

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

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

PROPOSITION ONE

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

PROPOSITION TWO

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

PART C: FACTS

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

1.
CITATIONS TO THE RECORD

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

Application: the instant Original Application for Post-Conviction Relief

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

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

2000, February 11, 2000.

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

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

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

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

2.

PROCEDURAL HISTORY

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

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

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

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

3.

FACTS RELATING TO THE OFFENSE, TRIAL, AND APPEAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

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

APPELLATE COUNSEL INEFFECTIVE

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

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

Pursuant to 22 O.S. §1089(D)(4)(b)

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

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

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

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

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

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

FAILURE TO INVESTIGATE AND INTERVIEW JURORS

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

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

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

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

CRIMINAL RECORDS OF JURORS

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

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

During voir dire, the Court explicitly inquired:

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

Mr. Whitmire's answer was misleading at best:

PROSPECTIVE JUROR WHITMIRE: Traffic-related offenses.

THE COURT: Anything other things?

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

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[4] Oklahoma County, CS-1986-2281

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

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

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

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6 Oklahoma County, CM-1983-2359

7 Oklahoma County, CF-1984-4267.

8 Oklahoma County, CRF-1986-962

9 Oklahoma County, CF-1993-1057.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FAILURE TO CONDUCT JUROR INTERVIEWS

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

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

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

APPELLATE AND TRIAL COUNSEL INEFFECTIVE

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

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

Appendix).

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

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

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

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

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

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

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

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

Both trial counsel and appellate counsel mention that the hair in the white bandanna recovered from the Buick Regal owned by Mr. Jones, was Mr. Jordan's and not Mr.

Jones's.[14] But, combine that fact with at least two people saying that Mr. Jordan was claiming that he was the shooter, doubt is created concerning who was the shooter. And because Mr. Jordan had access to Mr. Jones's parents's house, it is entirely possible that Mr. Jordan could have been the one who hid the gun in the attic.

This Court has repeatedly held that "'[t]he credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary.'" **McDonald v. State**, 674 P.2d 1154, 1155 (Okl.Cr.1984) *citing* **Smith v. State**, 594 P.2d 784 (Okl.Cr.1979) *quoting from* **Caudill v. State**, 532 P.2d 63 (Okl.Cr.1975)." **Bland v. State**, 2000 OK CR 11, 4 P.3d 702, 714.

Both trial counsel and appellate counsel were ineffective. Appellate counsel was ineffective for not investigating jurors, interviewing jurors, and further investigating and corroborating the claim that Mr. Jordan was the shooter and not Mr. Jones. Trial counsel were ineffective for failing to put on a defense.

STATE INDUCED INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Jones received ineffective assistance of trial counsel. Mr. Jones's attorneys were not experienced capital litigators. (Aplt. Brf at 39-53)(Rule 3.11 Motion; Exhs. 2, 7, 8, 9).

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[14] (State v. Christopher Jordan, MH 3/19/01 at 17)(MH 2/4/02, at 46)(Aplt. Brf at 6, ftn. 11)(Tr. 8 at 28-36; Tr. 9 at 214-215; SH at 32B).

Mr. Jones's appellate counsel raised several issues of ineffectiveness concerning trial counsel, but appellate counsel failed to argue that the ineffective assistance of counsel was state induced.

Mr. Jones's trial counsel were assistant public defenders. Mr. David McKenzie was the lead attorney at trial. Mr. McKenzie was second chair counsel for a while, but he became lead attorney when Mr. Barry Albert, the initial lead attorney, was suffering from some health problems. The experienced attorneys in capital trial litigation of the Oklahoma County Public Defenders Office had several cases themselves and could not add another capital case to their caseload, resulting in representation for Mr. Jones below the American Bar Association Guidelines. Mr. Robert A. Ravitz, the Oklahoma County Public Defender, could not contract out of the public defender's office for experienced capital trial lawyers and could not hire additional capital trial lawyers. (Exh. 19, Appendix). Therefore, Mr. Jones received inexperienced and ultimately ineffective counsel because of government and monetary restraints in violation of Mr. Jones's Sixth Amendment right to counsel and in violation of Mr. Jones's Fourteenth Amendment right of due process.

> [T]the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." **McMann v. Richardson**, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). *Government violates the right to effective assistance when it interferes* in certain ways with the ability of counsel to make independent decisions *about how to conduct the defense*. *See*, e.g., **Geders v. United States**, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); **Herring v. New York**, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); 2064 **Brooks v. Tennessee**, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); **Ferguson v. Georgia**, 365 U.S.

> 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," **Cuyler v. Sullivan**, 446 U.S., at 344, 100 S.Ct., at 1716. Id., at 345-350, 100 S.Ct., at 1716- 1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). **Strickland v. Washington,** 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 - 2064, 80 L.Ed.2d 674 (1984). (Emphasis added).
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> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. *See* **United States v. Cronic**, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. **Strickland v. Washington** 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984).

When defense counsel is prevented by State action from assisting an accused during critical stages of the case, fundamental constitutional error has occurred and no showing of prejudice is required. The State induced the ineffective assistance of counsel and then profited from its actions with a death sentence. The adversarial process broke down to the point that the trial cannot be relied on as having produced a just result.

Mr. Jones's trial counsel were inexperienced capital litigators. Because the Oklahoma County Public Defender's Office could not provide any other counsel due to monetary and case loads constraints, government action interfered with Mr. Jones's right to effective assistance of counsel in violation of the Sixth Amendment. Mr. David McKenzie, Mr. Jones's lead attorney, informed the public defender's office of his inexperience at capital litigation and his concerns, but he remained as lead counsel for Mr. Jones. In

addition, Mr. McKenzie informed the Court that Mr. Jones's case was his first death penalty case. (Tr. Vol. 1 at 15, lines 19-25). (Rule 3.11 Motion; Exhs. 7). The State profited from the defense team's inexperience and the adversarial process was non-existent.

The Public Defender's Office's inability to provide experienced capital lawyers was not the only example of state induced ineffective assistance of trial counsel in Mr. Jones's case. As stated earlier, the State was ordered two separate times to provide defense counsel their list of prospective jurors with criminal records. Even after the State said it would obey the Court's order, the State failed to give trial counsel that information. Only when the State was exercising their peremptory challenges was it made known to the Court and to defense counsel that a few of the jurors that were passed for cause by both the defense and the State had criminal records. Because state action precluded trial counsel's ability to make an informed decision on choosing jurors for Mr. Jones's trial, counsel was ineffective due to state action.

In addition, appellate counsel raised the **Brady**[15] violation issue concerning the State's failure to inform defense counsel until the end of the State's first stage case in trial that the cigarettes found in the stolen Suburban were not from any perpetrator, but rather a friend of Mr. Howell's. (Aplt. Brf. at 38). Appellate counsel did not argue that state action was interfering with the effective assistance of counsel for Mr. Jones. Trial counsel's

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15 *See* **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct 1194. 10 L.Ed.2d 215 (1963), **United States v. Bagley**,473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d. 481 (1985), **Kyles v. Whitley**,514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

ineffectiveness was state induced. Mr. Jones is entitled to effective assistance of counsel. Mr. Jones is entitled to a new trial.

APPELLATE COUNSEL FAILED TO ARGUE STRUCTURAL ERROR IN MR. JONES'S TRIAL

In addition to the ineffectiveness of trial and ultimately appellate counsel discussed above, appellate counsel failed to argue that Mr. Jones's entire trial proceeding, from the time he was charged until sentence was pronounced, was structurally defective and constitutionally deficient. Structural error is a "defect affecting the *framework* within which the trial proceeds, rather than simply an error in the trial process itself." **Arizona v. Fulminante**, 499 U.S. 279, 11 S.Ct. 1246, 113 L.Ed.2d 302 (1991). (Emphasis added). Structural errors "infect the entire trial process." **Brecht v. Abramson,** 507 U.S 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Whatever "[t]ranscends criminal process is structural error. " **Johnson v. United States**, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) "[T]hese errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence...and *no criminal punishment may be regarded as fundamentally fair*.'" **Neder v. United States,** 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999), *quoting* **Rose v. Clark,** 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (emphasis added). Structural errors are never harmless and require reversal of conviction. **Arizona v. Fulminante,** 499 U.S. 249, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

The Supreme Court has identified additional specific structural constitutional errors.

Some examples of structural error include unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, and the denial of the right to a public trial, the deprivation of the right to counsel, the lack of an impartial trial judge, and erroneous reasonable doubt instructions to a jury. **Fulminante,** 111 S.Ct. at 1265. *See* **Johnson v. United States**, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)." These lists are by no means exhaustive, but rather illustrative.[16]

Structural error is constitutional error not subject to harmless error analysis.

> In order for constitutional error to be deemed harmless, the Court must find beyond a reasonable doubt, that it did not contribute to the verdict. **Chapman v. California**, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The standard for constitutional violations is well-known: reversal is in order unless the State can show the error was harmless beyond a reasonable doubt. **Arizona v. Fulminante**, 499 U.S. 279, 295, 111 S.Ct. 1246, 1258, 113 L.Ed.2d 302 (1991); **Bartell v. State**, 1994 OK CR 59, ¶¶ 11, 881 P.2d 92, 95-97; **Simpson**, 1994 OK CR 40 at ¶¶ 34, 876 P.2d at 701, *citing* **Chapman v. California**, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The burden thus is on the State--the beneficiary of the error--to prove beyond a reasonable doubt that the error is harmless. **Van White v. State,** 1999 OK CR 10, 990 P.2d 253, 265.

