No. PCD-17-1313

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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JULIUS DARIUS JONES,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

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# RESPONSE TO PETITIONER'S THIRD APPLICATION FOR POST-CONVICTION RELIEF

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MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

JENNIFER L. CRABB, OBA # 20546
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR APPELLEE

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**RESPONSE TO PETITIONER'S THIRD APPLICATION FOR POST-CONVICTION RELIEF**

COMES NOW Respondent, the State of Oklahoma, by and through undersigned counsel, and responds to the claims raised in Petitioner's third application for post-conviction relief.

**STATEMENT OF THE CASE**

Petitioner was tried and convicted by a jury in Oklahoma County District Court Case No. CF-1999-4373 of first degree murder, possession of a firearm after former conviction of a felony and conspiracy to commit a felony. The jury found the existence of two aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; and (2) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. Petitioner was sentenced to death for the murder, fifteen years imprisonment for possession of a firearm after former conviction of a felony and twenty-five years imprisonment for conspiracy to commit a felony.

Petitioner brought a direct appeal to this Court. This Court affirmed Petitioner's convictions and sentences in a published opinion filed on January 27, 2006. *Jones v. State*, 2006 OK CR 5, 128 P.3d 521. This Court subsequently granted rehearing but denied relief. *Jones v. State*, 2006 OK CR 10, 132 P.3d 1.

Petitioner filed a post-conviction application in this Court on February 25, 2005, in Case Number PCD-2002-630. This Court denied relief in an unpublished opinion. 11/5/2007 *Order Denying Application for Post-Conviction Relief and Related Motion* (No. PCD-2002-630).

On November 3, 2008, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma, case number CIV-07-1290-D. On May 22, 2013, the district court issued an order denying Petitioner's petition for habeas corpus relief. *See Jones v. Trammell*, No. CIV-07-1290-D, slip op. (W.D. Okla. May 22, 2013) (unpublished).

Petitioner appealed the Western District of Oklahoma's denial of habeas relief to the Tenth Circuit. The Tenth Circuit affirmed the Western District's denial of relief on December 5, 2014. *Jones v. Trammell*, 773 F.3d 68 (10th Cir. 2014). The court subsequently granted rehearing and vacated the opinion, only to again affirm the district court's decision on November 10, 2015. *Jones v. Warrior*, 805 F.3d 1213 (10th Cir. 2015). The Supreme Court denied Petitioner's request for

certiorari review on October 3, 2016. *Jones v. Duckworth*, ___ U.S. ___, 137 S. Ct. 109 (2016).

On June 23, 2017, Petitioner filed a second application for state post-conviction relief, which this Court denied in an unpublished opinion on September 5, 2017. *See* 9/5/2017 *Order Denying Second Application for Post-Conviction Relief and Related Motions for Discovery and Evidentiary Hearing* (OCCA No. PCD-2017-654).

A mere six months after filing his second post-conviction application, Petitioner filed the instant *third* application for post-conviction relief.

## STATEMENT OF THE FACTS

This Court found the following facts on direct appeal:

> ¶ 2 On Wednesday, July 28, 1999, Paul Howell was fatally shot in the driveway of his parents' Edmond home. Howell, his sister, Megan Tobey, and Howell's two young daughters had just returned from a shopping trip in Howell's Chevrolet Suburban. Howell pulled into the driveway and turned the engine off. As Tobey exited from the front passenger side, she heard a gunshot. Tobey turned to see her brother slumped over the driver's seat, and a young black male, wearing a white T-shirt, a stocking cap on his head, and bandana over his face, demanding the keys to the vehicle. Tobey rushed to get herself and Howell's daughters out of the Suburban. As Tobey escorted the girls through the carport, she heard someone yelling at her to stop, and then another gunshot. Tobey got the girls inside and summoned for help. Howell's parents ran outside to find their son lying on the driveway. His vehicle was gone. Howell died a few hours later from a single gunshot wound to the head.

