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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 28 2018

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JULIUS DARIUS JONES,	)	
Petitioner,	)	NOT FOR PUBLICATION
-vs-	)	No. PCD-2017-1313
STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER DENYING THIRD APPLICATION FOR POST-CONVICTION RELIEF AND RELATED MOTIONS FOR DISCOVERY AND EVIDENTIARY HEARING

Before the Court is Petitioner Julius Darius Jones's third application for post-conviction relief and related motions for discovery and an evidentiary hearing. A jury convicted Jones in 2002 in the District Court of Oklahoma County, Case No. CF-1999-4373, of the first degree murder of Paul Howell and sentenced him to death.[1] Since then Jones has unsuccessfully challenged his

[1] Jones's jury convicted him of Count 1: First Degree Felony Murder, in violation of 21 O.S.Supp.1998, § 701.7(B); Count 2: Possession of a Firearm after Conviction of a Felony, in violation of 21 O.S.Supp.1998, § 1283; and Count 3: Conspiracy to Commit a Felony, in violation of 21 O.S.Supp.1999, § 421. The jury recommended the death penalty on Count 1 after finding that Jones knowingly created a great risk of death to more than one person and that Jones posed a continuing threat to society. *See* 21 O.S.2001, §§ 701.12(2) and (7). The jury recommended, and the trial court sentenced, Jones to fifteen

Judgment and Sentence on direct appeal[2] and in collateral proceedings in this Court.[3] Jones too has unsuccessfully challenged his convictions and death sentence in federal habeas proceedings.[4]

Jones now claims that newly discovered evidence establishes that a juror harbored racial animus toward him. According to Jones, an investigator working on his case sent a Facebook

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(15) years imprisonment on Count 2, and twenty-five (25) years imprisonment on Count 3.

[2] On January 27, 2006, this Court affirmed Jones's Judgment and Sentence. *Jones v. State,* 2006 OK CR 5, 128 P.3d 521. On March 14, 2006, the Court granted Jones's petition for rehearing, but finding relief was not warranted denied Jones's motion to recall the mandate. *Jones v. State,* 2006 OK CR 10, 132 P.3d 1. The United States Supreme Court denied certiorari review on October 10, 2006. *Jones v. Oklahoma,* 549 U.S. 963, 127 S. Ct. 404, 166 L. Ed. 2d 287 (2006).

[3] This Court denied Jones's original and second applications for post-conviction relief in unpublished opinions. *See Jones v. State,* Case No. PCD-2002-630 (Okl.Cr., Nov. 5, 2007) (unpublished); *Jones v. State,* Case No. PCD-2017-654 (Okl.Cr., Sept. 5, 2017) (unpublished).

[4] The United States District Court denied a petition for writ of habeas corpus in *Jones v. Trammell,* No. CIV-07-1290-D, 2013 WL 12205578 (W.D.Okla. 2013). The United States Court of Appeals for the Tenth Circuit subsequently granted Jones a certificate of appealability on the single issue of ineffective assistance of counsel, but denied Jones relief in *Jones v. Warrior,* 805 F.3d 1213 (10th Cir. 2015). On October 3, 2016, the United States Supreme Court denied Jones's petition for certiorari review in *Jones v. Duckworth,* __ U.S. __, 137 S. Ct. 109, 196 L. Ed. 2d 88 (2016).

message to Juror V.A. to arrange a meeting to discuss the case.[5] 3rd PC App. at 20. Juror V.A. purportedly responded:

> 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 have just take the nigger out and shoot him behind the jail" although that juror was never removed and nothing further came of it[.]

Petitioner's Exhibit A. Jones contends this evidence establishes that "racial prejudice influenced the decision of at least one juror to convict [him] and sentence him to death" in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments, and parallel provisions of the Oklahoma Constitution.

We note first that Petitioner's Exhibit A provides screen shots of Juror V.A.'s alleged response to substantiate this claim. Petitioner does not provide this Court with an affidavit from Juror V.A. or the investigator. An affidavit specifically averring Petitioner has reason to believe juror misconduct occurred is required to support such an accusation. *See Hatch v. State*, 1996 OK CR 37, ¶ ¶ 57, 924 P.2d 284, 296 (granting any relief based upon bald allegations or suspicions goes against "the presumption of

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[5] V.A. served as a juror in Jones's 2002 jury trial.

correctness we attach to trial proceedings, and to the presumption we use in dealing with counsel as officers of the court."); *see also* Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).

