IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PCD 2017 1313

JULIUS DARIUS JONES,	PC Case No.:
Petitioner,	**CAPITAL POST CONVICTION PROCEEDING**
vs.	Prior Post Conviction Nos.: PCD-2002-630, PCD-2017-654
THE STATE OF OKLAHOMA,	Direct Appeal No.: D-2002-534
Respondent.	District Court of Oklahoma County Case No.: CF-1999-4373

THIRD APPLICATION FOR POST-CONVICTION RELIEF

DEATH PENALTY CASE

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JULIUS DARIUS JONES
December 29, 2017

PART A: PROCEDURAL HISTORY

Petitioner, Julius Darius Jones, through undersigned counsel, hereby submits his third 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 Mr. Jones' original application for post-conviction relief and a copy of his second application for post-conviction relief are attached hereto as Attachments 1 and 2. The appendix of attachments to the original and subsequent applications have not been attached hereto, but they are available should this Court find them necessary for its review of Mr. Jones' application. The convictions and sentences from which relief is sought are: murder in the first degree, sentence of death by lethal injection; possession of a firearm after former conviction, sentence of fifteen (15) years imprisonment; conspiracy to commit a felony, sentence of twenty-five (25) years imprisonment.

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' 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' 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' 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 Second Post-Conviction Application:

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.

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' 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' 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 racial prejudice influenced the decision of at least one juror to convict Mr. Jones and sentence him 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 (O.R. 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

[1] Mr. Jones 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. Mr. Jones' hair was thus not long enough to fit Ms. Tobey's description of the man who shot

over the steering wheel, and held keys in his left 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 located 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-

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and killed her brother. However Mr. Jones' 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 Mr. Jones' and he wore it in corn rows. (*See* State Tr. Ex. 99.)

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 Mr. Jones as the perpetrator of the Edmond shooting and car robbery. (08/03/1999 Police Interview of Ladell King.) He testified that Mr. Jones 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 Mr. Jones 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 Mr. Jones 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 Mr. Jones 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 Mr. Jones at the Renaissance Apartments looking for King. (Tr. V 272-73.) Owens claimed that Mr. Jones told him that he had left his house out of a window. (Tr. V 273.) According to King's then-girlfriend, Vickson McDonald, Mr. Jones told her on the afternoon of July 30, 1999 that he had avoided the police by leaving his parents' home out

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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 Mr. Jones shot Mr. Howell and stole his Suburban, he followed Mr. Jones back to King's residence at the Renaissance Apartments. (*See* Tr. VIII 165.)

of a second story window. (Tr. VII 148.)

Police arrested Christopher Jordan, Mr. Jones' co-defendant, on the evening of July 30, 1999. (Tr. VII 186-87, 241-44, 248.) Like King, Jordan claimed that Mr. Jones had perpetrated Mr. Howell's murder.[4] (Tr. VIII 164-65, 167-70.) Mr. Jones was subsequently arrested on the morning of July 31, 1999 (Tr. VII 193-98) and charged with capital murder.[5]

Mr. Jones continues to maintain his innocence.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

Newly discovered evidence establishes that racial prejudice influenced the decision of at least one juror to convict Mr. Jones and sentence him 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.

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[4] Both Jordan and King benefitted from their testimony against Mr. Jones. Jordan pled guilty to first-degree murder (Count 1) and conspiracy to commit a felony (Count 3), and received a life sentence with all but the first thirty (30) years suspended. (Tr. VIII 94; 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. Mr. Jones' jury was told by prosecutor Sandra Elliott that, "Mr. Jordan has already entered a plea of guilty to the crime of Murder in the First Degree and has received a life sentence *except only the first 35 years of that life sentence has to be served.*" (Tr. IV 51-52 (emphasis added); *see also* Tr. X 51.) Counsel for Mr. Jones has learned, however, that Jordan was released from prison in December 2014 after serving just fifteen (15) years of his life sentence. Additionally, a larceny charge against Jordan was dismissed. (Tr. VIII 191-92.) Meanwhile, 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.