¶ 3 Two days after the shooting, Oklahoma City police found Howell's Suburban parked near a convenience store on the south side of town. Detectives canvassed the neighborhood and spoke with Kermit Lottie, who owned a local garage. Lottie told detectives that Ladell King, and another man he did not know, had tried to sell the vehicle to him the day before. Lottie realized at the time that the vehicle matched the description given in news reports about the Howell carjacking. Ladell King, in turn, told police that he had agreed to help Christopher Jordan and Jones find a buyer for a stolen vehicle. On the night of the shooting, Jordan came to King's apartment driving a Cutlass; Jones arrived a short time later, wearing a white T-shirt, a black stocking cap, and a red bandana, and driving the Suburban. King told police that Jones could be found at his parents' Oklahoma City home.

¶ 4 Police then drove to Jones's parents' home, called a telephone number supplied by King, and spoke to someone who identified himself as Julius Jones. Jones initially agreed to come out and speak to police, but changed his mind. Police made several attempts to re-establish telephone contact; eventually a female answered and claimed Jones was not there. While some officers maintained surveillance at the home, others sought and obtained warrants to arrest Jones and search his parents' home for evidence. Police found a .25–caliber handgun, wrapped in a red bandana, secreted in the attic through a hole in a bedroom ceiling and found papers addressed to Jones in the bedroom. Police also found a loaded, .25–caliber magazine, hidden inside a wall-mounted door-chime housing. Further investigation revealed that the bullet removed from Howell's head, and a bullet shot into the dashboard of the Suburban, were fired from the handgun found in the attic of the Jones['s] home.

¶ 5 Christopher Jordan was arrested on the evening of July 30. Jones, who managed to escape his parents'

> home before police had secured it, was arrested at a friend's apartment on the morning of July 31. The two men were charged conjointly with conspiracy to commit a felony, and with the murder of Howell. Jordan agreed to testify against Jones as part of a plea agreement. At trial, Jordan testified that the two men had planned to steal a Chevrolet Suburban and sell it; that they followed Howell's vehicle for some time with the intent to rob Howell of it; that once Howell pulled into the driveway, Jordan stayed in their vehicle while Jones, armed with a handgun, approached the Suburban on foot; that after the robbery-shooting, Jones drove the Suburban away and told Jordan to follow him; and that Jones subsequently claimed his gun had discharged accidentally during the robbery.

*Jones*, 2006 OK CR 5, ¶¶ 2-5, 128 P.3d at 532-33

## ARGUMENT AND AUTHORITY

## PROPOSITION

**PETITIONER'S CLAIM OF JUROR MISCONDUCT IS PROCEDURALLY BARRED.**

In the sole proposition of error raised in his third post-conviction application, Petitioner claims a juror harbored racial animus towards him. Petitioner raised a claim of juror misconduct based on these same facts on direct appeal. The claim is, therefore, barred by *res judicata*. Petitioner's attempt to transform this claim by alleging for the first time after almost sixteen years that the juror also used a racial epithet does not change the fact that this claim is barred. This claim should not be considered by this Court.

Petitioner claims that, on November 2, 2017, his attorney learned for the first time that one of the jurors who sat on his jury said, "they should just take the nigger out and shoot him behind the jail." 3rd PC App. at 14. Petitioner argues that this claim rests on new legal and factual bases and, therefore, should not be procedurally barred. 3rd PC App. at 16-20. The State will show that this claim was raised on direct appeal, and is not supported by a new legal or factual basis. Therefore, this claim must be barred.

**A. Standard of Review for Successive Post-Conviction Applications**

A post-conviction applicant may not raise a claim that was raised on direct appeal. 22 O.S.2011, §§ 1089(C)(1), 1089(D)(8)(a). Any claim which was raised previously is barred by the doctrine of *res judicata*. *Hooks v. State*, 1995 OK CR 56, ¶ 3, 902 P.2d 1120, 1123.

