Case No. 19-8229

IN THE SUPREME COURT OF THE UNITED STATES

DONNIE L. HARRIS, JR.,

***Petitioner*,**

v.

THE STATE OF OKLAHOMA,

***Respondent*.**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

***JENNIFER L. CRABB, OBA #20546**
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 FAX
ATTORNEYS FOR RESPONDENT
fhc.docket@oag.ok.gov
jennifer.crabb@oag.ok.gov

***Counsel of record**

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

CAPITAL CASE
QUESTION PRESENTED

In *Herrera v. Collins*, 506 U.S. 390 (1993), this Court held that Texas's thirty-day limit on the filing of a motion for new trial did not violate due process. Petitioner's motion for new trial, which was filed three years after the entry of judgment and sentence, was denied as untimely. The question presented is:

Should this Court review the application of Oklahoma's one-year time limit for filing motions for new trial to the specific facts of this case?

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Opinion and Judgment of the Oklahoma Court of Criminal Appeals ("OCCA") entered on September 26, 2019. *See Harris v. State*, 450 P.3d 933 (Okla. Crim. App. 2019).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Leflore County, State of Oklahoma, Case No. CF-2012-113. In 2013, Petitioner was tried by jury for one count of first degree (felony) murder. A bill of particulars was filed alleging two statutory aggravating circumstances: (1) the defendant knowingly created a great risk of death to more than one person; and (2) the murder was especially heinous, atrocious, or cruel. *See* OKLA. STAT. tit. 21, § 701.12. The jury found Petitioner guilty as charged, found the existence of both aggravating circumstances, and recommended a death sentence. Petitioner was sentenced accordingly.

The OCCA affirmed Petitioner's conviction and sentence in a published opinion filed on September 26, 2019. *Harris v. State*, 450 P.3d 933 (Okla. Crim. App. 2019). The OCCA denied Petitioner's request for rehearing on November 4, 2019. 11/4/2019 Order Denying Petition for Rehearing (OCCA No. D-2014-153).

On March 24, 2020, Petitioner's petition for a writ of certiorari was placed on this Court's docket.

STATEMENT OF FACTS

The OCCA set forth the relevant facts in its published opinion on direct appeal:

> Appellant was convicted of killing his girlfriend, Kristi Ferguson, by intentionally dousing her with gasoline and setting her on fire. The couple had been in a tumultuous relationship for several years. Late on the evening of February 18, 2012, Appellant and Ferguson showed up at the home of Martha Johnson in Talihina. Appellant lived with his father, brother, and others in a home near Johnson's. Johnson and her son testified that Ferguson, nearly naked, was screaming for help on their front porch. Part of her bra was melted to her chest. The Johnsons smelled gasoline and burned flesh. As they waited for an ambulance to arrive, Appellant repeatedly tried to keep Ferguson from talking, saying things like, "Shut the fuck up. Shut your fucking mouth. Just shut your fucking mouth. You're going to get me in fucking trouble. Don't say another fucking word." Ferguson was heard to say, "Donnie, look at me. Look what you did to me," to which Appellant replied, "I know."
>
> Emergency personnel also testified that Appellant tried to keep Ferguson from telling them what happened. The paramedics repeatedly asked Appellant to get out of their way as they attended to Ferguson. As Ferguson was carried to the ambulance, Appellant ran alongside, repeatedly exclaiming that he was sorry, that he loved her, and "We took it too far." Once Ferguson was secured inside the ambulance and away from Appellant, she said, "I don't want him in here. Keep him away from me. Keep him away from me. Don't let him near me. He did this to me. ... He threw kerosene on me and set me on fire."
>
> After the ambulance left, Appellant walked to the home of his friend, Melvin Bannister. (At trial, Bannister testified that Appellant said he had gotten into a fight with Ferguson, and that some candles caught their house on fire.) When police made telephone contact with Appellant, he initially refused to reveal his location, but eventually agreed to be transported to the police station for an

interview. Several witnesses said that Appellant reeked of gasoline; he had a serious burn to his left hand. A lighter was found in his pocket, although he later told a detective that he did not smoke.

Appellant gave authorities vague and inconsistent accounts of what happened.[1] On February 19, 2012, after a brief discussion with Talihina Police Officer Justin Klitzke, Appellant had a more extensive interview with State Fire Marshal Agent Tony Rust, who had been dispatched to investigate the fire. Appellant told Klitzke that he kept a Crown Royal bottle of gasoline on a table in his bedroom, but said he had no idea how the fire started. Appellant wrote a four-page account of what happened for Agent Rust where he claimed that while he and Ferguson were in his bedroom, a fire of unknown origin broke out "in an instant," and quickly "jumped to a blaze" on Ferguson's clothes. When Rust told Appellant he did not believe that account, Appellant exclaimed, "I didn't splash gasoline on her and set her on fire."

> [Fn. 1 Appellant does not challenge the voluntariness of any of his statements to authorities.]