I. Introduction

On November 2, 2017, counsel for Mr. Jones learned from Victoria Coates,[6] one of the twelve jurors who convicted Mr. Jones and sentenced him to death in the above-captioned case, that at least one juror who sat in judgment of Mr. Jones harbored racial prejudice that influenced his verdict. According to V.A.:

> During the trial I was the juror who went to the judge with the comment from another juror about how it was a waste of time and 'they should just take the nigger out and shoot him behind the jail' although that juror was never removed and nothing further came from it[.]

(Ex. A.)

Numerous courts across the country have recognized, in various contexts, that an individual's use of racial slurs "constitutes direct evidence of discriminatory intent." *Kinnon v. Arcoub, Gopman & Assoc., Inc.*, 490 F.3d 886, 891 (11th Cir. 2007); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997) (explaining that racial slurs used "even in jest could be evidence of racial antipathy" (quoting *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990)); *Brown v. East Mississippi Elec.*

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[6] Victoria Coates was previously Victoria Armstrong, who served on Mr. Jones' capital jury in 2002. (*See* Tr. XII 95-96; *see also* Ex. B.) For the sake of clarity, and out of an abundance of caution, Ms. Coates will be referred to hereafter by her initials "V.A." All other jurors will likewise be referred to throughout this Application by their initials. Additionally, in compliance with Rule 2.6(E) of this Court's rules, counsel for Mr. Jones has, prior to this filing, contacted the clerk of this Court in order to advise that this document contains material—namely, juror information—that may be protected under the rule. *See* Rule 2.6(E), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2016); *see also* Okla. Stat. Ann. tit. 38, § 36. Mr. Jones has sought and received guidance from the clerk of this Court regarding how jurors' names appear throughout this Application, and concerning the filing of any exhibits which contain jurors' identifying information.

Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993) (finding that supervisor's "use of racial slurs constitutes direct evidence that racial animus was a motivating factor" in disciplinary decision and not merely "an innocent habit"). The United States Supreme Court has likewise held, unequivocally, that racial prejudice is "constitutionally impermissible" if not "totally irrelevant" in the criminal justice context, where a defendant's life and liberty hang in the balance. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 2747, 77 L. Ed. 2d 235 (1983); *see also Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 3000, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), the Supreme Court reaffirmed this elemental principle, holding that where trial courts are confronted with evidence that a juror "relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment *requires* ... the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869 (emphasis added). Under *Peña-Rodriguez*, then, Mr. Jones is, at minimum, constitutionally entitled to an evidentiary hearing on his claim that racial prejudice influenced a juror's decision to convict and sentence him to death.

Racial prejudice evidenced by "one or more jurors" not only violates the Sixth Amendment fair-trial guarantee, *Pena-Rodriguez*, 137 S. Ct. at 869, but it also renders unlawful—because repugnant to the Eighth Amendment—a jury's decision to condemn a defendant to die. The Supreme Court has unequivocally condemned racial prejudice playing *any* role in a sentencer's exercise of its discretion to impose capital punishment.

Stephens, 462 U.S. at 885, 103 S. Ct. at 2747; *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"). That at least one juror who sat in judgment of Mr. Jones evidenced racial prejudice—"a familiar and recurring evil" throughout this nation's history—renders his conviction and death sentence 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. *Peña-Rodriguez*, 137 S. Ct. at 868. This Court should therefore grant Mr. Jones relief from his unconstitutional conviction and sentence of death. Alternatively, as Mr. Jones has stated a colorable claim that his rights under the federal and state constitutions have been violated, this Court should grant his requests for discovery and an evidentiary hearing[7] in order to further factually develop and support this meritorious claim.

II. Mr. Jones satisfies the successor post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8) 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:

> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or

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

b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089(D)(8). In addition, Rule 9.7(G) of the Rules of the Oklahoma Court of Criminal Appeals 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). Mr. Jones' present application for post-conviction relief satisfies these requirements.

