No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Julius Darius Jones, Petitioner,

vs.

State of Oklahoma, Respondent.

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

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****CAPITAL CASE****

QUESTIONS PRESENTED

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

On November 2, 2017, one of the twelve jurors who served on the nearly all-white jury that convicted Mr. Jones of capital murder and sentenced him to death came forward with new information that another juror who sat in judgment of Mr. Jones described the trial as "a waste of time" and expressed his belief that "'they should just take the nigger out and shoot him behind the jail.'"

Under Oklahoma's post-conviction statute, a death-sentenced prisoner has just sixty days to file a successor post-conviction application based upon newly-discovered evidence. In compliance with this rule, Mr. Jones filed a post-conviction application in the Oklahoma Court of Criminal Appeals ("OCCA") wherein he argued that newly-discovered evidence established that racial prejudice influenced the decision of at least one juror to convict and sentence him to death in violation of his rights under the Oklahoma Constitution, as well as under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The OCCA denied Mr. Jones' successor application on state procedural grounds.

The questions presented by this case are the following:

1. Whether 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?

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

PARTIES TO THE PROCEEDING

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The OCCA's order denying Mr. Jones' third application for post-conviction relief along with his motions for discovery and a hearing is attached hereto in the Appendix as A-1.

STATEMENT OF JURISDICTION

On September 28, 2018, the OCCA denied Mr. Jones' successor post-conviction application and his requests for further factual development. (A-1.) The OCCA's rules prohibited Mr. Jones from petitioning for rehearing from that denial. Rule 3.14(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) (hereafter "OCCA Rules"); OCCA Rule 5.5 (explaining that once the OCCA has rendered its decision on a post-conviction appeal, "the petitioner's state remedies will be deemed exhausted" and "[a] petition for rehearing is not allowed and these issues may not be raised in any subsequent proceeding in a court of this State"). On December 18, 2018, Justice Sotomayor granted Mr. Jones' request for an extension of time to file his petition for a writ of certiorari (alternatively hereafter "Petition")

pursuant to Rule 13(5) of this Court's Rules, and extended the filing deadline to January 28, 2019. (A-2.) Mr. Jones now timely files this Petition wherein he asks that this Court review the OCCA's judgment and order dismissing his successor post-conviction application. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

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

U.S. Const. amend. VIII

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

U.S. Const. amend. XIV

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

STATEMENT OF THE CASE

A. The Crime

Julius Jones, who is African American, turned nineteen years old three days before Paul Howell was shot in the driveway of his parents' home in Edmond, Oklahoma on July 28, 1999. (*See* Tr. IV 135.)[1] Mr. Howell's adult sister, Megan Tobey, and his two young children were with him at the time. (Tr. IV 97-102, 122-23.) They had just pulled into the driveway of the home belonging to Mr. Howell's parents, and were passengers in Mr. Howell's 1997 GMC Suburban. (Tr. IV 102, 104-05.) Mr. Howell turned off the car's engine and opened the driver-side door. (*Id.* at 104.) Ms. Tobey, meanwhile, gathered her belongings and instructed her nieces to do the same. (*Id.*) She opened the passenger-side door and stepped out of the vehicle when she heard a gunshot. (*Id.*) She also heard someone asking for the vehicle's keys. (*Id.*) According to Ms. Tobey, she "took a fast glance back" and saw a black man who she described as wearing jeans, a white t-shirt, a black stocking cap, and a red bandana over his face. (Tr. IV 104, 108, 116-19.) Critically, Ms. Tobey also described the shooter as having half-an-inch of hair sticking out from underneath the stocking cap.[2]

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[1] Citations to trial transcripts appear herein as "Tr." followed by volume and page number. Preliminary hearing transcripts are cited as "PH" followed by volume and page number.

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

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

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

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substantially longer than Mr. Jones' and he wore it in corn rows. *Jones v. Sirmons*, No. 5:07-CV-01290-D (W.D. Okla.), Dkt. 22-1 to 22-11, Appendix to Pet. for Writ of Habeas Corpus at 22-2, 11/3/2008.

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

Represented by three public defenders—none of whom had ever before tried a capital case, and who failed to put on a *single* witness in Mr. Jones' defense during the guilt-stage—Mr. Jones was convicted of capital murder and sentenced to death in April 2002. Since that time, Mr. Jones has maintained his innocence.

B. Racial Prejudice Revealed

In 2002, Victoria Armstrong,[4] an Oklahoma County resident, served as a juror in *State of Oklahoma v. Julius Darius Jones*. (*See* Tr. XII 95-96; *see also* A-3, A-4.) On November 2, 2017, she informed Mr. Jones' legal team that another juror who convicted Mr. Jones and sentenced him to death harbored racial prejudice that influenced those verdicts. According to Ms. Armstrong:

> 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[.]

