

Capital Case

Case No. _____

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2024**

Derek Don Posey
Petitioner,
v.
The State of Oklahoma,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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October 15, 2024

CAPITAL CASE
QUESTION PRESENTED

**WHETHER EVIDENCE FROM A PRIOR PROCEEDING WHICH RESULTED
IN ACQUITTAL SHOULD HAVE BEEN DEEMED INADMISSIBLE BECAUSE
THE ACQUITTAL DETERMINED AN ULTIMATE ISSUE CONTRARY TO THIS
COURT'S HOLDING IN *DOWNING V. UNITED STATES*, 493 U.S. 342 (1990),
WHICH HELD THAT A PRIOR ACQUITTAL DOES NOT BAR THE USE OF
EVIDENCE FROM THAT PRIOR PROCEEDING IN A SUBSEQUENT CASE
UNLESS THE ACQUITTAL DETERMINED AN ULTIMATE ISSUE?**

PARTIES TO THE PROCEEDINGS

All parties to this action are named in the caption.

RELATED PROCEEDINGS

Posey v. State, Case No. PCD-2019-609, Oklahoma Court of Criminal Appeals, Application for Post-Conviction Relief denied June 27, 2024.

Posey v. State, Case No. D-2019-542, Oklahoma Court of Criminal Appeals, Judgment and Sentence affirmed April 18, 2024.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Derek Don Posey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Court of Criminal Appeals entered in the above-entitled proceeding on April 18, 2024.

OPINIONS BELOW:

The judgment for which certiorari is sought is *Posey v. State*, 548 P.3d 1245 (Okla. Crim. App. 2024). The decision in *Posey* was filed on April 18, 2024. See Appendix, Exhibit A. Rehearing was denied on May 15, 2024. See Appendix, Exhibit B.

STATEMENT OF JURISDICTION IN THIS COURT:

The Oklahoma Court of Criminal Appeals, the highest Oklahoma court in which Petitioner may obtain relief, issued its decision affirming Petitioner's judgment and death sentence on April 18, 2024, and denied rehearing in the case on May 15, 2024. Pursuant to this Court's Rule 13.5, Petitioner timely sought from the Honorable Associate Justice Neil Gorsuch an extension of time to file a petition for a writ of

certiorari. Justice Gorsuch entered an order on August 21, 2024, giving Petitioner Posey up to and including October 12, 2024, to file a petition. This Court's jurisdiction arises pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

Constitutional Provisions:

Fifth Amendment:

No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law. . . .

Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States.

Okla. Stat. tit. 12, § 1111.1 (1987) Rape by Instrumentation

A. Rape by instrumentation is an act within or without the bonds of matrimony in which any inanimate object or any part of the human body, not amounting to sexual intercourse is used in the carnal knowledge of another person without his or her consent and penetration of the anus or vagina occurs to that person.

Okla. Stat. tit. 21, § 1123(B) (2006) Sexual Battery

B. No person shall commit sexual battery on any other person. "Sexual battery" shall mean the intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner:

1. Without the consent of that person;

Okla. Stat. tit. 21, § 1431 (1979) Burglary in the First Degree

Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such window or shutter; or
2. By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present; or
3. By unlocking an outer door by means of false keys or by picking the lock thereof, or by lifting a latch or opening a window, is guilty of burglary in the first degree.

Okla. Stat. tit. 12, § 2413 (2007) Sexual assault offense—Commission of other offenses admissible—Definition

- A. In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
- B. In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen (15) days before the scheduled date of trial or at such later time as the court may allow for good cause.
- C. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- D. For purposes of this rule, "offense of sexual assault" means a crime under federal law or the laws of this state that involve:
 1. Any conduct proscribed by Sections 1111 through 1125 of Title 21 of the Oklahoma Statutes;
 2. Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
 3. Contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
 4. Deriving sexual pleasure or gratification from the infliction of death, bodily injury, emotional distress, or physical pain on another person; or
 5. An attempt or conspiracy to engage in conduct described in paragraphs 1 through 4 of this subsection.

