No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

SHAUN MICHAEL BOSSE

Petitioner,

v.

THE STATE OF OKLAHOMA

Respondent.

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

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April 29, 2016

CAPITAL CASE

QUESTION PRESENTED

DO OKLAHOMA COURTS VIOLATE THE EIGHTH AMENDMENT AND THIS COURT'S HOLDINGS IN *BOOTH V. MARYLAND* AND *PAYNE V. TENNESSEE* WHEN THEY CONSISTENTLY ALLOW FOR THE ADMISSION OF VICTIM IMPACT TESTIMONY IN CAPITAL SENTENCING TRIALS THAT CONSISTS OF FAMILY MEMBERS' CHARACTERIZATIONS OF THE CRIME AND FAMILY MEMBERS' SENTENCING RECOMMENDATIONS?

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The Petitioner Shaun Michael Bosse 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 October 16, 2015.

LIST OF PARTIES:

All parties to this action are named in the caption.

OPINIONS BELOW:

The judgment for which certiorari is sought is *Bosse v. State*, 360 P.3d 1203 (Okla. Crim. App. 2015). The decision in *Bosse* was filed on October 16, 2015. *See* Appendix, Exhibit A. Rehearing was denied on December 1, 2015. *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 October 16, 2015, and denied rehearing in the case on December 1, 2015. Pursuant to this Court's Rule 13.5, Petitioner timely sought from the Honorable Associate Justice Sonia Sotomayor an extension of time to file a petition for a writ of certiorari. Justice Sotomayor entered an order on February 26, 2016, giving Petitioner Bosse up to and including April 29, 2016, to file a petition. This Court's jurisdiction arises pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

Constitutional Provisions:

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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. 21, § 142A-8(A) (2011) Victim Impact Statements:

A. Each victim, or members of the immediate family of each victim or person designated by the victim or by family members of the victim, may present a written victim impact statement, which may include religious invocations or references, or may appear personally at the sentence proceeding and present the statements orally. Provided, however, if a victim or any member of the immediate family or person designated by the victim or by family members of a victim wishes to appear personally, the person shall have the absolute right to do so. Any victim or any member of the immediate family or person designated by the victim or by family members of a victim who appears personally at the formal sentence proceeding shall not be cross-examined by opposing counsel; provided, however, such cross-examination shall not be prohibited in a proceeding before a jury or a judge acting as a finder of fact. A written victim impact statement introduced at a formal sentence proceeding shall not be amended by any person other than the author, nor shall the statement be excluded in whole or in part from the court record. The court shall allow the victim impact statement to be read into the record.

STATEMENT OF THE CASE:

A. Facts Material to the Question Presented.

Petitioner Bosse was tried by a jury on three counts of First Degree Murder and one count of First Degree Arson for the deaths of Katrina Griffin and her two children, Chasity Hammer and Christian Griffin. Following guilty verdicts on all counts, the jury heard evidence in aggravation and mitigation and returned three death sentences on the three counts of First Degree Murder.

This petition questions the continued practice of Oklahoma trial courts, prosecutors, and the Oklahoma Court of Criminal Appeals to present and/or sanction victim impact testimony regarding family members' characterizations of the crime and their recommended sentences in capital sentencing proceedings in light of this Court's holdings in *Booth v. Maryland*, 482 U.S. 496, 505, 107 S.Ct. 2529, 2525-36, 96 L.Ed.2d 440 (1987) and *Payne v. Tennessee*, 501 U.S. 808, 830 n.2, 111 S.Ct. 2597, 2611 n.2, 115 L.Ed.2d 720 (1991).

Prior to trial, Mr. Bosse filed a Motion seeking to prohibit the State from eliciting a recommendation of death by the victims' surviving family members. (O.R. 772-83). Prior to the presentation of evidence during the penalty phase of the trial, the trial court heard argument on this motion and, at the conclusion of the argument, overruled the motion and permitted the State to elicit a recommendation of death by the witnesses providing victim impact testimony. (X Tr. 9-13) The last three witnesses presented by the State of Oklahoma were Rebecca Allen, Katrina's mother, and Christian and Chasity's grandmother; Ginger

Griffin, Katrina's stepmother, and Christian and Chasity's step-grandmother; and Johnny Griffin, Katrina's father, and Christian and Chasity's grandfather. (X Tr. 197-223) Each delivered a prepared victim impact statement. Each witness concluded his or her testimony by asking the jury to sentence Mr. Bosse to death. (X Tr. 202, 212, 223) The presentation of this evidence deprived Mr. Bosse of fundamental constitutional rights, and rendered his sentencing trial fundamentally unfair and the resulting death sentence unreliable.

