No. 24-5793

CAPITAL CASE

In the

SUPREME COURT OF THE UNITED STATES

DEREK DON POSEY,

***Petitioner*,**

-vs-

STATE OF OKLAHOMA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant a writ of certiorari to review the Oklahoma Court of Criminal Appeals' ("OCCA") application of *Dowling v. United States*, 493 U.S. 342 (1990) to the facts of Petitioner's case?

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Respondent respectfully urges this Court to deny Petitioner Derek Don Posey's Petition for a Writ of Certiorari to review the judgment and opinion of the OCCA entered in this case on April 18, 2024, *Posey v. State*, 548 P.3d 1245 (Okla. Crim. App. 2024), Pet. Appx. A.[1]

STATEMENT OF THE CASE

A. Relevant Factual Background.

In the early morning hours of June 16, 2013, Amy Gibbons and her young son, B.G.[2], were murdered in their home located in Calumet, Oklahoma. *Posey*, 548 P.3d at 1255. Ms. Gibbons "died from blunt force head trauma and . . . [B.G.] died from smoke inhalation and thermal burns from the fire started by the killer to cover up the crime scene."[3] *Id*. Law enforcement discovered evidence of forced entry to the home via the front door, which was rarely used, as well as "the presence of accelerants

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[1] Record references in this brief are abbreviated as follows: citations to the original record will be referred to as "(O.R. [Vol.])"; citations to the jury trial transcripts will be referred to as "(JT [Vol.])"; citations to the transcript of formal sentencing will be referred to as "(Sent. Tr.)"; citations to the transcript of the hearings determining admissibility of the sexual propensity evidence at issue, occurring on October 4, 2018 and October 25, 2018, will be referred to as "(P. Evid. Tr.)"; citations to any other transcripts will be referred to as "([Date] Tr.)"; citations to exhibits presented by the State will be referred to as "(St. Ex.)"; citations to exhibits presented by Petitioner will be referred to as "(P. Ex.)"; and citations to the state district court's exhibits will be referred to as "(Ct. Ex.)" *See* Sup. Ct. R. 12.7. References to Petitioner's Petition for Writ of Certiorari will be cited as "(Pet.)" and references to Petitioner's Appendix will be cited as "(Pet. Appx.)."

[2] For privacy purposes, Respondent will refer to juvenile victims by their initials.

[3] The specific findings during Ms. Gibbons' autopsy were grim: She had sustained multiple, deep, irregular lacerations to portions of her scalp which were likely inflicted by extremely heavy or forceful blows to her head. (JT Vol. XV, 93, 96-98, 100-101; St. Exs. 48-49). Closer inspection yielded evidence of trauma-induced skull fractures caused by force applied to the bone, leading to the conclusion that a weapon, such as a pipe or bat, was "wielded with significant force to cause that sort of fracturing." (JT Vol. XV, 102-104, 133; St. Ex. 43-46). Expert medical testimony during Petitioner's trial indicated that Ms. Gibbons' throat was free of significant soot blackening, suggesting that she was not alive or breathing at the time the fire, which consumed her entire residence, was started. (JT Vol. XV, 107-108).

near . . . [Ms. Gibbons'] body, which was near the fire's origin point"; this factored into the conclusion that the fire was incendiary. *Id.* at n.7; (JT Vol. XII, 130-131, 195-196). Ms. Gibbons' body was discovered lying face down, covered with soot and debris and B.G.'s small body was recovered in the living room behind what appeared to be an entertainment center or small piece of furniture. (JT Tr. Vol. XV, 23, 27, 46; JT Tr. Vol. XIV 122-124; JT Tr. Vol. XXVI, 173; St. Ex. 33-37).

The ensuing law enforcement investigation focused on Petitioner as the primary suspect after an employee at Ms. Gibbons' bank notified police

> about a series of transactions on her debit card after her death. These transactions occurred at 4:35 a.m. and 4:37 a.m. at an ATM in nearby El Reno, [Oklahoma], while . . . [Ms. Gibbons'] house was ablaze. The bank captured video from the ATM showing . . . [Petitioner] using . . . [Ms. Gibbons'] debit card. . . . [Petitioner] tried to shield his face with a towel, but ultimately abandoned the towel to complete his transactions. Police recovered the towel and transaction slips in a field. . . . [Petitioner] admitted to using the debit card during a police interview, but his explanation for his possession of the debit card was refuted.[8]
>
> [8] Evidence showed . . . [Ms. Gibbons] had used her debit card throughout the day before her death. . . . [Petitioner] claimed he got the card when he was breaking into cars and found . . . [Ms. Gibbons'] card in a Ford Platinum truck near her home. Police found no evidence of any car break-ins that evening. Other investigation showed, however, that . . . [Petitioner] may have had financial problems.

Posey, 548 P.3d at 1255, n.8 (paragraph numbering omitted). Additional investigation revealed the following: 1) Petitioner, who is African American, worked on an oil rig within two miles of Calumet and the time of the murders, he lived in a trailer owned by his employer just outside town; 2) on the night of the murders, a witness who lived directly across from the company-owned trailer observed an African American male

exit the trailer at approximately 3:30-3:45 a.m. and get into a dark-colored truck heading towards Calumet; and 3) Petitioner had prior, negative encounters with both Ms. Gibbons and her sister at a local bar located directly across the alley from Ms. Gibbons' residence.[4] *Id.* at 1255.

