ORIGINAL

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

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| **SHAUN MICHAEL BOSSE,** | **McClain County District Court Case No. CF-2010-00213** |
| ***Petitioner,*** | **Court of Criminal Appeals Direct Appeal Case No. D-2012-1128** |
| ***-vs-*** | |
| **THE STATE OF OKLAHOMA,** | **Court of Criminal Appeals Prior Post Conviction Case No. PCD-2013-360** |
| ***Respondent.*** | **Post Conviction Case No. PCD-** PCD 2019 124 |

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 20 2019
JOHN D. HADDEN
CLERK

**SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF**

**- DEATH PENALTY -**

Petitioner, Shaun Michael Bosse, through undersigned counsel, submits his second application for post-conviction relief pursuant Section 1089 of Title 22.[1]

The sentences from which relief is sought are: (3) death sentences by lethal injection and First Degree Arson.

**PART A: PROCEDURAL HISTORY**

1. (a) Court in which sentence was rendered: District Court of McClain County, Oklahoma.
   (b) Case Number: CF-2010-00213.
   (c) Court of Criminal Appeals Direct Appeal Case Number: D-2012-1128.

[1] Pursuant Rule 9.7(A)(3) of the Rules of Court of Criminal Appeals, a copy of the original application for post-conviction relief is attached hereto as Att. 1. The appendix of attachments to the original application have not been attached, but are available should the Court find them necessary for its review of the subject application.

2. Formal sentencing occurred on December 18, 2012.

3. Mr. Bosse received three sentences of death for three counts (Counts I , II, and III) of first degree malice aforethought murder, and thirty-five years for one count (Count IV) of First Degree Arson. All sentences were ordered to run consecutively.

4. The Honorable Greg Dixon presided over the trial and sentencing.

5. Mr. Bosse is currently incarcerated at the Oklahoma State Penitentiary H-Unit. He has no other criminal matters pending in any other courts, nor does he have other sentences to be served in other jurisdictions.

## I. Capital Offense Information

6. Mr. Bosse was convicted of the following crime(s) for which a sentence of death was imposed: Three Counts of First Degree Malice Aforethought Murder in violation of Okla. Stat. tit. 21, § 701.7 of the Oklahoma Statutes.

The State alleged the following statutory aggravating factors for the three murder convictions:

a. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

b. The murder was especially heinous, atrocious, or cruel;

c. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society; and

d. The murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

The jury found the following aggravating factors for the three murder convictions:

a. The murders were especially heinous, atrocious, or cruel;

b. During the commission of the crime the defendant created a great risk of death to more than one person;

c. The murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

The following mitigating factors were provided to the jury:

a. Prior to this crime Mr. Bosse did not have any significant history of previous criminal activity; the only other crimes of which the defendant has committed were non-violent.

b. Mr. Bosse's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was greatly impaired by drugs and alcohol.

c. Mr. Bosse has been involved with drug use since his senior year in high school and has been a regular methamphetamine and pill user.

d. Mr. Bosse's father essentially abandoned him and did not maintain a close relationship depriving him of the opportunity to have a proper male role model.

e. Mr. Bosse's father neglected Mr. Bosse and his brother.

f. As a child, Mr. Bosse suffered from head injuries that may have negatively contributed to his mental health.

g. Mr. Bosse suffered from teasing and bullying from his brother.

h. Mr. Bosse's cellmates, family, and friends describe him as generous and helpful.

i. Mr. Bosse is thirty years old.

j. Mr. Bosse will benefit from the structure of prison life.

k. Family members describe Mr. Bosse as having been helpful, cooperative and a contribution to their lives.

l. To Mr. Bosse's friends and family the commission of this crime was a shock and not expected, as it was out of character with Mr. Bosse's personality of being quiet, shy, not losing his temper, and being nonaggressive.

m. Mr. Bosse provided physical assistance to his mother and grandparents by doing chores for them.

n. Mr. Bosse gladly helped friends and family with any requested tasks.