First, Mr. Jones' present claim—that racial prejudice influenced the decision of at least one juror to convict him of capital murder and to sentence him to death—was not previously raised either on direct appeal or in Mr. Jones' original and second post-conviction proceedings. (Case No. D-2002-534, Appellant's Original Brief, 03/08/2004; Reply Brief of Appellant, 07/21/2004; Suppl. Brief of Appellant Following Remand, 05/12/2005; Case No. PCD-2002-630, Original Application for Post-Conviction Relief, 02/25/2005; Case No. PCD-2017-654, Second Application for Post-Conviction Relief, 06/23/2017.) Nor could it have been, for at the time of Mr. Jones' direct appeal and original

post-conviction proceedings, longstanding Oklahoma law squarely prohibited defendants from challenging the validity of a jury's verdict by inquiring into the deliberative process. *See* Okla. Stat. Ann. tit. 12, § 2606(B); *Wacoche v. State*, 1982 OK CR 55, 644 P.2d 568 (Okla. Crim. App. 1982); *Matthews v. State*, 2002 OK CR 16, ¶¶ 13-14, 45 P.3d 907, 914-15 (Okla. Crim. App. 2002); *Wood v. State*, 2007 OK CR 17, ¶ 42 n.29, 158 P.3d 467, 480 n.29 (Okla. Crim. App. 2007). Furthermore, the factual basis for Mr. Jones' present claim became available only on November 2, 2017—nearly five months after Mr. Jones filed his second application for post-conviction relief with this Court. (*See* Case No. PCD-2017-654, Second Application for Post-Conviction Relief, 06/23/2017.)

While, as explained above, the legal basis for Mr. Jones' present claim was long unavailable to Oklahoma defendants, in the recently-decided case of *Peña-Rodriguez v. Colorado*, 137 S. Ct. at 861, 863, the United States Supreme Court carved out a narrow constitutional exception to the "no-impeachment rule," 137 S. Ct. at 861, 863, holding that where a juror's statement "indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869. In so holding, *Peña-Rodriguez* created a new avenue through which Mr. Jones could challenge the constitutionality of his conviction and death sentence with juror testimony that racial prejudice infected the deliberative process.

Prior to *Peña-Rodriguez*, therefore, the legal and factual bases for this claim were unavailable. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(a), (b)(1); *Matthews*, 45 P. 3d at 915

(upholding trial court's decision to prevent defense counsel from questioning juror post-verdict regarding the deliberative process because "under Section 2606(B), parties may only question former jurors to determine if improper and prejudicial information was revealed to the jury or any outside influence was improperly brought to bear upon any juror," and may not question jurors about the "deliberative process"). Indeed, at the time of Mr. Jones' trial, lead prosecutor Sandra Elliott argued to the court concerning allegations of juror misconduct that, "[T]he Oklahoma statutes *specifically forbid* this Court or *anyone* inquiring of the juror as to the deliberations that they had or upon what they based their verdict," and maintained that "[T]he statutes in Oklahoma are still clear. We are not entitled to inquire of a juror anything about upon what they base their verdict, period." (Tr. XIII 70-71 (emphasis added).) The trial court agreed with Elliott's reading of Oklahoma law, and cautioned defense counsel, David McKenzie, regarding his questioning of jurors concerning allegations of misconduct as follows:

> [I] looked at Title 12, 2606 ... [a]nd after reading 2606, Paragraph B and then reading the notes that follow that, as well as in the pocket parts, it's my opinion, Mr. McKenzie, that your questions [to a juror, *see* Section IV, *infra*] were getting dangerously close to requesting information about the deliberations of the jurors. We just have – just must have to be very very cautious in doing our best *as lawyers* and as the Judge *to protect the integrity of this jury.*

(*Id.* at 72 (emphasis added).) Oklahoma law at the time of Mr. Jones' trial, and until *Peña-Rodriguez*, was thus clear: questioning jurors about the deliberative process, as well as juror testimony concerning deliberations, was off limits.