Vaginal and anal swabs collected from Ms. Gibbons' body for DNA testing successfully captured "both an epithelial and sperm fraction with the same female profile, both of which matched" Ms. Gibbons. *Id.* at 1256. When these samples were compared to samples collected from Petitioner, Ms. Gibbons' current boyfriend, ex-boyfriend, and ex-husband, all were excluded; however, when Y-STR DNA testing—which only identifies male DNA—was conducted on the vaginal swab and compared to each of these men's profiles, Petitioner's "DNA profile matched the Y-STR profile from both the epithelial and sperm fractions at all sixteen points analyzed[,] while all other men were excluded."[5] *Id.*

When interviewed by police, Petitioner denied having any form of physical relationship with Ms. Gibbons, claiming that he had never been inside her residence.

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[4] Specifically, the same witness who lived across from the company-owned trailer also recalled Petitioner and his co-workers coming into a restaurant where she worked roughly a couple of weeks before the murders. *Posey*, 548 P.3d. at 1255. The group was "rowdy and said loud and inappropriate things about . . . [Ms. Gibbons'] sister, who was sitting at the cash register." *Id.* Petitioner was the "most vocal" during this incident, making "most of the derogatory statements, including that he knew . . . [Ms. Gibbons] and her sister from the bar, and they were nothing but 'little bitches.'" *Id.* at 1256. Ms. Gibbons' sister also recalled Petitioner introducing himself to the pair of them while they were at the bar one night. *Id.* During this interaction, "[w]hen . . . [Ms. Gibbons] set her drink down, . . . [Petitioner] picked it up and took a drink, irritating" her. *Id.* "On another occasion at the bar, [Petitioner] told . . . [Ms. Gibbons'] sister 'ya'll think you're hot shit' and 'you and your sister think you're the baddest bitches in town.'" *Id.* In March 2013, Ms. Gibbons cautioned another woman that Petitioner was "bad news." (JT Vol. XXI, 206).

[5] Due to Y-STR testing being only male-specific, these results included not only Petitioner, but "also all of his male blood relatives." *Id.* at 1256. Moreover, the "database used in Y-STR analysis calculated this profile would appear in African American men 1 in 4,301 times." *Id.*

Id. During the jury trial, Petitioner challenged the reliability of the criminal investigation, arguing that Ms. Gibbons' ex-boyfriend, Brady Almaguer, was the true perpetrator. *Id*. This defense was refuted by strong alibi evidence of Mr. Almaguer's whereabouts on the night of the murders and the exclusion of his DNA profile during the Y-STR testing. (JT. Vol. XXVIII, 33-35, 91-97, 120-126, 131-132, 320-321).

B. Relevant Procedural History.

In 2019, Petitioner was tried and convicted by jury in the District Court of Canadian County, State of Oklahoma, Case No. CF-2013-463, for the following crimes: First-Degree Murder (Malice Aforethought) (Count 1), or in the alternative, Felony Murder During the Commission of Rape (Count 2), for the death of Amy Gibbons, *see* OKLA. STAT. tit. 21, § 701.7(A), (B) (2012); Felony Murder During the Commission of Arson (Count 3), or in the alternative, Felony Murder During the Commission of the Murder of Another Person (Count 4), for the death of B.G., *see* OKLA. STAT. tit. 21, § 701.7(B) (2012); and Debit Card Theft (Count 5), *see* OKLA. STAT. tit. 21, § 1550.22(a) (2011). (O.R. I, 163-166; O.R. XVII, 3175-3177). The jury recommended death sentences in relation the murder counts after finding the following aggravating circumstances as to each victim: 1) Petitioner knowingly created a great risk of death to more than one person; 2) the murders were especially heinous, atrocious, or cruel; and 3) there existed a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *Posey*, 548 P.3d at 1255; *see* OKLA. STAT. tit. 21, § 701.12(2), (4), (7) (2011).

In the time leading up to trial, the State filed a notice of intent to introduce evidence of other crimes or bad acts pursuant to OKLA. STAT. tit. 12, § 2404(B) (2011), or as sexual propensity evidence under OKLA. STAT. tit. 12, § 2413, in the guilt stage of trial. The nature of this evidence was namely, that Petitioner sexually assaulted M.K.M.[6], a twenty-nine-year-old woman living in Tulsa, Oklahoma, after breaking into her apartment on the night of October 1, 2006. (O.R. III, 440-441; JT Vol. XXII, 114-115, 124, 151-154). The State's notice explained that this evidence was not only relevant to prove the identity of the perpetrator, but also demonstrated a common scheme or plan, given that the "modus operandi in the [instant] charged offenses" had "sufficient commonality" with the 2006 incident "to establish that the same person committed both crimes." (O.R. III, 440). In response, Petitioner's counsel filed written objections to the admissibility of this evidence, primarily arguing that the State had previously charged Petitioner with First-Degree Burglary, Rape by Instrumentation, and Sexual Battery in relation to this incident and a jury subsequently acquitted him of the Burglary and Sexual Battery counts. Petitioner further pointed out that the jury was unable to reach a verdict as to the Rape by Instrumentation charge, after which this count was dismissed by the state district court with prejudice. (O.R. III, 534-535; O.R. VI 1094-1102; *Posey*, 548 P.3d at 1259).

