No. 17-6943

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS DARIUS JONES, Petitioner

vs.

STATE OF OKLAHOMA, Respondent.

****CAPITAL CASE****

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The OCCA's rejection of Mr. Jones's successor post-conviction application does not rest upon an adequate or independent state procedural bar. 1

II. This case squarely presents a question that this Court has recognized is a serious and heretofore unresolved question of federal law. 3

III. Respondent's attack upon the statistical study demonstrating that Mr. Jones's race and that of the victim statistically predisposed him to receiving a death sentence is without merit. 6

IV. Mr. Jones has demonstrated that racial prejudice impacted decision makers in his case and the explicit as well as coded racial appeals to which he points should not, as Respondent urges, be minimized or dismissed as harmless 9

V. Oklahoma's capital post-conviction statute facially and as applied to Mr. Jones by the OCCA below violates Mr. Jones's rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Federal Cases

Andrews v. Shulsen, 485 U.S. 919 (1988) (Mem.) 12

Beard v. Kindler, 558 U.S. 53 (2009) 2-3

Caldwell v. Mississippi, 472 U.S. 320 (1985) 4

Carter v. Illinois, 329 U.S. 173 (1946) 15

Case v. Nebraska, 381 U.S. 336 (1965) 5-6

Draper v. Washington, 372 U.S. 487 (1963) 14

Ford v. Georgia, 498 U.S. 411 (1991) 2

Graham v. Florida, 560 U.S. 48 (2010) 13

Kyles v. Whitley, 498 U.S. 931 (1990) (Mem.) 6

Lockett v. Ohio, 438 U.S. 586 (1978) 14-15

McCleskey v. Kemp, 481 U.S. 279 (1987) 6

Miller v. Alabama, 567 U.S. 460 (2012) 13

Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam) 5

Rhines v. Weber, 544 U.S. 269 (2005) 13

Ross v. Moffitt, 417 U.S. 600 (1974) 14

Sheppard v. Early, 168 F.3d 689 (4th Cir. 1999) 13

Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445 (1985) 6

Walker v. Martin, 562 U.S. 307 (2011) 2

State Cases

McCleskey and State v. Loftin, 724 A.2d 129 (N.J. 1999) 8, 10

State Statutes

Okla. Stat. Ann. tit. 22, § 1086 4

Okla. Stat. Ann. tit. 22, § 1089(D)(5) 7

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) .... *passim*

Other

Ian Haney López, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* (2015).. 10

Eduardo Bonilla-Silva, *Racism without Racists: Color-blind Racism and the Persistence of Racial Inequality in America* (4th ed. 2014)...................................... 10

ARGUMENT

In its Brief in Opposition ("BIO"), Respondent advances a number of arguments in opposition to Mr. Jones's petition for a writ of certiorari ("Petition"), all of which must be rejected. As Mr. Jones will demonstrate herein, Respondent fails to show that the procedural bar applied by the OCCA to Mr. Jones's case was adequate to support its judgment and independent of federal constitutional guarantees. Respondent's arguments further fail to appreciate the character of Mr. Jones's constitutional challenge to Oklahoma's capital post-conviction statute, Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), as well as the importance—and heretofore unsettled nature—of the questions that he has presented before this Court. Finally, Respondent's dismissal of a complex statistical study demonstrating that race informs capital sentencing outcomes in Oklahoma as "meaningless" (BIO at 16) counsels in favor of this Court granting certiorari review in Mr. Jones's case. For confronting and weeding out racial prejudice in the imposition of capital punishment are matters that the State of Oklahoma, and its courts, have proven unwilling to address.

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

This case is not, as Respondent would have this Court believe, one that can simply be reduced to Mr. Jones's "mere[ ] disagree[ment]" with the OCCA's application of an adequate and independent procedural bar to his case. (BIO at 6.) Rather, Mr. Jones asks this Court to decide whether Okla. Stat. Ann. tit. 22, §