(A-3.) This information was relayed to a member of Mr. Jones' legal team through a Facebook message from Ms. Armstrong. (*Id.*)

Fifteen years earlier, during voir dire at Mr. Jones' trial and before his jury was empaneled, the trial court repeatedly asked jurors whether they could "decide this case solely on the evidence that you hear inside this courtroom." (*See, e.g.*, Tr. IIA 96 (trial court asking Christopher Whitmire whether he could be impartial); *id.*

[4] Victoria Armstrong is now known as Victoria Coates. She served on Mr. Jones' capital jury in 2002. (*See* Tr. XII 95-96; *see also* A-4.)

at 57 (trial court telling prospective jurors that "the trial needs to be decided solely upon the evidence"); *id.* at 84 (trial court asking Martin Johnson whether he could decide the case solely upon the evidence"); *id.* at 86 (trial court asking juror Colin White whether he could "listen to the evidence" in the case); *id.* at 94-95, 97, 166 (trial court asking jurors Michael Snodderly, Jerry Brown and Willie Woodward whether they 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 (Whitmire affirming that "I will be as fair as I can be"); *id.* at 84 (Johnson stating that it would be "[n]o problem" for him to decide the case solely on evidence presented inside the courtroom); *id.* at 86 (White affirming that he could "listen to the evidence in this case"); *id.* at 95-97 (Snodderly, Alfred Xuerueb, and Brown denying that they could not be "fair and impartial"); *id.* at 96 (Xuereb denying that he could not be "fair and impartial") *id.* at 193, 197-98 (Gloria Wickware and Jimmy Gordon affirming that they could be "fair and impartial").)

The trial record reflects that on February 27, 2002, prior to the close of evidence during the aggravation phase, Ms. Armstrong notified the trial court that juror Jerry Brown had commented, in reference to Mr. Jones, that "they should just place him in a box in the ground for what he has done." (Tr. XII 95-96.) This comment, she reported, was made "[i]n the jury room" during "the first break" when jurors "went up the stairs." (*Id.*) Ms. Armstrong described feeling bothered by Mr. Brown's remark,

as it evidenced that he was "not quite partial enough." (*Id.* at 96.) She also explained that when Mr. Brown's comment was made, "[t]here were a lot of people up there . . . I know Mr. [Martin] Johnson was." (*Id.*) Specifically, Ms. Armstrong recalled that jurors Xuereb, Wickware, Wainscott, Woodward, and Gordon 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," Ms. Armstrong replied, "I don't think so." (*Id.* at 98.) However she also stated that:

> I just don't believe [Brown'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 Ms. Armstrong, Mr. Brown'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 individual conversations. It was just something [Brown] said out loud. There was 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, 33, 35-37, 39-42, 44, 46, 48.) Each juror answered the trial court's question negatively. (*See id.* at 30, 33, 35-

37, 39-41, 44-46, 48.) Juror Brown, when questioned about his comment by the trial court, claimed that he did not remember making the statement. (*Id.* at 54-55.) He acknowledged, however, 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 Ms. Armstrong's firm recollection that Mr. Brown had remarked that, "[t]hey should put him in a box in the ground after this is all over for what he's done" (Tr. XIII 75), the trial court opined, without any basis in fact, that Mr. Brown "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 Brown] 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 Mr. Brown for cause and to replace him with an alternate juror. (*Id.* at 83.) The trial court denied McKenzie's request, 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, Mr. Brown "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.* 86-87.)

According to Ms. Armstrong, however, she specifically brought to the trial court's attention that another juror had referred to Mr. Jones as a "nigger,"

considered the trial proceedings "all a waste of time," and expressed the view that "they should just take the nigger out and shoot him behind the jail." (A-3.) "[T]hat juror was never removed," Ms. Armstrong affirmed, "and nothing further came from it." (*Id.*)

C. The Proceedings Below

On the basis of this new information, Mr. Jones timely filed a third application for post-conviction relief in the Oklahoma Court of Criminal Appeals, along with requests for discovery and a hearing. (A-5; A-6; A-7.) Mr. Jones argued that the information newly-relayed by Ms. Armstrong established that racial prejudice influenced the decision of at least one juror to convict and sentence him to death in violation of his rights under the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (A-5 at 13.) Mr. Jones also argued that a juror's use of a racial slur "constitutes direct evidence of discriminatory intent" that violates not only the Sixth and Fourteenth Amendment's fair-trial and equal protection guarantees, but also renders unlawful—because repugnant to the Eighth Amendment—his jury's decision to condemn him to die. (*Id.* at 14-15); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (holding that racial prejudice is "constitutionally impermissible" if not "totally irrelevant" in the criminal justice context); *see also Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of

justice."). In light of this, Mr. Jones argued, neither his conviction nor his death sentence could stand.

Mr. Jones also set out in considerable detail why he overcame Oklahoma's successor post-conviction procedural bar,[5] explaining that he could not have raised this claim previously either on direct appeal, or in his previous post-conviction applications because its factual basis became available only on November 2, 2017—when Ms. Armstrong came forward with this information. (A-5 at 18.) Mr. Jones also explained that the legal basis for his newly-discovered claim was long unavailable to Oklahoma defendants under Oklahoma's no-impeachment rule, which, until this Court's decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), could, consistent with the Constitution, prohibit any inquiry into jurors' subjective decision-making processes. (*Id.* at 19.) While Mr. Jones maintained that he was entitled to relief on the record before the OCCA, he also asked that court to grant his requests for discovery and a hearing if it "determine[d] that further factual development is necessary." (*Id.* at 28.)

The OCCA denied Mr. Jones' post-conviction application along with his related motions for discovery and a hearing in a fourteen-page order. (A-1.) Not only did the OCCA reason that Mr. Jones' claim was procedurally barred on the bases of res judicata and waiver, but it also rejected as inadequate his proffered factual support

[5] Okla. Stat. Ann. tit. 22, § 1089 governs post-conviction applications in capital cases and, by its express terms, was intended to "expedite" them.