[6] For privacy purposes, Respondent will refer to this witness by her initials. At the time of the assault, M.K.M. was unmarried and went by the initials: M.K.; after marrying, she assumed the initials: M.M. (*See* P. Evid. Tr., 8; JT Vol. XXII, 114). For clarity purposes, Respondent will refer to her as M.K.M., which is consistent with how the OCCA referred to her in its opinion issued in Petitioner's direct-appeal proceedings. *See Posey*, 548 P.3d at 1259-1262.

1. Pretrial hearings regarding sexual propensity evidence.

Based on Petitioner's objections to this evidence, the state district court conducted pretrial hearings to determine its admissibility in the instant matter; these hearings took place over two days, October 4, 2018 and October 25, 2018. (P. Evid. Tr., 1); *Posey*, 548 P.3d at 1259. During these hearings, M.K.M. testified that in 2006, she lived alone in a two-story apartment located in South Tulsa. (P. Evid. Tr., 8-10, 68). At approximately midnight on October 1, 2006, she awoke to her staircase audibly creaking and observed an African American man—later identified by M.K.M. as Petitioner—walk into her room with a "very determined" or "possessed" look on his face. Petitioner strode over to her bed, grabbed her wrists, and began punching her about the head while holding her arms down so she could not move or fight back. (P. Evid. Tr.,16-20, 22-25, 43-44, 62, 68, 75-78).

After a couple of blows, M.K.M. became unconscious and ultimately came to with Petitioner's left arm around her neck while he continued to punch her head and face with his right hand. M.K.M. indicated that at this point, she was barely able to breathe. (P. Evid. Tr., 23-24). At some point, Petitioner ceased punching her and dragged her off the bed and onto the floor, where she landed on her back with her comforter covering her face and body. (P. Evid. Tr., 26-27). Petitioner then climbed on top of her, telling her that he was going to touch her while he masturbated. (P. Evid. Tr., 26-28). He proceeded to remove her underwear and touch her breasts, legs, and vagina, at one point inserting his finger into her vagina. (P. Evid. Tr., 28-29). While masturbating, Petitioner was having difficulty ejaculating, so he asked M.K.M. to lay down on her stomach and touch his penis, a request with which she reluctantly

complied. (P. Evid. Tr., 27, 30-32). Petitioner eventually ejaculated after utilizing lotion that M.K.M. told him was in the bathroom. He then threated to kill M.K.M. and members of her family if she reported the incident to police. (P. Evid. Tr., 32-33, 35-36).

Despite Petitioner's threats, M.K.M. reported the incident to the Tulsa Police Department ("TPD") the same day. During the ensuing law enforcement investigation, TPD Detective Richard Mulenberg responded to M.K.M.'s apartment and used a blacklight to identify contrasting spots on an area of carpet adjacent to M.K.M.'s bed, which he cut out and collected as evidence. (P. Evid. Tr., 39-40, 48, 87-89). M.K.M. also worked with a sketch artist to identify her attacker, describing him as a thirty- to thirty-five-year-old African American male, approximately 5'10" to 6' tall and weighing between 160-170 lbs., with a medium build, thick eyebrows, and large eyes. (P. Evid. Tr., 51-52, 76-77; P. Evid. Tr., P. Ex. 1). Two years later, in December, 2008, TPD Detective Rodney Russo developed Petitioner as a suspect in M.K.M.'s sexual assault and obtained a body-sample search waiver from him for his DNA. (P. Evid. Tr., 98-103). Subsequent DNA testing indicated that Petitioner could not be excluded from the DNA found on the piece of carpet collected from M.K.M.'s apartment by police. (P. Evid. Tr., St. Ex. 2).

At the conclusion of these pretrial hearings, Petitioner largely reiterated his prior objections to the admissibility of this evidence, namely that: 1) it was not relevant as sexual propensity evidence; and 2) the outcome of his prior prosecution for M.K.M.'s assault equated to him being found innocent of these crimes, such that—

under *Dowling v. United States*, 493 U.S. 342 (1990)—the State was foreclosed from utilizing this evidence in the instant case. (P. Evid. Tr., 112-134, 139-140). The State responded with the following points: 1) the requisite clear and convincing standard for admissibility under OKLA. STAT. tit. 12, § 2413 was met based on M.K.M.'s testimony and the DNA evidence recovered from the crime scene; 2) comparing certain factual details of Ms. Gibbons' murder to M.K.M.'s sexual assault yielded undeniable and incredibly relevant similarities between the crimes that assisted the State in proving Petitioner was the perpetrator in this case;[7] 3) the fact that a prior jury never convicted Petitioner for M.K.M.'s sexual assault did not bar its subsequent introduction as sexual propensity evidence because it was now subject to a lesser standard of proof; and 4) the probative value of this evidence outweighed any potential unfair prejudice to Petitioner resulting from its admission. (P. Evid. Tr., 112, 134-139). At the hearings' conclusion, the state district court took this matter under advisement and on December 4, 2018, the court advised the parties that this evidence was admissible. (P. Evid. Tr., 141; JT Vol. XII, 5-6).