Appellate counsel's neglect of the structural errors of Mr. Jones's case is deficient performance. Structural error raises questions of constitutional magnitude. Constitutional questions must *always* be raised in capital cases. Any capital lawyer who is not at all times cognizant enough of the federal system to raise claims that could be meritorious in either state court or federal courts is ineffective when such a claim is not raised in this Court. Such

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[16] There are other errors that are structural. For instance, the denial of the full number of peremptory challenges allowed by state law amounted to a structural error that affected the entire trial. This error, under the facts of this case, cannot be said to be harmless. **Marrero v. State**, 2001 OK CR 12, 29 P.3d 580, 582.

a claim runs the risk of later being deemed waived and procedurally barred. The factual basis for a claim of structural error was available to appellate counsel but was not adequately pursued. Thus, it is ineffective assistance of appellate counsel and appropriate for post-conviction review.

CAPITAL TRIAL SCHEME IS STRUCTURALLY DEFECTIVE

Oklahoma's capital trial scheme is structurally defective because the procedure for capital cases in Oklahoma is arbitrary and capricious. The District Attorney alone decides whether a defendant charged with murder in the first degree case is going to be subject to the death penalty. The District Attorney charges either malice murder or felony murder, and then at some time prior to trial, even after preliminary hearing, the District Attorney files a Bill of Particulars listing the aggravating circumstances. There is no judicial review of probable cause of aggravators in a capital case. The decision to seek the death penalty is completely up to the State. [17] The arbitrary and capricious infliction of capital punishment violates the prohibition against cruel and unusual punishment found in the Eighth Amendment and violates the guarantee of due process found in the Fourteenth Amendment. **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

PROBABLE CAUSE DETERMINATION ON AGGRAVATION

Appellate counsel and trial counsel failed to argue that it is structural error not to have

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[17] If the death penalty as it is charged in Oklahoma County was not arbitrary and capricious, the State would not need an order from a court prohibiting defense counsel from comparing facts of other non-death penalty cases in capital jury trials. (Tr. Vol. 1 at 16).

a probable cause determination by a magistrate on aggravators alleged by the State. In Oklahoma, every felony case is subjected to a magistrate determination of probable cause that the crime charged by the State was committed and that there is probable cause to believe the defendant committed said crime. Okla. Const. Art. II, § 17. In a capital case in Oklahoma, a magistrate must still determine whether the crime of first degree murder was committed and if there is probable cause to determine that the defendant charged committed the murder. 22 O.S. §258. However, in order for the punishment for murder in the first degree to be enhanced to the death penalty, no judicial finding of probable cause of an aggravator is required. In the Bill of Particulars, the State merely alleges the aggravation, gives notice to the defense that a sentence of death will be sought against the defendant, and specifies what aggravators the State is alleging without specifying the evidence warranting the alleged aggravators.[18]

Because "death is different"[19] and because death is the ultimate penalty, a probable cause determination of the alleged aggravators should be required. The omission of a probable cause determination of aggravation is a structural defect in Oklahoma's capital trial process. Pursuant to **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556

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[18] Defense counsel filed two Motions to Make Bill of Particulars More Definite and Certain (O.R. 90-91 and 359-360).

[19] **Gregg v. Georgia**, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

(2002), aggravating circumstances are elements of the offense of capital murder. As elements of a crime, aggravating circumstances are subject to the same notice and charging requirements as required by state law consistent with constitutional notice and due process guarantees, as well as Fourth Amendment protections against arrests and confinement without probable cause.

Because aggravating circumstance are elements of the offense of capital murder, due process requires each element of the specific offense charged be stated plainly. A magistrate should determine whether there is probable cause to support the aggravators because the aggravators are elements. "[A]n accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason, 1 J. Bishop, Criminal Procedure §§ 87, p. 55 (2d ed. 1872)." **Blakely v. Washington**, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004). (Internal quotations omitted). Oklahoma law forbids the prosecution of a felony by Information without having had a preliminary examination before an examining magistrate. Okla. Const. Art. II § 17. Thus, prosecution of murder in the first degree with aggravation should also have a preliminary hearing. In addition, a bindover order from an examining magistrate after finding probable cause upon preliminary examination of evidence adversarially tested by defense counsel is the only way in which the district courts are vested with jurisdiction in felony cases charged by Information, and yet, the same is not true for murder in the first degree with aggravation. **Harper v. District Court of Oklahoma**

County, 1971 OK CR 182, 484 P.2d 891, 892; **State v. Weese**, 1981 OK CR 19, 625 P.2d 118. Such procedural protections serve to provide notice to the defendant of what he must be prepared to defend against at trial, as well as to provide a check on prosecutorial discretion in filing charges. *See* **United States v. Cotton**, 535 U.S. 625, 122 S.Ct. 1781, 1786-87, 152 L.Ed.2d 860 (2002).

Oklahoma death penalty procedures violate the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution protection against unreasonable detentions and guarantees of notice and due process, because they do not require a preliminary hearing for aggravating circumstances or properly confer jurisdiction upon the district court with respect to aggravating circumstances. Oklahoma's death penalty trial and sentencing procedures have never required that the evidence in support of aggravating circumstances be subject to adversarial testing by a preliminary examination by a magistrate or that district court jurisdiction over aggravating circumstance be dependent upon a bindover upon preliminary examination or finding of probable cause. *See* **Nuckols v. State**, 1984 OK CR 92, 690 P.2d 463, 469, **Wilson v. State**, 1988 OK CR 111, 756 P.2d 1240, **Newsted v. State**, 1986 OK CR 82, 720 P.2d 734, 738-9, **Brewer v. State**,1982 OK CR 128,650 P.2d 54, 61; 21 O.S. §§ 701.10, 701.12. No pre-trial hearing concerning the validity of the alleged aggravating circumstances in Mr. Jones's case was held. The United States Supreme Court made it clear in its recent cases of **Jones v. United States**, 526 U. S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348,

147 L. Ed. 2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and **Blakely v. Washington**, _U.S. _124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) that aggravating circumstances must be subjected to the same procedural requirements of any element in any charge. Therefore, concerning aggravation, the defendant should have the formality of notice, a preliminary examination by magistrate, submission of the all of the elements of fact to the jury, and the burden of proof beyond a reasonable doubt on all factual determinations. Pursuant to Oklahoma law, juries are allowed to sentence a defendant to death without the aggravators being adversarially tested by a magistrate and in which the aggravators never properly become the part of district court jurisdiction and renders Oklahoma procedure as arbitrary and capricious. **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The omission of a probable cause determination of aggravation is a violation of the due process rights of the defendant, in this case, Mr. Jones, and therefore, the error is not harmless. Mr. Jones should be granted a new trial with constitutionally adherent trial scheme.

DIFFERENT JURIES FOR GUILT STAGE AND PUNISHMENT STAGE

Appellate counsel and trial counsel failed to argue that it is structural error not to have a different jury decide guilt/innocence and punishment. In Oklahoma, the same twelve jurors that sit, listen, and decide whether the defendant is guilty or not guilty of murder in the first degree, also decide whether the defendant lives or dies at the hand of the

government. Because of this prospective jurors are asked in voir dire about their feelings and thoughts are concerning the death penalty. Before there is any evidence conveyed to the jury from either the State or the defense, prospective jurors know the defendant is possibly subject to being executed. This procedure speaks of the proverbial "putting the cart before the horse." In cases in which there is a question of guilt of innocence, jury might be pre-disposed to find guilt because the majority of voir dire is spent on death qualifying a jury.

In **Witherspoon v. Illinois**, 391 U.S. 510, 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (1968), the Supreme Court held that a prospective juror in a capital case could be excluded for cause if the juror is unwilling "to *consider* all of the penalties provided by state law." The Supreme Court did not decide "whether the Court might someday find that the Constitution required two separate juries in capital cases: one to determine guilt or innocence, and one to determine punishment. Under this bifurcated proceeding, the first jury may contain jurors who could not vote for the death penalty, although the second jury may not. The Court stated that for it to consider such a proceeding there would have to be a showing that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. **Witherspoon**, at 518, 88 S.Ct. at 1775." **Keeten v. Garrison**, 742 F.2d 129, 130 -131 (C.A.N.C.,1984). (Internal quotations omitted).

In 2004, in **U.S. v. Green,** 343 F.Supp.2d 23, 26 (D.Mass.,2004), the court held that "the government has no entitlement to a death-qualified *guilt/innocence* jury, or for that

matter, to a unitary jury hearing both phases. It only has a right to death-qualify the jury that will determine *punishment. See* **Witherspoon v. Illinois**, 391 U.S. 510, 520, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)." Therefore, having the same jury sit and render verdicts for both stages is not constitutionally required and it risks having a jurors sit with a "fixed, preconceived opinion of the accused's guilt" constituting a denial of due process. **Irvin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

Allowing jurors with a fixed notion of guilt to sit in judgment of guilt is a denial of due process, logic demands that the same be true of allowing jurors with a fixed notion of punishment to sit in judgment during the second stage of a death penalty trial. Oklahoma's trial scheme allows jurors with a "fixed, preconceived notion" of punishment to sit in judgment during the punishment stage of capital trials. Proof of this "fixed, preconceived notion" occurring in Mr. Jones's case was when Juror Victoria Armstrong asked to speak with Judge Bass and informed the Court that she had overheard a juror, Juror Brown, voicing his opinion on a sentence for Mr. Jones before the sentencing stage of the trial had concluded. (Tr. Vol. 12 at 95-104; Tr. Vol. 13 at 20-91). Although the Court did hold an in camera hearing with each individual juror to investigate the possibility of Juror Armstrong's claims, harm was done and could not be cured. Oklahoma's sentencing procedure is structurally unsound.

Clearly, then, Mr. Jones is the victim of a structurally unsound sentencing procedure. Although structural errors are never subject to harmless error analysis, **Neder**, *supra,* **Cage**

v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). **Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), Mr. Jones is still able to demonstrate prejudice, because he did not receive the benefit of a totally impartial jury during second stage.

PROSECUTORIAL MISCONDUCT IN MR. JONES'S CASE

Appellate counsel raised the issue of prosecutorial misconduct[20]; however, it was not raised as structural error. Each instance of misconduct grew upon the other until there was no way to cure it (even if the trial court had wanted to) without granting a mistrial. This becomes structural error and appellate counsel was ineffective for not raising the issue that substantial prosecutorial misconduct becomes incurable, is not harmless, and thus results in structural error.