o. Mr. Bosse's friends and family have maintained a relationship with Mr. Bosse since his incarceration.

p. Mr. Bosse's employers described him as a hard worker who was a self-starter who got along with other coworkers.

q. Mr. Bosse's mother and grandmother maintain a close relationship with Mr. Bosse through daily telephone conversations and weekly visitation.

r. Mr. Bosse had a good relationship with his nephew and supported the child by attending sporting events and playing with the child.

s. Jack Bosse, Mr. Bosse's father's alternative bisexual lifestyle was detrimental to his upbringing.

t. Mr. Bosse's mother struggled to provide for her two children.

u. Mr. Bosse's mother suffered from depression when he was a child and struggled to maintain a clean and proper home for her children.

v. Mr. Bosse has family and friends that love him and wish for him to live.

Victim impact testimony was presented during the trial's penalty phase.

7. The finding of guilt was made after a plea of not guilty.

8. The finding of guilt was made by a jury.

9. The sentences imposed were determined by the jury.

## II. Non-Capital Offense Information

10. Mr. Bosse was also convicted of one count (Count IV) of First Degree Arson in violation of 21 O.S. § 1401(A). He received a sentence of thirty-five years imprisonment for Count IV.

11. The finding of guilt was made after a plea of not guilty.

12. The sentence imposed was recommended by the jury.

## III. Case Information

13. Trial Counsel: Gary Henry
Formerly with the Oklahoma Indigent Defense System (OIDS)
Capital Trial Division
P.O. Box 926
Norman, Oklahoma 73070-0926

Mary Bruehl (co-counsel)
Formerly with the Oklahoma Indigent Defense System (OIDS)
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Bobby Lewis
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14. Counsel were appointed by the courts at all stages of this case.[2]

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[2] Mr. Bosse remains indigent, and there have been no changes in his financial status since the district court's determination of indigency and appointment of counsel, which is attached hereto pursuant to Rule 9.7 (A)(3)(h), *Rules of the Oklahoma Court of Criminal Appeals*. Att. 2. Petitioner is being represented in this matter by Assistant Federal Public Defenders Michael W. Lieberman and Sarah M. Jernigan.

15. Mr. Bosse appealed his convictions and sentences to this Court, where it was assigned Case No. D-2012-1128. The Brief in Chief was filed August 6, 2014. The Response Brief was filed December 23, 2014, and a Reply Brief was filed January 26, 2015. Oral argument was held on June 30, 2015. This Court affirmed the convictions and sentences on October 16, 2016. *Bosse v. State*, 360 P.3d 1203 (Okla. Crim. App. 2015). No 3.11 motion was filed on direct appeal, and no evidentiary hearing was held. The United States Supreme Court vacated and remanded this Court's ruling for further proceedings. *Bosse v. Oklahoma*, ___ U.S. ___, 137 S. Ct. 1 (2016). After further briefing, this Court again affirmed the convictions and sentences. *Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017), *cert denied* 138 S.Ct. 1264 (2018).

16. Appellate Counsel:
Michael D. Morehead
Jamie D. Pybas
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070

17. Mr. Bosse's judgments and sentences were upheld by this Court on May 25, 2017. *Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017).

18. Mr. Bosse sought further review by filing a Petition for Writ of Certiorari in the United Supreme Court, which was denied on March 5, 2018. *Bosse v. Oklahoma*, 138 S. Ct. 1264 (2018).

An Original Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2013-1128, on August 3, 2015. The Court denied Mr. Bosse's original application by way of an unpublished opinion on October 16, 2016. The following grounds for relief were raised in the original application:

Proposition I: MR. BOSSE WAS DENIED A FAIR TRIAL DUE TO IMPROPER COMMUNICATION WITH THE JURY.

Proposition II: THE INTRODUCTION OF IMPROPER EVIDENCE VIOLATED MR. BOSSE'S RIGHT TO A FAIR TRIAL.

Proposition III: PROSECUTORIAL MISCONDUCT DEPRIVED MR. BOSSE OF A FAIR TRIAL.