2. Reopening of pretrial hearings regarding sexual propensity evidence.

On March 11, 2019, Petitioner successfully moved to revisit the issue of the admissibility of M.K.M.'s sexual assault due to newly discovered evidence. (3/11/2019 Tr., 3). During the subsequent hearing, the court received testimony from Byron

[7] Specifically, the State articulated the following similarities between the crimes: 1) both women were in their 20s when the incidents occurred; 2) both women were living alone; 3) both women were attacked in the early morning after Petitioner broke into their respective residences; 4) both women lived near Petitioner at the time of the crimes; 5) both women received head trauma during the attacks; 6) M.K.M. was lying face down for a portion of the attack and Ms. Gibbons' body was discovered lying face down after the fire was extinguished; and 7) Petitioner's DNA was discovered during law enforcement's investigation into both crimes. (P. Evid. Tr., 135-136, 138-139).

Smith, a Quality Assurance & Accreditation Manager for the Tulsa Police Department's Forensic Laboratory ("TPDFL"), who testified that—at the State's request—he reviewed DNA reports published in relation to the findings from M.K.M.'s sexual assault case. (3/11/2019 Tr., 11-28, 31-35, P. Ex. 1). Mr. Smith explained that back in 2006, the DNA testing process conducted on the carpet sample collected from M.K.M.'s apartment utilized a "differential DNA extraction" method which yielded "two different fractions, a [F]raction A sample[,] which is predominately skin cells . . . and . . . a [F]raction B sample, which is predominantly sperm cells." (3/11/2019 Tr., 23; *see also* P. Evid. Tr., St. Ex. 2). DNA analysis of both fractions looked at sixteen different areas of human DNA, yielding DNA results that appear "like peaks on a graph[,]" with each peak each representing an "allele"—i.e., a variation of DNA. (3/11/2019 Tr.,15, P. Ex. 1).

During his review of the testing results concerning the Fraction A sample, Mr. Smith disagreed with the conclusions outlined in the report compiled in 2006 by the previous TPDFL analyst because of "the inability to satisfy a peak-height requirement for declaring discernable contributors to a DNA mixture[,]" such that the conclusion as to this sample should have been reported as an "indistinguishable mixture" as opposed to a mixture with "a clear major contributor[,]"—i.e., Petitioner.[8]

[8] If there are "three or more peaks, . . . the analyst knows that they have a DNA mixture[;] however, [i]f there are only two peaks of DNA all throughout the profile at any site, that would be consistent with a single source [DNA] profile" as opposed to a mixture of more than one. (3/11/19 Tr., 15-16). In the case of analyses consisting of mixtures of two or more DNA profiles, Mr. Smith explained that "the DNA analyst will try to determine if the mixture . . . has a clear major contributor," which is positively determined if the "peak heights are greater than 70 percent throughout the entire profile." (3/11/19 Tr., 16-17).

Notably, however, this conclusion by Mr. Smith did not change "any conclusions reported for the Fraction B sample" from which Petitioner could not be excluded, because it was "a single source evidentiary profile that did not require DNA mixture interpretation." (3/11/2019 Tr., 23-24, P. Ex. 1; *see also* P. Evid. Tr., St. Ex. 2). In other words, regardless of this supposed uncertainty regarding the nature of the Fraction A sample, this did not change the original conclusion that the Fraction B sample was a "single source profile from one contributor and that" Petitioner's DNA was consistent with it, matching all sixteen allele loci. (3/11/2019 Tr., 24, 27-28, 35; *see also* P. Evid. Tr., St. Ex. 2).

After receiving this additional evidence, the state district court issued an Order on March 12, 2019, once again permitting the State to present this evidence in its case-in-chief. (O.R. XVI, 2976-2977). The state district court also briefly articulated the basis for this ruling on April 4, 2019:

> With regard[] to the Tulsa case . . . I am going to find that, as I previously found, that it is admissible as propensity evidence based on the testimony of the alleged victim in that case as well as the DNA evidence, and I think based on those things, the State has met its burden of proving that incident by clear and convincing evidence.

(4/4/2019 Tr., 2).

3. Applying the *Horn* factors to the sexual propensity evidence at issue.

Prior to M.K.M.'s testimony during the jury trial in the instant case, the state district court, once again, explained in more detail its reasoning for admitting this evidence pursuant to OKLA. STAT. tit. 12, § 2413, specifically outlining its findings in relation to the factors outlined in *Horn v. State*, 204 P.3d 777, 786. (JT. Vol. XX, 236-239); *see Posey*, 548 P.3d at 1259, 1260 (quoting *Horn*, 204 P.3d at 786). As to the first

Horn factor—how clearly the prior act was proven—the court highlighted the following three facts: 1) M.K.M. unequivocally identified Petitioner as the perpetrator; 2) M.K.M. identified the area where Petitioner ejaculated during the assault; and 3) Petitioner's DNA was found on a section of carpet in this area. (JT Vol. XX, 236). As to the second *Horn* factor regarding how probative the evidence was of a material fact, the court observed that the Oklahoma Legislature, in drafting 12 OKLA. STAT. tit. 12, § 2413, "made propensity evidence in these types of cases probative to a certain degree," and determined that the following commonalities between M.K.M.'s sexual assault and Ms. Gibbons' murder were probative to show that the crimes were committed by Petitioner and carried out in a similar manner: 1) both women were of similar age when attacked; 2) both women were the lone adults in the home; 3) Petitioner gained entry to their residences late at night and violently beat both women about the head; and 4) both women were forced to remain face down while Petitioner sexually assaulted them. (JT Vol. XX, 236-237). Regarding the third *Horn* factor—how seriously disputed the material facts are—the court simply acknowledged that the facts are "seriously disputed here. We all know that." (JT Vol. XX, 237).