(A-1 at 3-7)—here, the Facebook message from Ms. Armstrong relaying another juror's reference to Mr. Jones as a "nigger" while expressing what was essentially a desire to see Mr. Jones lynched. *See* Randall M. Miller, "Lynching in America: Some Context and a Few Comments," 72 Pennsylvania History: A Journal of Mid-Atlantic Studies 275, 280 (Summer 2005) (noting that according to historian Christopher Waldrep, the term "lynching" historically described the "use of extralegal violence to uphold community norms"). And finally, the OCCA concluded that Mr. Jones' newly-discovered federal constitutional claim did not satisfy the strictures of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). (A-1 at 7-8.)

This petition for a writ of certiorari follows.

REASONS FOR GRANTING CERTIORARI

I. Newly-discovered evidence demonstrates that racial prejudiced 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.

The Sixth and Fourteenth Amendments to the U.S. Constitution guarantee to every criminal defendant 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[.]"); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that the Fourteenth Amendment to the U.S. constitution guarantees a fair and impartial jury as "a basic requirement of due process" (internal quotations omitted)). A jury is "impartial" within the meaning of the Sixth Amendment guarantee where no member

of the jury favors a party or an individual, but rather enters jury service "indifferent." *Irvin*, 366 U.S. at 722. ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). This Court has emphasized that special care is required to safeguard jurors' impartiality, particularly in capital cases, and to guard against the operation of racial prejudice. Indeed, this Court recently described racial bias as "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S. Ct. at 868 (internal quotations omitted). For where the criminal justice system and actors in it "permit[ ] racial prejudice in the jury system," they "damage[] 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.*

Decades earlier, in *Turner v. Murray*, 476 U.S. 28 (1986), a plurality of this Court recognized that "because of the range of discretion entrusted to the jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected" where, as in Mr. Jones' case, the defendant and the victim are members of different races. *Turner*, 476 U.S. at 35 (plurality opinion of White, J., joined by Blackmun, Stevens, and O'Connor, JJ.). The *Turner* plurality described "[t]he risk of racial prejudice" in this context as "especially serious in light of the complete finality of the death sentence." *Id.* "The reality of race relations in this country is such that we simply may not presume impartiality," Justice Brennan further observed. *Id.* at 39 (Brennan, J., concurring and dissenting in part). Perhaps

alluding to the mob anger that often preceded the lynchings of those deemed a threat to social control or who stood accused of certain crimes, *see* Miller, "Lynching in America," 72 Pennsylvania History: A Journal of Mid-Atlantic Studies at 278, 281 (explaining that "all manner of social outcasts" and racialized "others," as well as those "whom the dominant groups deemed unwelcome," were the victims of lynching historically, and noting that the term also referred to "racial mob violence against untried and, usually, wrongly accused blacks"), Justice Brennan cautioned that "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.* The *Turner* Court hoped that jurors' de facto impartiality might be achieved through individual questioning during voir dire; Mr. Jones' case however demonstrates the inadequacy of voir dire as a safeguard against the operation of racial prejudice. *See Peña-Rodriguez*, 137 S. Ct. at 869 (explaining that "[t]he stigma that attends racial bias may make it difficult for a juror to report" or acknowledge).

In *Peña-Rodriguez*, this Court explained that a jury's impartiality is compromised, and "systemic injury to the administration of justice" realized, where even a single juror's attitudes towards a defendant are infected with racial prejudice. 137 S. Ct. at 868-69. There, Miguel 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 learned from two jurors 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 did below, counsel for Mr. Peña-Rodriguez procured and proffered evidence documenting the racialized remarks made by another member of the jury. *Id.* at 861-62. The trial court in Mr. Peña-Rodriguez's case reviewed that evidence, acknowledged that it 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 court reasoned that any inquiry into jury deliberations was explicitly precluded by Colorado Rule of Evidence 606(b).[6] *Id.* at 862. The trial court's decision was affirmed by the Colorado Supreme Court on appeal, *id.*, and this Court subsequently reversed that affirmation, *id.* at 871.

Justice Kennedy, delivering the opinion of this 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. As a result, this Court concluded, the Sixth Amendment requires 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 racial animus evinced in the remarks of a juror who sat in judgment of Mr. Peña-Rodriguez, Ms. Armstrong has

[6] Colorado Rule of Evidence 606(b) is nearly identical to Oklahoma Rule of Evidence 2606(B), and both prohibit post-verdict questioning of jurors about their decision making processes. *Compare* Colo. R. Stat. Ann. § 606(b) (West 2017), *with* Okla. Stat. Ann. tit. 12, § 2606(B) (West 2002).

come forward with new evidence demonstrating more than simply "[t]he risk of racial prejudice" infecting Mr. Jones' trial. *Turner*, 476 U.S. at 35. Instead, Ms. Armstrong has revealed that at least one juror's decision to convict and sentence Mr. Jones to death was based upon anti-black antipathy in violation of the Sixth Amendment's fair-trial guarantee, and the Fourteenth Amendment's Equal Protection Clause. *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ('[T]o prevail under the Equal Protection Clause, [the defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose.").

This Court has long recognized that, under the Eighth Amendment, race is primary among those factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Stephens*, 462 U.S. at 885; *see also Rose*, 443 U.S. at 555. More recently, in *Buck v. Davis*, this Court 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." 137 S. Ct. 759, 778 (2017). For "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice").

