Case No. 17-7232
DEATH PENALTY CASE

IN THE SUPREME COURT OF THE UNITED STATES

SHAUN MICHAEL BOSSE,

***Petitioner*,**

v.

STATE OF OKLAHOMA,

***Respondent*.**

On Petition for Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FEBRUARY 1, 2018

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Should this Court grant certiorari review to consider an issue that is untimely and waived and/or barred for failure to earlier raise, and where the Oklahoma Court of Criminal Appeals followed this Court's established precedent?

No. 17-7232

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October Term, 2017

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-vs-

THE STATE OF OKLAHOMA

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Opinion of the Oklahoma Court of Criminal Appeals entered May 25, 2017. *See Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of McClain County, Case No. CF-2010-213, convicting him of three counts of first degree murder and one count of first degree arson. Petitioner's convictions are the result of a jury trial in which he was found guilty beyond a

reasonable doubt of murdering Katrina Griffin and her two children, eight-year-old Christian Griffin, and six-year-old Chasity Hammer, in Ms. Griffin's home, and then setting the home on fire. The jury found the existence of three aggravating circumstances for each murder count, namely: (1) during the commission of each murder, the defendant knowingly created a great risk of death to more than one person; (2) each murder was especially heinous, atrocious or cruel; and (3) each murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. *See* Okla. Stat. tit. 21, § 701.12 (2011). At the conclusion of Petitioner's trial, the jury recommended sentences of death for the murders, and thirty-five years imprisonment for the arson. The trial court sentenced Petitioner accordingly on December 18, 2012.

From his convictions, Petitioner filed a direct appeal with the Oklahoma Court of Criminal Appeals (OCCA). On October 16, 2015, the OCCA affirmed Petitioner's convictions and sentences. *See Bosse v. State*, 360 P.3d 1203, 1236 (Okla. Crim. App. 2015) (*Bosse I).* Relevant here, the OCCA addressed and rejected Petitioner's argument that Oklahoma's especially heinous, atrocious or cruel aggravating circumstance, as well as the two other aggravating circumstances found in his case, is facially vague and overbroad:

> In Proposition XIII, Bosse claims that the aggravating circumstances found by the jury failed to perform the narrowing function required by the Eighth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution. He argues that none of the aggravating circumstances, as presented to the jury through instructions, adequately serve the narrowing function necessary for constitutional

application of the death penalty. We have repeatedly rejected these arguments. Specifically, we have found that the aggravating circumstance that the defendant created a great risk of death to more than one person is constitutional. *Wood v. State*, 2007 OK CR 17, ¶ 26, 158 P.3d 467, 477. We have found the aggravating circumstance that the murder was committed to avoid arrest or prosecution is sufficiently narrow as to be constitutional. *Hanson v. State*, 2009 OK CR 13, ¶ 48, 206 P.3d 1020, 1034. We have found the aggravating circumstance that the murder was heinous, atrocious or cruel is narrow enough to be constitutional. *Smith*, 2013 OK CR 14, ¶ 61, 306 P.3d at 577; *Postelle*, 2011 OK CR 30, ¶ 84, 267 P.3d at 144. As the State notes, Bosse admits this but argues that the narrowing limitations for each circumstance are insufficient because, he alleges, they have been inconsistently applied. We have rejected this argument, stating, "an aggravating circumstance does not become 'overbroad' based upon the manner it is applied to particular cases." *Mitchell v. State*, 2006 OK CR 20, ¶ 104, 136 P.3d 671, 711 (quoting *DeRosa v. State*, 2004 OK CR 19, ¶ 91, 89 P.3d 1124, 1155).

In this proposition Bosse also complains about two instructions. He notes that there is no uniform jury instruction for the aggravating circumstance that the defendant created a great risk of death to more than one person. Bosse neither objected to the absence of such an instruction, nor requested such an instruction, and has waived all but plain error. *Postelle*, 2011 OK CR 30, ¶ 86, 267 P.3d at 144-45. We have held that no separate uniform instruction defining this aggravating circumstance is necessary, finding that use of the statutory language explaining this aggravating circumstance sufficiently informs jurors what is necessary to support a finding that it is present. *Eizember v. State*, 2007 OK CR 29, ¶¶ 137-139, 164 P.3d 208, 241. Bosse also complains the uniform instruction on the aggravating circumstance that the murders were heinous, atrocious or cruel fails to narrow the sentencer's discretion. Bosse objected to this instruction, and his request for a different instruction on this circumstance was denied by the trial court. As Bosse admits, this Court has rejected this claim. *Postelle*, 2011

> OK CR 30, ¶ 84, 267 P.3d at 144. This proposition is denied.