On February 24, 2012, Appellant was interviewed by LeFlore County Investigator Travis Saulsberry. That interview was recorded and played for the jury at trial.[1] He volunteered to Saulsberry (as he had to Officer Klitzke) that he kept a Crown Royal bottle full of gasoline on a table in his bedroom. Appellant maintained that he did not know how the fire started. However, from the beginning, he conceded that the gasoline-filled bottle played a part. Initially he theorized that Ferguson may have kicked the bottle off of the table. When directly confronted about how the fire started, Appellant offered various possible scenarios. Almost in the same breath, he claimed that it might have been caused by candles or a faulty space heater, but he later said there were no lit candles in his bedroom at the time. When confronted with Melvin Bannister's claim that he had blamed the fire on

[1] The OCCA was mistaken. Investigator Saulsberry discussed the interview, but it was admitted only as a court's exhibit, and was not played for the jury (Tr. 1075).

candles, Appellant denied making such a claim. When confronted with a recording of Bannister's statement to that effect, Appellant replied that he "didn't know what else to say." At one point he told Saulsberry, "I don't know how it happened." Still later, Appellant claimed that Ferguson actually grabbed the Crown Royal bottle full of gasoline and "threw it down," causing the bed to catch fire. Appellant accused every other witness of being untruthful or mistaken.[2]

> [Fn. 2 When Saulsberry asked Appellant why he was telling Ferguson to "shut the fuck up" when she was asking the neighbors for help, Appellant claimed he was talking to the neighbors, not Ferguson, because (he claimed) they were demanding that Ferguson leave their property.]

Because firefighters had to return to the scene several times to put out "hotspots," Agent Rust was unable to safely inspect it until a few days after the fire. He collected pieces of a Crown Royal bottle found in the debris and sent this evidence, along with clothing Appellant was wearing at the time of his arrest, to the Oklahoma State Bureau of Investigation for analysis. According to OSBI Criminalist Brad Rogers, the pieces of the bottle contained traces of an ignitable fluid such as gasoline.

Ferguson was eventually flown to Oklahoma City for treatment of second-and third-degree burns over fifty percent of her body. She also suffered other fire-related trauma such as lung damage. She succumbed to her injures a few weeks later. The burn patterns on her skin were consistent with those made by a liquid accelerant such as gasoline. Doctors testified that the pain associated with Ferguson's injuries would have been unimaginable.

The State presented evidence that the relationship between Appellant and Ferguson was tumultuous, that Appellant had made a number of menacing and threatening statements to and about Ferguson, and that Ferguson had sought a protective order against Appellant. A few weeks before the fire, Ferguson moved

> out of Appellant's home to live with a friend, Jenny Turner. Turner testified that Appellant threatened to kill Ferguson several times, saying things like, "I will kill you before I see you happy in Talihina." On one occasion, Appellant drove by Turner's home, waved a handgun and said, "I wanted y'all to see my new friend." Turner also recalled that a week before the fire, Appellant tried to run over Ferguson in his car.
>
> The defense presented testimony from several of Appellant's family, who described the relationship between Appellant and Ferguson and their observations during the fire. None of them had personal knowledge about how the fire started.
>
> In the first stage of the trial, the jury found Appellant guilty of First Degree Felony Murder in the Commission of First Degree Arson, rejecting the lesser alternative crimes of Second Degree Murder (Depraved Mind), First Degree Manslaughter (Heat of Passion), and Second Degree Manslaughter (Culpable Negligence). The jury's guilty verdict on a capital offense led to a second, capital sentencing phase of the trial. The State adopted the first-stage evidence to support its two aggravating circumstances. It presented victim impact testimony from Ferguson's father, mother, stepmother, and sister. It also presented brief expert testimony about the pain Ferguson likely suffered as a direct result of her burns. The defense presented many friends and family who testified to Appellant's upbringing, work habits, religious conviction, and general character as a good person whose life should be spared. The defense also presented a psychologist who examined Appellant and a mitigation specialist who provided a summary of Appellant's life story. After being instructed on how to consider the evidence relevant to sentencing, the jury recommended punishment of death.

Harris, 450 P.3d at 940-42 (paragraph numbers omitted).

Petitioner asserts that Ms. Ferguson cannot be heard on the 911 call blaming him for the fire. Pet. at 7. However, Petitioner does not go so far as to deny that Ms. Ferguson made these statements to the Johnsons, or to the paramedic in the

ambulance. In fact, on the call Petitioner placed to 911, *he* can be heard saying, "I didn't mean to … I'm so sorry, really" (State's Ex. 4, call no. 2).