B. How the Issue Was Raised and Decided Below.

On direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA"), Petitioner argued that the trial court and prosecutor presented the aforementioned victim impact testimony in violation of this Court's holdings in *Booth v. Maryland* and *Payne v. Tennessee*. Petitioner argued that this Court, in lifting the *per se* Eighth Amendment ban on victim impact evidence in *Payne v. Tennessee*, 501 U.S. 808, 830 n.2, 111 S.Ct. 2597, 2611 n.2, 115 L.Ed.2d 720 (1991), expressly limited its holding to "evidence and argument relating to the victim and the impact of the victim's death on the victim's family ...." *Payne* left untouched that portion of *Booth v. Maryland*, 482 U.S. 496, 508-09, 107 S.Ct. 2529, 2525-36, 96 L.Ed.2d 440 (1987), holding that victims' family members' characterizations about the crime, the defendant, and the appropriate sentence are irrelevant and violate the Eighth Amendment. *Payne*, 501 U.S. at 830 n.2, 833, 111 S.Ct. at 2611 n.2. Petitioner pointed out that in light of these holdings, the OCCA has erroneously held that the Supreme Court "implicitly overruled" that portion of *Booth*. *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997) (citing *Ledbetter v. State*, 933 P.2d 880 (Okla. Crim. App.1997)).

Petitioner reasoned that the OCCA reached this novel conclusion based on its view that "the entire discussion [in *Booth*] dealing with family members' opinions and characterizations of the crimes was covered in two paragraphs, after an extended discussion of the other victim impact evidence, and appeared based on the same rationale." *Ledbetter*, 933 P.2d at 890-91. The argument seems to be that since the underlying rationale was declared invalid as to one holding, it must also be invalid as to other holdings based upon that same rationale. Petitioner acknowledged this reasoning would make sense, until one looks at the rationale used in *Payne* to validate testimony relating to the victim and the impact on the victim's family. Petitioner asserted that this Court repeatedly stressed in *Payne* that the reason testimony about the victim and the impact of the death on the victim's family *is* relevant and admissible, and thus not violative of the Eighth Amendment, is that "victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. Characterizations of the crime and opinions as to the appropriate punishment, on the other hand, *do nothing* to inform the sentencing authority about the specific harm caused by the crime in question. Accordingly, "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth*, 482 U.S. at 508, 107 S.Ct. at 2536. Therefore, Petitioner argued, admission of this evidence "is inconsistent with

the reasoned decisionmaking we require in capital cases" and violates the Eighth Amendment. *Id.* at 508-09, 107 S.Ct. at 2536.

Petitioner observed that the OCCA had recently acknowledged that in both footnote two of the majority opinion in *Payne* and in Justice O'Connor's concurring opinion (joined by two Justices who also joined the majority Opinion), the Supreme Court "left open the question about admissibility of victim impact evidence regarding characterizations and opinions about the crime, the defendant, and the appropriate sentence because no such evidence was presented in that case." *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002) (citing *Payne*, 501 U.S. at 830, 833, 111 S.Ct. at 2611-13). Nevertheless, Petitioner noted, the OCCA suggested its expansive interpretation of *Payne* was validated by the fact that "the Supreme Court has denied certiorari in *Turrentine* [(one of the cases in which the OCCA wrongly upheld characterizations of the defendant, the crime, and opinions regarding sentence)], and, since that time, we have continued to approve such evidence in other capital cases." *Murphy*, 47 P.3d at 885 (citing *Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1055, 121 S.Ct. 2200, 149 L.Ed.2d 1030 (2001); *Welch v. State*, 2 P.3d 356, 373 (Okla. Crim. App. 2000), *cert. denied*, 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000)).