Oklahoma Uniform Jury Instruction-Criminal- 4-125

RAPE BY INSTRUMENTATION IN THE FIRST DEGREE - ELEMENTS

First, the person penetrated the anus/vagina;

Second, of any victim;

Third, with (an inanimate object)/(a part of the human body other than the penis); and

Fourth, without the victim's consent; and

Fifth, [List the Circumstance(s) Specified in Section 1111 Which Exist in This Case].

Any sexual penetration, however slight, is sufficient to complete the crime of rape by instrumentation.

Oklahoma Uniform Jury Instruction-Criminal- 4-130

SEXUAL BATTERY – ELEMENTS

No person may be convicted of sexual battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant intentionally;

Second, touched/felt/mauled;

Third, in a lewd and lascivious manner;

Fourth, the body/(private parts);

Fifth, of a person sixteen years of age or older;

Sixth, without his/her consent.

The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence.

Oklahoma Uniform Jury Instruction- Criminal- 5-12

BURGLARY IN THE FIRST DEGREE – ELEMENTS

No person may be convicted of burglary in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, breaking;

Second, entering;

Third, a dwelling;

Fourth, of another;

Fifth, in which a human is present;

Sixth, with intent to commit some crime therein;

STATEMENT OF THE CASE

A. Facts Material to the Question Presented.

Petitioner Posey was tried by a jury on two counts of First Degree Murder and one count of Debit Card Theft for the deaths of Amy Gibbins and her son, Bryor Gibbins. Following guilty verdicts on all counts, the jury heard evidence in aggravation and mitigation and returned two death sentences on the two counts of First Degree Murder, and a sentence of three years imprisonment and a three-thousand-dollar fine on the Debit Card Theft count.

The State charged Mr. Posey with First Degree Murder of Amy Gibbins under two alternate theories: malice aforethought murder and felony murder, with attempted rape as the underlying felony. The jury returned a guilty verdict without specifying which alternate theory upon which it rested its decision. To support the alternate theory of attempted rape, the State presented testimony regarding a prior case against Mr. Posey, a case in which the jury acquitted him of two of the three charges and the trial court dismissed the third charge with prejudice. This petition questions whether this Court reverse the Court of Criminal Appeals' decision in this case because it erred in finding that the acquittal in the prior proceeding did not constitute a determination of an ultimate issue, contrary to the holding in *Dowling v. United States*, 493 U.S. 342 (1990), where this Court held that neither the Due Process Clause nor the Double Jeopardy Clause barred testimony concerning a crime a defendant had previously been acquitted of committing unless the acquittal determined an ultimate issue. *Id.* at 493 U.S. at 348-50.

Mr. Posey objected to the State's desire to use this evidence in the first stage of his trial, both through written motions and orally during the pendency of his trial. (III O.R. 534-36; XII O.R. 2278-80; 10/25/18 Mt.Hrg. 111-40; 3-11-19 Mt.Hrg. 36-45; 3/27/19 Mt.Hrg.320; IX Tr. 29-33; XII Tr. 5-6, 36; XXII Tr. 109-110) Despite these repeated objections and numerous arguments, the trial court ultimately allowed the evidence to go before Mr. Posey's jury.

In support of its alternate theory of felony murder with attempted rape as the underlying felony, the State introduced evidence that in 2006, Mr. Posey allegedly broke into a woman's apartment, beat her about the head, and digitally raped her. (XXII Tr. 114-65; XXIII Tr. 5-165) Under current Oklahoma law, so-called "propensity evidence" is permitted in cases of sexual assault offenses. *See* Okla. Stat. tit. 12, § 2413 (2007). Mr. Posey was tried by a jury on three counts springing from this allegation: one count of first degree rape by instrumentation, one count of first degree burglary, and one count of sexual battery. (XI O.R. 2090) The case went to trial in September of 2010 and ended with the jury acquitting Mr. Posey on the burglary and sexual battery counts, and deadlocked on the rape by instrumentation count. (*Id.*) The trial court declared a mistrial on the rape count and dismissed the charge. (*Id.*)