Nonetheless, notwithstanding this omission and having reviewed Jones's claim and supporting exhibits, we find Jones's claim is barred on grounds of *res judicata* and waiver. 22 O.S.2011, §§ 1089(C)(1), 1089(D)(8); *see also* 22 O.S.2011, § 1086. While this claim was not raised in this exact manner previously, a factually similar claim of juror misconduct made by this same juror was litigated both at trial and on direct appeal. *Jones v. State*, 2006 OK CR 5, ¶¶ 19-20, 128 P.3d 521, 535. Jones's original juror misconduct claim involved the same two jurors at issue here—Juror V.A. and Juror J.B. During the second stage of trial, prior to deliberations, Juror V.A. notified the trial court that she had heard Juror J.B. make "a comment that they should place him in a box in the ground for what he has done." *Jones*, 2006 OK CR 5, ¶ 19 n.3, 128 P.3d at 535 n.3. Juror V.A.'s concerns regarding Juror J.B.'s comments were fully vetted by the trial court. The trial court denied Jones's motions to excuse Juror J.B. and to declare a mistrial. *Id.*, 2006 OK CR 5, ¶ 19. On direct appeal, this Court affirmed those rulings finding Jones had failed to show the alleged misconduct, i.e., Juror J.B.'s premature deliberations, was prejudicial.

The only perceivable difference between Jones's original claim and his current claim is Juror V.A.'s new assertion that Juror J.B. made a racial epithet. Juror V.A.'s recollection of what was said by J.B. on February 27, 2002, was no doubt better on that day when she reported it to the trial court than it is now. Moreover, Juror V.A.'s concern with Juror J.B.'s alleged comment was obviously significant enough that she felt compelled to report it to the trial court. Thus, it is highly improbable that Juror V.A. neglected to add, during the trial court's investigation into the matter, that J.B. used a clearly offensive racial epithet or for that matter, failed to mention that another juror possibly engaged in similar conduct. Consequently, to the extent Jones's present claim was previously raised on direct appeal, his claim is barred by *res judicata*. *Stevens v. State*, 2018 OK CR 11, ¶ 14, 422 P.3d 741, 745-46; *Logan v.*

State, 2013 OK CR 2, ¶ 6 n.5, 293 P.3d 969, 973 n.5, *as corrected* (Feb. 28, 2013) ("if appellate counsel actually did raise the issue (on direct appeal) that is now being re-asserted on post-conviction . . ., any rejection of the issue on direct appeal would make the issue *res judicata*[.]"). *See also 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").

Furthermore, to the extent Jones potentially raises a new claim related to the same issue, his claim is barred from review under 22 O.S.2011, § 1089(D). *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29 ("This Court may not consider a [subsequent] application for capital post-conviction relief unless its claims 'have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable' as defined in section 1089(D) of Title 22."). At the heart of Jones's claim is his assertion of juror misconduct. Juror J.B.'s alleged remark was made during the second stage proceedings—not during deliberations. Nothing presented in Jones's application for post-conviction relief indicates otherwise.

Jones was not precluded by law from further investigating Juror V.A.'s allegations post-trial. *See McGregor v. State*, 1997 OK CR 10, ¶ 7, 935 P.2d 332, 334-35 (Petitioner failed to demonstrate why his claim could not have been previously raised given that the facts generating the claim were available as the persons in possession of evidence were known to trial counsel); *cf. Crider v. State ex rel. Dist. Court of Oklahoma City.*, 2001 OK CR 10, ¶ 4, 29 P.3d 577, 579 ("defense representatives are entitled to contact jurors as part of the investigation of possible appellate issues, in order to determine whether any impermissible outside influence was introduced into deliberations"). Thus, contrary to Jones's assertion, the Supreme Court's decision in *Pena-Rodriquez v. Colorado*, __ U.S. __, 137 S. Ct. 855, 869 (2017), was not needed to bring today's claim of juror misconduct. The legal basis for this claim was therefore not unavailable. 22 O.S.2011, § 1089(D)(8)(a).

Additionally, for reasons discussed above, Jones's claim is also barred under 22 O.S.2011, § 1089(D)(8)(b), because he fails to show (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; and (2) that the factual basis of his current 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 improper racial prejudice, no reasonable fact finder would have found him guilty or rendered the penalty of death. *Sanchez*, 2017 OK CR 22, ¶¶ 8, 11, 406 P.3d at 29, 30.