Where capital punishment is concerned, this Court's decision since *Furman v. Georgia*, 408 U.S. 238 (1972), 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's guarantee against cruel and unusual punishment. First, this Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing must be exercised in an informed manner."). Second, this Court has prohibited states from limiting a sentencer's ability to consider "relevant facets of the character and record of the individual offender or the circumstances of the particular offense" that might warrant a sentence less than death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

While, in all of these cases, this Court has upheld the propriety of a capital sentencer's discretion to impose a death sentence under the appropriate circumstances, it has unequivocally condemned race playing *any* role in a sentencer's exercise of that discretion. *Stephens*, 462 U.S. at 885; *Buck*, 137 S. Ct. at 778; *Rose*, 443 U.S. at 555. Where race does play such a role, capital sentencing determinations are rendered "arbitrary and capricious" in violation of the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (observing that a sentence of death

cannot withstand constitutional scrutiny 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 (1983), and *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring)); *see also 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."); *Graham v. Collins*, 506 U.S. 461, 500 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

At least as early as 1908—merely forty-three years after slavery's abolition in the United States—this 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 (1908); *see also Calhoun v. United States*, 568 U.S. 1206 (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").

Numerous federal courts of appeal have also 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. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) (finding that a 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"). This 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*, 462 U.S. at 885; *Rose*, 443 U.S. at 555.

Recently, in *Tharpe v. Sellers*, 138 S. Ct. 545 (2017) (Mem.), this 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 asked the OCCA to consider—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." (A-8 at i.) Following this Court's decisions in *Peña-Rodriguez* and *Buck*, Mr. Tharpe sought to reopen the judgment in his case under Fed. R. Civ. P. 60(b)(6)—an endeavor denied by the district court along with a certificate of appealability ("COA") to have that decision

reviewed by the Eleventh Circuit Court of Appeals. *Tharpe*, 138 S. Ct. at 546. Whereas the Eleventh Circuit's denial of Mr. Tharpe's COA request was "rooted in the state court's factfinding[] that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim," this Court disagreed with that determination and instead found that "the record compels a different conclusion." *Tharpe*, 138 S. Ct. at 546. "The state court's prejudice determination rested on its finding that [the juror's] vote to impose the death penalty was not based on Tharpe's race." *Id.* However this Court determined that the juror's remarks "present[] a strong factual basis for the argument that Tharpe's race affected [that juror's] vote for a death verdict." *Id.* "At the very least," this Court concluded, "jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong[,]" and "[t]he Eleventh Circuit erred when it concluded otherwise." *Id.*

In Mr. Jones' case, the information brought forward by Ms. Armstrong reveals far more than simply another juror's racist and dehumanizing view of Mr. Jones as a "nigger." Rather, that juror's view of Mr. Jones' trial and penalty-phase proceedings as "a waste of time" (A-3), and belief that "they should just take the nigger out and shoot him behind the jail" (*id.*), also reveals an endorsement of "lynch-mob racism reminiscent of Reconstruction days." *Andrews v. Shulsen*, 485 U.S. 919, 922 (1988) (Mem.) (Marshall, J., & Brennan, J., dissenting from denial of certiorari).

"This 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 (1982). "Such a hearing is, of course, especially vital when the defendant has been condemned to die." *Andrews*, 485 U.S. at 921 (Marshall, J., & Brennan, J., dissenting). And yet, the OCCA refused Mr. Jones' request for "this modest procedure" so that at least one court could consider his "serious and specific allegations of racial animus" before the State of Oklahoma extinguishes his life. *Id.* at 921-22. Indeed, as discussed more fully *infra*, the OCCA has proven itself "willing to send petitioner to his death without so much as investigating these serious allegations at an evidentiary hearing," *id.* at 922, and by instead manufacturing reasons not supported either by the record or Oklahoma law to deny his requested relief. The OCCA's actions in Mr. Jones' case have afforded him "[n]ot only [ ] less process than due[,]" but rather "no process at all." *Id.* And finally, as further detailed below, the OCCA's refusal to consider the merits of Mr. Jones' serious charges, and its application of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), also violate Mr. Jones' rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

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

"In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Thus, this Court "has no power to review a state law determination

that is sufficient to support the judgment" since that would render its "resolution of any independent federal ground for the decision . . . advisory" in violation of the Case or Controversy requirement found in Article III of the federal constitution. *Id.*; U.S. Const. art. III, § 2.

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

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

successor post-conviction application inadequate to shield its judgment from this Court's review.

The OCCA first concluded that Mr. Jones' claim was procedurally barred because his factual support consisted of a Facebook message sent from Ms. Armstrong to a member of Mr. Jones' legal team, rather than "[a]n affidavit specifically averring Petitioner has reason to believe juror misconduct occurred" which "is required to support such an accusation." (A-1 at 3.) In support of this determination, the OCCA cited its decision in *Hatch v. State*, 924 P.2d 284 (Okla. Crim. App. 1996), and OCCA Rule 9.7(D)(5). *Hatch*, however, nowhere held that affidavits are the *only* factual support that a capital post-conviction petitioner in Oklahoma may offer in order to make out a colorable claim that his constitutional rights were transgressed. Instead, the OCCA in *Hatch* found that the petitioner "ha[d] *no proof* to offer" in support of his allegation—made in a successor post-conviction application—that the State violated its duties under *Brady v. Maryland*, 373 U.S. 83 (1963). 924 P.2d at 295 (emphasis added).