Bosse I, 360 P.3d at 1229. In pertinent part, the OCCA also held that there was no error in the admission of victim impact testimony that included sentencing recommendations. *Id*. at 1226-27. Petitioner sought a rehearing in the OCCA which was denied on December 1, 2015. *See* 12/01/2015 Order, OCCA Case No. D-2012-1128 (unpublished). Petitioner's application for post-conviction relief was denied by the OCCA in an unpublished order on December 16, 2015. *See Bosse v. State*, OCCA Case No. PCD-2013-360, slip op. (Okla. Crim. App. December 16, 2015) (unpublished).

Petitioner sought certiorari review from this Court alleging error in the admission of certain victim impact evidence. This Court granted certiorari, vacated Petitioner's sentence, and remanded the case back to the OCCA in *Bosse v. Oklahoma*, 580 U.S. __, 137 S. Ct. 1, 196 L. Ed. 2d 1 (2016). This Court's opinion in *Bosse* was limited to review of the OCCA's holding that the sentencing recommendations in the victim impact testimony were properly allowed. *Id*. at ___, 137 S. Ct. at 2. This Court held that the OCCA remained bound by this Court's holding in *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), that the admission of a victim's family members' opinions about the appropriate sentence violates the Eighth Amendment, such that the OCCA erred in concluding otherwise. *Id*. at ___, 137 S. Ct. at 1-2. This Court remanded this case to the OCCA for further proceedings not inconsistent with its opinion. *Id*. at ___, 137 S. Ct. at 3. On November 16, 2016, the

OCCA withdrew the mandate issued in *Bosse I*. Order Withdrawing Mandate, *Bosse v. State*, OCCA Case No. D-2012-1128 (Okla. Crim. App. Nov. 16, 2016) (unpublished).

Following further briefing from both parties on the issue, on May 25, 2017, the OCCA again affirmed Petitioner's convictions and sentences. *See Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017) (*Bosse II*). The opinion in *Bosse II* served to replace the opinion in *Bosse I* and discussed all of the issues originally raised in Petitioner's direct appeal. *See Id*. at 840. However, the only change in the OCCA's analysis of the issues was as to the *Booth* issue. *Compare Bosse I*, 360 P.3d at 1214-36, with *Bosse II*, 400 P.3d at 843-67. With regard to the *Booth* issue, the OCCA held that the admission of the sentencing recommendations was error, but the error was harmless beyond a reasonable doubt. *Bosse II*, 400 P.3d at 855-57. As to Petitioner's claim that the aggravating circumstances in his case are facially vague and overbroad, the OCCA repeated verbatim its analysis and rejection of this issue in *Bosse I*:

> In Proposition XIII, Bosse claims that the aggravating circumstances found by the jury failed to perform the narrowing function required by the Eighth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution. He argues that none of the aggravating circumstances, as presented to the jury through instructions, adequately serve the narrowing function necessary for constitutional application of the death penalty. We have repeatedly rejected these arguments. Specifically, we have found that the aggravating circumstance that the defendant created a great risk of death to more than one person is constitutional. *Wood v. State*, 2007 OK CR 17, ¶ 26, 158 P.3d 467, 477. We have found the aggravating circumstance that the murder was committed to avoid arrest or prosecution is sufficiently narrow as to be constitutional.