Proposition IV: COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE OKLAHOMA CONSTITUTION BY FAILING TO ADEQUATELY INVESTIGATE EVIDENCE ON BEHALF OF MR. BOSSE.

Proposition V: THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND IN POST CONVICTION RENDERED THE PROCEEDINGS RESULTING IN MR. BOSSE'S DEATH SENTENCES ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCES IN THIS CASE CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW AND MUST BE REVERSED OR MODIFIED TO LIFE IMPRISONMENT OR LIFE WITHOUT PAROLE.

**PART B: GROUNDS FOR RELIEF**

19. A motion for discovery has not been filed with this application.

20. A Motion for Evidentiary Hearing has been filed with this application.

21. No other motions have been filed with this application or prior to the filing of this application.

22. The propositions raised herein are:

PROPOSITION ONE: BECAUSE JURISDICTION FOR INDIAN COUNTRY CRIMES RESTS EXCLUSIVELY IN FEDERAL COURT, OKLAHOMA LACKED JURISDICTION TO PROSECUTE MR. BOSSE, AND HIS CONVICTIONS ARE VOID *AB INITIO*.

PROPOSITION TWO : TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ADEQUATELY INVESTIGATE BOSSE'S LIFE HISTORY, AND FAILING TO ADEQUATELY PREPARE WITNESSES, WHICH DEPRIVED HIM OF A FAIR AND RELIABLE SENTENCING. DIRECT-APPEAL AND POST-CONVICTION COUNSEL WERE EQUALLY INEFFECTIVE FOR FAILING TO RAISE THAT ISSUE. THESE FAILINGS ALL VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

PROPOSITION THREE : THE CUMULATIVE EFFECT OF ERRORS DEPRIVED MR. BOSSE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR CAPITAL SENTENCING UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

## PART C: FACTS

### CITATIONS TO THE RECORD

The trial transcript will be referenced as "Tr." then by volume and page. The motion hearing transcripts shall be referenced as "month/day/year Tr." followed by page number. The original record shall be referred to by volume as "O.R." followed by page number. Trial exhibits shall be referenced as "Def. Ex. #," "St. Ex. #," or "Ct. Ex. #." Attachments to the Original Post-Conviction Application shall be referred to as "PC Att. #." Finally, exhibits attached to this Application shall be referred to simply as "Att." followed by the number.

### STATEMENT OF THE CASE

On August 6, 2010, Mr. Bosse was charged by Information in McClain County District Court Case No. CF-2010-213 with three counts (Counts l-3) of Murder in the First Degree (21 O.S. 2011, § 701.l(A)(1), and one count (Count 4) of Arson in the First Degree (21 O.S. 2011, § 1401(A)). (O.R. 30-31). On March 3, 2011, the State filed a Bill of Particulars, alleging four aggravating circumstances as to each of the three victims: (1) the murders were especially heinous, atrocious, or cruel (21 O.S. 2011, § 701.12(4)), (2) the defendant knowingly created a great risk of death to more than one person (21 O.S. 2011, § 701.12(2)), (3) at the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society (21 O.S. 2011, § 701.12(7)), and (4) the murders were committed for the purpose of avoiding or preventing a lawful

arrest or prosecution (21 O.S. 2011, § 701.12(5)). (O.R. 63).

On August 31, 2011, Mr. Bosse waived his right to a preliminary hearing. (O.R. 95).

On September 28, 2012, through November 2, 2012, Mr. Bosse was tried by a jury. Mr. Bosse was represented by Gary Henry, Mary Bruehl, and Bobby Lewis. The State of Oklahoma was represented by District Attorney Greg Mashburn, and Assistant District Attorneys Susan Caswell and Lori Puckett. The Honorable Greg Dixon, District Judge, presided over the proceedings.