Neither does Rule 9.7(D)(5) support the OCCA's outright rejection of Mr. Jones' factual proffer. Rule 9.7(D), which governs the supplementation of the record and discovery in Oklahoma capital post-conviction cases, provides that "[t]he record on capital post-conviction shall consist of the original application for post-conviction relief, the record on appeal . . . and any affidavits *and evidentiary material* filed along with the original application." OCCA Rule 9.7(D)(1)(a) (emphasis added); *see also*

Williamson v. State, 422 P.3d 752, 760 (Okla. Crim. App. 2018) (noting that a "Facebook post" was "part of State's Exhibit 10" at criminal defendant's trial); *Bosse v. State*, 360 P.3d 1203, 1213 (Okla. Crim. App. 2015), *rev'd sub nom. Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (recounting evidence at capital murder trial, which included defendant's "Facebook status" and "a Facebook message"). "Affidavits *and evidentiary material* which are timely filed in support of a proposition of error *will be reviewed* to determine if a threshold showing is met to require a review on the merits," Rule 9.7(D) further provides. *Id.* (emphasis added). As a straightforward reading of these provisions makes evident, Rule 9.7(D) does not limit the factual support that a capital post-conviction petitioner can offer to substantiate allegations made in a post-conviction application to affidavits *alone*, as the OCCA "unexpected[ly]" and "freakishly" determined in Mr. Jones' case in order to deem his newly-discovered federal constitutional claim procedurally barred. *Prihoda*, 910 F.2d at 1383. Putting aside "the plain and ordinary meaning" of the language in Rule 9.7(D), Oklahoma's rules of statutory interpretation also dictate that "affidavits" and "evidentiary materials" as they appear throughout the rule be given distinct and independent definition. *State ex rel. Pruitt v. Steidley*, 349 P.3d 554, 557-58 (Okla. Crim. App. 2015).

Nor does the OCCA's imposition of this novel and unforeseeable requirement upon Mr. Jones comport with the plain language of other provisions of Rule 9.7 or Oklahoma's capital post-conviction statute which provide, for example, that "[b]y

filing any document with this Court, the attorney of record . . . is certifying that to the best of that person's knowledge, information, and belief, formed after inquiry reasonable under the circumstances[] . . . [t]he allegations and other factual contentions *have evidentiary support* or, if specifically so identified, *are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery*." OCCA Rule 9.7(C)(3) (emphasis added); *see also* Okla. Stat. Ann. tit. 22, § 1089(C) (providing that a capital post-conviction applicant "shall state in the application specific facts explaining as to each claim . . . how it supports a conclusion that the outcome of the trial would have been different but for the errors"); *id.* at § 1089(D)(4), (5) (requiring the OCCA to determine "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist," and, if so, directing the OCCA to "enter an order to the district court that imposed the sentence designating the issues of fact to be resolved"). The statutory provision governing successor post-conviction applications also obliges a capital petitioner to merely allege "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" and show that "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) (emphasis added).

Although Mr. Jones meticulously complied with the foregoing requirements, the OCCA nonetheless found his claim procedurally defaulted based on Rule 9.7(D)(5), which provides that "[a] request for an evidentiary hearing is commenced by filing an application for an evidentiary hearing, together with affidavits setting out those items alleged to be necessary for disposition of the issue petitioner is advancing." (A-1 at 3-4.) In *Coddington v. State*, however, the OCCA interpreted this provision to require only that "[a] request for an evidentiary hearing must present *information* which shows 'by clear and convincing evidence *the materials* sought to be introduced *have or are likely to have* support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." 259 P.3d 833, 840 (Okla. Crim. App. 2011) (emphasis added). In support of his request for a hearing, the petitioner in *Coddington* "incorporate[d] all the material included in his post-conviction application, Appendix of Exhibits, and any other filings in his case." *Id.* He "ma[de] no separate argument regarding the necessity for discovery." *Id.* However rather than deeming his claims procedurally defaulted for failing to submit affidavits exclusively in support of his post-conviction application and request for evidentiary development—as it did in Mr. Jones' case—the OCCA instead considered the merits of his claims and found "no merit to the propositions of error which were raised in his Application and supported by this material." *Id.* And because the OCCA additionally

found that "Coddington fail[ed] to meet the standard for an evidentiary hearing above,[7] and has not shown why discovery is warranted," it denied his application for post-conviction relief along with his requests for discovery and a hearing. *Id.* (footnote added).

As *Coddington* illustrates, the OCCA's determination below that Mr. Jones' federal claim is procedurally barred due to his failure to attach supporting affidavits is not a "strictly or regularly followed" rule that the OCCA applies "evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (providing that state procedural bar "must have been firmly established and regularly followed by the time as of which it is to be applied" (internal quotations omitted)). This renders it inadequate.

Also illustrating the inadequacy of the OCCA's determination that Mr. Jones' claim is procedurally barred due to the absence of supporting affidavits is the court's failure to invoke this procedural bar to deny relief in three recent successor post-conviction capital cases. In *Jones v. State*, No. PCD-2017-654 (Okla. Crim. App. Sept. 5, 2017) (A-9), and *Wood v. State*, No. PCD-2017-653 (Okla. Crim. App. Aug. 28, 2017) (A-10), Mr. Jones and Tremane Wood filed successor post-conviction applications in the OCCA raising the claim that a new statistical study on race and capital sentencing outcomes in Oklahoma demonstrated that the race of their alleged victims

[7] The OCCA was here referring to its earlier interpretation of Rule 9.7(D)(5), discussed *supra*.

increased the likelihood that they would be convicted and sentenced to death in violation of their rights under the U.S. and Oklahoma Constitutions. (A-11 at 9, 13-45; A-12 at 9, 13-38.) Along with their successor applications, Mr. Jones and Mr. Wood also filed requests for discovery and a hearing wherein, much like the petitioner in *Coddington*, they "incorporated by reference" "[a]ll averments and supporting attachments presented in [their] application[s]" for post-conviction relief. (A-11 at PDF 134, 138; A-12 at PDF 162, 166.) Importantly for the present purposes, neither Mr. Jones nor Mr. Wood attached affidavits to their requests for a hearing.