In addition to the Brief in Chief of Mr. Jones's direct appeal and the allegations of prosecutorial misconduct, another example of prosecutorial misconduct occurred. Another example occurred when Mr. Christopher Whitmire was allowed to stay on the jury. Because Mr. Whitmire was a twice convicted felon, the State violated the Court's order as discussed earlier. (M.H. 2/4/02 at 20) (Tr. Vol. 1 at 33-34). Whether the State knowingly or unknowingly failed to notify the Court of Mr. Whitmire's criminal record, the State was ordered to disclose to the Court and to defense counsel if any prospective juror had criminal

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[20] Proposition XI of the Brief of the Appellant argues several, not just a few, but several instances of prosecutorial misconduct. (Aplt. Brf., Proposition XI, at 62-68). Petitioner, Mr. Jones, hereby incorporates Proposition XI of the Brief in Chief of Appellant for instances of prosecutorial misconduct.

records. Thus, the State's evasive performance of the Court's order to inform the Court and defense counsel of any prospective jurors with criminal records is another example of prosecutorial misconduct.

Failure of defense counsel to object to these instances of prosecutorial misconduct demonstrates that the prosecution ran roughshod over defense counsel thereby destroying a meaningful adversarial process. Failure of defense counsel to object also demonstrates that there was ineffective assistance of trial counsel during both the first and second stages of the trial.

Current pronouncements do not rule out the existence of other structural constitutional defects. The hallmark of a structural constitutional error is a "structural defect affecting the *framework* within which the trial proceeds, rather than simply an error in the trial process itself." **Fulminante,** 111 S.Ct. at 1265. (emphasis added). If prosecutorial misconduct were sporadic, unintentional and inadvertent, that behavior might be properly evaluated totally within the context of the individual trial, and thereby subject to harmless error analysis under **Chapman.** *See, e.g.*, **Donnelly v. DeChristoforo,** 461 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). However, misconduct on the part of the assistant district attorney throughout an individual trial and allowed by the trial court regardless of whether or not the defense objects is a structural defect and should not be subject to harmless error analysis. (Aplt. Brf.).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Although Mr. Jones was not deprived of counsel altogether, he was deprived of experienced capital counsel, which serves as a deprivation of counsel and thereby constitutes structural error. A "violation of right to counsel can never be harmless." **Holloway v. Arkansas**, 435 U.S. 475, 489, 98S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978). According to the **Fulminante** opinion, in creating harmless error analysis, **Chapman v. State of California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) recognized that total deprivation of the right to counsel at trial could never be harmless error. **Fulminante,** 111 S.Ct. at 1264-65.

As demonstrated earlier, Mr. Jones's trial team was inexperienced in capital trials, failed to adversarially test the State's case; and thus was ineffective. The affidavits from some of the jurors in the Appendix of this application show just how ineffective the trial team was. Had the defense attorneys put on a defense and effectively cross-examine the State's witnesses, the outcome of the trial would have been different. Prejudice must be presumed and the error is not harmless.

MISCONDUCT OF JURORS IN MR. JONES'S CASE

Appellate counsel failed to argue that the known alleged misconduct of a juror and the unknown misconduct of a juror created structural error in Mr. Jones's case. As stated earlier, Juror Christopher Whitmire committed perjury during voir dire. His participation in the trial renders his verdict suspect. As such, his perjury is further evidence of the structural error present in Mr. Jones's trial.

Although counsel argues that having the same jury decide guilt and innocence is structurally defective, structural error occurred in Mr. Jones's case because a juror supposedly expressed his decision before all of the evidence had been presented in second stage.– "[A] trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process." **Irvin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639, 6L.Ed.2d 751 (1961).

Also, as stated earlier, Juror Brown was alleged to have expressed an opinion on the appropriate sentence for Mr. Jones before the close of evidence of the second stage. (Tr. Vol. 12 at 95-104; Tr. Vol. 13 at 20-91). Throughout the trial, the Court admonished the jury not to discuss the case with anyone. Unfortunately, even though Juror Brown did not point blank admit to his misconduct, the damage had been done and it could not be cured. It was not harmless error. Clearly, any discussion, thought, or opinion rendered prematurely was juror misconduct. It was and is structural error, it infected the trial, and mistrial should have been declared. Thus, Mr. Jones should receive a new trial.

AGGRAVATORS SHOULD OUTWEIGH MITIGATORS BEYOND A REASONABLE DOUBT

The trial court failed to instruct the jury that a critical factor in the sentencing stage had to be found beyond a reasonable doubt deprived Mr. Jones of a fair sentencing determination in violation of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution resulting in structural error.

In Oklahoma a person, who has been convicted of capital murder, has their sentence

determined by a jury, unless the right to a jury trial is waived. 21 O.S. 2001 § 701.10. In order for a death sentence to be imposed, a jury must make three findings of fact: 1) the person must be found guilty of first degree murder beyond a reasonable doubt; 2) at least one aggravating circumstance must be found beyond a reasonable doubt; and 3) the aggravating circumstance or circumstances must outweigh the mitigating evidence presented at trial. 21 O.S. 2001 § 701.11.

Juries in Oklahoma are instructed, as well as the jury in Mr. Jones's case, that the only fact in the second stage that must be found beyond a reasonable doubt is whether the State has proved an aggravating circumstance. The jury in this case was given the following instructions concerning its sentencing authority:

> Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.
>
> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole. (Instruction Number 7; O.R. 1415)..
>
> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances

outweigh the finding of one or more mitigating circumstances. [21]

(Instruction Number 12, O.R. 1426).

The jury was informed it had two critical facts to determine: 1) whether one or more of the aggravating circumstances exist beyond a reasonable doubt, and 2) if one or more aggravating circumstances were found to exist, whether those outweighed the mitigating circumstances. The jury was instructed that only the first fact had to be found "beyond a reasonable doubt." The failure to inform the jury that the second critical fact had to be likewise found "beyond a reasonable doubt" renders the resulting death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. *See* **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). "As **Apprendi** held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." **Blakely v. Washington**, U.S. ,124 S.Ct. 2531, 2543, 159 L.Ed.2d 403 (2004). Therefore, the fact that the aggravators outweigh mitigators must be proved beyond a reasonable doubt.

In **Jones v. United States**, 526 U. S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), the Supreme Court held "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

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[21] Trial counsel filed an objection to the language of the uniform jury instruction. (O.R. 43-446, 450-453.).

indictment, submitted to a jury, and proven beyond a reasonable doubt." **Id.**, 526 U.S. at 243, n. 6. 119 S. Ct. at 1224 n.6. In **Apprendi**, the Supreme Court held "[t]he Fourteenth Amendment commands the same answer [as **Jones v. U.S.**] in this case involving a state statute." **Id.**, 530 U.S. at 476, 120 S.Ct. at 2355.

In **Ring**, the Supreme Court affirmed **Jones** and **Apprendi** and made the Constitutional principles enunciated within applicable to capital cases. **Ring**, 536 U.S. at 607, 122 S. Ct. at 2442 ("We see no reason to differentiate capital cases from all others in this regard."). In so holding, the Court reaffirmed, again, the principle that

> [i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no mater how the State labels it - must be found by a jury beyond a reasonable doubt.

Id., 536 U.S. at 602, 122 S. Ct. at 2439. Justice Scalia, in his concurring opinion, stated:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.

Id., 536 U.S. at 610, 122 S. Ct. at 2444.

Because of the nature of Oklahoma's capital sentencing scheme, **Jones**, **Apprendi**, and **Ring**, require the capital jury be instructed it must find the aggravating circumstances outweigh any mitigating circumstances *beyond a reasonable doubt* before it may impose the

punishment of death.[22] The trial court's failure to instruct the jury in this manner violated Mr. Jones's state and federal constitutional rights. Because the jury's critical factual determination of whether the aggravating circumstances outweigh any mitigating circumstances is just such a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63. The trial court's Instructions No. 7 and 12, which failed to define properly the required burden of proof, run afoul of the Sixth and Fourteenth Amendments.

In Oklahoma, after a jury finds all the elements of first degree murder beyond a reasonable doubt, the maximum punishment a defendant is exposed to upon a guilty verdict is life imprisonment without parole. The minimum punishment is life imprisonment. This is made clear in the text of 21 O.S. § 701.11, which provides in part:

> Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence

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22 The United States Supreme Court reiterated its holding in **Ring** in **Sattazahn v. Pennsylvania,** 537 U.S. 101,123 S.Ct. 732, 739, 154 L.Ed.2d 588 (2003),

> [W]e held that aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a *greater offense. Id.,* at ----, 122 S.Ct. at 2443 (emphasis added). That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of murder plus one or more aggravating circumstances: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.,* at , 122 S.Ct. at 2442-2443. (Internal quotations omitted).

of imprisonment for life without parole or imprisonment for life.

The jury's finding the elements of first degree murder have been proved beyond a reasonable doubt does not authorize a death sentence at all. Under Oklahoma law, the death sentence is expressly forbidden unless the jury makes two further, unanimous findings: 1) one or more aggravating factors; and 2) the aggravating factors outweigh all mitigating factors.

The instructions given to the jury in this case bear witness to the actual way in which sentencing authority is conferred in capital cases. After the finding of guilt, the jury is instructed it must find one or more aggravating factors before it is authorized to consider, not impose, increasing the penalty to death. As the trial court instructed the jury in Instruction 7: "Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death..." (O.R. at 1415).

Instruction 12 further circumscribes the sentencing authority of the jury, prohibiting a sentence of death unless the jury makes the further finding: "If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt..., the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances." (O.R. at 1426). The cases of this Court have also read the statutes to this effect. In **Paxton v. State**, 1993 OK CR 59, 867 P.2d 1309, 1323, the Court stated, "only

when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed."