B. How the Issue Was Raised and Decided Below.

Mr. Posey objected to the State's desire to use this evidence in the first stage of his trial, both through written motions and orally during the pendency of his trial. (III O.R. 534-36; XII O.R. 2278-80; 10/25/18 Mt.Hrg. 111-40; 3-11-19 Mt.Hrg. 36-45; 3/27/19 Mt.Hrg.320; IX Tr. 29-33; XII Tr. 5-6, 36; XXII Tr. 109-110) Despite these repeated

objections and numerous arguments, the trial court ultimately allowed the evidence to go before Mr. Posey's jury.

On appeal to the Oklahoma Court of Criminal Appeals, Mr. Posey challenged the admission of this evidence on two grounds: first, that the evidence was inadmissible under *Horn v. State*, 204 P.3d 777, 786 (Okla.Crim.App. 2009); and second, that this evidence fell within a narrow exception recognized by this Court in *Dowling*, namely that evidence from a case that resulted in an acquittal could be excluded from use in a subsequent prosecution if the acquittal determined an ultimate issue. Mr. Posey argued that the acquittal, under the facts that are known from the prior prosecution, determined an ultimate issue, in that the only reasonable explanation for the jury's acquittal was that it believed that no crime occurred.

The evidence presented from the prior prosecution was that the victim, M.K.M., a woman of Asian descent, was alone in her apartment in Tulsa, Oklahoma, when she was awakened by an intruder about 3:00 or 4:00 a.m. The intruder appeared to be African-American, but she did not recognize him. She claimed that he punched her in the head, touched her right breast while masturbating, and penetrated her vagina with his fingers. (XXII Tr. 123-25, 132-33) Police investigated and collected biological materials. Eventually, Mr. Posey was identified as a suspect. An analysis of the DNA could not exclude him as the contributor. (XXII Tr.40, 132-33)

Mr. Posey lived in the same apartment building as the victim and admitted to police that he had a consensual encounter with an Asian woman in the apartment complex. (XXIII Tr. 50-51, 74) Given the DNA evidence and Mr. Posey's admission,

identity was likely not seriously in issue. Given the charges arising from these facts, it seems that the only element in dispute would have been whether the victim consented to the encounter, resulting in no crime being committed as to each charged count. This is so because his admission to a consensual encounter in conjunction with the DNA evidence amounted to an admission that he engaged in the alleged sexual acts in her apartment. Under Oklahoma law, consent would be an absolute defense to the alleged sex crimes, resulting in no crime being committed whatsoever. *See Okla Stat. tit. 21, §§ 1111.1, 1123(B); Oklahoma Uniform Jury Instructions- Criminal- No. 4-125, 4-130.* If there were no intent to commit a crime, due to consent, then the crime of burglary would not have been committed, as that crime requires an intent to commit a crime. *See Okla. Stat. tit. 21, § 1431; Oklahoma Uniform Jury Instruction-Criminal-5-12.* Each of these instructions require the jury to find a lack of consent to the charged crimes.

The Oklahoma Court of Criminal Appeals found that the evidence was properly admitted under *Horn. Posey*, 548 P.3d at 1260-61. Regarding the analysis under *Dowling*, the appeals court found that the evidence did not suggest that the jury concluded that no crime occurred when it acquitted Mr. Posey. *Id.* at 1262. The court acknowledged that identity was not likely an issue, given Mr. Posey's admission to a sexual encounter with an Asian woman in conjunction with the DNA evidence. *Id.* While acknowledging that the jury could have concluded that Mr. Posey was, indeed, the man who entered the victim's apartment, it also found that the same jury could have "grounded its verdict of acquittal based upon a finding that the State simply did not meet its demanding and highest burden of proof that he committed the charged crimes

rather than that no crimes were committed because of consent.” *Id.* The appeals court also found that Mr. Posey did not meet his burden to demonstrate that this issue was decided in his favor. Thus the appeals court held that the admission of the evidence did not run afoul of *Dowling*’s narrow exception to its core holding. *Id.*

REASON THIS COURT SHOULD GRANT THE WRIT

Certiorari Should Be Granted Because the Oklahoma Court of Criminal Appeals’ Ruling on this Issue Is Contrary to this Court’s Holding in *Dowling v. United States*.