> *Hanson v. State*, 2009 OK CR 13, ¶ 48, 206 P.3d 1020, 1034. We have found the aggravating circumstance that the murder was heinous, atrocious or cruel is narrow enough to be constitutional. *Smith*, 2013 OK CR 14, ¶ 61, 306 P.3d at 577; *Postelle*, 2011 OK CR 30, ¶ 84, 267 P.3d at 144. As the State notes, Bosse admits this but argues that the narrowing limitations for each circumstance are insufficient because, he alleges, they have been inconsistently applied. We have rejected this argument, stating, "an aggravating circumstance does not become 'overbroad' based upon the manner it is applied to particular cases." *Mitchell v. State*, 2006 OK CR 20, ¶ 104, 136 P.3d 671, 711 (quoting *DeRosa v. State*, 2004 OK CR 19, ¶ 91, 89 P.3d 1124, 1155).
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Id. at 859-60. Petitioner sought a rehearing in the OCCA which was granted on July 24, 2017, but no relief was given. *See Bosse v. State*, 406 P.3d 26 (Okla. Crim. App.

2017). The OCCA's opinion on rehearing effected a change only to its analysis of Petitioner's cumulative error claim. *See Id*. at 26.

STATEMENT OF THE FACTS[1]

Katrina Griffin lived with her two children, Christian Griffin and Chasity Hammer, in a mobile home located on her father's rural McClain County property near Dibble, Oklahoma (1 Tr. 30-34). For the most part, Katrina stayed home because she suffered seizures that prevented her either from driving or working (1 Tr. 35-36, 49). In early July 2010, Katrina met Petitioner on the internet and the two started dating (1 Tr. 38-41, 44; 2 Tr. 88-89, 121). Petitioner quickly became part of Katrina's world. On the evening of July 17, 2010, Petitioner hung out with Katrina, her cousin Heather Molloy and Molloy's boyfriend Henry Price, at Katrina's trailer. They played video games, drank beer and listened to music (2 Tr. 88-91,127-130).

On July 22, 2010, around 6:00 p.m., Petitioner arrived for a visit at Katrina's trailer (1 Tr. 45-46). Ginger Griffin, Katrina's step-mother, briefly entered Katrina's trailer that night when she dropped Chasity and Christian off after a visit next door to her home. Petitioner and Katrina were sitting on the love seat in the living room, using the laptop (1 Tr. 47-48, 58-59). Later that evening, Mrs. Griffin received a phone call from Christian asking if he had left any of his video games at her house (1 Tr. 59). When Mrs. Griffin responded that Christian had not left any of his video games behind

[1] References to the Trial Transcripts will be designated as "(Vol. No.) Tr." followed by the page number. References to the Original Record will be designated as "O.R." followed by the page number.

but, instead, took them home, Katrina got on the line and asked the same question (1 Tr. 59). At some point during this conversation, Katrina said she was getting another call from her biological mother, Rebecca Allen, and needed to take it (1 Tr. 59; 2 Tr. 112).

Ms. Allen spoke with Katrina several times that evening about the missing video games. Katrina was upset because Christian's video games were missing from the trailer. During the first conversation, which occurred around 10:00 p.m., Katrina said Petitioner and the children were present at the trailer with her. Katrina expressed her intent to try and find the missing video games that night (2 Tr. 117-18). Katrina believed Henry Price was responsible for their theft and told her mother that Petitioner was going to drive her to Heather Molloy's home in search of the missing video games (2 Tr. 124). Katrina left several text and phone messages for Molloy after 10:00 p.m. that night. Molloy was asleep, however, and did not see these messages until the next morning (2 Tr. 92-93, 96). Malloy described Katrina's messages as sounding "upset . . . because her son's video games were missing" and that Katrina sounded "a little mad" (2 Tr. 96-97). In one message, Katrina told Molloy "she knew where I lived and that they [were] going to come by." (2 Tr. 97). In another, Katrina wrote that she went to Molloy's house and banged on the door (2 Tr. 98).

Unsuccessful in finding the missing video games, Katrina called the McClain County Sheriff's Office to make a report. At 11:39 p.m., Deputy Kent Cunningham was dispatched to Katrina's mobile home. Deputy Cunningham arrived around 11:52 p.m.

on July 22nd and found Katrina, her two children and an adult white male at the trailer. Katrina explained to the deputy that approximately fifteen (15) video games from her children's collection went missing after Malloy and Price visited her trailer the previous Saturday, July 17th (2 Tr. 100-105). Katrina spoke with her mother for the last time by phone sometime between 12:30 and 1:00 a.m. (2 Tr. 117). She told Allen that the deputy had just left, she was getting tired and was going to bed (2 Tr. 119). Katrina's mother believed everything had "calmed down" and Katrina told her mother she would see her tomorrow (2 Tr. 119). Allen, who lived in Enid, Oklahoma, planned to drive to Dibble the next day and take Chasity back to Enid for a short visit (2 Tr. 119-121).