Petitioner also asserts that the State "filed lengthy responses to Mr. Harris's Brief of Appellant and Motion for Evidentiary Hearing, [but] offered no response to his Motion for New Trial." Pet. at 19. In fact, the State did not file separate responses to either Petitioner's motion for an evidentiary hearing or his motion for new trial. Within its merits brief, the State addressed the "new" evidence surrounding the fire investigation in a footnote which merely asserted that it made no difference. 7/25/2017 Brief of Appellee (OCCA No. D-2014-153) at 29 n.29.[2]

REASONS FOR DENYING THE WRIT

Although not exhaustive, Rule 10 of this Court's rules provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and includes examples of grounds for granting a petition for writ of certiorari. These include a conflict among state courts of last resort, an opinion by a state court of last resort that conflicts with a decision by a United States court of appeals, an opinion by a state court of last resort that decides an important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court of last resort that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner cannot make any of these showings. In fact, the OCCA's rejection of Petitioner's argument that application of Oklahoma's

[2] Although this argument was directed at Petitioner's motion for an evidentiary hearing, as will be explained below, Petitioner filed the same four attachments to both his motions for an evidentiary hearing and for a new trial.

one-year time limit to his motion for new trial would violate due process is fully supported by—indeed, compelled by—this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993). Petitioner's case-specific complaints do not warrant this Court's intervention. Further, Petitioner's argument for a new trial is exceptionally weak. For all of the foregoing reasons, this Court should deny certiorari review.

THIS COURT HAS ALREADY HELD THAT DUE PROCESS PERMITS STATES TO PLACE TIME LIMITS ON MOTIONS FOR NEW TRIAL.

Petitioner claims his right to due process was violated by the OCCA's finding that his motion for new trial was untimely. Petitioner's claim is foreclosed by *Herrera v. Collins*. Even absent that decision, Petitioner concedes that the one-year limitation for filing a motion for new trial is generally reasonable. Pet. at 19-20. Thus, Petitioner requests mere case-specific error-correction. In any event, Petitioner's "new" evidence fails to satisfy the standard for a new trial. Petitioner presents no compelling reason for this Court to review the lower court's decision.

A. Background of Petitioner's Claim

Petitioner and Ms. Ferguson had been in an on-again-off-again relationship for many years, and appeared not to be formally dating on February 18, 2012, as she was living at a separate location (Tr. 1083-84, 1094, 1232, 1514). Ms. Ferguson moved out of Petitioner's home following a fight she had with Petitioner that left her bloodied all over (Tr. 866-67). Ms. Ferguson told Petitioner following her move that she did not want him coming around anymore (Tr. 868). Petitioner's response to Ms. Ferguson's request was to threaten to kill her (Tr. 868). This was not the

only threatening thing Petitioner did toward Ms. Ferguson (Tr. 869, 877-78). On another occasion, Petitioner drove by the home of Ms. Turner and Ms. Ferguson, waiving a .38 special handgun he had just obtained, saying, "I wanted y'all to see my new friend." (Tr. 869). Still another time, approximately a week before February 18, 2012, Ms. Ferguson again made plain to Petitioner that they were through as a couple (Tr. 877). Petitioner was irate and attempted to run Ms. Turner over in his car as he drove away from their house (Tr. 877). According to Ms. Turner, Petitioner directly threatened Ms. Ferguson on multiple occasions, telling her, "I will kill you before I see you happy in Talihina." (Tr. 878).

Petitioner finally carried out his threats. On the evening of February 18, Petitioner doused Ms. Ferguson with an accelerant[3] in his bedroom, which he kept in a Crown Royal bottle on a table next to the door, and set her ablaze with a lighter he possessed (Tr. 728-30, 759-60, 765-66, 783-84, 791-92, 795, 798, 805-06, 813, 823-24, 842-43, 851-52, 883-85, 994, 1097, 1108-09, 1130-31; State's Exs. 9, 24-27).

Terribly burned, Ms. Ferguson made her way to the home of Martha Johnson, a neighbor (Tr. 839, 841-43). Petitioner followed (Tr. 841-42). Martha Johnson's son, Barry, could hear screams coming from the other side of the door and opened the door to the two of them (Tr. 841, 881-82). Every time Ms. Ferguson attempted to speak, Petitioner got right in her face and said, "Kristi, shut the fuck up. Shut your fucking mouth. Just shut your fucking mouth. You're going to get me in

[3] While the evidence leaves no doubt Petitioner covered Ms. Ferguson with an accelerant prior to setting her on fire, the evidence is unclear whether Petitioner used kerosene or gasoline (Tr. 728, 730, 899, 909, 1133-34). Kerosene and gasoline are both accelerants (Tr. 1133-34).

fucking trouble. Don't say another fucking word." (Tr. 843-44). If Ms. Ferguson attempted to move her head, Petitioner moved his to where it was still in her face and admonished her to remain silent (Tr. 844, 847). Ms. Ferguson was able to get in a few words herself, however, saying to Petitioner, "Donnie, look at me. Look what did you [sic] to me." (Tr. 844-45). Petitioner replied, "I know." (Tr. 844-45).