Further, any ground for relief raised in a subsequent post-conviction application which was not raised previously is barred unless this Court finds sufficient reason why it was not raised before. 22 O.S.2011, § 1086; *see also* 22 O.S.2011, § 1089(D)(8)(a) (this Court may not consider the merits of a claim raised in a subsequent application for post-conviction relief unless, *inter alia*, the claim could not have been raised in the original post-conviction application because the legal or factual basis for the claim was unavailable through the exercise of due diligence); *see also Murphy v. State*, 2005 OK CR 25, ¶ 5, 124 P.3d 1198, 1200 ("The amendments to the capital post-conviction review statute reflect the

legislature's intent to honor and preserve the legal principle of finality of judgment, and we will narrowly construe these amendments to effectuate that intent.").

Thus, Petitioner must show that his claim was not, and could not have been, raised on direct appeal or in his first or second post-conviction applications because it relies on a newly available legal basis or a factual basis that was "not [previously] ascertainable through the exercise of reasonable diligence[.]" Okla. Stat. tit. 22, § 1089(D)(8); *accord Slaughter v. State*, 2005 OK CR 2, ¶ 6, 105 P.3d 832, 834.

**B. This Claim was Raised on Direct Appeal**

According to Petitioner, an investigator working on his case sent a Facebook message to Juror V.A. to arrange a meeting to discuss the case. 3rd PC App. at 20. Juror V.A. reportedly responded that she "was the juror who went to the judge with the comment from another juror about how [the trial] 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[.]" 3rd PC App. at 20.

During the State's second stage case-in-chief, this same juror, V.A., notified the trial court that when she was in the jury room on a break that day, she heard Juror J.B. say "they should place him in a box in the ground for what he has

done."[1] (Tr. XII 95-96). The trial court and the parties questioned every juror. Aside from V.A., no other juror heard any such comment in spite of the fact that some of the jurors were closer to J.B. when he allegedly made the comment (Tr. XII 99; Tr. XIII 29-48).

Juror J.B. stated that he did not think he made any such statement and did not remember doing so (Tr. XIII 54). Juror J.B. also stated that he could have made the statement but reiterated that he did not think he did (Tr. XIII 61, 66). The trial court denied Petitioner's motions to excuse Juror J.B. and to declare a mistrial (Tr. XIII 84-91). On direct appeal, this Court affirmed those rulings:

> ¶ 19 Lastly, Jones complains about premature deliberations during the second stage of trial prior to second stage deliberations. The record shows one of the jurors informed the trial court she overheard another juror make a statement[3] which indicated to her that the other juror had already made up his mind and possibly could influence other jurors if they heard it. The trial judge then individually questioned the other jurors to determine if anyone else heard the statement. All other jurors denied hearing another juror express an opinion as to the appropriate penalty or punishment. Juror Y, alleged to have made the statement, denied making a statement concerning what the punishment should be, but then later admitted he "could have said that, yes." He also admitted he had formed a "partial" opinion on what he thought the punishment should be but was

[1]Although Petitioner appears to find the trial court's assertion that it was unclear who J.B. was referring to unreasonable, defense counsel acknowledged that "we don't necessarily know what he was talking about" (Tr. XIII 51). Further, Juror V.A. acknowledged that she heard only the one sentence, not what came before or after and it was possible the comment had nothing to do with Petitioner's case (Tr. XIII 74-75).

> waiting to hear the rest of the evidence. Following inquiry of Juror Y, the trial court questioned the reporting juror again who said she only heard part of the statement and admitted she did not know if it was related to the case. Defense counsel's requests to further question Juror Y and then to excuse the juror for cause were denied. Jones complains the denial of those requests was improper and the premature deliberation by even one juror warrants relief.
>
> [FN 3] Juror X told the trial court she heard Juror Y make "a comment that they should place him in a box in the ground for what he has done."
>
> ¶ 20 A claim of juror misconduct before a criminal case is submitted to a jury must be established by clear and convincing evidence. *Glasgow v. State*, 1962 OK CR 41, ¶ 16, 370 P.2d 933, 936; *Pennington v. State*, 1995 OK CR 79, ¶ 18, 913 P.2d 1356, 1363. Jones must show actual prejudice from any jury misconduct and "defense counsel's mere speculation and surmise is insufficient upon which to cause reversal." *Woodruff v. State*, 1993 OK CR 7, ¶ 13, 846 P.2d 1124, 1132, quoting *Chatham v. State*, 1986 OK CR 2, ¶ 7, 712 P.2d 69, 71. The trial court personally observed the jurors and their responses. We will not disturb its refusal to allow additional questioning and/or excuse the allegedly offending juror for misconduct absent an abuse of discretion. *Teafatiller v. State*, 1987 OK CR 141, ¶ 18, 739 P.2d 1009, 1012. The trial court did not abuse its discretion. Jones has failed to show that any of his alleged misconduct was prejudicial; therefore, this proposition fails.