As to the fourth *Horn* factor, the court indicated that it was unaware if the prosecution could avail itself of any less prejudicial evidence and proceeded to analyze the danger and likelihood that admission of this sexual propensity evidence would distract the jury or contribute to an improperly based verdict. (JT Vol. XX, 238-239). In so doing, the court acknowledged that the charges in relation to M.K.M.'s sexual

assault resulted in either dismissal or acquittal, which weighed in Petitioner's favor. However, the court also took note of the OCCA's decision in *Pullen v. State*, 387 P.3d 922 (Okla. Crim. App. 2016), which held that administering a limiting jury instruction in relation to sexual propensity evidence lessens the likelihood of an improper jury verdict. (JT Vol. XX, 237-238). Moreover, the court emphasized that not only was it going to administer a limiting instruction to the jury in relation to the sexual propensity evidence in this matter, the court also modified this instruction to ensure the jury knew the outcome of Petitioner's prior prosecution for M.K.M.'s sexual assault—i.e., that the jury did not find Petitioner guilty of First-Degree Burglary or Sexual Battery and could not reach a unanimous verdict in relation to the Rape by Instrumentation charge.[9] (O.R. XVII, 3196; JT Vol. XX, 238-239). This

[9] This jury instruction, in its entirety, read as follows: "You will hear or have heard evidence that the defendant may have committed another offense of sexual assault in addition to the offenses for which he is now on trial. You may consider this evidence for its bearing on any matter to which it is relevant along with all of the other evidence and give this evidence the weight, if any, you deem appropriate in reaching your verdict. You may not, however, convict the defendant solely because you believe he committed this offense or solely because you believe he has a tendency to engage in acts of sexual assault. The prosecution's burden of proof to establish the defendant's guilt beyond a reasonable doubt remains as to each and every element of the offense[s] charged. In this regard, you will hear or have heard that criminal charges were filed against the defendant in Tulsa County in 2008. There were four counts or four charges filed against the Defendant in one case. There was one alleged victim in that case, and all four charges arose out of the same set of facts. Those charges and the outcome of each of those charges were as follows: Count 1: RAPE BY INSTRUMENTATION. The jury was not able to reach a unanimous verdict of Guilty or Not Guilty, and the judge declared a mistrial at to this Count. The judge later dismissed this charge with prejudice, which means that the Defendant cannot be tried again for this offense. Count 2: BURGLARY IN THE FIRST DEGREE. The jury found the Defendant Not Guilty of this charge. Count 3: AGGRAVATED ASSAULT AND BATTERY. The State dismissed this charge prior to trial. Count 4: SEXUAL BATTERY. The jury found the Defendant Not Guilty of this charge. This information is provided to you in order to prevent any speculation as to the outcome of that case. You may consider this evidence of an alleged prior sexual assault, and give it only the weight, if any, allowed by law." (O.R. XVII, 3196 (Instruction No. 9-10A, Modified, OUJI-CR(2d))).

instruction was read to Petitioner's jury prior to receiving M.K.M.'s testimony.[10] (JT Vol. XXII, 109-112).

Moreover, in addition to hearing about M.K.M.'s harrowing encounter with Petitioner and the ensuing law enforcement investigation, which was consistent with prior testimony in pretrial proceedings, the jury also learned that when Petitioner was brought in for questioning in relation to this incident, he claimed that he had consensual sex with an Asian female in his apartment, that he preferred younger, Caucasian females, and that during sex, he was "very dominant and like[d] to choke." (JT Vol. XXII, 55-56, 88, 109-112, 124, 128-139, 147-153, 162; JT Vol. XXIII, 8-10, 28-30, 40-41, 46-47, 131-134, 151; *see supra* Procedural History); *Posey*, 548 P.3d at n.24.

4. Direct appeal proceedings.

On direct appeal, Proposition II of Petitioner's brief-in-chief argued that the state district court abused its discretion in admitting evidence of M.K.M.'s sexual assault during his trial for two reasons: first, he claimed that the *Horn* factors outlined above "weighed in favor of excluding the challenged evidence;" and second, he argued that this "evidence should have been excluded because his acquittal verdict and dismissal with prejudice of the [R]ape by [I]nstrumentation charge were final dispositions of ultimate issues" barred it from admission by this Court's holding in *Dowling v. United States*, 493 U.S. 342 (1990). *Posey*, 548 P.3d at 1259-1262. More specifically, Petitioner contended that the "prior charges related to M.K.M. were not sufficiently proven by clear and convincing evidence under *Horn* because he was

[10] This instruction was also included in the written jury charge at the conclusion of the trial. (*See* O.R. XVII, 3196); *Posey*, 548 P.3d at 1261.

acquitted of the burglary and sexual battery charges and the trial court dismissed with prejudice the remaining charge." *Posey*, 548 P.3d at 1259-1260. Thus, Petitioner argued, "the only way to reconcile the verdicts and evidence is to surmise that some evidence in the prior trial suggested a consensual encounter considering M.K.M.'s identification and DNA consistent with his profile being collected at the scene." *Id*. at 1260.