Counsel for Mr. Jones first learned on November 2, 2017 from juror V.A. that at least one juror referred to Mr. Jones as a "nigger" who deserved to die, in part, on that

basis. (Ex. A.) This application for post-conviction relief is being filed within sixty-days of November 2, 2017 in compliance with Rule 9.7(G)(3) of this Court's rules.

Second, and for the reasons outlined in greater detail, *infra*, the facts underlying Mr. Jones' present claim are sufficient to establish by clear and convincing evidence that racial prejudice tainted the fairness of his trial and capital-sentencing proceedings, but-for which he would neither have been convicted nor sentenced to death. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2).

III. Newly discovered evidence establishes that racial prejudice influenced the decision of at least one juror to convict Mr. Jones and sentence him to death.

In 2002, V.A., an Oklahoma County resident, served as a juror in *State of Oklahoma v. Julius Darius Jones*. (*See* Tr. XII 95-96; *see also* Exs. A, B.) On November 2, 2017, in response to a Facebook message sent to her by Rebecca Postyeni, an investigator with the Office of the Federal Public Defender for the District of Arizona,[8] requesting to meet in order to discuss Mr. Jones' case, V.A. sent Ms. Postyeni a Facebook message in which she stated the following:

> During the trial I was the juror who went to the judge with the comment from another juror about how it was a waste of time and 'they should just take the nigger out and shoot him behind the jail' although that juror was never removed and nothing further came from it[.]

(Ex. A.)

[8] The Office of the Federal Public Defender for the District of Arizona was appointed by the United States District Court for the Western District of Oklahoma to represent Mr. Jones in Case No. 5:07-cv-012900-D on August 1, 2016. (Dkt. No. 57.)

IV. Additional Relevant Facts

During voir dire, and before Mr. Jones' jury was empaneled, the trial court repeatedly asked members of the venire whether they could be fair and impartial, and whether they could "decide this case solely on the evidence that you hear inside this courtroom." (*See, e.g.*, Tr. IIA 14, 96 (trial court asking juror C.W. whether he could be impartial; *id.* at 57 (trial court telling prospective jurors that "the trial needs to be decided solely upon the evidence"); *id.* at 84 (trial court asking juror M.J. whether he could decide the case solely on the evidence); *id.* at 86 (trial court asking juror C.W. whether he could "listen to the evidence" in the case); *id.* at 94-95 (trial court asking juror M.S. whether he could be fair and impartial); *id.* at 96 (trial court asking juror A.X. whether he could be fair and impartial); *id.* at 97 (trial court asking juror J.B. whether he could be fair and impartial); *id.* at 166 (trial court asking juror W.W. whether he could be fair and impartial)).

In response to questions from both the court and defense counsel, each juror affirmed that they could render a fair and impartial verdict. (*See, e.g.*, Tr. IIA 14, 96 (juror C.W. affirming that "I will be as fair as I can be," and denying that he could not "be[] fair and impartial"); *id.* at 84 (juror M.J. stating that it would be "[n]o problem" for him to decide the case solely on evidence presented inside the courtroom); *id.* at 86 (juror C.W. affirming that he could "listen to the evidence in this case"); *id.* at 94-95 (juror M.S. denying that he could not be "fair and impartial"); *id.* at 96 (juror A.X. denying that he could not be "fair and impartial"); *id.* at 97 (juror J.B. denying that he could not be "fair and impartial"); *see also* Tr. III 138 (juror J.B. affirming that he could be "a fair and impartial juror"); *id.* at 172-73 (juror A.X. affirming that he could be "fair and impartial");

id. at 193 (juror G.W. affirming that she could be "fair and impartial"); *id.* 197-98 (juror J.G. affirming that he could be "fair and impartial")). As was the case in *Peña-Rodriguez*, at no point did any of the jurors empaneled in Mr. Jones' case express reservations about their ability to be fair or impartial based on racial, or other, prejudices. *See Peña-Rodriguez*, 137 S. Ct. at 861.