The reasoning of **Jones**, **Apprendi**, and **Ring** demonstrate the trial court's instructions failed to comport with the Sixth Amendment's requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63; also **Ring**, 536 U.S. 602, 122 S. Ct. at 2439. The trial court's instructions did require the jury to find the alleged aggravating circumstances only upon proof beyond a reasonable doubt. Yet the jury was not instructed the weighing determination, the most critical factual inquiry and the one which actually authorizes the jury to return a verdict of death, must also be proved to its satisfaction beyond a reasonable doubt.

This omission is plain error of constitutional magnitude. Like other errors denying a defendant's right to an instruction concerning the finding of the essential elements of an offense beyond a reasonable doubt, the error infects the very structure in which the capital sentencing proceeds, and can never be harmless. **Cage v. Louisiana**, 498 U.S. 39, 111 S.Ct. 328, 112 L. Ed. 2d 339 (1990); **Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993). The jury's decision whether the aggravating circumstances outweigh mitigating circumstances is clearly a finding of "fact" for purposes of the Constitutional rule announced in **Ring**. In the closing instruction, the jurors were told:

> In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the State and the defendant during guilt and the sentencing phase of this proceeding.

(Instruction Number 15; O.R. at 1433).

***

> You determine *the facts*. The importance and worth of the evidence is for you to decide.

(Instruction Number 15; O.R. at 1433). (emphasis added)

The failure to instruct the jury properly concerning the rigorous burden of proof therefore renders the death sentence imposed against Mr. Jones unconstitutional. The trial court's error in its instructions resulted in a sentence which violates Mr. Jones's Sixth and Fourteenth Amendment rights recognized by the Supreme Court in **Ring**, and further violates his right to due process of law and a fair and reliable capital sentencing proceeding in violation of the Eighth Amendment.

Counsel for Mr. Jones respectfully submits the death sentence imposed against Mr. Jones is unconstitutional. At the very least, this Court should vacate the death sentence and remand for a new sentencing with appropriate constitutional instructions, or in the alternative modify Mr. Jones's sentence to life imprisonment. Mr. Jones's trial was structurally defective and as such, Mr. Jones should be granted relief.

CONCLUSION

Serious constitutional errors occurred in Mr. Jones's trial, thereby undermining

confidence in the reliability of the sentence of death. The specific errors in the present case are an integral part of the structural and systemic errors built in to the manner in which Oklahoma seeks and imposes a sentence of death. The state process is infected with constitutional error. But for the constitutional errors enumerated in this brief, Mr. Jones would in all probability have a sentence other than death. Structural error mandates reversal of the conviction.

Because ultimately these are claims of ineffective assistance of appellate counsel, these claims could not have been raised on direct appeal. Mr. Jones thus deserves relief from his death sentence in the form of a new sentencing proceeding or a modification of his death sentence to life with the possibility of parole or life without the possibility of parole.

Mr. Jones's trial counsel and appellate counsel were ineffective. A twice convicted felon was allowed to render verdicts. Trial counsel was inexperienced and ineffective throughout Mr. Jones's case. Trial counsel failed to investigate possible defenses for Mr. Jones. Because appellate counsel failed to raise the issues discussed above, appellate counsel was ineffective. Mr. Jones's sentence should be vacated, his conviction reversed, and a new trial should be ordered. At the very least, Mr. Jones is entitled to modification of the death sentence to a sentence of life or life without parole.

PROPOSITION TWO

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

In **United States v. Rivera**, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. **Rivera,** 900 F. 2d at 1469. *See* **Walker v. Engle**, 703 F.2d 959, 963 (6th Cir. 1983). A valid death sentence must be free of any passion, prejudice or arbitrary factors that taint the reliability of the outcome. The decision to impose a death sentence must reflect a reasoned moral judgment as to the defendant's actions and character in light of the offense and the defendant's background. **Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Failure to adhere to these constitutional mandates at every stage of the capital sentencing and review process creates a risk that a death sentence will be based on considerations that are constitutionally impermissible and totally irrelevant to the offender and the crime. In order to maintain the integrity of the criminal justice system and public confidence in the reliability of its results, it is of vital importance that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977),

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct at 2991, 49 L.Ed.2d 944 (1977).

According to the Tenth Circuit,

> Cumulative error analysis is an extension of harmless error, *see* **Rivera**, 900 F.2d at 1469, and [the court should] conduct the same inquiry as for individual error, *id.* at 1470, focusing on the underlying fairness of the trial, *id.* at 1469 (quoting *Van Arsdall*, 475 U.S. at 681); *see also* **United States v. Wood**, 207 F.3d 1222, 1237 (10th Cir.2000). [T]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Hooper*, 314 F.3d at 1178; (quoting **Duckett v. Mullin**, 306 F.3d 982, 992 (10th Cir.2002), *petition for cert. filed*, (U.S. Feb. 25, 2003) (No. 02-9257); *see also* **Rivera**, 900 F.2d at 1469. As in assessing the harmlessness of individual errors, therefore, this court evaluate[s] whether cumulative errors were harmless by determining whether a criminal defendant's substantial rights were affected. **Moore v. Reynolds**, 153 F.3d 1086, 1113 (10th Cir.1998). A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Unless an aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. **Rivera**, 900 F.2d at 1470; *see* **Duckett**, 306 F.3d at 992; **Willingham**, 296 F.3d at 935. **Darks v. Mullin**, 323 F.3d 1001, 1018 (10th Cir. 2003) (Internal quotations omitted).

See also **United States v. Toles**, 297 F.3d 959, 972, 1207 (10th Cir. 2002) (quotation omitted); *see* **United States v. Rivera**, 900 F.2d 1462, 1470 (10th Cir.1990) (en banc), *see* **Cargle v. Mullin,** 317 F.3d 1196, 1206 -1207 (10th Cir. 2003).

Also, in **Cargle v. Mullin**,317 F.3d 1196, at 1200, the Court held

> that prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated among such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment. Finally, we conclude that prejudice from guilt-phase error may be cumulated with prejudice from penalty-phase error.

The Tenth Circuit reiterated this holding of **Cargle v. Mullin** in **Darks v. Mullin,** 323 F.3d 1001, 1018 (10th Cir., 2003), "In assessing cumulative error, only first stage errors are relevant to the conviction, but all errors are relevant to the sentence." Therefore, even though each instance of error alone would not require reversal, some or all errors combined may warrant reversal.

The ineffectiveness of trial and appellate counsel and the errors enumerated by appellate counsel and post-conviction counsel, denied Mr. Jones substantial statutory and constitutional rights. His death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article 2, §§ 7, 9, and 20 of the Oklahoma Constitution.

Mr. Jones should therefore be granted a new trial, or in the alternative, his death sentence should be modified to life imprisonment or life imprisonment without parole.

PRAYER FOR RELIEF

Wherefore, Mr. Jones respectfully requests that this Court enter an order vacating the conviction and death sentence and remand for a new trial or new sentencing. In the

alternative, Mr. Jones respectfully requests this Court to impose a sentence of life imprisonment or life imprisonment without parole, or remand this case for a full and fair evidentiary hearing on the issues presented.[23]

Respectfully submitted,

Laura M. Arledge, OBA #15462
Capital Post-Conviction Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
(405) 801-2770
larledge@oids.state.ok.us
Attorney for Julius Darius Jones

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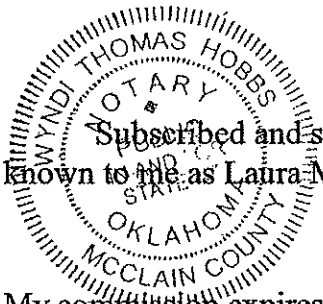
[23] Mr. Jones's Appendix to the Original Post-Conviction Application, Emergency Motion for an Abeyance, Motion Reserving the Right to Supplement the Original Post-Conviction Application and the Motion for Evidentiary Hearing, and all attachments thereto, filed in this case contemporaneously with this original application, is hereby incorporated by reference as if fully set forth.

VERIFICATION OF COUNSEL FOR PETITIONER

Laura M. Arledge, after being duly sworn, states that she is the duly appointed counsel of the Petitioner, Julius Darius Jones; that she has read the foregoing application for post-conviction relief, its argument and authorities; and the statements of fact contained therein, and the documents appended to this application, are true and correct to the best of her knowledge and belief.

Laura M. Arledge, OBA #15462



Subscribed and sworn before me on this 25th day of February, 2005, by the person known to me as Laura M. Arledge.

Notary Public

My commission expires: 7-2-05

My commission number: 01011011

CERTIFICATE OF SERVICE

By my signature below, I certify that a copy of the foregoing was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of the Court of Criminal Appeals this 25th day of February, 2005.

Laura M. Arledge, OBA #15462
Capital Post-Conviction Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
(405) 801-2770
Attorney for Julius Darius Jones

Attachment 2

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JULIUS DARIUS JONES,	)	
	)	
Petitioner,	)	**Case No.** _____
	)	
vs.	)	
	)	**Oklahoma County**
STATE OF OKLAHOMA,	)	**Case CF-1999-4373**
	)	
Respondent.		

AFFIDAVIT IN FORMA PAUPERIS

I, Julius D. Jones state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20TH day of June, 2017 at McAlester, Pittsburgh, OK
(City, County, State)

KIM A. MARKS NOTARY #04006555 EXP. 07/20/20 PUBLIC STATE OF OKLAHOMA

Julius D. Jones
Signature

Mr. Julius D. Jones
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary #04006555
Exp 07-20-2020

AFFIDAVIT IN FORMA PAUPERIS

I, JULIUS D. JONES, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20TH day of June, 2017 at MCALESTER, PITTSBURG, OK.
(City, County, State)

KIM A. MARKS NOTARY PUBLIC STATE OF OKLAHOMA # 04006555 EXP. 07/20/20

Signature

MR. JULIUS D. JONES
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp 07-20-2020

2170/5025

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG 26 1999
PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

STATE OF OKLAHOMA,

vs. Case No. CF-99-4373

JULIUS DARIUS JONES

Defendant.)