Petitioner's attempts to silence Ms. Ferguson continued even after emergency personnel arrived (Tr. 848-49). Petitioner was so persistent that the paramedics attending to Ms. Ferguson had to repeatedly ask him to move out of the way (Tr. 848-49). As the paramedics were loading Ms. Ferguson into the ambulance, Petitioner stayed right at the stretcher's side, repeating his warnings to Ms. Ferguson to not say anything (Tr. 848-50). Even after the paramedics had fully loaded Ms. Ferguson into the ambulance and shut its doors, Petitioner continued yelling through the closed doors, warning her to not say anything lest he get in trouble (Tr. 851). Inside the ambulance, Ms. Ferguson fearfully told Keith Lickly, one of the paramedics, "I don't want him in here. Keep him away from me. Keep him away from me. Don't let him near me. He did this to me." (Tr. 899, 919). Asked by Mr. Lickly what happened, Ms. Ferguson told him, "He threw kerosene on me and set me on fire." (Tr. 899).

When Officer Justin Klitzke located Petitioner the next morning, he instantly recognized the smell of gasoline and observed that Petitioner had only a single burn to the top of his left hand (Tr. 730; State's Exs. 36, 38, 40, 44-45). Before officers said anything to Petitioner about flammable substances, he volunteered, "I didn't

splash gasoline on her and set her on fire." (Tr. 765, 791-92, 798). In a subsequent interview, Petitioner claimed not to know how the fire started (Tr. 1097). However, Petitioner admitted that he kept a bottle of Crown Royal containing gasoline in his bedroom on a table next to his door (Tr. 1097). At one point, Petitioner suggested that lit candles must have ignited the gasoline (Tr. 1107). When asked who lit the candles, Petitioner responded that "there were no candles" in the room (Tr. 1107-09).

Agent Tony Rust of the Oklahoma State Fire Marshal's Office found a broken Crown Royal bottle and a Crown Royal label inside Petitioner's bedroom (Tr. 780-84; State's Ex. 23-27). These items tested positive for the presence of an ignitable liquid in the gasoline class (Tr. 993-94).

In preparing the direct appeal, Petitioner's appellate attorney retained an expert who wished to examine the bottle and label but they could not be located. 3/30/2017 Brief of Appellant (OCCA No. D-2014-153) ("DA Br.") at 10. The OCCA remanded to the trial court for a hearing, at which Agent Rust testified that he picked the evidence up from the Oklahoma State Bureau of Investigation ("OSBI") and delivered it to Officer Jody Thompson (12/23/2015 Tr. 26-28). Officer Thompson denied receiving the evidence (12/23/2015 Tr. 115). No chain of custody form was prepared (12/23/2015 Tr. 29). Agent Rust testified that he noted the exchange in his day planner (12/23/2015 Tr. 29).

On direct appeal, Petitioner raised four claims related to this evidence: Proposition I.B, alleging that his rights under the Fifth, Sixth, Eighth, and

Fourteenth Amendments were violated by the lack of a complete record; Proposition III, claiming his rights to due process and the effective assistance of appellate counsel were violated by the loss and/or destruction of evidence; Proposition IV.B, claiming the State suppressed evidence that Agent Rust was investigated for his handling of the evidence in this case; and Proposition XIV.B, alleging trial counsel was ineffective for stipulating to the use of photographs of the bottle and label at trial without verifying the existence of these items of evidence. DA Br. at 10, 25-36, 39-42, 81-83. Petitioner also filed a motion for new trial based on newly discovered evidence, *i.e.* the discovery by his investigator of a piece of a broken 375 milliliter Crown Royal bottle (which had a lid melted onto it) in his bedroom, and a post-trial investigation into Agent Rust's handling of evidence in this case. 3/30/2017 Motion for New Trial and/or Request for Evidentiary Hearing Based on Newly Discovered Evidence and Brief in Support (OCCA No. D-2014-153) ("MNT"). Among other things, Petitioner argued the OCCA should excuse his failure to file the motion within one year of the judgment based on *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). MNT at 3-4.

The OCCA did not directly address Proposition I because Petitioner claimed he would show prejudice from the lack of a complete record within other propositions of error. *Harris*, 450 P.3d at 943. The OCCA denied Proposition III because the missing evidence had no apparent exculpatory value as required by *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), and Petitioner failed to show bad faith in its loss as required by *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

Id. at 948-49. Because OSBI had found gasoline on the broken bottle, "there was nothing to be gained from" further examination of the bottle. *Harris*, 450 P.3d at 949. As for Proposition IV.B, the OCCA denied the claim under *Brady v. Maryland*, 373 U.S. 83 (1963) because the factual basis for the claim that Agent Rust was investigated for his handling of Petitioner's case did not exist at the time of trial. *Id*. at 950. Notably, regarding other evidence which could have been used to impeach Agent Rust, the OCCA concluded that

> [t]he State's case was built upon the statements of the victim immediately after the fire, and Appellant's own suspicious conduct and statements. Rust's credibility *per se* was not central to the State's case, because Rust's participation was limited to collecting evidence from Appellant and the fire scene, and – as we observed in Proposition III – the probative value of *that* evidence was marginal as well.

Id. at 951 (emphasis adopted). Significantly, the OCCA also acknowledged that Petitioner did not claim that Rust tampered with or planted evidence, and that "the fact that Appellant kept a liquor bottle full of gasoline in his bedroom, and that gasoline played a part in the fire that killed Ferguson, was never in dispute." *Id*. Further, the OCCA noted that Agent Rust never claimed to be able to prove the only question at trial—whether Petitioner intentionally set Ms. Ferguson on fire. *Id*. at 952. Finally, the OCCA concluded that "[t]he State's case did not rest on Agent Rust's credibility. It did not even rest, to any material degree, on the evidence he collected." *Id*.