On February 27, 2002, prior to the close of evidence during the aggravation phase of Mr. Jones' trial, V.A. notified the trial court that juror J.B. had commented, in reference to Mr. Jones, that "they should place him in a box in the ground for what he has done." (Tr. XII 95-96.) The comment was made "[i]n the jury room" during "the first break" when jurors "went up the stairs." (*Id.* at 95-96.) V.A. described feeling bothered by J.B.'s comment as it evidenced that he was "not quite partial enough." (*Id.* at 96.) In response to questioning by the trial court, V.A. explained that when J.B.'s comment was made, "[t]here were a lot of people up there ... I know Mr. [M.J.] was." (*Id.* at 96.) She also recalled that jurors A.X., G. W., G. W., J.G., W.W., and C.W. were likely present. (*Id.* at 96-97.) "There were at least 8 to 10 of us up there," she said. (*Id.* at 96.)

In response to the trial court's question about whether "what you heard [has] affected you at all in your ability to deliberate this case fairly," V.A. replied, "I don't think so." (*Id.* at 98.) However she also stated that:

> I just don't believe [juror J.B.'s] comments were appropriate. I believe, you know, we are not supposed to be deliberating yet at this point and I just – I felt that may influence somebody or his opinion is not important right now.

(*Id.*) According to V.A., juror J.B.'s comment was made in the jury deliberation room as jurors were seated around a table:

> [W]e were just all sitting there. Everyone was – I mean, they get involved in, you know, individual conversations. It was just something [J.B.] said out loud. There were no comments to it and it was right before we came back down from break.

(*Id.* at 99.)

The following day, on February 28, 2002, the trial court asked each juror the following question, "[a]t any time during the sentencing phase of this trial have you overheard anyone express an opinion outside of the courtroom as to the appropriate penalty or punishment of this trial." (*See, e.g.*, Tr. XIII 30 (trial court posing question to juror M.N.); *id.* at 33 (trial court posing question to juror A.X.); *id.* at 35-36 (trial court posing question to juror M.J.); *id.* at 37 (trial court posing question to juror G.W.); *id.* at 39 (trial court posing question to juror J.G.); *id.* at 40 (trial court posing question to juror C.W.); *id.* at 41 (trial court posing question to juror M.S.); *id.* at 42 (trial court posing question to juror G.W.); *id.* at 44 (trial court posing question to juror W.W.); *id.* at 45 (trial court posing question to juror C.W.); *id.* at 46 (trial court posing question to alternate juror D.M.); *id.* at 48 (trial court posing question to alternate juror J.M.)). Each juror answered the trial court's question negatively. (*See id.* at 30, 33, 35-37, 39-42, 44-46, 48.) Juror J.B., when questioned about his comment by the trial court, claimed that he did not remember making the statement. (*Id.* at 54-55.) However J.B. acknowledged that he had "formed a partial – partial opinion" about what Mr. Jones' appropriate punishment should be, notwithstanding the fact that, as the court put it, not "all of the evidence is in." (*Id.* at 58.)

In spite of V.A.'s firm recollection that J.B. had remarked that, "They should put him in a box and put him in the ground after this is all over for what he's done" (Tr. XIII

75), the trial court opined that J.B. "could have been talking about Osama Bin Laden" (*id.* at 82). The court added further that, "I mean, with everything that's going on, [juror J.B.] could have been talking about Osama Bin Laden, he could have been talking about anything else," other than Mr. Jones. (*Id.*) Counsel for Mr. Jones, David McKenzie, asked the court to excuse juror J.B. for cause and to replace him with an alternate juror. (*Id.* at 83.) He explained that:

> [T]he prejudice to my client is inferred when somebody has already made up their mind. It's just like in voir dire with jurors we start out with, we have to make sure they are fair and impartial. And it's obvious this guy – I mean, he said in the second stage he has a partial opinion. He did not deny making that statement. He did not deny that it had anything to do with Mr. Jones.
>
> Out of an abundance [of caution] that this is a death penalty case, my client's life is on the line, out of an abundance of caution, even if you think that it may be conjecture, he has to be excused for cause.