In a published opinion wholly rejecting Petitioner's claims, the OCCA initially noted that under the *Horn* paradigm, the state district court correctly admitted the evidence. Moreover, the OCCA agreed with the state district court that this evidence not unfairly prejudicial to Petitioner because it was relevant, and any danger of unfair prejudice was greatly reduced by the trial court's limiting instruction. *Id*. at 1260-1261. Consequently, the OCCA determined that this sexual propensity evidence was duly admissible under Oklahoma law.

The OCCA likewise found Petitioner's second claim—i.e., that this evidence was also inadmissible because the outcome of his prior prosecution amounted to a final disposition of an ultimate issue, which barred its subsequent admission under *Dowling*—unpersuasive. *Id*. at 1261 (citing *Dowling*, 493 U.S. 342). In so finding, the OCCA noted that in *Dowling*, this Court "held neither the Double Jeopardy Clause nor the Due Process Clause barred testimony concerning a crime a defendant had previously been acquitted of committing[,]" a finding made in the context of evaluating whether evidence in relation to Mr. Dowling's prior prosecution for breaking into a home and attempting to rob the homeowner was admissible under

Fed. R. Evid. 404(b) in a subsequent prosecution for bank robbery. *Id*. at 1261 (citing *Dowling*, 493 U.S. at 348-350, 352-354). The OCCA further noted that although the *Dowling* Court acknowledged Mr. Dowling's prior acquittal established reasonable doubt as to whether he was one of the intruders involved in the prior home invasion robbery, "the government at the bank robbery trial did not have to prove . . . [Mr.] Dowling was one of the intruders beyond a reasonable doubt; it had to show for admission under Rule 404(b) only that the jury could 'reasonably conclude'" he "was an actor involved in the home invasion." *Id*. (citing Dowling, 493 U.S. at 348-349). Thus, in finding no violation of the collateral-estoppel component of the Double Jeopardy Clause, this Court specifically explained that due to the lower burden of proof required for Rule 404(b) evidence in this context, a "'jury might reasonably conclude that [Mr.] Dowling was the masked man who entered [the] home[,] even if it did not believe beyond a reasonable doubt that [Mr.] Dowling committed the crimes charged . . . .'" *Id*. (quoting *Dowling*, 493 U.S. at 348-349).

Consequently, in the present case, the OCCA noted that *Dowling* specifically holds: "[A]n acquittal verdict in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent case with a lower burden of proof.'" *Id*. (quoting *Dowling*, 493 U.S. at 348-349).

However, the OCCA noted that this Court, in a seeming alternative holding, stated that even if the doctrine of collateral estoppel applies in a proceeding with a lower standard of proof, collateral estoppel is violated: "'[W]hen 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.* at 1261, n.22 (quoting *Dowling*, 493 U.S. at 347 (quoting *Ashe v. Swenson*, 397 U.S. 436, (1970)). Along those lines, the OCCA acknowledged the *Dowling* Court held that a defendant carries the burden of proving that a prior acquittal conclusively decided an ultimate issue in a prior proceeding and in the context of an "acquitted charged based upon a general verdict," "courts must examine the entire record . . . and decide whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration." *Posey*, 548 P.3d at 1262 (citing *Dowling*, 493 U.S. at 350-351 (citing *Ashe*, 397 U.S. at 443)). More specifically, the OCCA noted that in *Dowling*, this Court "observed that the record concerning the charges resulting in [Mr.] Dowling's acquittal was sparse and consisted of a discussion between the parties and the trial court[,]" such that there were "'any number of possible explanations for the jury's acquittal verdict' and that nothing in the record persuasively indicated that the question of identity was at issue and was determined in [Mr.] Dowling's favor.'" *Posey*, 548 P.3d at 1262 (citing and quoting *Dowling*, 493 U.S. at 351-352).

Utilizing this Court's reasoning in *Dowling* as a guide, the OCCA determined in the instant case that the state district court "did not err in admitting evidence related to the charges . . . [Petitioner] was [either] acquitted of . . . or . . . were dismissed," for two reasons: 1) the clear and convincing evidence standard for evaluating admission of sexual propensity evidence under Oklahoma law is lower than "the beyond a reasonable doubt burden utilized in" Petitioner's prior criminal

trial, and *Dowling* does "not preclude the government from relitigating an issue in a subsequent case with a lower burden of proof"; and 2) the record regarding Petitioner's prior acquittal was sparse, such that Petitioner failed to carry his burden in showing his previous jury's verdict determined an ultimate issue—i.e., whether he was innocent of the charged crimes due to M.K.M.'s consent.[11] *Posey*, 548 P.3d at 1262 (citing *Dowling*, 493 U.S. at 348-349).