On October 29, 2012, the jury found Mr. Bosse guilty of three counts of First-Degree Malice Aforethought Murder and one count of First Degree Arson. (O.R. 1011-1014; Tr. IX 108-09). The jury assessed punishment at thirty-five years imprisonment and a fine of $25,000 on the arson count. (O.R.1014; Tr. IX 109). At the conclusion of the capital sentencing phase, the jury found the existence of three aggravating circumstances on all three counts: (1) the murders were especially heinous, atrocious, or cruel, (2) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person, and (3) the murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution. (O.R. 1090; Tr. XII 76-77). The jury assessed a sentence of death for all three counts. (O.R. 1093-95; Tr. XII 77).

On December 18, 2012, the trial court formally sentenced Mr. Bosse in accordance with the jury's verdict, with all sentences to run consecutively, beginning with Count 1. (O.R. 1117-20; Sent. Tr. 8-9).

Mr. Bosse appealed his convictions and sentences to this Court, where it was assigned Case No. D-2012-1128. The Brief-in-Chief was filed August 6, 2014. The Response Brief was filed December

23, 2014, and a Reply Brief was filed January 26, 2015. Oral argument was held on June 30, 2015. This Court affirmed the convictions and sentences on October 16, 2016. *Bosse v. State*, 360 P.3d 1203 (Okla. Crim. App. 2015). No 3.11 motion was filed on direct appeal, and no evidentiary hearing was held. The United States Supreme Court vacated and remanded this Court's ruling for further proceedings. *Bosse v. Oklahoma*, ___ U.S. ___, 137 S.Ct. 1 (2016). After further briefing, this Court again affirmed the convictions and sentences. *Bosse v. State*, 400 P.3d 834 (Okla. Crim. App. 2017), *cert denied* 138 S.Ct. 1264 (2018).

Mr. Bosse filed an Original Application for Post-Conviction Relief in this Court on August 3, 2015. That APCR was assigned Case No. PCD-2013-360. The State filed a response on November 11, 2015, and this Court issued an opinion denying relief on December 16, 2015.

In addition to this Second Application for Post-Conviction Relief, Bosse is also filing in the United States District Court for the Western District of Oklahoma a Petition for a Writ of Habeas Corpus. That case has been assigned Case No. CIV-18-204-R.

## STATEMENT OF THE FACTS

This case involves the deaths of Katrina Griffin, 24, and her two children, Christian Griffin, 8, and Chasity Hammer, 6, who died in their trailer home in Dibble, Oklahoma, on July 23, 2010. Ms. Griffin and Christian died of multiple stab wounds. Chasity died of smoke inhalation and thermal injury caused when the trailer caught fire.

Ms. Griffin was a homebody and single mom, who had a seizure disorder and did not drive or work outside the home. She depended on her parents (who lived on the same property) and others for

support. Her children spent a lot of time at home, watching TV and movies. There were many TVs in the house. (Tr. I 35, 49, 50-53). Ms. Griffin was protective of her belongings and would put her initials, "KRG," on every movie she bought to avoid getting them mixed up if she traded them with anyone. (Tr. I 53). She also kept a list of people to whom she loaned movies. (Tr. I 56). According to her stepmother, Ginger Griffin, she recently was approved to receive disability for her seizure disorder. She received some back pay, which she used to buy new furniture, TVs, and a laptop. (Tr. I 54-55).

About two weeks before her death, Ms. Griffin met Bosse online. Bosse would come over to the trailer and they would play video games. He spent the night at the trailer a couple of times. (Tr. I 43). On July 17, 2010, Ms. Griffin's cousin, Heather Molloy, and Heather's boyfriend, Henry Price, visited Ms. Griffin's trailer to "hang out and have a good time." (Tr. II 88). Bosse was also there. Heather and Henry stayed until midnight or so, and Bosse remained behind. Everything seemed fine. (Tr. II 91).