In nearly identical four-page orders, the OCCA denied Mr. Jones' and Mr. Wood's successor post-conviction applications and requests for evidentiary development. (A-9 at 3-4; A-10 at 3-4.) The OCCA predicated its denials not on Mr. Jones' or Mr. Wood's failure to attach affidavits to their requests for a hearing; rather the OCCA found their claims "procedurally barred under [Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)]."[8] (A-9 at 3; A-10 at 3.)

The OCCA's failure to invoke Rule 9.7(D)(5) to find capital post-conviction petitioners' claims procedurally barred in *three* decisions over the past eighteen months—including its denial of Mr. Jones' second application for post-conviction

[8] The OCCA reasoned that its decision in *Sanchez v. State*, 406 P.3d 27 (Okla. Crim. App. 2017), "is dispositive and controls our decision in this case." (A-9 at 3; A-10 at 3.) In *Sanchez*, as in *Jones* and *Wood*, the OCCA denied the petitioner's successor post-conviction application and requests for factual development based not on his failure to attach supporting affidavits to his motion for a hearing. *Sanchez*, 406 P.3d at 30. Significantly, the petitioner in *Sanchez* did not attach affidavits to his request for a hearing, instead "incorporate[ing] by reference" "[a]ll averments and supporting attachments presented in [his] Application." (A-13 at PDF 98.)

relief—and in at least *four* cases since *Coddington*, renders its invocation of this procedural bar below "unexpected[ ]" and therefore "inadequate" to support its judgment.[9] *Walker*, 562 U.S. at 320 (internal quotations omitted) (citing *Prihoda*, 910 F.2d at 1383).

The OCCA next found Mr. Jones' claim procedurally barred on res judicata and waiver grounds because "a factually *similar* claim of juror misconduct was litigated both at trial and on direct appeal." (A-1 at 4 (emphasis added).) The court recognized, however, that the material difference between the juror-misconduct claim previously raised[10] and the newly-discovered claim that he asserted below was a juror's use of a "racial epithet." (A-1 at 5); *cf. Smallwood v. State*, 937 P.2d 111, 115 (Okla. Crim. App. 1997) (explaining that a post-conviction claim is not procedurally barred on the basis of res judicata where it "is based on facts which were not available to Petitioner's direct appeal attorney"). Nonetheless, the OCCA found Mr. Jones' claim procedurally

[9] It bears mentioning that the OCCA's procedural default determination is also inequitable. From the very moment that Mr. Jones received Ms. Armstrong's Facebook message on November 2, 2017, he diligently endeavored to find and locate her in order to procure her sworn statement to include along with his application for post-conviction relief. He was unable to do so, however, in time to comply with Oklahoma's sixty-day statute of limitations that applies uniquely to capital successor post-conviction applicants. *See* OCCA Rule 9.7(G) (providing that in capital cases "[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable . . . factual basis serving as the basis for a new issue is announced or discovered"). Mr. Jones was thus confronted with a Hobson's choice: either he could comply with Oklahoma's sixty-day statute of limitations by submitting the evidentiary material that he had—which consisted of Ms. Armstrong's Facebook message—or he could wait until Ms. Armstrong could be located and persuaded to provide a sworn statement, although doing so would require that he violate Oklahoma's sixty-day statute of limitations.

[10] On direct appeal in 2006, Mr. Jones raised a premature-deliberation claim. *Jones v. State*, 128 P.3d 521, 535 n.3 (Okla. Crim. App. 2006) (internal quotations omitted).

barred based on its conclusion that it was "highly improbable" that Ms. Armstrong had neglected to inform the trial court at the time of Mr. Jones' trial that another juror had referred to Mr. Jones as a "nigger." (A-1 at 5.) The OCCA's assumption—that Ms. Armstrong must have brought another juror's reference to Mr. Jones using a racial slur to the trial court's attention back on February 27, 2002—is not only unsupported by the state-court record in Mr. Jones' case, but that assumption is also *contradicted* by that record and by Ms. Armstrong's own statements (*see* A-3). Nowhere in the transcripts of trial proceedings on February 27 and 28, 2002, or in the transcripts of Mr. Jones' trial proceedings more generally, is a juror's use of a racial slur documented. (Tr. XII; Tr. XIII.) If the OCCA perceived a factual dispute between the state-court record and the new evidence that Ms. Armstrong provided, then the proper way to resolve that dispute was through a hearing at which evidence and testimony could be developed and tested, *not* through the OCCA's unsupported speculation about what it believes must have occurred. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(5) (providing that controverted and previously unresolved factual issues material to the legality of a capital petitioner's confinement should be resolved in the trial court that imposed sentence).