After the publication of the OCCA's opinion, Petitioner moved for rehearing to withdraw the mandate solely based upon Proposition X, as alleged in his direct appeal brief-in-chief, which concerned the sufficiency of evidence supporting the "'Great Risk of Death to More Than One Person' aggravating circumstance, as to Counts 3 and/or 4." *Posey v. State*, D-2019-542, Petition for Rehearing and Motion to Withdraw the Mandate (Okla. Crim. App. May 8, 2024). The OCCA denied this request for rehearing on May 15, 2024. (Pet. Appx. B, at 32-34).

On October 15, 2024, Petitioner filed a Petition for Writ of Certiorari with this Court seeking review of the OCCA's decision. Respondent filed a motion to extend the time in which to file a response on November 15, 2024, which was granted by this Court, making the brief in opposition due on December 20, 2024.

REASONS FOR DENYING THE WRIT

Although not exhaustive, Rule 10 of this Court's rules provides that "a petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Here,

[11] Given that there is no trial transcript from his prior prosecution, Petitioner's consent argument depends entirely on what he told police during their investigation into this case; however, Petitioner fails to prove that his statements to police were actually admitted during the jury trial in relation to this incident.

Petitioner asks this Court to grant certiorari to consider whether "this Court [sic] reverse the . . . [OCCA's] decision in this case because it erred in finding that the acquittal in [Petitioner's] prior proceeding did not constitute a determination of an ultimate issue, contrary to the holding in *Dowling v. United States*." (Pet. at 5). In particular, Petitioner claims that in his previous trial concerning M.K.M.'s sexual assault, because he "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 conclusion the jury could have reached—despite the existence of a sparse and virtually silent record on this issue—was that Petitioner committed no crime whatsoever because M.K.M. "consented to the sexual acts."[12] (Pet. at 9-10). Petitioner insists that this finding "represents a determination of an ultimate fact," and because "no crime or bad act occurred, the State should not have been permitted to infer such to" the jury in the instant case. (Pet. at 10).

[12] Again, it bears worth repeating that Petitioner did not present the district court with a transcript from the M.K.M. prosecution. Thus, it is unclear how Petitioner can definitively state that he "did not seriously deny the acts underlying each of the[se] charges." (P. at 9). In fact, Petitioner's own trial attorneys in the instant case appeared to be unclear in their own understanding of the exact nature of his defense in this prior prosecution. This is evidenced by portions of argument against admission of the propensity evidence at issue during pretrial proceedings in this case. At one point, Petitioner's counsel informed the state district court that one of the key differences between Petitioner's prior prosecution and the facts of the *Dowling* case was that Mr. Dowling's "presence at the house where he went in on a home invasion and was acquitted . . . was not contested[,] . . . and that is unlike what we have here, where . . . [Petitioner] has always maintained his innocence and has always said he did not do this and was not at her house." (P. Evid. Tr. 126). Additionally, during the pretrial hearing regarding the DNA evidence, defense counsel likewise argued that the jury in that case "acquitted him on burglary in the first degree. And what they said was he didn't do the burglary . . . . And that means he was never in the house. And if you're never in the house, you can't rape somebody in the house." (3/11/19 Tr. 40). Thus, at most, these statements indicate that Petitioner may have either presented conflicting defenses in his prior prosecution, or that the nature of his defense changed over time. Regardless, these excerpts further emphasize the fact that the basis for the jury's acquittal was far from clear.

In so arguing, Petitioner specifically takes issue with the OCCA's reasoning that the jury could have simply concluded that the State did not carry its burden of proving Petitioner guilty beyond a reasonable doubt in relation to these crimes—as opposed to specifically concluding M.K.M. consented to the conduct. (Pet. at 10-11). He argues that this analysis "simply does not comport with the facts[,]" and he specifically asks this Court to correct the OCCA's alleged "erroneous factual findings or the misapplication of a properly stated rule of law," with respect to this issue. (Pet. at 10-11).

Respondent respectfully submits that a grant of certiorari review to consider this issue is not warranted. Importantly, Petitioner fails to identify a compelling issue worthy of this Court's review, given that he has not alleged a split amongst state or federal courts, nor has he alleged that the OCCA's ruling in any way conflicts with a decision of this Court. Instead, the instant Petition *solely* rests upon a claim that a lower court misapplied a properly stated rule of law, which, as this Court's Rules indicate, is *rarely* a valid basis for granting certiorari. *See* Sup. Ct. R. 10. In reality, the heart of Petitioner's claim merely takes issue with the OCCA's fact-based determination that the circumstances of this case clearly weighed in favor of admitting the propensity evidence at issue, irrespective of the outcome of Petitioner's prior sexual assault prosecution. *See* Sup. Ct. R. 10.

The writ of certiorari should therefore be denied.

I. Petitioner's claim that the OCCA misapplied the appropriate law in this case is actually an attempt to seek fact-bound error correction.

As stated, this Court sparingly grants review on compelling issues and generally does not engage in mere error correction. *See* Sup. Ct. R. 10; *Halbert v. Michigan*, 545 U.S. 605, 605 (2005) (explaining that, on "certiorari review in this Court," "error correction is not" this Court's "prime function."). Here, Petitioner's question presented—*at best*—requests this Court to do just that: correct what Petitioner believes is a misapplication of settled Supreme Court law by the OCCA to the facts of this case. As such, Petitioner's true request for this Court to reassess the relevant facts in relation to the admission of the contested sexual propensity evidence and render a different—and more favorable—decision, one that disregards the numerous factual findings supporting the OCCA's analysis and disposition of this issue, should be rejected.