Thus, for the foregoing reasons, we find Jones's claim is barred. Jones's third application for post-conviction relief and related motions for discovery and evidentiary hearing are therefore **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT

this 28th day of September, 2018.

GARY L. LUMPKIN, Presiding Judge

David B. Lewis

DAVID B. LEWIS, Vice Presiding Judge

Robert L. Hudson

ROBERT L. HUDSON, Judge

Dana Kuehn - CIR, separate writing

DANA KUEHN, Judge

Scott Rowland

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

KUEHN, J., CONCURRING IN RESULT:

Upon review of the application and exhibits, I cannot agree that the doctrine of res judicata bars consideration of the proposed newly discovered evidence. *Hale v. State*, 1991 OK CR 27, ¶ 2, 807 P.2d 264, 266–67. I do, however, agree that the Third Application for Post-Conviction Relief should be denied. Petitioner does not meet the basic minimum pleading requirements necessary before this Court may consider whether to grant relief on a subsequent capital post-conviction application based on its merits.[1]

Petitioner's Application, supported by a cell phone screen shot of a hearsay statement, is a bare-bones attempt to motivate the Court to make a decision based on emotion. The alleged statement

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[1] This Court may not consider the merits on a subsequent post-conviction application unless:

> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
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> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder. . . would have rendered the penalty of death. 22 O.S. § 1089 (D)(8)(b)(1) and (2).

is appalling, intolerable and maddening. However, this Court should not deny this claim based upon res judicata, or any procedural barrier, upon the slim presentation filed by Petitioner. As the record is not complete, I cannot join the Majority's leap to the res judicata conclusion. Just as easily as the Majority finds res judicata, I believe what was submitted could support the contrary argument. 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 juror misconduct of premature deliberations. The statement which was at issue on direct appeal, regarding putting the defendant "in a box" for killing a man, is completely different from the statement alleged here, that the defendant should die solely for the color of his skin. The latter, of course, is deplorable not only to the American system of justice, but to the core of liberty and decency. Again, we cannot reach either conclusion based on the meager information Petitioner provides.

Petitioner's application, supported by a screen shot of an investigator's phone conversation allegedly had with Juror V.A., does not contain a factual basis establishing this newly remembered racially-charged statement was not ascertainable through the exercise of reasonable diligence for use in the direct appeal or any subsequent post-conviction applications. Post-conviction relief may be based on the discovery of "material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." 22 O.S. § 1080(d). These facts must have been undiscoverable for trial or original appeal despite the exercise of due diligence. *Romano v. State*, 1996 OK CR 20, ¶ 12, 917 P.2d 12, 15. The record is clear that the trial judge questioned all of the jurors about a statement made, yet the new statement was never brought up by Juror V.A. or any other juror during the *in camera* review at trial. The record is completely barren of any exhibits or affidavits to support a claim that the information was not ascertainable previous to this Third Application for relief.

Petitioner's application also fails to establish by clear and convincing evidence that the statement, if true, affected the fact-finders' rendering of a verdict recommending death. 22 O.S. § 1089 (D)(8)(b)(2). Recognizing the Legislature's intent to honor and preserve the legal principle of finality of judgment, we will narrowly construe the post-conviction amendments to reflect that intent. *Smallwood v. State*, 1997 OK CR 25, ¶ 4, 937 P.2d 111, 114. The sparse information provided by Petitioner does not meet the minimum standards necessary to overcome this principle of finality of judgment.

The request for an evidentiary hearing must also be denied as Petitioner failed to follow the procedural mandates necessary for this Court to even consider his motion for evidentiary hearing. 22 O.S. § 1051; Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). Rule 9.7(D)(5) requires a petitioner to submit affidavits in support of the specific statements contained in the request for evidentiary hearing. *Id.* Petitioner's request for evidentiary hearing only incorporated by reference his Exhibits from this Post-Conviction Relief Application, which, as I discuss above, are not sworn affidavits and lack any value. Simply attaching the screen shot of a phone does not meet the threshold requirements required for the Court to remand the post-conviction application to the District Court for a hearing. Rule 9.7(D)(1)(a), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). The better approach is for Petitioner to follow procedure, raise specific allegations of fact, and submit worthy affidavits in support of those allegations.

Because Petitioner has failed to comply with the Rules of this Court, I agree that the request for an evidentiary hearing should be denied. His subsequent post-conviction application does not meet the statutory requirements for this Court to consider his substantive claim on its merits, and I agree that the application should be denied.