Ginger Griffin left for work around 7:00 a.m., July 23, 2010 (1 Tr. 62). Mrs. Griffin looked at Katrina's trailer that morning as she drove past but saw nothing unusual (1 Tr. 63). Griffin did not see Petitioner's truck; nor did she notice any smoke (1 Tr. 63). Daryl Dobbs lived in the Griffins' rural neighborhood (1 Tr. 87-89). At 8:55 a.m., Dobbs left home (1 Tr. 90). While driving out of the neighborhood, he saw smoke coming from the top of Katrina's mobile home on the west side of the trailer (1 Tr. 91-92). Dobbs backed up and drove towards Katrina's trailer while honking his horn in a furious attempt to get the attention of anyone nearby (1 Tr. 91-92). Dobbs called 911 and reported the fire (1 Tr. 94-95).

At 9:02 a.m., Walt Thompson, the Dibble police chief, responded to the fire based on Dobbs's 911 call (1 Tr. 125, 127). Chief Thompson arrived at the scene within

minutes (1 Tr. 107, 132). Bill Scott and Mark Palmore, volunteer firemen from Dibble, soon arrived with the town's 1,100-gallon fire engine (1 Tr. 144-145, 177-178). Clad in their self-contained breathing apparatuses, the Dibble firemen made an immediate assault on the fire with water suppression at the front door. They fought back smoke and flames coming from the living room and dining room areas adjacent to the front door so they could enter (1 Tr. 178-180, 186). During their search, the smoke inside was intense as the heat continued to rise; visibility "was next to nothing" as the Dibble firemen searched and cleared the two bedrooms and one bathroom on the north end of the trailer. They eventually retreated outside when their oxygen tanks started to run low (1 Tr. 180-182).

Volunteer firemen from nearby Washington, Oklahoma, responding to a mutual aid request, relieved Scott and Palmore and made their way inside through the front door, towards the south side of the trailer, in search of victims (2 Tr. 12-19). Firemen Derek Cheek and Gary Bolster were crouching very low to navigate through the thick, black smoke (2 Tr. 19). The Washington firemen searched the living room, kitchen and utility room area but found only a few small flames which they quickly extinguished (2 Tr. 19-21, 42-43). The door separating the master bedroom from the rest of the trailer was closed and was warm to the touch. With no visible signs of flames, Cheek—with some effort—opened the door. Inside, they found the bodies of Katrina and Christian laying on the floor (2 Tr. 21-25).

Because of a problem with their hose, the Washington firemen retreated back outside in the middle of their search of the master bedroom (2 Tr. 25-27). When the fire was finally extinguished and firemen returned inside, they discovered a much different scene compared to their initial entry. The bodies of Katrina and Christian had extensive burning and were covered in debris not present when the Washington firemen first found them (2 Tr. 39-41, 43). Worse yet, the severely charred body of Chasity Hammer was discovered inside what was left of the master bedroom closet, covered in charred debris (2 Tr. 34; 4 Tr. 98-100; 6 Tr. 31, 34; State's Exhibits 36-37). Additionally, investigators discovered what appeared to be blood spatter from cast off and arterial blood spurts on the lower bedroom walls near Christian's body. Notably, Christian's head was partially wrapped in a blanket and he was clothed only in a pair of unbuttoned, unzipped jean shorts and underwear. Christian had five (5) stab wounds to the neck and chest. A stab wound to his right forearm was consistent with being a defensive wound. Blunt force trauma over Christian's right eyebrow was also evident (4 Tr. 113-115, 141-143, 148-155; 6 Tr. 13, 18-20; State's Exhibits. 43, 45, 81, 87).

Katrina's body—clothed in a t-shirt, shorts and underwear—was badly burned and had eight (8) stab wounds to the neck and abdomen (4 Tr. 156; 5 Tr. 223). Blunt force trauma to the right side of her head was also observed (5 Tr. 225). Katrina's face was charred and the eyeglasses she normally wore, and many times fell asleep in, were still attached to her burned hair (1 Tr. 57-58; 5 Tr. 223). Incised wounds on the palm

of Katrina's right hand were classified as defensive wounds by the medical examiner (5 Tr. 229, 237-238). Katrina's legs were found laying over Christian's legs and her body was covered in debris from the fire (4 Tr. 115-116; State's Exhibit 47). Katrina's shirt was bunched up over head, her hands and arms were crossed and her body was stretched out on its side (4 Tr. 116-117, 124; State's Exhibit 48). This was consistent with Katrina's body having been drug with her arms over her head (4 Tr. 117). In Katrina's right hand was a knife (4 Tr. 118; State's Exhibit 49). This was unusual because Katrina was left-handed and the knife blade was found facing her body (3 Tr. 94; 4 Tr. 118). The knife was completely backwards in her hand—the opposite of how someone using a knife would hold it (3 Tr. 95). Additionally, a knife with a broken-off blade belonging to Christian was found underneath Katrina's body (4 Tr. 121-122; State's Exhibit 52).

The medical examiner determined the cause of death for both Katrina and Christian was multiple stab wounds (5 Tr. 247; 6 Tr. 30). Neither Katrina nor Christian had soot in their noses or mouths, suggesting they were murdered prior to the home being set on fire (5 Tr. 223; 6 Tr. 13-14). The medical examiner observed no stab wounds on Chasity's remains but did observe blunt force trauma to the right side of her head which resulted in a bruise (6 Tr. 31-32). Chasity's legs were charred to the muscle and bone was exposed (6 Tr. 33). Chasity's cause of death was smoke inhalation and thermal injury (6 Tr. 83). "[T]hat is, she burned to death." *Bosse*, 360 P.3d at 1227.

Forensic testing of stains found on Petitioner's tennis shoes, as well as a pair of blue jeans rolled into a ball and placed inside the back of Petitioner's bedroom closet, tested positive for blood (2 Tr. 233-236; 4 Tr. 185-186, 189, 193-194; 7 Tr. 67-72). DNA testing of the bloodstain on Petitioner's jeans revealed the presence of both Chasity's and Petitioner's genetic profiles (7 Tr. 102-107). DNA testing of Petitioner's tennis shoes revealed the presence of Chasity's and Katrina's genetic profiles (7 Tr. 108-110). Police discovered that Petitioner pawned numerous movies, televisions and other electronic equipment belonging to Katrina Griffin at seven (7) different Oklahoma City pawnshops the morning of July 23, 2010 (3 Tr. 57-63, 119-237, 267-75; 4 Tr. 31-64). Several of the DVD movies Petitioner pawned (or, in some cases, attempted to pawn) had the handwritten letters "KRG" which police discovered were handwritten initials placed by Katrina on all the movies she owned (1 Tr. 53-54; 3 Tr. 57-63, 126, 160-161, 214-215). Several DVD movies recovered from a stack found on top of Petitioner's bed also had Katrina's initials (4 Tr. 191-192; State's Exhibit 193). A television remote control found in Petitioner's truck likewise matched one of Katrina's televisions that Petitioner had pawned (4 Tr. 206). Additional facts may be presented below as they become relevant.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY CERTIORARI REVIEW TO CONSIDER AN ISSUE THAT IS UNTIMELY AND WAIVED AND/OR BARRED FOR FAILURE TO EARLIER RAISE, AND WHERE THE OKLAHOMA COURT OF CRIMINAL APPEALS FOLLOWED THIS COURT'S ESTABLISHED PRECEDENT.

A. Timeliness and Waiver/*Res Judicata*.

Certiorari review should be denied on this issue first because it is untimely raised. As discussed above, the OCCA considered and denied relief on Petitioner's facial vagueness challenge to the especially heinous, atrocious, and cruel aggravating circumstance in its original decision. *See Bosse I*, 360 P.3d at 1229. While Petitioner filed a certiorari petition to seek review of that decision, he did not raise that issue in his petition. Under the Rules of this Court, a petition for a writ of certiorari "is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Rule 13.1, *Rules of the Supreme Court of the United States*. "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." Rule 13.3, *Rules of the Supreme Court of the United States*; *see also Mkt. St. Ry. Co. v. R.R. Comm'n of State of Cal.*, 324 U.S. 548, 550-52, 65 S. Ct. 770, 772-73, 89 L. Ed. 1171 (1945) (holding that the California appellate rule delaying the issuance of the remittitur (*i.e.*, the mandate) for 30 days after the issuance of a final judgment does not affect the finality of the judgment for purposes of the time for filing a petition for certiorari review). In *Mkt. St. Ry. Co.*, this Court explained:

> We have held that finality of a judgment of a state court for determining the time within which our jurisdiction to review may be invoked is not controlled by the designation applied in state practice. The judgment for our purposes is final when the issues are adjudged. . . . Our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30-day period. If rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing.

Mkt. St. Ry. Co., 324 U.S. at 551-52, 65 S. Ct. at 773 (citations and footnote omitted).

Here, the OCCA adjudged the issue of whether Oklahoma's especially heinous, atrocious and cruel aggravating circumstance is facially overbroad and vague in *Bosse I*, decided in October 2015, after which rehearing was denied in December 2015. Thus, Petitioner's attempt to seek certiorari review of this issue is plainly untimely. This is so regardless of the fact that the OCCA subsequently withdrew the mandate in *Bosse I*–the time for seeking review of this issue began, under this Court's "practical" rule, when this issue was originally decided, regardless of the issuance or withdraw of the mandate under state law. *See Mkt. St. Ry. Co.*, 324 U.S. at 551-52, 65 S. Ct. at 773.

Nor is it of any consequence that the OCCA repeated its rejection of Petitioner's facial vagueness challenge to the especially heinous, atrocious and cruel aggravating circumstance in *Bosse II*. This Court examined a similar issue in *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S. Ct. 245, 97 L. Ed. 245 (1952), in which it held that the time for filing a petition for certiorari review ran from

the original judgment entered by the Court of Appeals on July 5, 1951, and not from a second judgment that was entered on September 18, 1951, after the expiration of the time to file a petition for rehearing and that did not have any effect on the merits of the original decision:

> While it may be true that the Court of Appeals had the power to supersede the judgment of July 5 with a new one, it is also true, as that court itself has recognized, that the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged. Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.
>
> The judgment of September 18, which petitioner now seeks to have us review, does not meet this test. It reiterated, without change, everything which had been decided on July 5. Since the one controversy between the parties related only to the matters which had been adjudicated on July 5, we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment.

Fed. Trade Comm'n, 344 U.S. at 211-12, 73 S. Ct. at 248-49.

Here, too, with regard to Petitioner's facial vagueness challenge to the especially heinous, atrocious and cruel aggravating circumstance, *Bosse II* reiterated, without change, its decision on this issue in *Bosse I*. It did not change any matter of substance

with regard to this issue. Petitioner notes that the OCCA stated in *Bosse II*, "This Opinion reflects our consideration of those briefs, as well as the other appellate briefs filed in the case, and replaces our original Opinion." *Bosse II*, 400 P.3d at 840; *see* Petition at 1 n.1. However, *Bosse II* reflected consideration of the original appellate briefs only in the sense that the opinion repeated its analyses on all of Petitioner's claims, minus the *Booth* issue, from *Bosse I*. This was necessary because this Court vacated *Bosse I* and the OCCA wrote *Bosse II* to "replace[] [its] original Opinion." *Id*. Thus, in sum, the facial vagueness issue was adjudged and decided in *Bosse I*, *Bosse II* made no change to the resolution of this issue, and the time for seeking certiorari review of this issue ran from the issuance of *Bosse I*, such that Petitioner's current attempt to seek review of this issue is untimely.

Relatedly, this Court should further deny certiorari review because Petitioner could have, but failed to, raise this issue in his prior petition for certiorari review to this Court, resulting in waiver and/or *res judicata* bar of this issue. It is a basic and fundamental rule of litigation that a party should raise an issue when he is first able to do so. *See Massaro v. United States*, 538 U.S. 500, 508, 123 S. Ct. 1690, 1695, 155 L. Ed. 2d 714 (2003) (noting the benefits of "rules requiring claims to be raised at the earliest opportunity"); *see also Yakus v. United States*, 321 U.S. 414, 471, 64 S. Ct. 660, 689, 88 L. Ed. 834 (1944) (Rutledge, J., dissenting) ("It is true that in a variety of situations and for a variety of reasons a person is foreclosed from raising issues, including some constitutional ones, where he has failed to exercise an earlier

opportunity."). Petitioner's failure to raise this issue at his first opportunity–*i.e.*, in his original certiorari petition–should result in waiver of this issue.