(*Id.*) The trial court denied McKenzie's request to remove juror J.B. for cause, as well as his subsequent motion for a mistrial, instead informing him that, "I think that we are – without further proof, that we are reading into this statement." (*Id.* at 86, 87, 91.) "As I said earlier," the court stated, "[J.B.] could have been talking about Osama bin Laden or whoever the guy that they have been referring to as the American Tali Ban [sic] or any other number of items. We don't know who he was talking about." (*Id.* at 86-87.)

According to V.A., however, she specifically brought to Judge Bass' attention that another juror referred to Mr. Jones as a "nigger," considered the trial proceedings "all a waste of time," and who expressed the view that "they should just take the nigger out and shoot him behind the jail." (Ex. A.) "[T]hat juror was never removed," V.A. affirmed, "and nothing further came from it." (*Id.*)

V. Law & Argument

A. Mr. Jones was convicted and 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.

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. II, § 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, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (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)). This Court has explained that a jury is "impartial" within the meaning of these constitutional guarantees where no juror "favor[s] a party or an individual because of the emotions of the human mind, heart, or affections." *Tegeler v. State*, 1168, 9 Okl. Cr. 138, 1913 OK CR 87, 130 P. 1164 (Okla. Crim. App. 1913) (internal citation and quotation marks omitted). "It means," in other words, "that, to be impartial, the party, his cause, or the issues involved in his case should not, *must not*, be prejudged." *Id.* (emphasis added) (internal citation and quotation marks omitted); *see also Stevens v. State*, 94 Okl. Cr. 216, 224, 232 P.2d 949, 958 (Okla. Crim. App. 1951) (explaining that "an impartial jury means a jury *not biased* in favor of one party more than another; indifferent; unprejudiced; disinterested" (emphasis added) (internal quotation marks omitted)); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 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."); *Stouffer v. Duckworth*, 825 F.3d 1167 (10th Cir. 2016) (noting that included in the Sixth Amendment jury trial guarantee is the right to jury capable and willing to decide the case solely on the evidence before it). Impartiality, within the meaning of the Sixth and Fourteenth Amendments, requires that impaneled jurors "can lay aside any preconceived opinions" and "render a verdict based on the evidence presented in court." *Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006) (internal citation and quotation marks omitted).

In *Peña-Rodriguez*, the Supreme Court explained that a jury's impartiality is compromised, and "systemic injury to the administration of justice" results, where even a single juror's attitudes are infected with racial prejudice. 137 S. Ct. at 868-69. There, Miguel Angel Peña-Rodriguez, a Hispanic man, was convicted of unlawful sexual contact and harassment. *Id.* at 861, 863. Subsequent to jurors' discharge, counsel for Mr. Peña-Rodriguez questioned jurors and learned from two of them that, "during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness." *Id.* at 861. As counsel for Mr. Jones has done here, counsel for Mr. Peña-Rodriguez procured and proffered evidence from jurors wherein they described the racialized remarks made by a fellow juror. *Id.* at 861-62. The trial court reviewed the affidavits, acknowledged that they constituted evidence of "apparent bias" on the part of one juror, but denied Mr. Peña-Rodriguez's motion for a new trial. *Id.* at 862. The trial court reasoned that any inquiry into jury deliberations was explicitly precluded by

Colorado Rule of Evidence 606(b).[9] *Id.* at 862. The trial court's decision was affirmed by the Colorado Supreme Court on appeal, *id.* at 862, and the United States Supreme Court subsequently reversed that affirmation, *id.* at 871.