*Jones*, 2006 OK CR 5, ¶¶ 19-20, 128 P.3d at 535.

Although Petitioner's claim that he did not raise his "present claim–that racial prejudice influenced the decision of at least one juror to convict[2] him of capital murder and to sentence him to death" on direct appeal is, in a sense, technically correct because he did not include the alleged racial epithet, this claim *was* presented on direct appeal.[3] The phrasing used by Juror V.A.--"I was the juror who went to the judge . . ."--suggests that she was referring to an incident which she expected the investigator to have knowledge of. Further, the accusations are nearly identical, suggesting that the juror had allegedly formed an opinion as to the appropriate sentence, except for the racial epithet. In addition, the court and parties questioned Juror V.A. at length and she made no allegation that Juror J.B., or any other juror, used a racial epithet to describe Petitioner (Tr. XII 95-103; Tr. XIII 73-77).

It defies belief that Juror V.A., who obviously felt strongly about Juror J.B.'s alleged statement, (Tr. XII 96, 98, 100), neglected to add that he used a very offensive racial epithet or neglected to mention that another juror engaged in similar conduct. In fact, V.A. claims to have gone to the judge, but other than this

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[2]Although Petitioner appears to be challenging his conviction, in addition to his sentence, defense counsel specifically asked Juror V.A. whether there were "any of those types of comments before the verdict was rendered in the first stage of this case?" (Tr. XII 103). Juror V.A. replied that there were not (Tr. XII 103).

[3]Petitioner also implies that when Juror V.A. said she brought to the trial court's attention that "another juror" referred to Petitioner by a racial epithet, she was referring to a juror other than J.B. 3rd PC App. at 24 (emphasis added). However, there is nothing to suggest V.A. meant anything other than, a juror other than herself.

alleged comment by J.B., there is nothing in the record. The trial court took the allegations against Juror J.B. very seriously (Tr. XII 104-06; Tr. XIII 52, 81). It similarly defies belief that there was another incident which somehow did not make it into the record.

It has been almost sixteen years since Petitioner's trial. There can be no question that V.A.'s recollection of what was said would have been better the day it was said than it is now. Thus, in spite of Petitioner's attempt to make this sound like a new claim, it is the same claim and is barred. *See Braun v. State*, 1997 OK CR 26, ¶ 17, 937 P.2d 505, 511 ("as the basis for [this] issue was raised on direct appeal, res judicata applies and this Court cannot address it"); *Hooks v. State*, 1995 OK CR 56, ¶ 3, n.4, 902 P.2d 1120, 1122 n.4 (although Petitioner raised different allegations of ineffective assistance of counsel on post-conviction than he had raised on direct appeal, the new allegations were nonetheless barred); *Williamson v. State*, 1993 OK CR 24, ¶ 4, 852 P.2d 167, 169 (defendants may not "assert error in a piecemeal fashion" or "obtain review of an issue raised previously by presenting it in a slightly different manner").

### C. Assuming Petitioner's Claim is not Barred by *Res Judicata*, it is Waived by his Failure to Present it Earlier

Even assuming the doctrine of *res judicata* does not apply in this instance, Petitioner's claim is waived by his failure to raise it on direct appeal or in either of his two previous post-conviction applications. As set forth above, it is

Petitioner's responsibility to adequately explain his delay in bringing this claim. Petitioner alleges that both the legal and factual bases for his claim were previously unavailable. Petitioner is incorrect.