INMATE APPLICATION FOR APPOINTED COUNSEL AND ORDER

NAME: JULIUS DARIUS JONES ; SSN: 446/88/5262 ; DOB: 07/25/80

I have been in jail for 26 days. Before my arrest, I was working (YES) (NO)

I live at 12304 GREYSTONE TER. I am married (YES) (NO)

My spouse works at N/A. I am 19 years old

INFORMATION ON ASSETS AND REPRESENTATION

DO YOU OR YOUR SPOUSE HAVE ANY OF THE FOLLOWING:

1. Bank or Credit Union accounts? (YES) (NO) Local Federal Bank $20
2. Stocks, bonds, retirement accounts? (YES) (NO)
3. A House or land? (YES) (NO)
4. Car, truck, van, motorcycle? (YES) (NO)
5. Charge, credit or store cards? (YES) (NO)
6. Money owed to you? (YES) (NO)
7. Furniture? (YES) (NO); Appliances? (YES) (NO) Tools, Computers? (YES) (NO)

HAVE YOU OR YOUR SPOUSE RECENTLY:

8. Sold anything? (YES) (NO); 9. Filed Bankruptcy? (YES) (NO)
10. Sued someone? (YES) (NO); 11. Been sued by someone? (YES) (NO)

IF YOU OR YOUR SPOUSE CURRENTLY RECEIVE ANY OF THE FOLLOWING, HOW MUCH?

12. AFDC? NO; 13. FOOD STAMPS? NO; 14. SOCIAL SECURITY? NO
15. VA BENEFITS? NO; 16. SECTION 8/HOUSING AUTHORITY HELP? NO

17. HAS A LAWYER BEEN HIRED TO REPRESENT YOU IN THIS CASE? (YES) (NO)
18. HAVE YOU ANY FRIENDS/RELATIVES WILLING AND ABLE TO HELP YOU? (YES) (NO)
19. HAVE YOU BEEN ABLE TO CALL ANY LAWYERS ABOUT THIS CASE? (YES) (NO)

JUDGE'S NOTES TO ABOVE QUESTIONS: ( )_____

( )_____

( )_____

( )_____

( )_____

( )_____

I SWEAR OR AFFIRM THAT:

1. All the above information is true and correct to the best of my knowledge;
2. I can not afford a lawyer or pay for transcripts or any other costs;
3. I know I can be charged with perjury if I lied answering questions above;
4. I know I will have to pay an attorney's fee if appointed a lawyer;
5. I am unable to pay the $15.00 application fee and request it be waived.

_____ John D. Jones

WITNESS/INTERPRETER DEFENDANT

Subscribed and sworn to before me this 25 day of Aug, 199 9

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JUN 22 2017

RICK WARREN COURT CLERK Oklahoma County

_____

JUDGE OF THE DISTRICT COURT

ORDER

~~THE COURT FINDS:~~ Based on the foregoing sworn application for appointed counsel and in-court interview, that the defendant (IS) (~~IS NOT~~) indigent and (~~IS~~) (IS NOT) ABLE TO PAY THE $15.00 application fee.

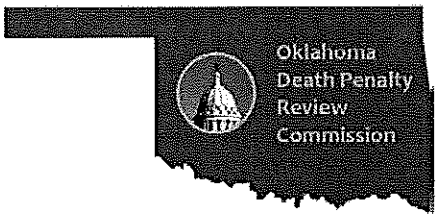
THE COURT ORDERS THAT: The defendant (BE) (~~NOT BE~~) represented by the Public Defender of Oklahoma County or Appointed Counsel in the above styled case until further order of this Court.

THE COURT FURTHER ORDERS THAT: The $15.00 application fee (BE) (~~NOT BE~~) waived for good cause shown above.

DONE this 25 day of Aug, 199 9 _____

JUDGE OF THE DISTRICT COURT

Attachment 3



FOR IMMEDIATE RELEASE

MEDIA CONTACT
Brenda Barwick, APR
(405) 516-9686
brenda@jones.pr

INDEPENDENT BIPARTISAN COMMISSION RECOMMENDS EXTENDING CURRENT MORATORIUM ON THE DEATH PENALTY

Oklahoma City (April 25, 2017) — The Oklahoma Death Penalty Review Commission, a bipartisan group of eleven prominent Oklahomans, unanimously recommends extending the current moratorium on the death penalty in its final report. For nearly a year-and-a-half, the Commission studied all aspects of Oklahoma's death penalty system, from arrest to execution, and today announced its recommendations at a news conference held in the Oklahoma State Capitol.

"The Commission did not come to this decision lightly," said Commission Co-Chair former Governor Brad Henry, of Henry-Adams Companies, LLC. "Due to the volume and seriousness of the flaws in Oklahoma's capital punishment system, Commission members recommend that the moratorium on executions be extended until significant reforms are accomplished."

The bipartisan Commission, comprising five women and six men, represents urban and rural communities, as well as prosecutors, defense attorneys, individuals who have served in each of the three branches of government, law school professors and deans, victims' advocates and Native American advocates. In the course of their work, Commissioners gathered data from state and local government agencies, reviewed scholarly articles, commissioned further research, conducted interviews and heard presentations from those with direct knowledge of how the system operates. Commissioners met with a number of stakeholders who have been directly involved in death penalty cases, including law enforcement, prosecutors, defense attorneys, judges, families of murder victims and those wrongfully convicted.

Gov. Henry added, "Many of the findings of the Commission's investigation were disturbing and led members to question whether the death penalty can be administered in a way that ensures no innocent person is put to death."

Commission members agree that, at a minimum, those who are sentenced to death should receive this sentence only after a fair and impartial process that ensures they deserve the ultimate penalty of death.

(MORE)

To help ensure a fair and impartial process, the Commission's in-depth, 300+ page report includes over 40 recommendations to address systemic problems in key areas, including forensics, innocence protection, the execution process, and the roles of the prosecution, defense counsel, jury and judiciary.

"Our hope is for this report to foster an informed discussion among all Oklahomans about whether the death penalty can be implemented in a way that eliminates the unacceptable risk of executing the innocent, as well as the unacceptable risks of inconsistent, discriminatory and inhumane application of the death penalty," said Gov. Henry.

Joining Gov. Henry as co-chairs are Reta Strubhar, a former judge on the Oklahoma Court of Criminal Appeals (1993-2004) and former Assistant District Attorney of Canadian County (1982-1984); and Andy Lester, of the Spencer Fane law firm and a former U.S. Magistrate Judge for the Western District of Oklahoma who served on President Ronald Reagan's Transition team for the Equal Employment Opportunity Commission (1980-1981).

Members of the Commission are Robert H. Alexander, Jr., of The Law Office of Robert H. Alexander, Jr.; Howard Barnett, President of OSU-Tulsa; Andrew Coats, Dean Emeritus of OU College of Law; Valerie Couch, Dean of Oklahoma City University School of Law; Maria Kolar, Assistant Professor of OU College of Law; Christy Sheppard, a victims' advocate; Kris Steele, Director of The Education and Employment Ministry (TEEM) and former Speaker of the House; and Gena Timberman, founder of The Luksi Group.

To uphold Oklahoma values and aspirations of innocence protection, procedural fairness and justice, Commission members encourage the Oklahoma legislature, executive branch and judiciary to take actions to address systemic flaws in the death penalty system.

The Oklahoma Death Penalty Review Commission came together shortly after the state imposed a moratorium on the execution of condemned inmates while a grand jury investigated disturbing problems involving recent executions, including departures from the execution protocols of the Department of Corrections.

To download a free copy of the Oklahoma Death Penalty Review Commission report, visit okdeathpenaltyreview.org. For more information about the Commission, visit Facebook at okdeathpenaltyreview and on Twitter @OklaDPReview.

The Constitution Project (TCP) assisted the Commission's work with staff and researchers. TCP is a Washington, D.C., bipartisan, nonprofit organization that fosters consensus-based solutions to the most difficult constitutional challenges of our time.

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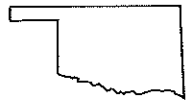
Attachment 4

DEATH. THAT'S THE PENALTY THAT WILL BE SOUGHT BY DISTRICT ATTORNEY BOB MACY FOR THE YOUNG SUSPECT IN THE MURDER OF AN EDMOND INSURANCE EXECUTIVE.

EYEWITNESS NEWS FIVE WAS THE FIRST TO TELL YOU ABOUT THE FILING OF THE CHARGES LATE YESTERDAY AFTERNOON. 19 YEAR OLD JULIUS JONES FACING A PRIMARY CHARGE OF MURDER IN THE FIRST WITH A REQUEST FOR THE DEATH PENALTY.

Its an awful crime. It happened in what should be a safe neighborhood. It happened for the worst of reasons, to get moeny to go buy drugs. Killed a totally innocent person. Put three other lives at risk... it was a crime that richly deserves the death penalty.
ALONG WITH JONES.... 20 YEAR OLD CHRISTOPHER O'NEAL IS ALSO FACING A FIRST DEGREE MURDER CHARGE BUT WITHOUT THE REQUEST FOR THE DEATH PENALTY. O'NEAL IS BELIEVED TO HAVE DRIVEN THE GET-AWAY CAR.
--CHARGES FOR A THIRD SUSPECT, DEMOND COLEMAN, WHO IS BELIEVED TO HAVE HELPED JULIUS JONES AVOID POLICE, ARE EXPECTED TO BE FILED TODAY.