Justice Kennedy, delivering the opinion of the Court, explained that because racial prejudice is "a familiar and recurring evil" that "implicates unique historical, constitutional, and institutional concerns," *id.* at 868, it is incumbent upon courts "to consider the evidence of [a] juror's [racially prejudiced] statement and any resulting denial of the jury trial guarantee," *id.* at 869. The Court found that the allegations contained in the affidavits of two jurors indicated that another juror was influenced by "racial bias" as well as "a dangerous racial stereotype." *Id.* at 870. As a result, the Court concluded, the Sixth Amendment required that where allegations of racial bias are concerned, courts "must not wholly disregard its occurrence." *Id.* at 870.

Like the jurors in *Peña-Rodriguez* who attested to the racial prejudice evinced by another juror in Mr. Peña-Rodriguez's case, V.A. has provided evidence about the use of an anti-black racial slur by at least one juror who sat in judgment of Mr. Jones. (Ex. A.) The use of racial slurs are "evidence of racial antipathy," *Delph*, 130 F.3d at 356 (internal quotation and citation omitted), and can, in no way, ever be considered benign. The word

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[9] Colorado Rule of Evidence 606(b) is nearly identical to Oklahoma Rule of Evidence 2606(B), and both prohibit post-verdict questioning of jurors regarding the deliberative process. *Compare* Colo. R. Stat. Ann. § 606(b) (West 2017) ("Inquiry into the validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations…"), *with* Okla. Stat. Ann. tit. 12, § 2606(B) (West 2002) ("Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations…").

"nigger" is "a universally recognized opprobrium, stigmatizing African-Americans because of their race." *Brown v. East Miss. Elec. Power Ass'n.*, 989 F.2d 858, 861 (5th Cir. 1993). Indeed, as explained in Section I, *supra*, courts around the country recognize that an individual's use of racial slurs often belies "discriminatory intent," *Kinnon*, 490 F.3d at 891, and "racial animus," *Brown*, 989 F.2d at 858. Race-based antipathy harbored by even a single juror violates the Sixth Amendment's fair-trial guarantee owed to every criminal defendant, especially those, like Mr. Jones, for whom life and death hang in the balance. *Peña-Rodriguez*, 137 S. Ct. at 869.

While Mr. Jones 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, Mr. Jones submits that under *Peña-Rodriguez* he is entitled to discovery and to an evidentiary hearing. This is because, like the petitioner in *Peña-Rodriguez*, he has set forth herein more than colorable allegations that his conviction and death sentence were rendered in violation of his state and federal rights.

B. Mr. Jones 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 primary among those factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Stephens*, 462 U.S. at 885, 103 S. Ct. at 2747; *see also Mitchell*, 443 U.S. at 555, 99 S. Ct. at 3000 ("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*, 2010 OK CR 23, 241 P.3d 214, 235 (Okla. Crim. App. 2010); *see also Williams v. State*, 1975 OK CR 171, 542 P.2d 554, 585 (Okla. Crim. App. 1975), *judgment vacated on other grounds by Williams v. Oklahoma*, 428 U.S. 907, 96 S. Ct. 3218, 49 L. Ed. 2d 1215 (1976) (Mem.) ("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)).

Where capital punishment is concerned, the Supreme Court's decisions since *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), have delimited "a constitutionally permissible range of discretion in imposing the death penalty," *McCleskey v. Kemp*, 481 U.S. 279, 305, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), 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, 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 that discretion. *Stephens*, 462 U.S. at 885, 103 S. Ct. at 2747 (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck*, 137 S. Ct. at 778 (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"); *Mitchell*, 443 U.S. at 555, 99 S. Ct. at 3000 ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital sentencing determinations are rendered "arbitrary and capricious"

in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500, 113 S. Ct. 892, 915, 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 detail above, *see* Sections I, III, and IV, *supra*, the risk that racial prejudice impacted at least one juror's decision to condemn Mr. Jones to die is "constitutionally unacceptable." *Turner v. Murray*, 476 U.S. 28, 36 n.8, 106 S. Ct. 1683, 1688 n.8, 90 L. Ed. 2d 27 (1986); *see also McCleskey*, 481 U.S. at 322, 107 S. Ct. at 1783 (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), and *Eddings*, 455 U.S. at 118, 102 S. Ct. at 878 (1982) (O'Connor, J., concurring)).