Petitioner pointed out to the OCCA that a denial of a petition for writ of certiorari is not a ruling on the merits. *Missouri v. Jenkins*, 515 U.S. 70, 85, 115 S.Ct. 2038, 2047, 132 L.Ed.2d 63 (1995) ("Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'") (quoting *United*

States v. Carver, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923)). Accordingly, Petitioner argued, this Court's denial of petitions for writ of certiorari in *Turrentine*, or any other of the cited cases, for that matter, should not be read as approval of this Court's decision to overrule *Booth v. Maryland*.[1]

Petitioner also addressed another OCCA case in which the OCCA responded summarily to a capital defendant's claims on improper victim impact testimony as follows:

> This Court has recently noted that although the Supreme Court had earlier forbidden such evidence, the decision in *Payne* left open the question of the validity of such evidence. The legislature of this State has specifically provided for the admission of this kind of victim impact evidence. And this Court has rejected claims like DeRosa's in the past. The Court will not re-examine the issue here.

DeRosa v. State, 89 P.3d 1124, 1151-52 (Okla. Crim. App. 2004) (footnotes omitted). *See also Bush v. State*, 280 P.3d 337, 349-50 (Okla. Crim. App. 2012)(acknowledging such evidence is admissible in capital sentencing procedures and declining to revisit the issue); *Malone v. State*, 168 P.3d 185, 204, n.89 (Okla. Crim. App. 2007)(acknowledging that the prohibition in *Booth* is still good law post-*Payne*, but nevertheless declining to revisit the issue). Petitioner pointed out to the OCCA that, in the first place, the fact that the Oklahoma Legislature has allegedly provided for the admission of this kind of opinion testimony does not answer the question of whether that legislative pronouncement is constitutionally valid. Article Six of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; *and the Judges in every*

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[1] Indeed, this issue was not even presented for the Court's consideration in Turrentine's Petition for Writ of Certiorari.

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., art. VI, § 2 (emphasis added). Secondly, Petitioner argued, for the OCCA to say that this Court has "left open" this question is inaccurate. This Court answered this question in *Booth*. That is the last command on this topic, and until this Court decides to reconsider this issue, that is the Law of the Land. Petitioner is aware of no other precedent equating a court's decision not to reconsider a prior ruling with overruling that prior ruling.

Petitioner reminded the OCCA that the Tenth Circuit has consistently recognized that *Booth*'s prohibition of opinions and characterizations about the crimes, the defendant, and appropriate punishment is still in force. *See Dodd v. Trammell,* 753 F.3d 971, 996-97 (10th Cir.2013); *Grant v. Trammell*, 727 F.3d 1006, 1015–17 (10th Cir.2013); *Lockett v. Trammell*, 711 F.3d 1218, 1226, 1238–40 (10th Cir.2013); *Lott v. Trammell*, 705 F.3d 1267, 1202, 1214, 1218–19 (10th Cir.2013); *DeRosa v. Workman*, 679 F.3d 1196, 1236–37, 1240 (10th Cir.2012); *Selsor v. Workman*, 644 F.3d 984, 1025, 1027 (10th Cir.2011); *Welch v. Workman* (Gary Welch), 639 F.3d 980, 996–1000, 1002–04 (10th Cir.2011); *Welch v. Sirmons* (Frank Welch), 451 F.3d 675, 703–04 (10th Cir.2006); *Hooperv. Mullin*, 314 F.3d 1162, 1174 (10th Cir.2002); *Willingham v. Mullin*, 296 F.3d 917, 930–32 (10th Cir.2002); *Hain v. Gibson*, 287 F.3d 1224, 1234–36, 1239–40 (10th Cir.2002), as have the Fifth and Eighth Circuits, *see Woods v. Johnson*, 75 F.3d 1017, 1037-38 (5th Cir. 1996) (noting that *Payne* "largely overruled" *Booth* and *Gathers* and pointing out habeas petitioner's case did not involve "evidence or argument concerning 'the opinions of the victim's family about the crime, the defendant, and the appropriate sentence'"); *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir.

1999) (citing *Payne* and stating that "family members of the victim may not state 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' at the penalty phase").