Attachment 5



Appendix IA[1]

Race and Death Sentencing for Oklahoma Homicides, 1990-2012[2]

I. Introduction

In the first 15 years of the 21st century, we have seen several indicators that the use of the death penalty is in sharp decline in the United States. According to the Death Penalty Information Center, between 1996 and 2000 an annual average of 275 new prisoners arrived on America's death rows, but by 2015 this figure had precipitously decreased to 49.[3] The average number of executions per year has fallen nearly fifty percent since the last five years of the twentieth century, from 74 between 1996 and 2000 to 376 in the years 2011-2015.[4] In just the past 10 years, seven states have abolished the death penalty,[5] the Delaware Supreme Court invalidated that state's statute in August 2016,[6] and four more states –Washington, Oregon, Colorado and Pennsylvania – have seen their governors impose moratoria on executions. A September 2016 poll by the Pew Research Center found that slightly less than half of Americans (49 percent) supported the death penalty,[7] the lowest level of support in more than 40 years. A 2015 poll by Quinnipiac indicates that more Americans (48%) now prefer a sentence of Life Imprisonment without Parole (which is available in all death penalty jurisdictions) to a death sentence (43%).[8] Even in Oklahoma, a November 2015 poll found that the majority of the population (52 percent) would prefer a sentence of life plus restitution rather than the alternative of the death penalty.[9] A second poll taken in July 2016 found that 53 percent of the "likely voters" in the state would prefer life

[1] This report is an early draft of an independent study (current through November 1, 2016), submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. The final study will be published by the Northwestern University School of Law in the fall of 2017. *See* Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides, 1990-2012*, 107 Nw. U. J. Crim. L. & Criminology. The Commission is grateful to the authors for providing this study for its consideration during its review of Oklahoma's death penalty. **Please note: the Commission did not edit this draft report and any errors should be attributed the authors. Moreover, the views reflected by the authors do not necessarily reflect those of the Commission.** This study is included in the Commission's report as a reference for Appendix I.

[2] This report was authored by Glenn L. Pierce, Michael L. Radelet, and Susan Sharp. Radelet is a Professor of Sociology, University of Colorado-Boulder; Pierce is a Principal Research Scientist, School of Criminology & Criminal Justice, Northeastern University, Boston; Sharp is the David Ross Boyd Professor/Presidential Professor Emerita, Department of Sociology, University of Oklahoma. The three authors are listed alphabetically; each made equal contributions to this project. The authors wish to thank Melissa S. Jones and Amy D. Miller for their assistance in helping to build the Oklahoma death row data set.

[3] *Death Sentences in the United States From 1977 by State and by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[4] *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year.

[5] New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).

[6] Eric Eckholm, *Ruling by Delaware Justices Could Deal Capital Punishment in the State a Final Blow*, NEW YORK TIMES, Aug. 2, 2016, at A11.

[7] Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades* (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/.

[8] *Quinnipiac University Poll Release Detail*, http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=2229 (June 1, 2015).

[9] *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative (Nov. 19, 2015); *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative (Nov. 19, 2015); Graham Lee Brewer, *New Poll Shows Over Half of Oklahomans Support Life Sentences Over the Death Penalty*, NEWSOK, http://newsok.com/article/5461486.

sentences without parole and mandatory restitution instead of the death penalty.[10] These results document a changing climate around death penalty debates: apparently more Americans now prefer long prison terms rather than the death penalty.

One reason for the decline in support for and the use of the death penalty is growing concerns that the penalty is not reserved for "the worst of the worst." In a nationwide Gallup Poll taken in October 2015, 41 percent of the respondents expressed the belief that the death penalty was being applied unfairly, and a 2009 Gallup Poll found that 59 percent of the respondents believed that an innocent person had been executed in the preceding five years.[11] This concern is undoubtedly on the minds of many Oklahomans, since ten inmates have been released from its death row since 1972 because of doubts about guilt.[12]

In this article, we examine another question that is related to the contention that the death penalty is reserved for the worst of the worst: the possibility that the race of the defendant and/or victim affects who ends up on death row. To do so, we will study all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012, and compare those cases with the subset that resulted in the imposition of a death sentence.

Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population.[13] Racial and ethnic minorities are over-represented among those on death row, which housed 46 men and one woman as of July 1, 2016 (23 white, 20 black, 3 Native American, 2 Latino).[14] Between 1972 and October 31, 2016, Oklahoma conducted 112 executions (with the first occurring in 1990), which ranks second among U.S. states behind Texas and gives Oklahoma the highest per capita execution rate in the U.S.[15]

Of the 112 executed inmates, 67 were white (60 percent), 35 black, 6 Native American, 2 Asian, 1 Latino, and 1 whose race was classified as "Other."[16] The races of the homicide victims in the death penalty cases are also predominately white, with 83 of the 112 executed inmates convicted of killing at least one white victim (74.1 percent), 19 at least one black victim, 7 at least one Asian victim, 5 at least one Latino victim, 1 at least one Native American victim, and 1 who killed two people whose races are classified as "Other" (both the assailant and his two victims were Iraqi).[17]

[10] Silas Allen, *Majority of Oklahomans Support Replacing Death Penalty with Life Sentences, Poll Shows*, THE OKLAHOMAN, Aug. 6, 2016, http://newsok.com/majority-of-oklahomans-support-replacing-death-penalty-with-life-sentences-poll-shows/article/5512693.

[11] *Gallup Poll Topic: Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx.

[12] These former death row inmates include Charles Ray Giddens (released in 1981), Clifford Bowen (1986), Richard Jones (1987), Greg Wilhoit (1995), Adolph Munson (1995), Robert Miller (1998), Ronald Williamson (1999), Curtis McCarty (2007), Yancy Douglas (2009), and Paris Powell (2009). *See* Death Penalty Information Center, *List of Exonerees Since 1973*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty.

[13] https://suburbanstats.org/population/how-many-people-live-in-oklahoma

[14] DEATH ROW USA, Summer 2016, http://www.naacpldf.org/files/publications/DRUSA_Summer_2016.pdf (current as of July 1, 2016).

[15] http://www.deathpenaltyinfo.org/state-execution-rates. Among the executed are two juveniles (one of whom was just 16 at the time of his crime), three women, and seven inmates who dropped their appeals and asked to be executed. *See also Executions Statistics* available from the Oklahoma Department of Corrections, https://www.ok.gov/doc/Offenders/Death_Row/. There have also been four death sentences commuted to prison terms by Oklahoma governors since 1972: Phillip Smith (2001), Osvaldo Torres (2004), Kevin Young (2008), and Richard Smith (2010). *See* Michael L. Radelet, *Commutations in Capital Cases on Humanitarian Grounds*, available at http://www.deathpenaltyinfo.org/clemency#List.

[16] This does not include Timothy McVeigh, executed under federal authority in June 2001 for murdering 168 people in the explosion of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995.

[17] These tallies were calculated from data provided by Death Penalty Information Center, *Searchable Execution Database*, available at http://www.deathpenaltyinfo.org/views-executions. Because four executed inmates were convicted of killing multiple victims who had different races, one execution can fit two or more of these criteria, giving us a total for these calculations of 116.

II. Previous Research

Concerns about the impact of the defendant's and/or victim's race on death penalty decisions have a long history in the U.S. Soon after the 1976 decision in Gregg v. Georgia that breathed new life into death penalty statutes,[18] researchers led by the late University of Iowa legal scholar David Baldus began to study the possible relationships, with the most comprehensive study by Baldus and his team focusing on Georgia.[19] Those race studies conducted prior to 1990 were reviewed by the U.S. government's General Accounting Office in 1990, which produced a report concluding that in 82 percent of the 28 studies reviewed, "race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."[20]

In 2003, Baldus and George Woodworth in effect updated and expanded the GAO Report, reviewing 18 race studies that had been published or released after 1990.[21] Their conclusions are worthy of a lengthy quote:

> Overall, their results indicate that the patterns documented in the GAO study persist. Specifically, on the issue of race-of-victim discrimination, there is a consistent pattern of white-victim disparities across the systems for which we have data. However, they are not apparent in all jurisdictions nor at all stages of the charging and sentencing processes in which they do occur. On the issue of race-of-defendant discrimination in the system, with few exceptions the pre-1990 pattern of minimal minority-defendant disparities persists, although in some states black defendants in white-victim cases are at higher risk of being charged capitally and sentenced to death than are all other cases with different defendant/victim racial combinations.[22]

Overall, Baldus and Woodworth concluded that the studies displayed four clear patterns: 1) with few exceptions, the defendant's race is not a significant correlate of death sentencing, 2) primarily because of prosecutorial charging decisions, those who kill whites are significantly more likely than those who kill blacks to be sentenced to death, 3) black defendants with white victims are especially likely to be treated more punitively, and 4) counties with large numbers of cases with black defendants or white victims show especially strong impacts on black defendants or on those with white victims.[23]

Professor Baldus passed away in 2011, but one of his students, Catherine Grosso, has taken the reigns and assembled a team that has continued Baldus's work. Among their publications is one that recently updated the Baldus literature review.[24] Published in 2014, the researchers had by then identified 36 studies that had been completed after the 1990 GAO Report. Their review identified four patterns:

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[18] Gregg v. Georgia, 428 U.S. 153 (1976).

[19] DAVID C. BALDUS, GEORGE G. WOODWORTH, & CHARLES A. PULASKI, JR. EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

[20] *See* GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD.90-57 (1990), at 5.

[21] David C. Baldus & George Woodworth, G., *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIMINAL LAW BULLETIN 194 (2003).

[22] *Id.*, at 202.

[23] *Id.*, at 214-15.

[24] Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, 3rd ed. (J. R. Acker, R. M. Bohm, & C. S. Lanier, eds. 2014), 525-76.