At least as early as 1908—merely forty-three years after slavery's abolition in the United States—the Supreme Court recognized that "an appeal to race prejudice" through the use of the word "nigger" is "degrad[ing] to the administration of justice." *Battle v.*

United States, 209 U.S. 36, 38, 28 S. Ct. 422, 424, 52 L. Ed. 670 (1908); *see also Calhoun v. United States*, 568 U.S. 1206, 133 S. Ct. 1136, 1138, 185 L. Ed. 2d 385 (2013) (Mem.) (Sotomayor, J., & Breyer, J., dissenting from denial of certiorari) (describing federal prosecutor's use of the word "niggers" as "deeply disappointing" and "conduct [that] diminishes the dignity of our criminal justice system and undermines respect for the rule of law"); *id.* (discussing "nigger" as a term that "tap[s] a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation").

Recently, in *Tharpe v. Sellers*, 138 S. Ct. 53, 198 L. Ed. 2d 779 (2017) (Mem.), the United States Supreme Court stayed the execution of Keith Tharpe, an African-American prisoner on death row in Georgia, based, in part, on evidence similar to that which Mr. Jones has proffered here—that is, evidence that a juror in his case voted for the death penalty because, in that juror's view, Mr. Tharpe was a "nigger." (Ex. C.) Mr. Tharpe argued that the commitment to justice "rings hollow" where courts dismiss evidence that a juror has opted to sentence a person to die because he is black. (*Id.* at 14.)

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Indeed, the Court's decision in *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), supports Mr. Jones' right to an evidentiary hearing on his claim that racial prejudice factored into his jury's decision to convict and sentence him to death. In *Turner*, the Supreme Court vacated a prisoner's death sentence where the trial court refused his request to question prospective jurors on the issue of racial prejudice. The plurality recognized that

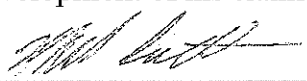
"in light of the complete finality of the death sentence," the Constitution requires courts to give allegations of racial prejudice in capital cases greater scrutiny. *See Turner*, 476 U.S. at 35, 106 S. Ct. at 1688. Although the defendant in *Turner*, who was black and was sentenced to die for killing a white victim, had not made specific allegations of racial prejudice, the plurality nonetheless vacated his death sentence. The Court reasoned that "the *risk* that racial prejudice may have infected petitioner's capital sentencing [was] unacceptable in light of the ease with which that risk could have been minimized." *Id.* (emphasis added).

Mr. Jones' case involves serious and specific allegations of racial animus: a juror stated during his trial that "they should just take the nigger out and shoot him behind the jail." (Ex. A.) This remark is reminiscent of the lynch-mob racism that characterized the Reconstruction period in United States history. Mr. Jones seeks an evidentiary hearing wherein the courts of Oklahoma can consider his most serious charges. At minimum, the Constitutions—of the United States and the State of Oklahoma—require as much.

While Mr. Jones 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, Mr. Jones submits that he is entitled to discovery and to an evidentiary hearing. This is because he has set forth herein more than colorable allegations that his conviction and death sentence were rendered in violation of his state and federal rights.

CONCLUSION

Mr. Jones' conviction and 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 relief. Alternatively, Mr. Jones asks that this Court grant his requests for discovery and an evidentiary hearing in order to allow for the further factual development of his claim.



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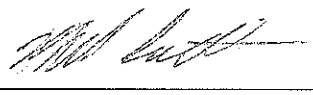
Verification of Counsel

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

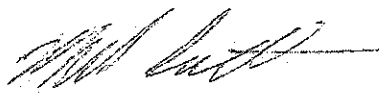


Mark Barrett

12/28/2017
Date

CERTIFICATE OF SERVICE

I certify that a copy of this Third Application for Post-Conviction Relief was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of this Court on the date that it was filed.



Mark Barrett