II. Certiorari review should be denied because the question presented lacks merit under this Court's precedent.

As a further matter, despite Petitioner's attempts to frame the OCCA's decision affirming the admission of Petitioner's prior sexual assault of M.K.M. as error, the OCCA's analysis, outlined above, clearly comports with this Court's precedent and the Constitution, such that the nature of Petitioner's question is meritless.

As relevant here, the OCCA, in its published opinion, scrupulously analyzed this Court's holding in *Dowling* and applied its holding and reasoning to this case. In so doing, the OCCA specifically noted that *Dowling* reaffirmed this Court's position

that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling*, 439 U.S. at 349; *cf., United States v. Felix*, 503 U.S. 378, 387 (1992) (in considering double jeopardy implications under Fed. R. Civ. P. 404(b), this Court has recognized the "basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." (construing *Dowling*, 493 U.S. 342)).

This point of settled law is *crucial* to this case and one that Petitioner appears to wholly ignore, evidenced by his failure to even broach it the instant Petition. Here, evidence that Petitioner sexually assaulted M.K.M. was admitted as sexual propensity evidence under OKLA. STAT. tit. 12, § 2413, whereby the standard for admission is clear and convincing, which is directly in line with *Dowling's* holding, as the OCCA duly noted. *See Dowling*, 493 U.S. at 348-349. Thus, for reasons fully explained in *Dowling* and drawn upon by the OCCA in its disposition of this issue on direct appeal—as discussed above—because the jury could have found Petitioner committed these crimes under the lesser standard of proof, admission of this evidence did not violate the collateral estoppel provision of the Double Jeopardy Clause, regardless of the partial acquittal in Petitioner's prior prosecution. *See id.*

Moreover, in addition to this dispositive holding, the OCCA—as did this Court in *Dowling*—likewise addressed the fact that Petitioner *also* failed to carry his burden of showing that the previous jury acquitted him on the sole basis that M.K.M. consented to the sexual encounter and absolved him of all culpability for the incident.

Specifically, the OCCA noted that the sparse record regarding the prior prosecution not only failed to support this conclusion, it also lacked any indication that the jury determined Petitioner had not committed these crimes for any *other* reason. *See Dowling*, 493 U.S. at 352-354. In fact, the OCCA—in resolving this issue—highlighted the fact that Petitioner even conceded in his direct appeal brief that "*there is no record of the jury trial*" and "*[w]e have no idea what evidence was presented.*" *Posey*, 548 P.3d at n.23 (internal quotations omitted) (emphasis added). More specifically, the OCCA held:

> It appears that identity was not seriously disputed based upon DNA consistent with . . . [Petitioner's] DNA profile at the scene, M.K.M.'s identification, and . . . [Petitioner's] police interview admission that he had a consensual encounter with an Asian female[13]. . . . [Petitioner] insists, however, that the jury must have acquitted him based upon a finding that no crimes were committed because of consent. Given the sparseness of the record of the prior trial, we are hard pressed to find . . . [Petitioner] has met his burden of proof. All things considered, a rational jury in the prior trial might reasonably have concluded that . . . [Petitioner] was the man who entered M.K.M.'s home but 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. . . . [Petitioner] simply has not shown on this record that he was deprived of a fundamentally fair trial in violation of due process by admission of the challenged propensity evidence, especially considering the limiting instructions issued in this case.

Posey, 548 P.3d at 1262; *see also Schiro v. Farley*, 510 U.S. 222, 223 (1994) (observing *Dowling*'s holding and noting where there are "any number of possible explanations for the jury's acquittal verdict, the defendant ha[s] failed to satisfy his burden" on a

[13] Once again, given that no transcript indicating exactly what evidence the jury received in relation to Petitioner's prior prosecution for M.K.M.'s sexual assault was admitted or referenced in the instant case, the OCCA appears to simply assume that these statements were elicited during the course of the proceedings in that case.

claim of collateral estoppel (internal citations and quotations omitted)); *cf. United States v. Benton*, 852 F.3d 1456, 1466 (6th Cir. 1988) ("Unless it can be said with definite assurance, and by clear evidence, that a jury found a fact in the defendant's favor, which is also a necessary element of the crime sought to be reprosecuted, *Ashe [v. Swenson]* will not assist a criminal defendant.").

As a final point, the instant Petition likewise fails to acknowledge that as to the Rape by Instrumentation charge, the ultimate issue was not decided at all; Petitioner was not acquitted of this count and despite his attempts to equate the dismissal of this charge as being tantamount to an acquittal for purposes of a *Dowling* analysis, the bottom line is that the record contains *no* substantive, underlying reason for the dismissal, other than the jurors were deadlocked on this charge for reasons that are likely to never be known. (*See* 3/11/2019 Tr., 41-43). Consequently, based on the foregoing, the OCCA in this case appropriately applied this Court's settled precedent in the instant matter, ultimately finding no Constitutional violation under these facts. Certiorari review should be denied.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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