On July 22, 2010, Ms. Griffin and Christian noticed some video games were missing. Ms. Griffin suspected Henry Price had stolen them. They called Ms. Griffin's step-mother to see if Christian had left some of them at her house, but she did not have them. (Tr. I 59). After calling Heather about the missing games, Katrina and Bosse went over to Heather's house to search for them. Heather and Henry did not answer the door so they returned home. (Tr. II 92-93). After they returned to the trailer, Ms. Griffin called a deputy sheriff, who came and took a report about the missing property. When the deputy came to the trailer, Bosse was there, wearing a t-shirt and blue jeans. The deputy, who did not notice Bosse acting suspicious or peculiar, left at about 12:30 a.m. on July 23, 2010. (Tr. II 102, 111).

Later that morning, Ms. Griffin's step-mother left for work at 7 a.m., passing her step-daughter's trailer on the way. She did not notice anything unusual, nor did she see Bosse's vehicle in the driveway. (Tr. I 63). Shortly before 9 a.m., Daryl Wesley Dobbs, who lived down the road from Ms. Griffin, was on his way to work when he noticed smoke coming out of the trailer. He called 9-1-1, then went up to the trailer to see if anyone was home. He banged on the doors and windows. (Tr. I 90-95).

Dibble Police Chief Walt Thompson arrived within five minutes of Dobbs, who he observed trying to hose down the roof. (Tr. I 107, 135). Chief Thompson helped Dobbs bang on the doors and windows. Mr. Dobbs opened the front door and smoke rolled out, forcing Dobbs back. (Tr. I 142). Within a minute or two of Mr. Dobbs opening the front door, flames appeared. (Tr. I 143).

Chief Thompson broke open a window and yelled inside to attempt to get a response. (Tr. I 136, 138; Tr. V 52-53). After Chief Thompson broke out the window, he put his head through it. Although there were no flames, he received a facial burn from the heat of the smoke. He did not hear any responses from that particular room. (Tr. I 140).

By the time the fire department arrived, approximately three to four minutes after Dobbs and Chief Thompson, they had been alerted to the possibility there were occupants inside. Two firemen entered the front door after suiting up. They went toward the right or the north end of the trailer, where the children's bedrooms were located. (Tr. I 99, 108, 118, 144, 146-47, 180). As they began to run out of oxygen, they exited the trailer. A second two-person fire fighter team entered the trailer, going to the left, through the living room, kitchen, laundry room then the master bedroom. (Tr. I148, 181-82).

They found two bodies, later determined to be Katrina and Christian Griffin in the master bedroom. The firefighters then had to leave because the room became too hot. (Tr. I 191; Tr. II 23, 29; Tr. IV 142).

Chasity's body was eventually found in the closet of the master bedroom under a pile of debris. (Tr. IV 130). She was burned with soot in her stomach and lungs.

The sheriff's department, with help from the State Fire Marshal and the OSBI, processed the scene. Authorities began searching for Bosse, as they were told by Ms. Griffin's family members that he and Ms. Griffin were dating. (Tr. I 160-62; Tr. II 123-24).

Bosse's mother saw him at the apartment they shared in Oklahoma City at about 6:00 a.m. on July 23. He left the apartment between 6:15 and 6:30 a.m. and went to Oklahoma City Community College (OCCC), where he logged onto computers at about 7:30 a.m. (Tr. II 151, 187-88; Tr. III 28).

Bosse also visited various Oklahoma City-area pawn shops, pawning items later determined to belong to Ms. Griffin. He pawned movies, movie collections, and TVs and VCRs belonging to Ms. Griffin. (Tr. II 128, 146, 167-68, 186, 193, 231, 268).

Bosse received a telephone call at approximately 2:30 p.m. from Detective Dan Huff of the McClain County Sheriff's Office asking him to come to their office. Bosse agreed and met at approximately 4:00 p.m. with Detectives Huff and David Tompkins, and OSBI Agent Bob Horn; the interview lasted 50 to 60 minutes and was audio and video recorded. (Tr. II 152, 154-57; State's Exhibit 301).