Petitioner claims the legal basis for his claim was unavailable because jurors are not permitted to testify regarding their deliberations. 3rd PC App. at 17-18; *see also* 12 O.S.2011 § 2606(B). In *Pena-Rodriquez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 869 (2017), the Supreme Court held that this "no-impeachment" rule does not apply to allegations that racial animus motivated the jury's (or a juror's) verdict.[4]

Petitioner correctly notes that the prosecutor objected to inquiry into first stage deliberations and the trial court agreed[5] (Tr. XIII 19-22, 25-27, 70-72). However, as shown above, the comment in question was made during second stage and was not made during deliberations. Even assuming this claim presents a different comment, there is no evidence it was made during deliberations.

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[4]Even if Petitioner's allegation that the statement was made is true, "the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Pena-Rodriguez*, 137 S. Ct. at 869. While the juror's alleged use of the racial epithet certainly demonstrates racial antipathy towards Petitioner, it does not establish that the juror's belief that Petitioner should be executed was motivated by anything other than the evidence that Petitioner murdered an innocent man, in front of his children, and had a history of terrorizing people with guns. *See Jones*, 132 P.3d at 3 (describing Petitioner's history as "replete with the use and threat of violence: armed robbery, carjackings, assault.").

[5]Although Petitioner attempts to make it sound as if the prosecutor was trying to prevent questioning of the jurors, the prosecutor made it clear that she believed it was necessary to inquire of the jurors (Tr. XII 105-06; Tr. XIII 52).

Accordingly, Petitioner did not need *Pena-Rodriquez* to be able to bring this claim. As the legal basis for this claim is not new, Petitioner's claim is barred.

Petitioner also claims the factual basis for his claim was not available. Petitioner states that his attorney "first learned" of this allegation on November 2, 2017. 3rd PC App. at 19-20. However, Petitioner makes no attempt to show that he could not have ascertained this information earlier through the exercise of due diligence. Petitioner has provided no explanation for the fact that he waited nearly *sixteen* years to reach out to the jurors. This claim is procedurally barred.

**RESPONSE TO PETITIONER'S MOTIONS FOR EVIDENTIARY HEARING AND DISCOVERY**

Finally, Petitioner has filed separate motions for discovery and an evidentiary hearing. This Court may grant an evidentiary hearing in a post-conviction proceeding only if the claims could not have been previously raised and relief is not otherwise foreclosed by the Uniform Post-Conviction Procedure Act. 22 O.S.2011, §§ 1089(D)(4) & (5). As set forth above, Petitioner's claim was raised previously and he received a hearing in the trial court. Alternatively, assuming Petitioner is raising a new claim, that claim could have been raised previously. As Petitioner is not entitled to relief for this barred claim, even if the facts are as he alleges, he is not entitled to an evidentiary hearing. Petitioner's request for discovery must fail for the same reason. Rule 9.7(D)(1)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008). Further, Petitioner has

failed to support his request for an evidentiary hearing with affidavits, as required by Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008). Petitioner is not entitled to supplement the record for this procedurally barred claim.

## CONCLUSION

Respondent has shown that Petitioner's claim is procedurally barred. Therefore, Respondent respectfully requests this Court deny Petitioner's post-conviction application and applications for discovery and an evidentiary hearing in their entirety.

Respectfully submitted,

**MIKE HUNTER**
**ATTORNEY GENERAL OF OKLAHOMA**

**JENNIFER L. CRABB, OBA# 20546**
**ASSISTANT ATTORNEY GENERAL**
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921 FAX (405) 522-4534
**ATTORNEYS FOR RESPONDENT**

## CERTIFICATE OF MAILING

On this 1st day of February, 2018, a true and correct copy of the foregoing was mailed to:

Mark Barrett
P.O. Box 896
Norman, Oklahoma 73070

JENNIFER L. CRABB