- Four of the studies did not discover any race effects.
- Four found independent effects of the race of the defendant (that is, effects that remained after statistically controlling for other relevant variables).
- Twenty-four studies in 15 jurisdictions found significant race-of-victim effects.
- Nine found that black defendants with white victims were more harshly treated than other homicide defendants.[25]

Unfortunately, none of these post-1990 studies focused on Oklahoma, and only one credible study has explored the possibility of racial disparities in Oklahoma in the post-*Furman* years.[26] In that study, first published in *Stanford Law Review*,[27] Samuel Gross and Robert Mauro studied all homicides and death sentences in Oklahoma during the 53-month period, August 1976 through December 1980.[28] Thus, these data are almost forty years old. Included were 43 death sentences imposed in 898 cases.[29] Initially the researchers found that death sentences were imposed in 16.7 percent of the cases in which a black was suspected of killing a white (B-W), 6.6 percent of the cases where a white was suspected of killing a white (W-W), and 1.3 percent of the black on black (B-B) cases.[30]

If the homicide was accompanied by other felony circumstances, no cases with black victims resulted in a death sentence, compared to 30.6 percent of the white victim cases. If the victim and defendant were strangers, 21.8 percent of the white Victim cases resulted in a death sentence, compared to 3.4 percent of such cases with black victims.[31]

In 2016 a second study of death sentencing in Oklahoma was published.[32] The paper attempted to look at death sentencing in Oklahoma in a sample of 3,395 homicide cases over a 38-year time span, 1973-2010. Unfortunately, some of the data presented by the authors in that paper is incorrect, so the paper is not useful. For example, in Appendix B we are told that 8 percent of the white-white homicides contained "capital" or "first-degree" (as opposed to "second-degree" murder charges) (137/1,696), compared to 53 percent of the black-black cases (348/659).[33] We are also told that the data set includes 1,030 cases "charged capital" in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma.[34]

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[25] *Id.*, at 558-59. Because some of the studies reached more than one of these conclusions, the sum of these findings (41) is greater than the total number of studies (36).

[26] SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 88-94 (1989).

[27] Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27 (1984).

[28] GROSS & MAURO, *supra* note 26, at 233.

[29] *Id.*, at 235.

[30] *Id.*

[31] *Id.*, at 236.

[32] David P. Keys & John F. Galliher, *Nothing Succeeds Like Failure: Race, Decisionmaking, and Proportionality in Oklahoma Homicide Trials, 1973-2010*, in RAGE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V. KEMP 123 (David P. Keys & R. J. Maratea eds. 2016). We mention this study only to show our awareness of it and to alert future students of the death penalty in Oklahoma that its data is fundamentally flawed, from which no conclusions are possible.

[33] *Id.*, at 142.

[34] Email exchange available with the author (Radelet).

III. Methodology

We examined all cases in which the death penalty was imposed for Oklahoma homicides that occurred between January 1, 1990, and December 31, 2012. Using 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns. We ended with cases in 2012 because we found only one death penalty case for a 2013 murder, and any homicides that occurred in 2013 or later might still be awaiting final disposition. During those 23 years, the state recorded some 5,090 homicides, for an annual average of 221.[35]

A. Homicide Data Set

To begin, we assembled a data set on all Oklahoma homicides with an identified perpetrator over a 23 year period from 1990 to 2012.[36] We obtained these data from the FBI's "Supplemental Homicide Reports," or SHRs. Supplemental Homicide Reports are compiled from data supplied by local law enforcement agencies throughout the United States, who report data on homicides to a central state agency, which in turn reports them to the FBI in Washington for inclusion in its Uniform Crime Reports.[37] While the Reports do not list the suspects' or victims' names (and only the month and year of the offense – not the specific date), they do include the following information: the month, year, and county of the homicide; the age, gender, race,[38] and ethnicity of the suspects and victims; the number of victims; the victim-suspect relationship; weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).[39] Local law enforcement agencies usually report these data long before the defendant has been convicted, so offender data are for "suspects," not convicted offenders.[40]

The SHRs include information on all murders and non-negligent manslaughters, but they do not differentiate between the two types of homicides. They define murders and non-negligent manslaughters as "the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded."[41]

In addition, the SHRs have a separate classification for justifiable homicides, which are defined as "(1) the killing of a felon by a law enforcement officer in the line of duty; or (2) the killing of a felon, during the commission of a felony, by a private citizen."[42] Because the data come from police agencies, not all the identified suspects are eventually convicted of the homicide.

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[35] Oklahoma Crime Rates 1960-2013, available at http://www.disastercenter.com/crime/okcrimn.htm.

[36] This is similar to the methodology used in other studies that Pierce and Radelet have conducted using information from the Supplemental Homicide Reports. *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LOUISIANA LAW REVIEW 647 (2011); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1 (2005); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA LAW REVIEW 1 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 NORTH CAROLINA LAW REVIEW 2119 (2011). The methodology was developed and first used by GROSS & MAURO, *supra* note 26, at 35-42.

[37] *See* http://www.bjs.gov/content/pub/pdf/ntmh.pdf (last visited August 1, 2016). We have used SHR data in other research projects, and an earlier version of this paragraph was included in Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1, 15 (2005).

[38] The racial designations used in the UCR are defined as follows: (1) white. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East. (2) black. A person having origins in any of the black racial groups of Africa. (3) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition. (4) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent. (5) Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa. (6) Unknown). Federal Bureau of Investigation, UNIFORM CRIME REPORTING HANDBOOK 97, 106 (2004).

[39] *See id.*, NAT'L ARCHIVE OF CRIM. JUSTICE DATA.

[40] *Id.*

[41] *See* FEDERAL BUREAU OF INVESTIGATION, *Uniform Crime Reporting Statistics, UCR Offense Definitions*, http://www.ucrdatatool.gov/offenses.cfm (last visited August 1, 2016).

[42] *Id.*

For our project, a total of 4,813 homicide suspects were identified from Oklahoma SHR's for homicides committed during the period 1990 through 2012. Only those SHR cases that recorded the gender of the homicide suspect were included in the sample, effectively eliminating those cases in which no suspect was identified. In other words, for SHR homicide cases where no suspect gender information was recorded, we assumed that the police had not been able to identify a suspect for that particular homicide incident, rendering sentencing decisions irrelevant.

Finally, we constructed one new SHR case and added it to our data when we found a death penalty case with no corresponding case in the existing SHR data. To better pinpoint the race differences, we also dropped 82 cases in which there were multiple victims who were not all the same races, and an additional 64 cases where either the victim or offender was Asian. This resulted in a reduction of 146 homicide cases (three percent of the original sample of 4,813 homicide cases) and one addition, resulting in a final sample size of 4,668 cases.

In addition to the race of the victim, the SHR data include information on the number of homicide victims in each case, and on what additional felonies, if any, occurred at the same time as the homicide. These variables are key to the analysis reported below.

B. Death Row Data Set

Unfortunately, there is no state agency, organization, or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the "Death Row Data Set."

To do this, we used data compiled by the NAACP Legal Defense and Educational Fund, Inc., and issued in a (usually) quarterly publication called "Death Row USA."[43] This highly-respected source lists (by state) the name, race and gender of every person on America's death rows. Unfortunately, it contains no other information about the defendant (e.g., age), victim (e.g., name, age, race), or crime (e.g., date, location, or circumstances).

Copies of most back issues of Death Row USA are available online,[44] and other issues are available in hard copy in many law libraries, including the University of Colorado's. From these sources we made copies of all the Oklahoma inmates listed in the 83 issues of Death Row USA published in the years 1990-2012. From those we identified the *additions* to the lists, since the additions would give us a preliminary list of those sentenced to death for homicides committed on or after January 1, 1990. We were not interested in the names of inmates who were on death row in the first issue we examined since all of those inmates were convicted of murders from the 1970s or 1980s. We were only interested in the additions, and then only those sent to death row for murders committed on or after January 1, 1990.

With that list, we conducted internet searches for information about the crime – specific date, county of offense, name of victim/s (and age, sex, and race), and the like. All those whose crimes occurred in the 1980s or after December 31, 2012 were deleted. We also used a web site maintained by the Oklahoma Department of Corrections to confirm the inmate's race and gender, as well as the county of conviction and the inmate's date of birth.[45] Because this source provides only the date of the conviction, not the date of the offense, information on the date of offense had to be obtained from other sources (primarily newspaper articles and published appellate decisions in the case).

In the end, we identified 153 death sentences imposed against 151 offenders for homicides committed 1990-2012. Two men, Karl Myers and Darrin Pickens, had two separate death sentences imposed in two separate trials for two separate homicides, so each defendant is counted twice.

[43] DEATH ROW USA, http://www.naacpldf.org/death-row-usa.

[44] *See id.*

[45] OKLAHOMA DEP'T OF CORRECTIONS, *Offender Look-Up* Database, https://okoffender.doc.ok.gov/.

On multiple victim homicides, we counted the homicides with at least one female victim as homicides with female victims.

IV. Results

A. Frequencies and Cross-Tabulations

Table 1 displays descriptive statistics from our data. There are a total of 4,668 homicides included, of which 2,060 (44.1 percent) involved both white suspects and white victims, and 1,266 (27.1 percent) involved black suspects and black victims. There are 427 cases with a black suspect and white victim (9.1 percent), and 143 cases with a white suspect and a black victim (3.1 percent).

Table 1: Oklahoma Homicides by Suspect's and Victim's Race/Ethnicity

	Race/Ethnicity of Victim				
	White Only	Black Only	Hisp. Only	Nat. Am. Only	TOTAL
White Suspect	2060	143	38	99	2340
Black Suspect	427	1266	42	30	1765
Hispanic Suspect	65	21	133	8	227
Nat. Am. Suspect	151	15	12	158	336
TOTAL	2703	1445	225	295	4668

Table 2 shows that overall, 143 (3.06 percent) of the homicides with known suspects resulted in a death sentence. Homicides with white victims are the most likely to result in a death sentence. Here 106/2703 resulted in death (3.92 percent), whereas 37/1965 of the homicides with nonwhite victims resulted in death (1.88 percent).[46]

Table 2: Oklahoma Homicides and Death Sentences by Race of Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	2703	106	3.92
Black Victim	1445	27	1.87
Hispanic Victim	225	6	2.67
Native American Victim	295	4	1.36
TOTAL	4668	143	3.06

Table 3 looks at only those homicides with male victims. There are a sufficient number of cases to make conclusions only for cases with either white or black victims.[47] Of the white male victim cases 2.26 result in a death sentence, but only .77 of the black male cases result in a death sentence. Thus, homicides with white male victims are 2.94 times more likely to result in death than cases with black male victims (2.26 divided by .77).