When Bosse arrived, the detectives noticed he had red knuckles, as if he had been punching

something. They also noticed blood on his tennis shoes and a scratch on his arm. (Tr. II 174, 203-206; Tr. III 31-32). He told detectives several things about his whereabouts earlier in the day that did not check out. Bosse asked if Ms. Griffin was OK, but did not mention pawning her possessions to the detectives. (Tr. II 210-11, 218; Tr. III 35-37).

Although Bosse refused to let detectives physically search his truck, he did agree to let them photograph what was inside. (Tr. II 170-72). They photographed several items of interest, including a laptop computer, several movies, and a Play Station. (Tr. II 232). Ms. Griffin's family later identified the items seen in the photographs as possessions of Ms. Griffin. They also identified receipts for the missing items. (Tr. I 70-73, 77-79; Tr. II 158, 170-72, 220-21, 224-29, 231-32; Tr. III 59-63).

The officers released Bosse, but two hours later, OSBI agents arrested him at the apartment he shared with his mother. When the agents arrived, Bosse was there, along with his mother and brother, Matthew Bosse. (Tr. III 116).

Bosse gave permission for authorities to search his truck, but the property previously photographed was gone, with the exception of some movies, which were found in his bedroom. (Tr. II 188-89; Tr. III 28-30). Agent Akers found Bosse's billfold in the truck. Inside the billfold, the agent found pawn tickets. When asked about the pawn tickets, Bosse appeared nervous, after which he was arrested. (Tr. II 191; Tr. III 40-44).

Several Oklahoma City-area pawn brokers confirmed Bosse pawned items identified as belonging to Ms. Griffin. (Tr. III 119-275). During a search of Bosse's apartment, agents found items taken from Ms. Griffin's trailer, as well as blood on his bathroom towels and by his laundry basket.

They also found a wadded-up bloody pair of jeans in the back corner of his closet. The jeans and Bosse's tennis shoes with blood spots were sent to the OSBI lab for DNA testing. The DNA tests linked Bosse to the victims. (Tr. VII 102-11). OSBI criminologists further linked Bosse to the crime via his fingerprints on items taken from Ms. Griffin's trailer. (Tr. IV 56-64).

Tests conducted by the Bureau of Alcohol, Firearms and Tobacco concluded the fire was set on the living room couch, where it flamed, then smoldered for several hours. (Tr. V 119-20, 142,147; VI Tr.180). An autopsy on the three bodies revealed Ms. Griffin had thermal burns to her entire body, as well as eight stab wounds. Her right hand had defensive wounds. (Tr. II 40; Tr. III 94-98; Tr. IV 156; Tr. V 78-81, 223, 229-30). Medical Examiner Inas Yacoub, who performed the autopsy on Ms. Griffin, testified "the sharp force trauma to the neck, because of the bleeding associated with it, including the bleeding inside the airway" was fatal. (Tr. V 226, 231-32). Dr. Yacoub testified Christian "died of multiple stab wounds." (Tr. VI 30). Dr. Yacoub opined Chasity died "from smoke inhalation and thermal injury." (Tr. VI 83).

Additional facts will be discussed as they relate to the various propositions of error.

## PART D: PROPOSITIONS, ARGUMENTS, AND AUTHORITIES

### PROPOSITION ONE

**BECAUSE JURISDICTION FOR INDIAN COUNTRY CRIMES RESTS EXCLUSIVELY IN FEDERAL COURT, OKLAHOMA LACKED JURISDICTION TO PROSECUTE BOSSE, AND HIS CONVICTIONS ARE VOID *AB INITIO*.**

The crimes charged in this case occurred in Indian Country – namely, within the boundaries of the Chickasaw Reservation. The victims were all members of the Chickasaw Tribe. And the crimes

were prosecuted by the State of Oklahoma even though "the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country." *Cravatt v. State*, 1992 OK CR 6 ¶ 15, 825 P.2d 277, 279 (citing *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403). Jurisdiction to prosecute this case is exclusively federal. *The General Crimes Act*, 18 U.S.C. § 1152. *See also Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert granted sub nom Royal v. Murphy*, 138 S. Ct. 2026 (2018) (oral argument November 27, 2018). Mr. Bosse's convictions must be vacated for lack of subject-matter jurisdiction.