As for Proposition XIV.B, the OCCA denied Petitioner's ineffective assistance of counsel claim because it had "already considered and rejected the merits of

Appellant's claim that the loss of this evidence rendered his trial fundamentally unfair. See Proposition III. The extra-record material related to this claim [and presented in Petitioner's motion for an evidentiary hearing] does not alter our conclusion." *Id*. at 962.

Finally, the OCCA addressed Petitioner's motion for new trial. A new trial may be granted in "limited situations where [a defendant's] 'substantial rights have been prejudiced,' including when 'new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial.' 22 O.S.2011, § 952(7)." *Id*. at 966. A motion for new trial must be filed within one year of the judgment. *Id*. The OCCA found the motion for new trial moot, with respect to the evidence concerning the investigation of Agent Rust, given its analysis of Petitioner's *Brady* claim.[4] *Id*. As for the new piece of broken bottle, the motion was untimely, so the court did not have jurisdiction. *Id*. at 966-67. The OCCA declined to excuse Petitioner's untimely filing, in spite of delays in completing the appeal record, because the delays did not have any bearing on Petitioner's ability to find evidence at the crime scene[5]. *Id*. at 966 n.4.

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[4] Petitioner correctly points out that the OCCA was mistaken in this regard, as it had rejected his *Brady* claim only because this evidence was not available at the time of trial, without analyzing its materiality. Pet. at 21 & n.4. Nevertheless, as will be shown, Petitioner was not entitled to a motion for new trial based on this evidence.

[5] Petitioner's challenge to this finding is without merit. Pet. at 22-23. Petitioner argues that he could not have reasonably begun his investigation until the record was complete on July 13, 2016. Pet. at 20, 22-23. Yet, the broken bottle was discovered on August 10, 2015. MNT, Attachment 1 at ¶ 3. Thus, the investigation *clearly* began before counsel received the record. Petitioner, therefore, could have

B. Petitioner Fails to Present an Important, Unanswered Question of Federal Law or Demonstrate That the OCCA's Decision Conflicts with Decisions of This Court

Petitioner asks this Court to review his case in order to determine whether due process prevents the OCCA from enforcing Oklahoma's one-year limitation period on the filing of a motion for new trial based on newly discovered evidence. Petitioner fails to acknowledge that this Court has held that a thirty-day limitation on the filing of a motion for new trial does not violate due process. As there is no important question that requires this Court's attention, Petitioner is not entitled to a writ of certiorari.

In *Herrera v. Collins*, a Texas capital case, the petitioner claimed to have discovered new evidence establishing his innocence. *Herrera*, 506 U.S. at 393. Like Oklahoma, Texas has a jurisdictional time limit for the filing of a motion for new trial based on newly discovered evidence. *Id*. at 400. However, Texas's time limit is only thirty days from the imposition of the sentence. *Id*. Herrera claimed due process was violated by the Texas court's refusal to entertain his motion for new trial. *Id*. at 407. This Court noted that it grants "'substantial deference'" to the judgment of state legislatures in the area of criminal procedure. *Id*. (quoting *Medina v. California*, 505 U.S. 427, 445-46 (1992)). Accordingly, this Court will find a violation of due process only if the complained-of procedure "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id*. at 407-08 (quoting *Medina*, 505 U.S. at 445-46).

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discovered the broken bottle within the one-year time limit for filing a motion for new trial.

"The Constitution itself, of course, makes no mention of new trials." *Id*. at 408. Early cases limited motions for new trial to the term of court in which the judgment was entered. *Id*. Subsequently, this Court adopted a sixty-day time limit for motions for new trial based on newly discovered evidence. *Id*. At one point, this Court amended its rule to permit such motions to be filed at any time in capital cases. *Id*. However, in 1946, this Court adopted a two-year time limit for such motions and abolished the exception for capital cases. *Id*. at 409. This Court has "strictly construed" that limit. *Id*.

At the time of *Herrera*, one State required motions for new trial to be filed in the same term of court as the judgment, seventeen States had limits of sixty days or less, eighteen states had time limits of one to three years, fifteen States permitted such motions more than three years after conviction (with four of those States having waivable time limits), and nine States had no time limit. *Id*. at 410-11. In light of the historically limited availability of new trials, this Court's own practice, and the divergent practices within the States[6], this Court held that application of Texas's rule did not violate Herrera's right to due process. *Id*. at 411. This Court further noted that Herrera had a forum for presenting his alleged innocence via executive clemency. *Id*. at 411-16.

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[6] Petitioner relies upon this divergent practice, emphasizing those States with longer time limits or which provide exceptions. Pet. at 28-30. However, as in *Herrera*, this divergent practice cuts *against* Petitioner's due process argument by proving that any one State's practice does not offend a principle of justice that is so rooted in this country's traditions and conscience as to be fundamental.