In *Dowling v. United States*, 493 U.S. 342 (1990), this Court held neither the Due Process Clause nor the Double Jeopardy Clause bars the admission of evidence from a prior proceeding, which resulted in an acquittal, in a subsequent criminal case. 493 U.S. at 348-49. This Court did allow for a narrow exception to this ruling: namely “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.” *Id.* 493 U.S. at 347.

In the present case, Mr. Posey’s prior jury acquitted him of two of the three charges he faced, and deadlocked on the third. Following the jury’s verdicts, the trial judge dismissed with prejudice the third charge, effectively granting him the acquittal the jury was not able to do. As to each of the charges, Mr. Posey did not seriously deny the acts underlying each of the charges, as his own words and the DNA evidence foreclosed any argument on the underlying acts. The only remaining issue was whether the alleged victim consented to the sexual acts. If the jury believed that the victim consented to Mr. Posey’s actions, then no crime occurred. As Mr. Posey was

ultimately acquitted on these charges, it stands to reason that the jury and trial court believed that no crime occurred. This finding represents a determination of an ultimate fact, *i.e.*, Mr. Posey committed no crime. As no crime or bad act occurred, the State should not have been permitted to infer such to Mr. Posey's jury in its quest to obtain convictions in the present case.

Despite the fact that Mr. Posey had been found to have committed no crime, the State was still able to use the prior allegations against him, thus forcing him to defend against charges of which he already had been acquitted. This was particularly harmful to Mr. Posey's position because the only fact in issue was that of consent and his only way of effectively stating his position before his capital jury would be for him to take the stand and tell the jury that the encounter was consensual. However, if he did this, but did not desire to testify on his own behalf regarding the charges in the case for which he was on trial, he would have been forced to appear before the jury to deny charges on an ancillary issue, thus being forced to surrender his right not to testify.

The Oklahoma Court of Criminal Appeals, in denying that the acquittal determined an ultimate issue, reasoned that perhaps that jury concluded "that the State simply did not meet its demanding and highest burden of proof that he committed the charged crimes rather than that no crimes were committed because of consent." *Posey*, 548 P.3d at 1262. This holding does not comport with the facts. Mr. Posey essentially admitted to each element of the charged crimes except that of a lack of consent. The only issue on which the jury would have had reason to deliberate was consent. That it acquitted Mr. Posey can only mean that it believed that he engaged

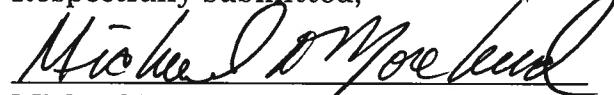
in consensual sex in her apartment, thus there was no burglary, no rape, and no sexual battery. There was no crime.

Mr. Posey recognizes that this Court rarely grants relief to correct erroneous factual findings or the misapplication of a properly stated rule of law by the lower courts. *See* S.Ct. Rule 10. However, it will do so if necessary. *See, e.g., Kaupp v. Texas*, 538 U.S. 626 (2003) (reversing lower courts' ruling that no illegal seizure occurred and vacating the judgment).

CONCLUSION

Derek Don Posey respectfully requests this Court grant this petition for certiorari to the Oklahoma Court of Criminal Appeals on the question presented. Petitioner further requests that this Court vacate the death sentence in this case and grant such other relief as it deems appropriate.

Respectfully submitted,



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