Counsel for Mr. Jones has located not a single case where the OCCA invoked res judicata to procedurally bar a claim in a post-conviction application the factual and legal bases for which materially differ from a claim previously raised on direct appeal. (*See* A-1 at 10, Kuehn, J., concurring in the result ("I cannot agree that the

doctrine of res judicata bars consideration of the proposed newly discovered evidence. . . . The direct appeal did not raise the proposition of juror misconduct or mandatory juror dismissal for racial statements that violated his Sixth, Eighth, and Fourteenth Amendment rights. It addressed only the issue of premature deliberations."). Moreover, the OCCA cited *no* authority for its blanket determination that whenever a juror misconduct claim is raised on direct appeal, res judicata and waiver necessarily preclude a capital post-conviction petitioner from ever raising another juror-misconduct claim that relies upon materially different evidence. The OCCA's unusual application of this novel procedural bar to Mr. Jones below is thus inadequate. *Ford*, 498 U.S. at 424 (stating that to satisfy the adequacy requirement, a state procedural rule "must have been firmly established and regularly followed by the time as of which it is to be applied" (internal quotations omitted)).

The OCCA additionally found Mr. Jones' claim procedurally barred because he failed to demonstrate that its factual or legal basis was previously unavailable. (A-1 at 6-7.) Mr. Jones had argued, however, that until this Court's decision in *Peña-Rodriguez*, longstanding Oklahoma law squarely prohibited criminal defendants from impeaching a jury's verdict with evidence that bore upon jurors' subjective, and thus internal, decision making processes. (A-5 at 17-19 (citing Okla. Stat. Ann. tit. 12, § 2606(B) ("Upon inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement . . . as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to

or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations"); *Wacoche v. State*, 644 P.2d 568, 572 (Okla. Crim. App. 1982) ("Jurors cannot impeach or contradict their verdict by affidavits or testimony after they have been discharged from the jury"); *Matthews v. State*, 45 P.3d 907, 914-15 (Okla. Crim. App. 2002 (noting that "[s]ection 2606(B) was enacted to prohibit jurors from testifying post-verdict to the motives, methods or mental processes by which they reached their verdict"); *Wood v. State*, 158 P.3d 467, 480 n.29 (Okla. Crim. App. 2007) ("It is a well settled rule that jurors may not impeach or contradict their verdict by affidavits or testimony after they have been discharged from the jury."). This all changed with *Peña-Rodriguez*, wherein this 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 that 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 evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869. In so holding, *Peña-Rodriguez* created a new—and previously unavailable—legal avenue through which Mr. Jones could seek to have a court consider evidence that racial prejudice unconstitutionally infected the decision of at least one juror to convict and sentence him to die. The OCCA's determination that Mr. Jones was not precluded from impeaching his jury's verdict with evidence of racial prejudice prior to *Peña-Rodriguez* (A-1 at 6-7) thus flies in the face of the clear dictates of Oklahoma law,

rendering it inadequate as well. *Walker*, 562 U.S. at 320 (explaining that a state-court decision is inadequate where "discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law").

Finally, the OCCA reasoned that Mr. Jones' claim is procedurally barred under Okla. Stat. Ann. tit. 22, §1089(D)(8)(b). (A-1 at 7-8). For the reasons set forth more fully in Section IV, *infra*, this determination is "interwoven with federal law," *Long*, 463 U.S. at 1040, implicating, in particular, the Fourteenth Amendment's Equal Protection and Due Process guarantees, as well as the Eighth Amendment's prohibition on arbitrary considerations, like race, influencing trial and capital sentencing outcomes. *Beard*, 558 U.S. at 59.

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

In *Case v. Nebraska*, 381 U.S. 336 (1965), this Court granted certiorari to decide "whether the Fourteenth Amendment requires that States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Case*, 381 U.S. at 337. This Court never answered that question, however, because while certiorari was pending, the Nebraska legislature enacted a statute that, facially, provided an avenue through which the petitioner in *Case* could have the merits of his federal constitutional claim

heard by the courts of that state. *Id.* The intervening change in Nebraska law thus rendered the matter before this Court moot.

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

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." *Mooney v. Holohan*, 294 U.S. 103, 113 (1935). The petitioner in *Mooney* argued before this Court, as Mr. Jones does here, that newly-discovered evidence established a violation of his constitutional rights, and that the State of California had violated his due process rights by failing to provide any corrective judicial remedy whereby he could seek to have his federal claim heard and his conviction set aside. *Id.* at 110. This Court took up these "serious charges," *id.*, but ultimately denied the petition without prejudice because the petitioner had not shown "[t]hat corrective judicial process . . . to be

unavailable." *Id.* at 115. More than a decade later, this Court, in *Carter v. Illinois*, 329 U.S. 173, 175 (1946), articulated the following principle: "[a] State must give one to whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface." This principle applies with even greater force where the deprivation that the State seeks to exact is one's life. *Id.* at 186 (Murphy, J., dissenting) ("When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society is here attempting to take away the life or liberty of one of its members. That attempt must be tested by the highest standards of justice and fairness that we know.").

Without squarely addressing the question presented here, this Court in *Young v. Ragen*, 337 U.S. 235 (1949), explained that there is a "requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights." *Id.* at 239. While recognizing "the difficulties" that States might confront in "adapting state procedures to [this] requirement," this Court nonetheless stated that "[this] requirement must be met." *Id.* Nearly twenty years later, when this Court took up—but failed to answer—this very question in *Case*, Justices Brennan and Clark concurred, putting forth their view as to why the Constitution mandates full, fair, and adequate state post-conviction processes for the vindication of federal constitutional guarantees. *Case*, 381 U.S. at 338 (Clark, J., concurring) (declaring that the "wide variety" of then-current post-conviction techniques had

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

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

This Court's jurisprudence makes it clear that "if a State establishes postconviction proceedings, [then] these proceedings must comport with due process." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 293 (1998) (Stevens, J., concurring); *see also Yates v. Aiken*, 484 U.S. 211, 217-18 (1988) (per curiam) (unanimous court making clear that state post-conviction proceedings are subject to due process protections). Likewise, this Court has recognized that Equal Protection guarantees extend to state collateral proceedings. *See Smith v. Bennett*, 365 U.S. 708, 712-13 (1961); *Lane v. Brown*, 372 U.S. 477, 484 (1963) (noting that in *Smith*, the Supreme Court "made clear that [Equal Protection] principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings").