Further, "[u]nder *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 467 n.6, 102 S. Ct. 1883, 1890 n.6, 72 L. Ed. 2d 262 (1982). "While the technical rules of preclusion are not strictly applicable in the context of a single ongoing original action, the principles upon which these rules are founded should inform our decision." *Arizona v. California*, 530 U.S. 392, 410, 120 S. Ct. 2304, 2316, 147 L. Ed. 2d 374 (2000) (quotation marks omitted, alterations adopted). *Res judicata* is one such rule of preclusion. *See Id*. Here, as discussed above, in *Bosse I*, the OCCA considered and denied relief on Petitioner's vagueness challenge to the especially heinous, atrocious, and cruel aggravating circumstance, but Petitioner failed to seek review of that holding in his first petition for certiorari review. Indeed, Petitioner's failure to seek review of this issue then, while now seeking review at this juncture, strikes at the heart of the reasons behind the doctrine of *res judicata*:

> [I]nvocation of res judicata relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication. When a state court has adjudicated a claim or issue, these doctrines also serve to promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.

Kremer, 456 U.S. at 467 n. 6, 102 S. Ct. at 1890 n.6. Through Petitioner's failure to earlier seek review of this issue, this Court is now forced to consider, and Respondent is forced to respond to, a second certiorari petition raising a single issue that could have, and should have, been raised in Petitioner's earlier petition, resulting in great cost in time and resources. Accordingly, Petitioner's current attempt to seek review of this issue should be barred by *res judicata*.

B. The OCCA has followed this Court's precedent.

The merits of Petitioner's claim advances no compelling reason to grant certiorari. Petitioner presents no conflict in federal constitutional precedent warranting resolution, nor does Petitioner develop a compelling federal constitutional issue arising from the OCCA's opinion warranting certiorari. Petitioner believes the OCCA has refused to either consistently apply its own limiting construction to the especially heinous, atrocious, or cruel aggravating circumstance, or to require juries to be so informed. To be constitutional, an aggravating circumstance "may not be vague," and "may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S. Ct. 2630, 2635, 129 L. Ed. 2d 750 (1994). "If the sentencer fairly could conclude that an aggravating circumstance applies to **every** defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 1542, 123 L. Ed. 2d 188 (1993) (emphasis in original) (citing *Maynard v. Cartwright*, 486 U.S. 356, 364, 108 S. Ct. 1853, 1859, 100 L. Ed 2d 372

(1988) (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder)). However,

> [I]f a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty," *Cartwright*, 486 U.S., at 362, 108 S. Ct., at 1858, has been satisfied.

Lewis v. Jeffers, 497 U.S. 764, 779, 110 S. Ct. 3092, 3101, 111 L. Ed. 2d 606 (1990). The OCCA has adopted a constitutionally narrow construction of the especially heinous, atrocious, or cruel aggravating circumstance and applied that construction to Petitioner's case. Thus, the especially heinous, atrocious, or cruel aggravating circumstance is not vague and overbroad, and the OCCA has not "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10, *Rules of the Supreme Court of the United States*. This Court should not grant certiorari to review this particular case.

Petitioner claims the especially heinous, atrocious, or cruel aggravating circumstance is vague and overbroad, and that the OCCA does not routinely apply a limiting construction, nor require juries be informed of the limiting construction. However, as shown below, Petitioner's claim is without merit.