Table 4 shows that homicides with at least one female victim are 4.6 times more likely to result in a death sentence (7.21 percent) than the homicides with no female victims shown in Table 3 (1.57 percent). There are 1,235 cases in the data with at least one female victim, and again we focus on differences between cases with white victims and black victims, and do not look at the other race/ethnicity categories that have low sample counts. The data show only small differences in death sentencing rates among cases with at least one female victim between white (7.57 percent) and black (6.67 percent) victims. Clearly, race makes less of a difference when women are killed than when men are killed.

Table 5 examines the percentage of cases that resulted in a death sentence by the race of the defendant. There is virtually no difference in the probability of a death sentence by race of defendant, with 3.2 percent of the white offenders sentenced to death and 3 percent of the nonwhite defendants.

[46] These 37 suspects were implicated in 27 cases with black victims, 6 with Hispanic victims, and 4 with Native American victims. The 1,965 victims included 1,445 cases with black (only) victims, 225 with Hispanic victim only, and 295 with Native American victim only.

[47] That is, there are so few cases with black, Hispanic, or Native American victims that small fluctuations in the number of death sentences will result in large proportional differences.

Table 3: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with No Female Victims

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	1857	42	2.26
Black Victim	1175	9	0.77
Hispanic Victim	189	1	0.53
Native American Victim	212	2	0.94
TOTAL	3433	56	1.57

Table 4: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with At Least One Female Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	846	64	7.57
Black Victim	270	18	6.67
Hispanic Victim	36	5	13.89
Native American Victim	83	2	2.41
TOTAL	1235	89	7.21

Table 5: Death Sentences by Race of Defendant

		White	Nonwhite	Total
	No	2266	2259	4523
		.968	.970	
Death Penalty Imposed				
	Yes	74	69	143
		.032	.030	
	Total	2340	2328	4668

Chi Square 1.55; 1 df; NS

Table 6: Death Sentences by Race of Victim

		White	Nonwhite	Total
	No	2597	1928	4525
		.961	.981	
Death Penalty Imposed				
	Yes	106	37	143
		.039	.019	
	Total	2703	1965	4668

Chi Square 15.92; 1 df; p<.001

However, there is much more to this story. Table 6 looks at the percentages of death penalty cases by the race of the victim. Here we see that 1.9 percent of those who were suspected of killing nonwhites were ultimately sentenced to death (37 divided by 1965), whereas 3.9 percent (106 divided by 2703) of those suspected of killing whites ended up on death row. The probability of a death sentence is therefore 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites.

Table 7 combines both suspect's and victim's races/ethnicities.[48] The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences was 1.9 and 1.8 percent death sentence respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence, compared to 5.8 percent of the nonwhites suspected of killing white victims. The gender of the victim also makes a very large difference in who ends up on death row. As Table 8 shows, 1.6 percent of the defendants suspected of killing males (no female victims) were sentenced to death, compared to 7.2 percent of those who were suspected of killing one or more women.

Table 7: Death Sentences by Races of Defendant and Victim

Defendant-Victim Race/Ethnicity

(W= White; NW=Nonwhite)

	NW-W	W-W	NW-NW	W-NW	Total
No	606	1991	1653	275	4525
	.942	.967	.981	.982	.969
Death Penalty Imposed					
Yes	37	69	32	5	143
	.058	.033	.019	.018	.031
Total	643	2060	1685	280	4668

Chi Square 25.48; 3 df; p<.001

Table 9 (on next page) shows the likelihood of a death sentence by the race and gender of the victim. Among those suspected of killing white males, 2.3 percent are sentenced to death, whereas among those suspected of killing nonwhite males, only .8 percent are sent to death row. On the other hand, 7.6 percent of those suspected of killing white females are sentenced to death, as are 6.4 percent of those suspected of killing nonwhite females.

Finally, Table 10 (on next page) displays the percent of death penalty cases broken down by the presence of zero, one, or two "additional legally relevant factors." The factors we included are 1) whether the homicide event also included additional felonies, and 2) whether there were multiple victims. All cases had 0, 1, or 2 of these factors present. Table 10 shows what would be expected: 1.7 percent of the cases with no additional legally relevant factors ended with a death sentence, 6.2 percent of the

Table 8: Death Sentences by Gender of Victim (V=Victim)

		No Female V	1+ Female V	Total
	No	3378	1146	4535
		.984	.928	.969
Death Penalty Imposed				
	Yes	54	89	143
		.016	.072	.031
	Total	3433	1235	4668

Chi Square 97.07; 1 df; p<.001

[48] When the analysis examines the potential effect of more than one independent variable the likelihood of a death sentence, we combine the separate racial/ethnic minority categories (i.e., black, Hispanic, and Native American) into a single minority category. Each of these minority subgroups are recognized as groups that are subject to subject to discrimination.

Table 9: Death Sentences by Race/Gender of Victim

(W= white; NW=Nonwhite)

		W-F	W-M	NW-F	NW-M	Total
	No	782	1815	364	1564	4525
		.924	.977	.936	.992	.969
Death Penalty Imposed						
	Yes	64	42	25	12	143
		.076	.023	.064	.008	.031
	Total	846	1857	389	1576	4668

Chi Square 104.69; 3 df; p<.001

Table 10: Death Sentences by Number of Additional Legally Relevant Factors (ALRF)

		No ALRF	1 ALRF	2ALRF	Total
	No	3510	978	37	4525
		.983	.938	.698	.969
Death Penalty Imposed					
	Yes	62	65	16	143
		.017	.062	.302	.031
	Total	3852	1043	53	4668

Chi Square 187.9; 2 df; p<.001

cases with one factor, and 30.2 percent of the cases with two factors.

We now turn our attention to pinpointing the effects of each of our predictor variables.

B. Multiple Logistic Regression Analysis

Table 11 presents the results from a statistical technique called logistic regression.[49] This is the statistical technique of choice used to predict a dependent variable that has two categories, such as whether or not a death

[49] In logistic regression, the dependent variable is predicted with a series of independent variables, such as gender, income, etc. The model predicts the dependent variable with a series of independent variables, and the unique predictive utility of each independent variable can be ascertained. As we have explained elsewhere:

> Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, y=P / 1-P and; (1) $\ln(y) = \hat{a}_{e,} X\hat{a} + {}_{IS}$ where $\hat{a}_{0}$ is an intercept, $\hat{a}_{i}$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ${}_{IS}$ is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.

Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 59 (2002).

sentence is imposed.[50]

Table 11 shows that there are five variables in our model that are associated with who is sentenced to death in Oklahoma: 1) having a white female victim, 2) having a white male victim, 3) having a female victim from a minority race of ethnicity, 4) having one additional legally relevant factor (a homicide event with more than one victims OR one in which there were additional felony circumstances present, and 5) having two additional legally relevant factors present (a homicide event with more than one victims AND one in which there were additional felony circumstances present. The reference category for the latter two variables is "no additional factors." We also included a variable measuring the race of the defendant (white vs. minority), but that factor was not statistically significant.

Table 11: Logistic Regression Analysis of Victim's Race/Gender and Number of Additional Legally Relevant Factors on the Imposition of a Death Sentence (n=4668)

	β	Sig.	Exp β
Independent Variables			
White Female Victim	2.261	.000	9.592
White Male Victim	1.171	.001	3.225
Minority Female Victim	2.161	.000	8.678
One additional aggravator*	1.235	.000	3.439
Two additional aggravators**	2.553	.000	12.847
Defendant's Race (white vs. minority)	.284	.164	1.328
Constant	5.799	.000	.003

*Either multiple victim homicide or homicide with additional felony circumstances

**Both multiple victim homicide and homicide with additional felony circumstances

It is no surprise that having one or both legally relevant factors increases the odds of a death sentence dramatically. Let's focus on the column labeled Exp β. The Exp β for "one additional aggravator" is 3.439 (rounded to 3.4), which is also the odds ratio. Thus, after controlling for all the other variables in the model, the odds of receiving a death sentence are 3.4 times higher in cases with one additional legally relevant factor (compared to cases with no additional legally relevant factors). When the two additional legally relevant factors are both present, the Exp β tells us that the odds of a death sentence are 12.847 (12.8) times higher than cases where no additional factors are present. This is what would be expected – clearly those cases are highly aggravated.

More interesting are the effects of race and gender. Here the excluded category (the comparison group) includes cases with male victims, minority races (black, Hispanic, or Native American). The Exp β in Table 11 shows that the odds of a death sentence for those with white female victims are 9.59 time higher than in cases with minority male victims. The odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence with minority male victims. Finally, the odds of a death sentence for those with minority female victims are 8.68 times higher than the odds of a death sentence with minority male victims. And all these race/gender effects are net of our two control variables (multiple murder victims and the presence of additional felony circumstances), and all are statistically significant.

[50] Logistic regression is a statistical method to predict the value of one variable with a series of other variables. The technique is regularly used in studies of race and death sentencing. See, e.g., David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Equal Justice And The Death Penalty* 78 n.55 (1990) (explaining how logistic regression models can be used to calculate the odds of a death sentence); Gross & Mauro, *supra* note 15, at 248–52 (using a logistic regression model to help predict the probability of a death sentence); Raymond Paternoster et al., JUSTICE BY GEOGRAPHY AND RACE: THE ADMINISTRATION OF THE DEATH PENALTY IN MARYLAND, 1978–1999, 4 MARGINS 1, 51–44 (2004) (using logistic regression to address the relationship between victim and offender race).

V. Conclusion

The data show that death sentencing in Oklahoma is not related to the race of the defendant. However, there are rather large disparities in the odds of a death sentence that correlate with the gender and the race/ethnicity of the victim. Controlling for other factors — the presence of additional felony circumstances and the presence of multiple victims — cases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims.