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COMMENT

OFTEN NO RELIEF IN POST-CONVICTION RELIEF

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I. INTRODUCTION

On April 25, 2017, a bipartisan group released "The Report of the Oklahoma Death Penalty Commission" ("the Report"), a baffling report of in-depth examinations of the death penalty system in Oklahoma.[1] The conclusions drawn throughout the Report portrayed a system with some of the highest execution rates in the nation and world, upsettingly large numbers of exonerations (prisoners sentenced to death who are later deemed to be innocent), and indications of racial bias as a determining factor of who lives and who dies.[2]

Within the Report, a study titled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012" examined the possibility that the "race

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1. *See* THE OKLA. DEATH PENALTY REV. COMM'N, THE REPORT OF THE OKLAHOMA DEATH PENALTY REVIEW COMMISSION (2017) [hereinafter *The Report*].

2. *See id*. at 211-22.

of the defendant and/or victim affects who ends up on death row."[3] The study's primary conclusion was that race of the victim plays an important factor in whether or not the defendant will be sentenced to death, finding that defendants convicted of killing white victims are nearly twice as likely to receive the death penalty, rather than life in prison with or without parole, than if the victim is nonwhite.[4] That race plays a role in determining whether an inmate will live or die offends traditional notions of justice, and one might think it is a violation of the Constitution. However, decisions from this country's highest Court, as well as statutory schemes, have made it nearly impossible to address the racial bias that occurs within a discretionary criminal justice system.

Following the brutal murder of University of Oklahoma college student Juli Busken in 1996, Anthony Castillo Sanchez was found guilty of first-degree murder, first-degree rape, and forcible sodomy.[5] Juli Busken was white, and Anthony Sanchez is Hispanic. He was sentenced to death in 2006, and his most recent attempt at post-conviction relief was denied with the wave of a hand and a short, two-and-a-half-page opinion authored by the Oklahoma Court of Criminal Appeals.[6] The Court's opinion is illustrative of the limited remedies currently available to capitally-sentenced defendants through post-conviction relief. Mr. Sanchez's case exemplifies two significant shortcomings of the post-conviction relief process in Oklahoma and beyond: limits of the statutes themselves, as well as the minimal weight, if any, given by our Judiciary to the validity of conclusions drawn by social sciences.

II. STATUTORY POST-CONVICTION RELIEF IN OKLAHOMA

Within the Post-Conviction Procedure Act,[7] the Oklahoma Legislature provides defendants sentenced to death, for whom the Oklahoma Court of Criminal Appeals has already affirmed on direct appeal, with a mechanism to seek post-conviction relief.[8] This Act is not intended to function as a means for a second appeal,[9] but rather as a means to challenge a conviction

3. Glenn L. Pierce et al., *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. CRIM. L. & CRIMINOLOGY 733, 737 (2017).
4. *See id.*
5. Sanchez v. State, 2009 OK CR 31, ¶¶ 2, 4-5, 223 P.3d 980, 987.
6. *See* Sanchez v. State, 2017 OK CR 22, 406 P.3d 27.
7. OKLA. STAT. tit. 22, § 1080 (2011 & Supp. 2017).
8. Tit. 22, § 1089(A).
9. *See* tit. 22, § 1089(D)(4); Cartwright v. State, 708 P.2d 592 (Okla. Crim. App.

or a sentence. The statutes "reflect the [L]egislature's intent to honor and preserve the legal principle of finality of judgments."[10] In fact, the Legislature specifically mandates that the "issues that may be raised in an application for post-conviction relief are [limited to] those that were not and could not have been raised in a direct appeal [and those that s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent."[11] Courts have maintained that *res judicata* bars post-conviction claims already raised in earlier appeals.[12] Consequently, the Court of Criminal Appeals has held time and again that post-conviction claims are waived if they could have been brought in previous appeals but were not.[13]

The incredibly limited nature of post-conviction relief is further narrowed for subsequent applications. Generally, a defendant may only apply for additional post-conviction relief following an initial application if the factual or legal basis for the new claim did not exist at the time of filing of the first motion.[14] The United States Supreme Court has held that states are permitted to impose "proper procedural bars to restrict repeated returns to state court for post[-]conviction proceedings."[15] Under Oklahoma's post-conviction statutory scheme, a defendant may not bring a successive claim that could have been raised in an initial post-conviction application and is entitled to relief through successive applications only if the legal or factual grounds of the claim did not exist at the time that the first motion was filed.[16] If the subsequent application is factually based, the "facts underlying the claim [must] be sufficient to establish by clear

1985); Jones v. State, 704 P.2d 1138 (Okla. Crim. App. 1985).

10. 6 Harvey D. Ellis, Jr., & Clyde A. Muchmore, *Okla. Prac. Series, Appellate Practice* § 25:104 (2017 ed.).

11. Tit. 22, § 1089(C).

12. Walker v. State, 826 P.2d 1002, 1005 (Okla. Crim. App. 1992) (petitioner's evidence of brain dysfunction is barred on post-conviction relief by *res judicata* because defense of insanity was already vigorously pursued at trial); Moore v. State, 889 P.2d 1253, 1255 (Okla. Crim. App. 1995) (propositions raised on direct appeal are barred by *res judicata*); Walker v. State, 933 P.2d 327, 331 (Okla. Crim. App. 1997) ("post-conviction claims which were raised and addressed in previous appeals are barred [by] *res judicata*").

13. Johnson v. State, 823 P.2d 370, 372 (Okla. Crim. App. 1991); *Moore*, 889 P.2d at 1255-56 (propositions were not raised that could have been raised on direct appeal and are therefore waived "absent proof of adequate grounds to excuse the delay"); *Walker*, 933 P.2d at 331 ("post-conviction claims which could have been raised in previous appeals but were not are generally considered waived").

14. 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2168 (2018) Westlaw.

15. Slack v. McDaniel, 529 U.S. 473, 489 (2000).

16. OKLA. STAT. tit. 22, § 1089(D)(8) (2011 & Supp. 2017).

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."[17]

The Oklahoma Court of Criminal Appeals explained the reasoning behind the severely limited nature of post-conviction relief applications:

> The establishment and recognition of this type of procedural prohibition is necessary to at some point close the books on a particular case. Without any restraint on the number of times in which a defendant could seek review of his judgment and sentence on any ground, there would never be a point at which the system could rely on the finality of the judgment and sentence. By limiting the available avenues of review, the rights of defendants are protected while providing a finite number of opportunities for relief. Such a limitation on the right to judicial review is constitutionally permissible and should be respected.[18]

III. UNJUST JUSTICE: THE *SANCHEZ* CASE

In the early morning of December 20, 1996, recent University of Oklahoma graduate, Juli Busken was brutally attacked at her apartment,[19] kidnapped, and driven to nearby Lake Stanley Draper where she was raped and then shot in the back of the head with a .22 Long Rifle.[20] Her body was found hours later, lying face down, hands bound behind her back, "her jeans unbuttoned and unzipped, and her underwear partially rolled down her thighs."[21] Investigators recovered ample evidence from the scene but had no initial leads as to who had committed this atrocious crime.[22]

Four years later, investigators received a break in the case when a tissue sample taken from an inmate detained by the Oklahoma Department of Corrections positively linked to the DNA collected from the scene of Juli Busken's murder.[23] According to the State's DNA expert, the probability of a random DNA match between an unrelated individual and the evidence collected from the scene of the crime was "1 in 200.7 trillion

17. Tit. 22, § 1089(D)(8)(b)(2).
18. *Johnson*, 823 P.2d at 372 (citing McCleskey v. Zant, 499 U.S. 467 (1991)).
19. Sanchez v. State, 2009 OK CR 31, ¶¶ 2, 4-5, 223 P.3d 980, 987.
20. *Id*. ¶¶ 6, 8-9, 223 P.3d at 988.
21. *Id*. ¶ 7, 223 P.3d at 988.
22. *Id.* ¶¶ 9-10, 13, 223 P.3d at 988-89.
23. *Id.* ¶ 13, 223 P.3d at 989.

Caucasians, 1 in 20.45 quadrillion African Americans, and 1 in 94.07 trillion Southwest Hispanics."[24] Aside from the overwhelming DNA evidence tying the inmate to the crime, circumstantial evidence, including records of calls made from Juli Busken's phone to known contacts of this new suspect,[25] led the jury to find Anthony Sanchez guilty beyond a reasonable doubt for the murder of Juli Busken.[26] On June 6, 2006, Sanchez was sentenced to death in the District Court of Cleveland County for Ms. Busken's murder, as well as a combined 60 years in prison for rape and forcible sodomy.[27]

On appeal, the Oklahoma Court of Criminal Appeals upheld Mr. Sanchez's convictions and found that the sentences handed down by the District Court were "factually supported and appropriate."[28] Subsequently, the Supreme Court denied certiorari for Mr. Sanchez's case.[29]

Mr. Sanchez next sought capital post-conviction relief on January 26, 2009.[30] Following the Oklahoma Court of Criminal Appeals' denial of his initial application,[31] the United States District Court for the Western District of Oklahoma denied a petition for writ of habeas corpus,[32] and the United States Court of Appeals for the Tenth Circuit then denied a certificate of appealability.[33] Again, the Supreme Court denied certiorari in *Sanchez v. Duckworth* in 2016.[34]

In his second application for post-conviction relief,[35] Mr. Sanchez used evidence from a new study titled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," which found "rather large disparities in the odds of a death sentence [based on] the gender and . . . race/ethnicity of the victim."[36] The study found cases with white female, white male, and minority female victims to have a statistically significant higher likelihood

24. *Id.* ¶ 15, 223 P.3d at 989-90.
25. *Id.* ¶ 12, 223 P.3d at 989.
26. *Id.* ¶ 1, 223 P.3d at 987.
27. *Id*.
28. *Id.* ¶ 106, 223 P.3d at 1014.
29. Sanchez v. State, 2009 OK CR 31, 223 P.3d 980, *cert. denied*, 562 U.S. 931 (2010).
30. Sanchez v. State, 2017 OK CR 22, ¶ 2, 406 P.3d 27, 28.
31. *Id.*
32. Sanchez v. Trammell, No. CIV-10-1171-HE, 2015 WL 672447, at *32 (W.D. Okla. Feb. 17, 2015).
33. Sanchez v. Warrior, 636 F.App'x 971, 977 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 119 (2016).
34. *Id*.
35. Sanchez v. State, 2017 OK CR 22, ¶ 3, 406 P.3d 27.
36. Pierce et al., *supra* note 3, at 750.

of resulting in capital punishment, compared to cases with racial and ethnic minority male victims.[37] Specifically, Mr. Sanchez pointed to the study's finding that defendants accused of murdering white female victims face 9.59 times greater odds of receiving the death penalty than those accused of killing minority male victims.[38] Mr. Sanchez argued that these findings evidenced that "his race and/or the race and/or gender of his victim were 'decisive' factors in his [receiving the death penalty, and] that the prosecutors' decision to seek the death sentence and the jury's decision to impose it [were polluted by] race and gender discrimination" in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and equivalent provisions of the Oklahoma Constitution.[39]

In addition to his application, Mr. Sanchez requested court-ordered discovery and an evidentiary hearing in hopes of examining the ways in which "race and gender influenced various decision[-]makers in his case."[40] Specifically, he wished to observe the district attorney's office protocol for seeking the death penalty, race and gender data for homicides and for all first-degree murder cases prosecuted from 1990 to 2012, data for all cases from 1990 to 2012 in which the death penalty was sought (as well as the race, gender, and name of the victims in those cases), and the eventual sentences imposed in those cases.[41]

On August 22, 2017, the Oklahoma Court of Criminal Appeals held that Mr. Sanchez's second application for post-conviction relief was procedurally barred, denying both the application and the related motions.[42] The decision predicated the denial on Oklahoma's statutes governing post-conviction relief, which state in relevant part that the Court of Criminal Appeals may not consider the merits of or grant relief based on a subsequent application for post-conviction relief unless the second application's claims have not been and could not have been presented in a previously-considered application because the legal and factual bases for the claim were unavailable.[43]

Further, the Court may not consider the factual basis of a subsequent application for a capital post-conviction claim unless the application establishes sufficiently that the current claims could not have been

37. *Id.*
38. *Sanchez*, ¶ 3, 406 P.3d at 28 (citing Pierce et al., *supra* note 3, at 749).
39. *Sanchez*, ¶ 4, 406 P.3d at 28.
40. *Id.* ¶ 5, 406 P.3d at 28.
41. *Id.* ¶ 5, 406 P.3d at 28-29.
42. *Id.* ¶ 11, 406 P.3d at 30.
43. OKLA. STAT. tit. 22, § 1089(D)(8)(a) (2011 & Supp. 2017).

previously presented because "the factual basis for the claim was unavailable [or] not ascertainable through the exercise of reasonable diligence" prior to the filing of the original post-conviction application.[44] Additionally, a second application may not be considered unless "the facts underlying the claim . . . 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."[45]

The Court viewed Mr. Sanchez's new post-conviction claim as factually based upon the "statistical analysis of race, gender, and comparative sentencing outcomes in Oklahoma homicides" resulting from the study raised in Mr. Sanchez's application, and determined that, under title 22, sections 1089(D)(8)(a) and (b)(1) of the Oklahoma Statutes, Mr. Sanchez was procedurally barred from applying for post-conviction relief.[46] After acknowledging Mr. Sanchez's argument that the findings from the quoted study were "'newly discovered evidence' as of its publication in 2017," the Court concluded that Mr. Sanchez had failed to show "specific facts to establish that the identified patterns of race and gender disparity" were "not ascertainable through the exercise of reasonable diligence on or before [the] original post-conviction application [was filed] in 2009," as required by section 1089(D)(8)(b)(1).[47]

Further, the Court determined that section 1089(D)(8)(b)(2), which requires the new evidence 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," procedurally barred Mr. Sanchez's application.[48] The Court reasoned that large racialized disparities in the likelihood of a death sentence are "simply *not* clear and convincing evidence that the prosecutors who sought, or the jury that imposed, this death sentence improperly considered race and/or gender in making complex discretionary decisions."[49]

IV. STATUTORY LIMITATIONS OF CAPITAL POST-CONVICTION RELIEF: IS

44. Tit. 22, § 1089(D)(8)(b)(1).
45. Tit. 22, § 1089(D)(8)(b)(2).
46. *Sanchez*, ¶ 8, 406 P.3d at 29.
47. *Id.* (quoting tit. 22, § 1089(D)(8)(b)(1)).
48. *Id.* (quoting tit. 22, § 1089(D)(8)(b)(2)).
49. *Id.* ¶ 10, 406 P.3d at 29.

RELIEF UNATTAINABLE?

While the burden of proof required for criminal cases at the trial level is "beyond a reasonable doubt," the highest evidentiary standard, the burden required for post-conviction relief is slightly lower, that of "clear and convincing evidence." Under Oklahoma's post-conviction statutory scheme, the defendant requesting post-conviction relief on a factual basis has the burden 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."[50]

In Mr. Sanchez's case, that statute required an inmate on death row to present clear and convincing proof both that the evidence of racial discrimination in capital sentencing in Oklahoma was unavailable or not ascertainable through the exercise of reasonable diligence, and that but for the failure to present evidence of this bias, not one single member of the jury would have found him guilty of Juli Busken's murder or would have rendered the death penalty. Essentially, by the nature of the statute, Mr. Sanchez (and his counsel) would have needed to: (1) collect data that was not available to the public, (2) analyze it to the same degree and understanding as had the three experienced sociological researchers who conducted the study, and (3) present the findings in court in a manner that would convince a jury that racial discrimination had played a decisive role in his specific case, rather than as a factor that boosts the odds of all non-white defendants convicted of capital crimes in receiving the death penalty. Then, if Mr. Sanchez met the first prong, he would have to show that, with this evidence, the jury as a whole would have found him innocent or would not have sentenced him to death.

It is easy to argue that the lower clear and convincing standard bar required for post-conviction relief is reasonable, given that guilt beyond a reasonable doubt has already been established for each inmate on death row through a trial process. However, the criminal justice system makes mistakes, particularly in Oklahoma. Since 1973, one hundred and fifty-seven people nationwide have been exonerated from death row, and ten of those occurred in Oklahoma.[51] Of the ten individuals exonerated from death row in Oklahoma, five were black.[52]

50. Tit. 22, § 1089(D)(8)(b)(2).
51. *The Report*, *supra* note 1, at 41.
52. *Id*. at 42.

Time and again, we have allowed the courts to play God and decide who lives and who dies despite the many instances that they have gotten it wrong. If capital punishment is to continue to be meted out as a punishment in this state, should we not give defendants every opportunity to be heard? This standard required of defendants applying for capital post-conviction relief—"clear and convincing that . . . no reasonable trier of fact would have convicted"[53]—is so high that it asks appellate judges and courts to turn a blind eye to new evidence. We are placing lives on the line in the interest of judicial efficiency and finality. Instead, if the courts are sentencing people to death, they should at the very least throw enough judicial and litigatory resources into the process so that, when it comes to the final hour and that person is lying on a gurney, they know that no judge or jury would have decided otherwise.

V. SOCIAL SCIENCES FIND LIMITED ACCEPTANCE BY JUSTICE SYSTEM

More than thirty years ago, the United States Supreme Court decided a case that has fostered decades of dramatically increasing racial disparities within the criminal justice system. In 1978, Warren McCleskey, a black man, was convicted and sentenced to death for the murder of a white police officer in the commission of an armed robbery of a furniture store.[54] McCleskey unsuccessfully appealed to the Georgia Supreme Court[55] before applying in vain for post-conviction relief.[56] On writ of habeas corpus for relief in Federal District Court, McCleskey raised a claim that "the Georgia capital sentencing process [was] administered in a racially discriminatory manner in violation of" his Eighth and Fourteenth Amendment rights.[57] He based his claim upon the "Baldus study,"[58] which indicated a "disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant."[59] McCleskey asserted that defendants who murder white victims are more likely to be sentenced to death than those who murder black victims, and that black defendants convicted of murder are more

53. Tit. 22, § 1089(D)(8)(b)(2).
54. McCleskey v. Kemp, 481 U.S. 279, 283-85 (1987).
55. McCleskey v. State, 263 S.E.2d 146, 151 (Ga. 1980).
56. *McCleskey*, 481 U.S. at 286.
57. *Id*.
58. *See* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).
59. *McCleskey*, 481 U.S. at 286.

likely to be sentenced to death than their white counterparts.[60]

Sound familiar? In fact, the study raised by Mr. Sanchez in his post-conviction application was founded upon the work performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth in the early 1980s.[61] Like Mr. Sanchez, McCleskey's argument that this statistical disparate treatment in capital sentencing is unconstitutional did not find acceptance in court.[62] The District Court concluded that "statistics d[id] not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon [McCleskey] because of his race, because of the race of the victim, or because of any Eighth Amendment concern,"[63] and, accordingly, denied the petition "insofar as it was based upon the Baldus study."[64] On appeal, the Court of Appeals for the Eleventh Circuit decided that, assuming the study's validity, the statistics were "insufficient" to show discriminatory intent, in violation of the Fourteenth Amendment, or arbitrariness and capriciousness, in violation of the Eighth Amendment.[65]

The Court of Appeals affirmed the District Court's denial, and the Supreme Court granted certiorari.[66] In a 5-4 decision that would act to reinforce, rather than to alleviate, the role of racial bias in the American criminal justice system, the Court concluded that "[a]pparent disparities in sentencing are an inevitable part" of our society,[67] and that the Constitution is only violated when individual actors "purposeful[ly] discriminat[e]"[68] on the basis of race in specific cases.[69] Further, for McCleskey's claim that the State of Georgia had violated the Equal Protection Clause through its enactment of a capital punishment statute, despite its apparently discriminatory effect to prevail, the Court maintained that McCleskey would have to prove "that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect."[70] The Court concluded that McCleskey offered "no evidence

60. *Id.* at 291.
61. Pierce et al., *supra* note 3, at 738-39.
62. McClesky v. Zant, 580 F. Supp. 338, 380 (N.D. Ga. 1984).
63. *Id.* at 379.
64. McCleskey v. Kemp, 481 U.S. at 289.
65. McCleskey v. Kemp, 753 F.2d 877, 891 (11th Cir. 1985).
66. *McCleskey*, 481 U.S. at 290-91.
67. *Id.* at 282, 312.
68. Whitus v. Georgia, 385 U.S. 545, 550 (1967) (citing Tarrance v. Florida, 188 U.S. 519 (1903)).
69. *McCleskey*, 481 U.S. at 292.
70. *Id.* at 298. *See also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979);

specific to his own case that would support an inference that racial considerations played a part in his sentence,"[71] and that a finding that these statistics of racial disparities in capital sentencing in Georgia are "sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."[72] In short, the Court reasoned:

> In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. . . [therefore], this claim must fail.[73]

In his strongly-worded dissent, Justice Brennan criticized the failure to acknowledge proof of racially-based disparities in sentencing as constitutional violations and alleged that the Court "f[ound] no fault in a system in which lawyers must tell their clients that race casts a large shadow on the capital sentencing process."[74] Brennan argued that the Court's decision had given four factors deference over considerations of racial equity: "the desire to encourage sentencing discretion, the existence of 'statutory safeguards' in the Georgia scheme, the fear of encouraging widespread challenges to other sentencing decisions, and the limits of the judicial role."[75]

The sentencing stage, arguably one of the most researched aspects of the American criminal justice system, is well-documented as a source of racial bias. Sentencing literature produced by decades of sociological research runs deep with findings of racial and ethnic disadvantages throughout the criminal justice system. For instance, racial disparities begin to accrue as early as the arrest stage, where black males face the highest racial proportion of arrests (arrest rates compared to the portion of the population, by race), followed by Hispanic male arrest racial proportions. White males are arrested at the lowest rates relative to their

Wayte v. United States, 470 U.S. 598, 608-09 (1985).

71. *McClesky*, 481 U.S. at 292-93.
72. *Id*. at 293.
73. *Id.* at 292.
74. *Id.* at 321-22 (Brennan, J., dissenting).
75. *Id.* at 323 (Brennan, J., dissenting).

proportions in the population.[76] Hispanics face the highest disadvantages in terms of arrest-to-incarceration rates, indicating that from the point of arrest, Hispanic defendants face the highest odds of being sentenced to prison, net of controls.[77]

Additional literature indicates that from the moment initial charges are filed, black and Hispanic defendants are about 26% more likely than the average white defendant of going to prison.[78] Studies show that, independent of other factors (i.e., criminal history, severity of offense, etc.), on average, courts sentence black defendants more harshly than whites,[79] and that the odds of receiving the next-most severe sentence are about 26% and 30% higher for black and Latino defendants, respectively, than for the average white defendant.[80]

McCleskey has had and, unless it is overturned, will continue to have immense effects on American justice. Essentially, the highest Court in our land dismissed the issue of overwhelming race and class inequalities within our jails and courtrooms, accepting the notion that we have a racist society. There exists an entire field of study that has spelled out the impact of racial bias in a discretionary justice system, yet *McCleskey* closed the door to constitutional challenges on disproportionality throughout the criminal process. As a result, the well-documented fact that racial and ethnic minorities are disproportionately stopped, searched, arrested, held on bail,[81] charged with serious crimes,[82] convicted, and sentenced to prison

76. Casey T. Harris et al., *Are Blacks and Hispanics Disproportionately Incarcerated Relative to Their Arrests? Racial and Ethnic Disproportionality Between Arrest and Incarceration*, 1 RACE & SOC. PROBS. 187, 199 (2009).

77. *Id*. at 198.

78. John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RES. 1207, 1207 (2013).

79. Oimarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. QUANTITATIVE CRIMINOLOGY 439, 439-40, 462 (2005).

80. Sutton, *supra* note 78, at 1216.

81. *See* John Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants?*, 14 CRIMINOLOGY & PUB. POL. 187 (2015);Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 879, 892-99 (2003); Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 237 (2004). *See* Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 174, 189 (2005)*;* Sutton, *supra* note 78; Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 Nu. 3 CRIMINOLOGY 514, 517, 528,538 (2014).

82. *See* Sutton, *supra* note 78. *See also* L. Stolzenberg et al., *Race and cumulative*

and death will go virtually untouched, save for specific instances of intentional race-based discrimination.

VI. WHY DO WE NEED TO EXAMINE OKLAHOMA'S TREATMENT OF CAPITAL POST-CONVICTION RELIEF?

As of June 2018, Oklahoma is the prison capital of the world, with an incarceration rate over 50% higher than the national incarceration rate.[83] While people of color only make up approximately 36.2% of Oklahoma's population,[84] in 2015 they comprised 45.5% of Oklahoma's prison and jail populations. Because of the arbitrary and discretionary nature of our death penalty statutes, inmates of color convicted of first-degree murder, particularly those convicted of killing white victims, face higher odds of being placed on death row than their white counterparts.

Oklahoma's death penalty statutes have a long-criticized history of being unconstitutional and inhumane. In 1976, Oklahoma's death penalty statute was struck down as unconstitutional following the Supreme Court's decisions in *Furman v. Georgia* (holding that the discretionary nature of Texas and Georgia's capital punishment systems were unconstitutional, in violation of the Eighth and Fourteenth Amendments, and that the imposition of the death penalty in the cases before the court would constitute cruel and unusual punishment)[85] and *Gregg v. Georgia* (upholding Georgia's newly enacted death penalty statutes, stating that capital punishment "does not invariably violate the Constitution," and reasoning that Georgia's new system "provided adequate guidance and procedures to remedy the arbitrariness that resulted from unfettered discretion at the hands of the jury").[86]

Following the *Furman* and *Gregg* decisions, Oklahoma's death penalty statute, which mandated capital punishment for all persons convicted of capital murder, was invalidated.[87] Immediately, the Oklahoma Legislature convened and, in 1977, passed new legislation to

discrimination in the prosecution of criminal defendants, 3 RACE & JUST. 275 (2013).

83. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, The Prison Pol'y Initiative (2018), https://www.prisonpolicy.org/global/2018.html [https://perma.cc/X3XH-TB8K].

84. U.S. Bureau of the Census, *QuickFacts* (2017), https://www.census.gov/quickfacts/fact/table/ok/ [https://perma.cc/MBQ7-XLCH].

85. Furman v. Georgia, 408 U.S. 238, 240 (1972) (per curium).

86. Gregg v. Georgia, 428 U.S. 153, 169, 192-95 (1976).

87. *The Report*, *supra* note 1, at 3.

reinstate the death penalty and to adopt lethal injection as the State's mode of execution.[88] Since this change in 1977, Oklahoma has had the "highest execution rate per capita of any state."[89]

In recent years, the State has received national attention for a series of horribly botched executions of inmates on death row. On April 29, 2014, the State executed Clayton Lockett by lethal injection.[90] Despite being declared unconscious, Lockett reportedly "moaned, writhed, lifted his head and shoulders off the gurney, and attempted to speak."[91] Within the next year and a half, Oklahoma again made it to the national stage after the Oklahoma Supreme Court prohibited the State's use of the drug midazolam as a part of its lethal injection protocol[92] and after a discovery that the wrong drugs had been used in multiple previous executions.[93]

These facts together indicate that people of color in Oklahoma are at an increased risk of being sentenced to death, whether guilty or, in some cases, innocent, and of experiencing a traumatic and painful botched execution. When our systems are built in a way that procedurally bars judges from even considering the role of racial bias in sentencing, and when our case law insists that we turn a blind eye to racial discrimination and inequality in sentencing, people of color are not given the same protections afforded to white individuals who come face-to-face with the criminal justice system.

VII. CONCLUSION

The Court of Criminal Appeals' decision was not outside of the law, and his approach was consistent with past approaches to capital post-conviction relief. He concluded what Oklahoma's post-conviction statutes forced him to reach—that Mr. Sanchez failed to meet the burden of proof required of him by clear and convincing standards—all the while ignoring statistical conclusions that say that the sentencing process is designed to benefit some citizens while disadvantaging others.

Sanchez was not decided "incorrectly," but it is time for our courts and the Legislature to rethink approaches to post-conviction relief, as well as the weight given to conclusions of social science that point to glaring

88. *Id.* at 3.
89. *Id*. at 7.
90. *Id*. at 11.
91. *Id*.
92. *Id.* at 11-12.
93. *Id*. at 12.

disparities on the basis of race within the criminal justice system. Deference in sentencing is continually given by legislators to prosecutors, all the while ignoring the statistical elephant in the room.

People commit heinous crimes, for which our society demands justice. But is it justice if the perpetrators of these awful acts are systematically handed different outcomes, deciding whether they will live or die, based on their race or the race of their victim? "A society is judged not by how they treat the best people, but by how they treat the worst people. And those people have the same rights that you have, that I have." – Bob Ravitz, Oklahoma County Chief Public Defender.[94]

94. Josh Dulaney, *For the Defense: Oklahoma County Public Defender Bob Ravitz has Lived a Life in Law*, The Oklahoman (February 4, 2018), https://www.oklahoman.com/article/5581378 [https://perma.cc/8M7Z-9EAL].