Petitioner's jury was instructed:

> The State has alleged that the murder was "especially heinous, atrocious, or cruel." This aggravating circumstance is not established unless the State proves beyond a reasonable doubt:

> First, that the murder was preceded by either torture of the victim or serious physical abuse of the victim; and
>
> Second, that the facts and circumstances of this case establish that the murder was heinous, atrocious, or cruel.
>
> You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that you cannot find that "serious physical abuse" or "great physical anguish" occurred unless you also find that the victim experienced conscious physical suffering prior to his/her death.
>
> In addition, you are instructed that the term "heinous" means extremely wicked or shockingly evil; the term "atrocious" means outrageously wicked and vile; and the term "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

(O.R. 1060; Instruction No. 4-73 (OUJI-CR(2d)). Petitioner's jury found the existence of the first three aggravating circumstances and sentenced the defendant to death (O.R. 1090-1095). The OCCA held:

> We have found the aggravating circumstance that the murder was heinous, atrocious or cruel is narrow enough to be constitutional. *Smith*, 2013 OK CR 14, 61, 306 P.3d at 577; *Postelle*, 2011 OK CR 30, 84, 267 P.3d at 144. As the State notes, Bosse admits this but argues that the narrowing limitations for each circumstance are insufficient because, he alleges, they have been inconsistently applied. We have rejected this argument, stating, "an aggravating circumstance does not become 'overbroad' based upon the manner it is applied to particular cases." *Mitchell v. State*, 2006 OK CR 20, 104, 136 P.3d 671, 711 (quoting *DeRosa v. State*, 2004 OK CR 19, 91, 89 P.3d 1124, 1155).

Bosse II. at 860.

Where, as here, the OCCA applied an interpretation of this aggravator that has previously been found constitutional, Petitioner's constitutional challenge to that aggravator is at an end. *Jeffers*, 497 U.S. at 779. *See Walton v. Arizona*, 497 U.S. 639, 654-655, 110 S. Ct. 3047, 3058, 111 L. Ed. 2d 511 (1990) (overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584, 589, 122 S. Ct. 2428, 2432, 153 L. Ed. 2d 556 (2002)) ("In *Maynard v. Cartwright*, we expressed approval of a definition that would limit Oklahoma's 'especially heinous, atrocious, or cruel' aggravating circumstance to murders involving 'some kind of torture or physical abuse,' 486 U.S., at 364-365, 108 S. Ct., at 1859-1860."). The crux of Petitioner's argument is that in Oklahoma, the aggravating circumstance does not require the jury to find that a victim must suffer for an appreciable amount of time prior to death. However, this Court has never mandated a specific length of time that a victim must suffer.

The current version of the constitutionally narrow definition and limiting instruction was first espoused by the OCCA in *DeRosa v. State*, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004). However:

> This instruction does not change any of the legal requirements of the "heinous, atrocious, or cruel" aggravating circumstance as it has existed up until this time. Rather, it is intended to more fully inform the jury regarding the findings that must be made in order to properly apply the aggravator and to ensure that a jury determination is made regarding each of these findings.

Id. The OCCA mandated that the instruction shall be used in all future capital murder trials in which the State alleges the especially heinous, atrocious, or cruel aggravating

circumstance. *Id*. Accordingly, Petitioner's claim that the OCCA does not require Oklahoma juries to be informed of the limiting instruction is without merit.

Further, as in the Petitioner's case, the OCCA has even handedly applied the limiting construction of the aggravator on direct review of capital cases. Petitioner's allegation that the OCCA has not routinely applied the limiting construction is simply conclusory as Petitioner fails to cite even one OCCA case in which the limiting construction was not applied. The OCCA has:

> [C]onstrued the aggravating circumstance narrowly and had followed that precedent numerous times; absent an affirmative indication to the contrary, we must presume that it did the same thing here. That is especially true in a case such as this one, where the state court has recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case.

Bell v. Cone, 543 U.S. 447, 456, 125 S. Ct. 847, 853, 160 L. Ed. 2d 881 (2005). Petitioner cites several Tenth Circuit cases that are critical of the OCCA's application of the aggravator. However, "there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in the state courthouse." *Burt v. Titlow*, __U.S.__, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013) (quoting *Stone v. Powell*, 428 U.S. 465, 494 n.35, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) (internal quotation marks omitted).

CONCLUSION

Petitioner has raised an issue that could have been raised in his prior petition for writ of certiorari. Thus, this petition is untimely and should be denied. Further, Petitioner presents no conflict in federal constitutional precedent warranting resolution, nor does Petitioner develop a compelling federal constitutional issue arising from the OCCA's opinion warranting certiorari. Thus, the OCCA has not "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10, *Rules of the Supreme Court of the United States*. Accordingly, for the reasons stated above, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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