The question of "what process is due," *Woodard*, 523 U.S. at 293 n.3 (Stevens, J., concurring) (emphasis omitted), to state prisoners seeking to vindicate their federal rights, was answered, in part, by this Court in *Young*, 337 U.S. 235. There, this Court announced the requirement that states give prisoners "some clearly defined method by which they may raise claims of denial of federal rights." 337 U.S. at 239. "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois," this Court stated, "we wish to be advised of that fact upon remand of this case." *Id.* More generally, Due Process also requires at *minimum* that before the State can deprive a defendant of his life, it must provide him with notice of the grounds upon which he could be denied judicial review of his federal

constitutional claim, and a meaningful opportunity to be heard where those grounds turn out to be factually and materially incorrect. *See Woodard*, 523 U.S. at 290 (O'Connor, J., concurring) (recognizing that Due Process protections would be transgressed where capital petitioner failed to receive notice of a clemency hearing and an opportunity to participate in clemency interview prior to his execution, but finding no such transgression to have occurred); *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (due process requires "notice and an opportunity to be heard" before one is deprived of a constitutionally protected interest); *Woodard*, 523 U.S. at 291 (Stevens, J., concurring) ("There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.").

In light of these controlling principles, Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) by its express terms and through its application by the OCCA in Mr. Jones' case violates Mr. Jones' rights under the Due Process Clause. First, under this statutory provision, which Oklahoma reserves only for those who it seeks to execute, Mr. Jones has no "clearly defined method" by which to raise his newly-available federal constitutional claim that race tainted the fairness of his trial and sentencing proceedings. *Young*, 337 U.S. at 239. This is because § 1089(D)(8)(b), unlike its non-capital counterpart, *see* Okla. Stat. Ann. tit. 22, § 1086, limits the types of claims that a capital defendant can bring in a successor post-conviction application to those with underlying facts that "would be sufficient to establish by clear and convincing

evidence that, but for the alleged error, *no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death*." § 1089(D)(8)(b)(2) (emphasis added). Thus, Mr. Jones' newly-available federal constitutional challenge to his conviction and death sentence, which is based on the invidious role that race played in their imposition, is simply not cognizable under Oklahoma law, which erects a standard different from, and in fact higher than, that required to establish a federal constitutional violation. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (referring to the "unacceptable *risk* that 'the [death] penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis added)). And the OCCA so held in denying Mr. Jones' successor application for relief. (A-1 at 8.)

Second, the OCCA's denial of Mr. Jones' successor application based upon novel and thus unforeseeable procedural bars deprived him of notice of the grounds that the court would invoke to deny review of his federal constitutional claim. *See* Section II, *supra*. The OCCA's rules prohibiting a post-conviction petitioner from ever petitioning for rehearing from a decision of that court also denied Mr. Jones the opportunity to be meaningfully heard and, in particular, to correct the materially incorrect factual and legal conclusions that the OCCA unforeseeably invoked to deem his federal constitutional claim procedurally barred. (A-1 at 3-8); *see also* OCCA Rule 5.5.

The OCCA's rejection of Mr. Jones' successor application violated his constitutional rights in yet another way. The OCCA reasoned that Mr. Jones failed to show pursuant to Okla. Stat. Ann. tit. 22, §1089(D)(8)(b)(1) "that the factual basis for his claim was unascertainable through the exercise of reasonable diligence on or before the filing of his original post-conviction application." (A-1 at 7-8.) In so concluding, the OCCA applied a statutory provision that, on its face, arbitrarily discriminates against Mr. Jones on account of his status as a death-sentenced prisoner in violation of his rights under the Fourteenth Amendment's Equal Protection Clause. *Compare* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) (imposing a diligence requirement upon capital successor post-conviction petitioners and limiting successor claims based on newly-available evidence only to those that "establish by clear and convincing evidence that, but for the alleged error, no reasonable factfinder would have found the applicant guilty . . . or would have rendered the penalty of death"), *with* Okla. Stat. Ann. tit. 22, §1086 (providing that a *non*-capital defendant's successor post-conviction application need only assert "a ground for relief which for sufficient reason was not asserted or was inadequately raised in the prior application" (emphasis added)).

In *Peña-Rodriguez*, Justice Kennedy cautioned that courts "must not wholly disregard" evidence that racism denied a criminal defendant that impartial jury which the constitution guarantees to him. 137 S. Ct. at 870. This admonition applies with even greater force here, where racial prejudice influenced a juror's decision to

condemn Mr. Jones to die. The State of Oklahoma "is here attempting to take away the life [ ] of one of its members," *Carter v. Illinois*, 329 U.S. 173, 186 (1946) (Murphy, J., dissenting), and it is doing so without a single court having reviewed or allowed Mr. Jones to factually develop the merits of his newly-available federal constitutional claim. "Not only is this less process than due; it is no process at all." *Andrews*, 485 U.S. at 922 (1988) (Mem.) (Marshall, J., dissenting from the denial of certiorari).

CONCLUSION

For the foregoing reasons, Mr. Jones asks that this Court grant his petition for a writ of certiorari.

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