This Court has thus found that due process is not violated by a thirty-day limit, and has itself adopted a sixty-day time limit. Oklahoma's one-year limit, therefore, does not violate due process.

Without acknowledging *Herrera*, Petitioner seemingly attempts to avoid its holding by arguing that it was a State practice (delays in completing the record) that caused him to be unable to comply with the one-year limit. However, as shown in footnote 5, *supra*, the delays in completing the record did not impede his investigation.

Further, Petitioner cites absolutely no cases in which any court has held that due process was violated by application of a time limit on the filing of a motion for new trial, whatever the reason for the motion's untimeliness. Indeed, the only case Petitioner cites that is even remotely on point is *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Pet. at 26. The petitioner in *Hicks* was arbitrarily denied the state-law right to be sentenced by a jury. *Hicks*, 447 U.S. at 345-47. Thus, *Hicks* is only violated if a defendant is arbitrarily deprived of something to which state law entitles him. *Ross v. Oklahoma*, 487 U.S. 81, 88-91 (1988).

Oklahoma's *limitation* on the filing of a motion for new trial creates no *right* for Petitioner. A state-created right exists when substantive guidelines are imposed on the exercise of official discretion. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) ("Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause."). Oklahoma's mandatory one-year limitation leaves no room for

official discretion; nor does it place substantive guidelines thereon. Petitioner refers to a "miscarriage of justice exception" which the OCCA has applied, in extraordinary circumstances, to claims which would otherwise be procedurally barred in a successive post-conviction proceeding. Pet. at 26. Petitioner provides no authority for the idea that this exception is available for motions for new trial, and the State is aware of none. Accordingly, Petitioner has failed to demonstrate that the OCCA's decision conflicts with decisions of this Court.

Finally, as noted above, this Court found it significant in *Herrera* that the petitioner could present his new evidence in a clemency proceeding. Petitioner will have that same opportunity. OKLA. CONST. Art. 6, § 10. Further, although he claims otherwise, Pet. at 23-25, Petitioner also could have presented this claim in his post-conviction application if, as he asserts, he was unable to present it on direct appeal.

The State believes Petitioner could have timely presented his motion for new trial, as he discovered the broken bottle before receiving the record on appeal proving that delays in completing the record did not impede his investigation. However, assuming Petitioner is correct and this claim was unavailable on direct appeal, "[t]he only issues that may be raised in an application for post-conviction relief are those that . . . were not and could not have been raised in a direct appeal." OKLA. STAT. tit. 22, § 1089(C). Thus, if Petitioner is correct that Oklahoma's motion for new trial procedure was inadequate, he could have presented this claim in his post-conviction application. Alternatively, Petitioner could have argued that

appellate counsel was ineffective for not timely filing the motion for new trial. *See* Pet. at 25 (acknowledging that, pursuant to OKLA. STAT. tit. 22, § 1089(D)(4)(b)(2), claims of ineffective assistance of appellate counsel may be raised in a post-conviction application). It is simply untrue that Petitioner had no avenue for presenting his new evidence.

In fact, the attachments to Petitioner's motion for an evidentiary hearing regarding his allegation that trial counsel was ineffective were identical to the attachments to his motion for new trial. *Compare* MNT, Attachments 1-4 *with* 3/30/2017 *Notice of Extra-record Evidence Supporting Propositions II, III, IV and XIV of Brief of Appellant and/or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims* (OCCA No. D-2014-153), Attachments 1, 3, 4, 5. The OCCA considered the evidence of the broken bottle found by his direct appeal investigator and the investigation of Agent Rust and determined that "we have already considered and rejected the merits of Appellant's claim that the loss of this evidence [the missing bottle and label] rendered his trial fundamentally unfair. See Proposition III. The extra-record material related to this claim does not alter our conclusion." *Harris*, 450 P.3d at 962.

A motion for new trial requires a defendant to produce evidence that "creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome." *Underwood v. State*, 252 P.3d 221, 254-55 (Okla. Crim. App. 2011). This reasonable probability standard is identical to that used to evaluate claims of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 694

(1984) (a defendant claiming ineffective assistance of counsel must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). The OCCA analyzes a motion for an evidentiary hearing under a standard that is *less* demanding than *Strickland*. *Simpson v. State*, 230 P.3d 888, 905-06 (Okla. Crim. App. 2010).

Given that the OCCA actually considered Petitioner's new evidence under a standard that is less demanding than its standard for granting a new trial, Petitioner has failed to show that he was denied due process. In light of *Herrera*, *Hicks*, *Olim*, and *Ross*, Petitioner has failed to raise a question which is unanswered, but needs to be answered, by this Court. Petitioner has also failed to demonstrate that the OCCA's decision conflicts with *Hicks*, or any of this Court's cases. Petitioner has presented no compelling reason for this Court to grant certiorari review.