Petitioner also pointed out that a number of states are in agreement that *Payne* did not overrule *Booth's* ban on victim impact evidence *in toto*. For example, the State of Tennessee, from whence *Payne v. Tennessee* originated, has recognized that "the Supreme Court did not disturb that portion of its opinion in *Booth* that excluded information relating to family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence." *State v. McKinney*, No. W1999-008440CCA-RD-DD, 2001 WL 298636, at *14 (March 28, 2001) (citing *Payne*, 501 U.S. at 830 n.2, 111 S.Ct. at 2611 n.2). Similarly, the State of Maryland, from whence *Booth v. Maryland* originated, has treated *Booth* as having been overruled only "in part," thus continuing to hold that "[t]he sentencing authority ... may not consider statements of the victim's family that amount to an opinion regarding the appropriate sentence to be imposed upon the defendant. *See Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), *overruled in part on other grounds*, *Payne v. Tennessee*, 501 U.S. at 830 & n.2, 111 S.Ct. 2597." *Ware v. State*, 759 A.2d 764, 783 (Md. Ct. App. 2000). The State of Texas, meanwhile, has been more blunt about the issue, finding that "*Booth's* latter holding remains binding precedent." *Fryer v. State*, 68 S.W.3d 628, 630 (Tex. Crim. App. 2002). Other state courts are in agreement with this general principle. *See Ex parte McWilliams*, 640 So.2d 1015, 1017 (Ala. 1993) (noting that *Payne* only "partially" overruled *Booth* and "conclud[ing] that McWilliams's Eighth

Amendment rights were violated if the trial judge in this case considered the portions of the victim impact statements wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment"); *Farina v. State*, 680 So.2d 392, 399 (Fla. 1996) ("The only part of *Booth* that *Payne* did not overrule was 'that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."); *People v. Harris*, 695 N.E.2d 447, 467 (Ill. 1998) ("*Payne* did not address, however, the prohibition in *Booth* on the introduction of surviving family members' views regarding appropriate punishment. We note that this court has held that witnesses' opinions regarding the proper punishment in a capital case are irrelevant and therefore inadmissible at a capital sentencing hearing.") (citations omitted); *State v. Taylor*, 669 So.2d 364, 369-70 (La. 1996) (explaining that *Payne* left that portion of *Booth* "undisturbed" and "highlight[ing] the Supreme Court's consistent holding that, '[e]vidence of the victim's survivors' opinions about the crime and the murderer is clearly irrelevant to any issue in a capital sentencing hearing.'") (citations omitted); *State v. Muhammad*, 678 A.2d 164, 172 (N.J. 1996) ("*Payne* left undisturbed the holding in *Booth* that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.") (citing *Payne*, 501 U.S. at 830 n.2, 111 S.Ct. at 2611 n.2).

In response to Petitioner's arguments, the OCCA , while acknowledging the fact that the Tenth Circuit has found Oklahoma's position on this issue constitutionally infirm, nevertheless declined "the invitation to reconsider [its] consistent position on this issue."

Exh. A, ¶ 56. Judge Lumpkin, in a concurring Opinion, elaborated on the OCCA's view of this issue. Judge Lumpkin, referring to previous opinions of the Oklahoma court, maintained that *Payne* overruled *Booth* in its entirety. Exh. A, ¶ 18 (Lumpkin, J., concurring in part/dissenting in part). Judge Lumpkin did note, however, that footnote number 2 in Payne "has caused some confusion." *Id.* at ¶ 17. That footnote, by Chief Justice Rehnquist, observed that *Payne* was overruling only that portion of *Booth* that pertained to evidence and argument relating to the victim and the impact of the victim's death on the victim's family, and that portion of *Booth* that prohibited victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence was left intact. *Payne*, 501 U.S. at 830 n.2, 111 S.Ct. at 2611 n.2.

Judge Lumpkin then dismisses the import of the Chief Justice's footnote by noting that footnotes have no precedential value and are merely *obiter dictum*. Exh. A, ¶ 19 (Lumpkin, J., concurring in part/dissenting in part). While this may be true, the concurring judge wholly ignores the fact that Justice O'Conner, in a concurring Opinion joined by two of the six Justices writing for the majority Opinion, said the very same thing as did the Chief Justice in footnote 2, to wit: "Booth also addressed another kind of victim impact evidence—opinions of the victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial." *Payne*, 501 U.S. at 833, 111 S.Ct. at 2612 (O'Conner, J., concurring.) Thus, four of the six Justices writing for the *Payne* majority explicitly acknowledged that those portions not directly at issue in *Booth* were still the law

of the land, and at no place in any of the *Payne* Opinions was there so much of a hint that the law should be interpreted otherwise.

Judge Lumpkin practically begged this Court to clear up the "confusion": "We are waiting for the issue to be presented to the United States Supreme Court. [Citation omitted.] Until the United States Supreme Court issues a definitive opinion on the issue, we will continue to apply the explicit language of *Payne* and approve of such evidence in other capital cases." Exh. A, ¶ 21 (Lumpkin, J., concurring in part/dissenting in part). Mr. Bosse is now presenting the issue to this Court.