1089(D)(8)(b) facially and as applied to him comports with the requirements of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Respondent's attempt to transform the OCCA's "freakish[ ]," *Walker v. Martin*, 562 U.S. 307, 320 (2011) (internal quotation marks omitted), and "unexpected[ ]," *id.*, application of Oklahoma's successor post-conviction procedural bar into one that is "firmly established," *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (internal quotation marks omitted), and therefore adequate to support its judgment is futile. First, Respondent's contention that Mr. Jones "fails to claim, much less present evidence that, Oklahoma does not consistently follow the rule in question" (BIO at 9) is not accurate and ignores Mr. Jones's extended discussion of the inadequacy of the procedural bar applied by the OCCA below. (Pet. at 25-30.) Also notably absent from Respondent's defense of the adequacy of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and the OCCA's application of this provision to Mr. Jones is any mention of even a *single* case where the OCCA measured "fact[s] . . . not ascertainable through the exercise of reasonable diligence" *not* from the date of a timely filed initial post-conviction application, as is required under Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), but rather from a later point in time, as the OCCA did here. (*See* Pet. at 25-30.) The patent inadequacy of the OCCA's procedural ruling here is, on its own, sufficient to confer upon this Court jurisdiction to reach the merits of Mr. Jones's federal constitutional claims. *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).

Second, Respondent does not dispute Mr. Jones's claim that the OCCA's determination—that the Study on the basis of which Mr. Jones timely petitioned for post-conviction relief did not constitute "clear and convincing evidence that, but for the improper influence of race and/or gender discrimination, no reasonable fact finder would have … rendered the penalty of death" (A-1 at 3)—is not independent of federal law. (BIO at 10-11.) Rather, Respondent argues that this Court need not consider this argument at all because the OCCA also found that Mr. Jones failed to show that the factual basis for his federal constitutional claim was previously unavailable. (BIO at 10-11.) However as Mr. Jones sets out in his Petition, this determination by the OCCA runs afoul of the Fourteenth Amendment's Due Process and Equal Protection guarantees. (Pet. at 34-40.)

II. This case squarely presents a question that this Court has recognized is a serious and heretofore unresolved question of federal law.

Respondent claims that Mr. Jones has not shown that the OCCA's denial of his successor post-conviction application raises an important and unsettled question of federal law. (BIO at 6, 28.) This contention ignores the substance of Mr. Jones's constitutional challenge to Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) as well as to the OCCA's application of this statute in a manner that discriminates against him, as an indigent death-row prisoner, and against his newly-available federal constitutional claim.

Respondent nowhere disputes that Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b), by its express terms, imposes stricter limitations on the types of claims that a defendant can raise in a successor post-conviction application before Oklahoma's courts if he is a capital defendant than if he is a non-capital defendant. *Compare* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) (limiting a capital defendant's successor post-conviction 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 application 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)). Nor does Respondent dispute that Mr. Jones's newly-available federal constitutional claim is simply not cognizable under Oklahoma law, which erects a procedural standard unique to capital defendants that is 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" (internal quotation marks omitted)).

Instead, Respondent gives short shrift to Mr. Jones's facial and as-applied Due Process challenge to Oklahoma's capital post-conviction statute by asserting, in conclusory fashion, that "Oklahoma does afford adequate corrective process for the

determination of federal claims." (BIO at 23.) As an example of the adequacy of Oklahoma's corrective process, Respondent points to the opportunities available to Mr. Jones on direct appeal and in his prior post-conviction proceeding "to present constitutional claims." (BIO at 23.) This argument misses the critical fact that while Mr. Jones *did* have the opportunity to present federal constitutional claims in prior state-court proceedings as a general matter, he has *never* had the opportunity to present *this particular* newly-available federal constitutional claim to an Oklahoma court. Nor will he ever have that opportunity under Oklahoma law as it stands based on the mere fact that he is an individual sentenced to die.

Respondent's characterization of the questions that Mr. Jones has presented to this Court as unimportant (BIO at 6) turns a blind eye to this Court's recognition of the serious and undecided nature of the question presented here—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. *Mooney v. Holohan*, 294 U.S. 103, 110 (1935) (per curiam) (recognizing the "serious charges" raised by petitioner that the State of California violated his due process rights by failing to provide any corrective judicial remedy whereby he could seek to have his newly-discovered federal constitutional claim heard and his conviction set aside); *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (noting that the Court originally granted certiorari review to decide "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of

claims of violation of federal constitutional guarantees"); *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 450 (1985) (recognizing the open question of whether the Fourteenth Amendment's Due Process Clause requires state judicial review of state prisoners' federal constitutional claims); *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Mem.) (Stevens, J., concurring) (explaining that the scope of states' obligation to provide collateral review of federal constitutional claims remains "shrouded in [ ] much uncertainty.").

In an effort to obscure the thread of reasoning woven throughout these cases and its logical extension to Mr. Jones's case, Respondent argues that *Case*, *Young*, *Superintendent, Mass. Corr. Inst., Walpole*, and *Mooney* "illustrate perfectly the reason that [Mr. Jones's] Petition should be denied." (BIO at 23.) Unlike the petitioners in these cases, so goes Respondent's argument, "[Mr. Jones] had the opportunity to present constitutional claims on *direct appeal*" and in his prior post-conviction proceeding. (BIO at 23 (emphasis added).) But, as explained *supra*, this argument misses the point.

III. Respondent's attack upon the statistical study demonstrating that Mr. Jones's race and that of the victim statistically predisposed him to receiving a death sentence is without merit.

Respondent argues that Mr. Jones's case is not the proper vehicle through which this Court should reconsider *McCleskey v. Kemp*, 481 U.S. 279 (1987), because the Study upon which Mr. Jones relies is allegedly "so flawed it cannot be relied upon to draw conclusions about the operation of Oklahoma's death penalty scheme." (BIO at 11.) Respondent is wrong, as will be demonstrated below. However

even assuming that Respondent's attack on the Study has a modicum of merit, its arguments raise disputed issues of fact that should have been resolved at the evidentiary hearing that Mr. Jones requested and which the OCCA denied. (A-1 at 3); *see also* 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 the sentence).

First, Respondent faults Mr. Jones for relying on "an early draft" of the Study. (BIO at 13.) What Respondent fails to mention is that Mr. Jones was *required* to rely on this early draft in order to comply with Oklahoma's sixty-day statute of limitations that applies uniquely to capital successor post-conviction applicants. Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) (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). Furthermore, Respondent provides no argument whatsoever explaining why the fact that the Study is an early draft—commissioned by a bipartisan group of prominent Oklahomans, including former Oklahoma governor Brad Henry and former United States Magistrate Judge Andy Lester—should render it inherently unreliable. Importantly, the Study has now gone through peer reviews and has been published in one of the leading scholarly journals in the field of criminal law and criminology. Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma*

Homicides, 1990-2012, 4 J. Crim. L. and Criminology 107, 733-56 (2017) (authors listed alphabetically).

Next, Respondent argues that the Study's authors "made no similar effort to ensure reliable data," unlike the authors of the studies addressed in *McCleskey* and *State v. Loftin*, 724 A.2d 129 (N.J. 1999), because "the data set is far too inclusive to yield reliable results." (BIO at 13-14.) Respondent points to the Study's inclusion of all non-negligent homicides in its data set as a "fatal[ ] flaw[ ]" because its analysis takes into account "a large number of homicides which are not death eligible." (BIO at 11, 14.) Respondent urges that the correct approach would begin with only the pool of death-eligible cases. (BIO at 12-14.) Respondent's critiques are misguided and must be rejected.

Importantly, one of the fundamental flaws with studies of race and capital punishment that take the approach of the New Jersey Supreme Court in *Loftin*, 724 A.2d at 129, and which look only at the pool of death-eligible cases, is that they may significantly underestimate the degree of bias in death sentencing cases because the identification of death-eligible cases is, in itself, possibly subject to discriminatory decisions. More specifically, the inclusion, exclusion, or construction of evidence to determine death eligibility can be subject to the same types of implicit or explicit bias that impacts conviction and sentencing decisions. This is a process of endogenous system bias that can arise when officials who are responsible for system outcomes are also, at least in part, responsible for the collection and organization of evidence on which those outcomes are determined.

The approach of the Study's authors to addressing this form of bias was to examine the broadest possible set of cases in order to capture the potential operation of bias throughout the criminal justice process, including the determination of death eligibility in the first instance, conviction, and sentencing. Thus, theirs is a much sounder approach to examining the operation of bias on criminal justice outcomes in Oklahoma than using a smaller number of cases that have already, potentially, been whittled down by decisions correlated with race.

In addition, the Study's authors do effectively exclude less aggravated cases as their analysis proceeds due to the fact that they examine racial differences in death sentencing among: 1) all homicide cases with identified suspects; 2) only those cases with additional felony circumstances present; 3) only those cases with multiple victims; and 4) only those cases with *both* additional felony circumstances and multiple victims. In other words, Respondent's critique of the Study's methodology ignores the critical fact that *even among the most aggravated cases*, the Study's authors identified significant race and gender effects in sentencing.

IV. Mr. Jones has demonstrated that racial prejudice impacted decision makers in his case and the explicit as well as coded racial appeals to which he points should not, as Respondent urges, be minimized or dismissed as harmless.

Respondent agrees that *McCleskey* requires an individual to show that "race played a role in [a] particular case" (BIO at 11 n.4), but insists that Mr. Jones has not satisfied this requirement (BIO at 16). First, Respondent defends then-District Attorney Bob Macy's public call for Mr. Jones's execution because he had allegedly committed a crime "in what should be a safe neighborhood" and perpetrated "for the

worst of reasons, to get money to go buy drugs," as devoid of racialized meaning. While Respondent speculates that Macy's remarks about Mr. Jones's drug motive harmlessly referred to the senselessness of the crime with which Mr. Jones was charged, they do not dispute that at the time Macy made these public remarks, *no evidence whatsoever* existed to suggest that the crime, or Mr. Jones himself, had any connection to drugs. Nor was any such evidence ever subsequently developed by police or prosecutors. Macy's remarks thus constituted a coded racial appeal, which scholar and University of California, Berkeley law professor Ian Haney López has described as a claim which, on the surface, appears to "have nothing to do with race, yet [ ] nevertheless powerfully communicate[s] messages about threatening nonwhites"—here, Mr. Jones. Ian Haney López, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* ix (2015); *see also* Eduardo Bonilla-Silva, *Racism without Racists: Color-blind Racism and the Persistence of Racial Inequality in America* (4th ed. 2014) (discussing coded language that masks racial prejudice as the product of the post-1960s rise in color blind ideology). Likewise, Macy's reference to the safety of the affluent and predominantly-white neighborhood where the crime occurred in the context of calling for Mr. Jones's death was a racial entreaty that "operate[d] like a dog whistle"—that is, "racial pandering [that] [ ] operates on two levels: inaudible and easily denied in one range, yet stimulating strong reactions in another." *Id.* at 3.

Respondent also argues that because Mr. Jones is not Mexican, the trial judge's publicly-reported racist remarks about Mexicans are irrelevant to the

McCleskey analysis. (BIO at 17.) This, however, is far from correct and a sitting trial judge's subscription to racist ideas about a race/ethnic group certainly illustrates race impacting a key decision-maker in Mr. Jones's case; it furthermore raises troubling questions about the judge's attitudes towards people of color more generally, including towards black defendants like Mr. Jones.

In defense of the prosecutor's statement to Mr. Jones's nearly all-white jury that he was "out prowling the streets,"[1] Respondent argues that "'prowl' is a very apt description" for what Mr. Jones allegedly did when he "drove around until [he] found a person to rob." (BIO at 18.) However the prosecutor's use of the term "prowl" referred *not* to the robbery/murder for which Mr. Jones was on trial, but rather was made during the penalty phase and in reference to uncharged and non-violent conduct that predated the Edmond shooting by at least four months.[2] The prosecutor told Mr. Jones's jury that "as early as March of 1999 we can document Julius Darius Jones out prowling the streets with loaded firearms committing crimes." (Tr. XV 143.) Notwithstanding the critical timing of the prosecutor's remark, Respondent maintains that "[i]t is far from inaccurate to say that Petitioner stealthily searched for his prey." (BIO at 19.)

Finally, Respondent's defense of a white juror's comment during Mr. Jones's trial that he should be put "in a box in the ground" (Tr. XII 95-96) amounts to a defense of "a vulgar incident of lynch-mob racism reminiscent of Reconstruction

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[1] Respondent points out that Mr. Jones failed to include a record citation in support of this remark made by prosecutors at his trial. This remark can be found at Tr. XV 143.

[2] Respondent insinuates that Mr. Jones had committed armed robbery on three prior occasions. (BIO at 19.) Importantly, while the State tried to circumstantially tie Mr. Jones to these armed robberies at his capital trial, he was only charged with *one* of these armed robberies.

days." *Andrews v. Shulsen*, 485 U.S. 919, 922 (1988) (Mem.) (Marshall, J., & Brennan, J., dissenting from denial of certiorari).

V. Oklahoma's capital post-conviction statute facially and as applied to Mr. Jones by the OCCA below violates Mr. Jones's rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Respondent disagrees that the OCCA infringed upon Mr. Jones's Due Process rights in its application of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) because Mr. Jones allegedly "could have raised the same *McCleskey*-based claim of racial discrimination in his trial at any point." (BIO at 27.) As evidence of this, Respondent points to an Oklahoma-specific study that they claim was available to Mr. Jones in 2003 (BIO at 27); this was one year *after* his trial. Moreover, this study was published in 1984—nearly twenty years before Mr. Jones's trial—and is simply inapposite here for a number of reasons. First, *none* of the post-1990 studies on race and capital sentencing patterns included in the 2003 review cited by Respondent focused on Oklahoma specifically. (Study at 214.) Second, the 1984 study looked only at homicides and death sentences that occurred over a four-year period, from 1976 through 1980. (*Id.*) As such, the study's data was long outdated by the time Mr. Jones's case went to trial in 2002 and, importantly, excluded the time period in which Mr. Jones was convicted and sentenced to death. The April 25, 2017 study on the basis of which Mr. Jones timely petitioned the OCCA for post-conviction review of his conviction and death sentence was thus the very first comprehensive and methodologically sound statistical study to examine the impact of race on capital sentencing outcomes in Oklahoma for the time period in which Mr. Jones was

convicted and sentenced to die. Respondent has failed to show otherwise. *See* Section III, *supra*.

Finally, Respondent argues that Mr. Jones has not established an Equal Protection violation because he is not similarly situated to non-capital prisoners. (BIO at 26.) However this Court has not so held and the cases cited by Respondent in support of this contention are not controlling here. (*See* BIO at 25-26.) Furthermore, this Court has likened life-without-parole sentences to the death penalty which points, at the very least, to the similarly situated nature of prisoners sentenced to death by execution and non-capital prisoners sentenced to death in prison. *Graham v. Florida*, 560 U.S. 48, 69-70 (2010) ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."); *Miller v. Alabama*, 567 U.S. 460, 474-75 (2012) ("Imprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable" (internal quotation marks omitted)).

Nor are the cases relied upon by Respondent apposite as persuasive authority.[3] For Mr. Jones's complaint is not just that Oklahoma's capital post-

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[3] In *Sheppard v. Early*, 168 F.3d 689 (4th Cir. 1999), the Court of Appeals held that a Virginia statute requiring an execution date to be set within sixty or seventy days following the notification by the Attorney General or the attorney for the Commonwealth of the Court of Appeals' decision denying habeas relief did not violate the Equal Protection Clause. For the additional reason

conviction statute discriminates against his newly-available federal constitutional claim simply because of his status as a death row prisoner, but also that the OCCA's determination that he should have marshalled the resources to undertake the Study back in 2009 discriminates against him on account of his *poverty*. *Draper v. Washington*, 372 U.S. 487, 496 (1963) ("[T]he State must provide the indigent defendant with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."). Respondent does not argue that a rational basis exists for the OCCA's decision to deny Mr. Jones "meaningful access to the appellate system" due to his indigence. *Ross v. Moffitt*, 417 U.S. 600, 611 (1974). Neither does Respondent show that a rational basis exists for the Oklahoma legislature's decision to more strictly limit the types of federal constitutional claims that capital prisoners can raise in a successor post-conviction proceeding than those available to non-capital prisoners.

Respondent's defense of the fewer procedural protections that the State of Oklahoma provides to capital defendants in post-conviction proceedings than it affords non-capital defendants furthermore turns this Court's Eighth and Fourteenth Amendment jurisprudence—which calls for *more* reliability in the imposition of capital punishment, not *less*—on its head. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death

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that Mr. Jones is not here challenging the Oklahoma legislature's time requirements for the setting of execution dates, this case is inapposite. *Rhines v. Weber*, 544 U.S. 269 (2005), also cited by Respondent, supports Mr. Jones's complaint about Oklahoma's capital post-conviction procedure. In *Rhines*, this Court observed that while some capital prisoners "might" engage in dilatory tactics they should, as a general matter, be allowed to air their federal constitutional grievances before a state court before such claims are either dismissed or passed upon by a federal district court. 544 U.S. at 278 ("[A] petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions.").

and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Carter v. Illinois*, 329 U.S. 173, 186 (1946) (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.").

CONCLUSION

Respondent has advanced no meritorious argument in opposition to Mr. Jones's request for this Court to consider the important questions presented by his case. For this and the foregoing reasons, Mr. Jones asks that this Court grant his petition for a writ of certiorari.

Respectfully submitted: February 12, 2018.

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