C. This Court Should Deny the Petition Because, His Untimeliness Aside, Petitioner's New Evidence Fails to Satisfy Oklahoma's Requirements for a New Trial

This Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). The OCCA would have denied Petitioner's motion for new trial on the merits, even had it excused Petitioner's lack of diligence. Accordingly, this Court should deny the petition.

A motion for new trial based on newly discovered evidence may be granted only if the evidence could not have been discovered before trial with reasonable diligence, it is material, it is not cumulative, and it "creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome." *Underwood*, 252 P.3d at 254-55; *see also* OKLA. STAT. tit. 22, § 952 (the new evidence must be material and not capable of having been discovered before trial with reasonable diligence).

Petitioner's untimeliness aside, he was not entitled to a new trial based on the broken bottle because it could have been discovered before trial with reasonable diligence. The direct appeal investigator observed it by simply looking through the window of the house. MNT, Attachment 1 at ¶ 4. Thus, the bottle obviously could have been discovered before trial with reasonable diligence.

Further, there is no reasonable probability Petitioner would have been acquitted if this piece of glass had been admitted at trial. Petitioner argues that the piece of broken bottle could have been used to establish that the bottle of gasoline used by Petitioner to set Ms. Ferguson on fire had a capacity of 375 milliliters, as opposed to 1.75 liters (or a half-gallon) as Agent Rust had testified. Pet. at 13. Agent Rust believed the bottle was a half-gallon because that is what Petitioner told him (Tr. 794-95). Neither Petitioner nor his expert explains the significance of the size of the bottle. Petitioner does not contend that 375 milliliters of gasoline would have been insufficient to kill Ms. Ferguson and cause the damage that was done to

the home. Accordingly, it is entirely unclear what difference the size of the bottle would have made.

Petitioner also finds it significant that the portion of bottle found by his investigator had a lid melted onto it. Pet. at 13. Petitioner's arson expert said this fact would "discount the State's theory that Mr. Harris poured gasoline from the Crown Royal Bottle on Ms. Ferguson" because "one would have to believe Mr. Harris poured the gasoline on Ms. Ferguson and then put the lid back on the empty bottle before igniting the gasoline with a cigarette lighter." Pet. at 13. Petitioner does not explain why it might be hard to believe that he would have replaced the lid. It is common knowledge that gasoline vapors are very combustible (Tr. 809). Thus, one would not want to light a cigarette lighter while holding an open container of gasoline. Further, the lid was melted onto the bottle by the fire. Thus, it is possible that Petitioner could have merely set the lid on top, as opposed to taking the time to screw it back on. Another possibility is that Petitioner broke the bottle on Ms. Ferguson and, therefore, never took the lid off (Tr. 1267 (another occupant of the home was awakened by the sound of glass shattering)). Nothing about this evidence would have cast doubt upon Petitioner's guilt.

Finally, as noted by Petitioner, an investigation was conducted to determine what happened to the evidence Agent Rust retrieved from OSBI, and whether he doctored his day planner and lied about giving the evidence to Officer Thompson. Pet. at 14-18. There is no reasonable probability that Petitioner would have been acquitted had the jury known about the allegations against Agent Rust.

Petitioner has never alleged that Agent Rust falsified or tampered with the fire evidence, which was determined by OSBI to contain an accelerant. *Harris*, 450 P.3d at 951. Nor has Petitioner challenged the testing performed by OSBI. *Id*. at 950 n.13. Thus, assuming *arguendo* that Agent Rust lost or deliberately discarded the evidence and lied about it, such had no effect on Petitioner's trial.

The State's evidence inescapably showed Petitioner's guilt: (1) Ms. Ferguson had previously sought a protective order against Petitioner (Tr. 712-13); (2) Ms. Ferguson left living with Petitioner to live with Jenny Turner following an encounter with Petitioner that left Ms. Ferguson with "blood all over her" (Tr. 866-67); (3) Petitioner furiously insisted that Ms. Johnson stop assisting Ms. Ferguson with getting her life together so that Ms. Ferguson would come back to Petitioner (Tr. 854-55); (4) Petitioner drove by Ms. Ferguson and Jenny Turner's residence one day, waiving a .38 special handgun, saying that he wanted the women to see his new friend (Tr. 869); (5) Petitioner repeatedly threatened to kill Ms. Ferguson, telling her that he would see her dead before he saw her happy in Talihina (Tr. 868, 877-78); (6) a few weeks before the house fire, Petitioner discovered Ms. Ferguson was having an affair with one of his brothers and became upset about it (Tr. 1100); (7) at about this same time as his discovery of their affair, Petitioner started keeping a bottle of Crown Royal filled with gasoline in his bedroom (Tr. 1097, 1100); (8) Petitioner kept a lid on the Crown Royal bottle at all times, limiting the possibility of an accidental spill (Tr. 1097); (9) Petitioner became extremely angry when—about a week before the fire—Ms. Ferguson told him that they were finished