REASON THIS COURT SHOULD GRANT THE WRIT:

Certiorari Should Be Granted Because the Oklahoma Court of Criminal Appeals' Analysis on the Admissibility of Victim Impact Evidence in Capital Sentencing Trials Is Consistently and Clearly Contrary to *Payne v. Tennessee, Booth v. Maryland,* and the Eighth Amendment.

Oklahoma stands alone, an outlier, in holding that the Constitution permits victim characterizations of crimes and recommendations of an appropriate sentence in capital sentencing proceedings. Every jurisdiction which has addressed this issue, with the lone exception of Oklahoma, has held that the prohibition of this form of evidence, as explained in *Booth v. Maryland*, remains intact following *Payne v. Tennessee*. In a recent Oklahoma capital case, the Tenth Circuit reminded the OCCA that "it remains constitutionally improper for the family members of a victim to provide 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital case." *DeRosa v. Workman*, 679 F.3d 1196, 1237 (10th Cir. 2012)(internal citations omitted). Accordingly, the Tenth Circuit found the OCCA's analysis to the contrary was in clear

contravention of *Payne* and *Booth*." *Id.* at 1240. The Tenth Circuit further found that the OCCA's "prejudice analysis necessarily failed to take into account the full scope of the constitutional errors that resulted from the admission of the challenged victim impact testimony, and thus is not entitled to any deference in this federal habeas proceeding." *Id.*

Ultimately, in *DeRosa*, the Tenth Circuit found the admission of such improper evidence to be harmless under the standards provided for habeas review in *Brecht v. Abrahamson*, 507 U.S. 619, 634, 113 S.Ct. 1710, 123 L.Ed.2d. 353 (1993). *Id.* However, in his dissent from a denial of *en banc* rehearing in *DeRosa*, Judge Lucero made the following observation:

> This case presents a troublesome and recurrent theme in capital cases arising out of the Oklahoma state courts which causes me to dissent from the denial of en banc review. As I note herein, state prosecutors and courts have developed a pattern and practice of non-compliance with – if not outright ignoring of - United States Supreme Court precedent that specifically prohibits eliciting from a relative of the victim an opinion as to whether the death penalty should be imposed.

DeRosa v. Workman, 696 F.3d 1302, 1303 (10th Cir. 2012)(Lucero, J., dissenting).

Lamenting the impotence of the harmlessness analysis to which federal courts are confined under *Brecht* in addressing what can only be construed as the OCCA's "intentional disobedience of the federal Constitution...," Judge Lucero argued that were "the option not foreclosed by precedent, one could make a strong case that a state court system's pattern of ignoring the United States Supreme Court should be immune from harmless error review as akin to structural error. *Id.* at 1305. "[W]hile there is no direct action we can take to halt this contumacious behavior," Judge Lucero observed, there is but "one federal court that can

directly correct the OCCA's unreasonable interpretation: the United States Supreme Court." *Id.* at 1306.

Despite this Court's clearly established law banning evidence of family members' opinions about the crime and the appropriate sentence for the perpetrator, Oklahoma prosecutors and trial courts continue to allow such evidence in capital sentencing trials, as they did in this case. Moreover, the OCCA continues to uphold the admissibility of such unconstitutional evidence and willfully ignore the dictates of this Court's case law. As already noted, the only answer the OCCA gave to Petitioner's argument on this issue was that the Tenth Circuit's interpretation of the issue was not binding and that the OCCA would not "reconsider [its] consistent position on this issue." Exh. A, ¶ 56. Judge Lumpkin, writing on this issue in his concurring opinion, bluntly stated that the OCCA would continue to permit the unconstitutional evidence until this Court orders it to do otherwise. Exh. A, ¶ 21 (Lumpkin, J., concurring in part/dissenting in part).

Noting the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," this Court granted certiorari in the case of *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), because there was reason to question whether the Court of Appeals for the Fifth Circuit evaluated the significance of undisclosed evidence under the correct standard. *Id.* at 1560 (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). The reason for granting certiorari in this case is similarly compelling, because the OCCA has signaled that it will continue to act in an unconstitutional manner on this issue until told otherwise by this Court.

CONCLUSION

Shaun Michael Bosse 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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