as a couple (Tr. 877-78); (10) Jenny Turner testified that Ms. Ferguson lived in such fear of Petitioner that she slept with a knife under her pillow each night (Tr. 869); (11) following the start of the fire and Ms. Ferguson's receipt of serious burns, Petitioner did not call emergency services until they reached the Johnsons' home (Tr. 729-30, 739, 845); (12) Ms. Ferguson told the Johnsons that Petitioner poured gasoline on her and lit her on fire (Tr. 842); (13) Petitioner repeatedly instructed Ms. Ferguson not to tell anyone what had happened ("Shut your fucking mouth. Just shut your fucking mouth. You're going to get me in fucking trouble. Don't say another word.") (Tr. 843-44, 847-49); (14) Petitioner indicated agreement when Ms. Ferguson told him to look at what he had done to her (Tr. 844-45, 883); (15) Martha and Barry Johnson smelled the strong odor of gasoline coming from Ms. Ferguson as she stood in their home (Tr. 843, 851-52, 883-84); (16) Petitioner told Ms. Ferguson that he was sorry for what he did as she was loaded into the ambulance (Tr. 897-98); (17) Ms. Ferguson implored Paramedic Lickly once inside the ambulance to keep Petitioner away from her because "he did this to me" (Tr. 899, 919); (18) Petitioner did not go home to check on his family, but instead walked almost a mile to the home of Melvin Bannister to change his shirt (Tr. 751-53, 1098-99); (19) Petitioner initially refused to disclose his location to authorities—while presumably still at Mr. Bannister's home disposing of his shirt (Tr. 729-30); (20) Office Klitzke recognized the smell of gasoline on Petitioner when he picked him up (Tr. 730); (21) testing of the shoes and jeans Petitioner was wearing when he was picked up, while not conclusive, indicated the presence of a chemical profile similar

to gasoline (Tr. 786-87, 993-94); (22) despite not being a smoker, Petitioner had in his possession a lighter when he was picked up by police (Tr. 766, 1109-10; State's Ex. 9); (23) when asked about the lighter, Petitioner stated he and Ms. Ferguson purchased matching lighters a month prior to the fire, but no matching lighter was ever found in Ms. Ferguson's possessions (Tr. 1109-10, 1136); (24) in an interview with Agent Rust the morning after the fire—prior to anything being said about Petitioner pouring gasoline on Ms. Ferguson—he responded to accusations that he was not being truthful by saying, "I didn't splash gasoline on her and set her on fire" (Tr. 765); (25) Agent Rust discovered a shattered Crown Royal bottle amongst the debris of the fire in Petitioner's bedroom (Tr. 783-84, 815; State's Exs. 24-27); (26) subsequent tests of the Crown Royal bottle indicated the presence of an ignitable liquid in the gasoline class (Tr. 994); (27) there was an obvious disparity between Ms. Ferguson's injuries (second and third degree burns to approximately 42 percent of her body) and Petitioner's injuries (a small burn to the back of his left hand) despite them being in the same location when the fire started (Tr. 766-67, 944, 1035-37, 1046-51, 1405; State's Exs. 35-48, 50-51, 53, 55, 57, 77); (28) Petitioner had no burns on his left palm or his right hand despite his claim that he assisted Ms. Ferguson in removing her burning clothes (Tr. 767, 944, 1097-98, 1102; State's Exs. 7, 46); (29) Dr. Pfeifer testified that the pattern of Ms. Ferguson's burns was consistent with her being doused with a flammable liquid and then being set ablaze (Tr. 1066-67); (30) Petitioner was indifferent when viewing photographs of Ms. Ferguson's injuries in an interview with Agent Saulsberry (Tr. 1101-02); (31)

Petitioner gave ever-changing and improbable explanations for how Ms. Ferguson received her injuries in that same interview (Tr. 763-64, 1092-1111; State's Ex. 7); and (32) Ms. Ferguson died from the severe burns she sustained and her inhalation of superheated gases (Tr. 1066).

As found by the OCCA,

> Rust's participation was limited to collecting evidence from Appellant and the fire scene, and . . . the probative value of *that* evidence was marginal as well. . . . the fact that Appellant kept a liquor bottle full of gasoline in his bedroom, and that gasoline played a part in the fire that killed Ferguson, was never in dispute. . . . The only question at trial was whether Appellant intentionally set Ferguson ablaze. Rust never claimed any ability to "prove" that contention. . . . The State's case did not rest on Agent Rust's credibility. It did not even rest, to any material degree, on the evidence he collected.

Id. at 951-52. Although the OCCA made these findings in reference to other evidence Petitioner offered to impeach Agent Rust, they apply equally to the evidence at issue. In light of Ms. Ferguson's statements, and Petitioner's statements and behavior, there is no reasonable probability the jury would have acquitted Petitioner had it known that Agent Rust may have lied about what happened to the bottle after it was tested. As Petitioner's motion for new trial would have been denied absent the OCCA's finding of untimeliness, Petitioner presents no compelling question which warrants this Court's intervention. Respondent respectfully asks this Court to deny the petition for writ of certiorari.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

Mike Hunter
Attorney General of Oklahoma

Jennifer L. Crabb
Asst. Attorney General
Counsel of Record
Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
jennifer.crabb@oag.ok.gov

Counsel for Respondent