### A. Questions About the Trial Court's Jurisdiction Can Be Raised at Any Time and Are Never Waived.

Questions regarding whether the trial court had subject matter jurisdiction are always ripe for resolution, and the issue can, therefore, be raised at any time, even if not preserved below. *See, e.g., Buis v. State*, 1990 OK CR 28 ¶ 4, 792 P.2d 427, 428-29 (vacating conviction for lack of subject matter jurisdiction of trial court although issue not raised until petition for rehearing); *Johnson v. State*, 1980 OK CR 45 ¶ 30, 611 P.2d 1137, 1145 ("There are, of course, some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be raised at any time"). *See also Albrecht v. United States*, 273 U.S. 1, 8 (1927) ("a person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court").

This Court has applied this principle to consider jurisdictional issues raised for the first time in several Indian Country cases. *See, e.g., Magnan v. State*, 2009 OK CR 19 ¶¶ 9-10, 207 P.3d 397, 402 (remanding for evidentiary hearing on whether crime occurred in Indian Country where issue had not been raised below, and defendant pled guilty, waiving direct appeal, but raised jurisdiction question as

part of mandatory sentence review proceeding); *Murphy v. State*, 2005 OK CR 25 ¶¶ 6-11, 124 P.3d 1198, 1200-01 (remanding for evidentiary hearing where Indian Country issue not raised until second application for post-conviction relief); *Cravatt*, 825 P.2d at 278 (remanding for evidentiary hearing on Indian Country claim where issue was not raised until the day before oral argument).

**B. Federal Law Provides for Exclusive Federal Jurisdiction over Murders Committed by or Against Indians in Indian Country.**

All murders committed by or against Indians in "Indian Country" are subject to exclusive federal jurisdiction. If an Indian is either the victim or perpetrator of a murder in Indian Country, federal courts are the only courts with jurisdiction. *See United States Department of Justice Indian Country Criminal Jurisdiction Chart*, https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20_Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf (last visited January 29, 2019). *See also* 18 U.S.C. § 1152 ("The General Crimes Act"); 18 U.S.C. § 1153 ("The Indian Major Crimes Act"). "Indian Country" is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

18 U.S.C. § 1151. Oklahoma has no jurisdiction over any crime committed by or against an Indian within Indian Country. *See Cravatt,* 825 P.2d at 279 (citing *Klindt*, 782 P.2d at 403). Therefore, the Court must determine: (1) If the victim or perpetrator was Indian; and (2) If the crime occurred in Indian Country.

**C. The Victims Were Members of the Chickasaw Tribe.**

The requirement of establishing the Indian status of the victims is easily satisfied in this case.

Katrina and Christian Griffin, and Chasity Hammer were all members of the Chickasaw Tribe.0

In order to establish Indian status under federal law, the person whose status is in issue must (1) have some degree of Indian blood; and (2) must be recognized as an Indian by some tribe or society of Indians or by the federal government. *See United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) (citing *United States v. Rogers*, 45 U.S. (4 How.) 567, 11 L. Ed. 1105 (1846)). *See also Goforth*, 644 P.2d at 116.

Katrina Griffin, Christian Griffin, and Chasity Hammer all had some degree of Indian blood and were recognized by the Chickasaw Nation as Indians. Specifically, the Chickasaw Nation has certified that each of the 3 victims "possessed a CDIB [Certificate of Degree of Indian Blood] showing her/his degree of... Indian Blood" and that each "was recognized as a Chickasaw Nation Citizen." Att. 3 (Tribal Enrollment Verification for Katrina Griffin); Att. 4 (Tribal Enrollment Verification for Christian Joe Griffin); Att. 5 (Tribal Enrollment Verification for Chasity Renea Hammer). Accordingly, under the two-part test recognized in *Rogers*, *Dodge*, and *Goforth*, each of the three victims was an Indian.

**D. This Crime, Which Occurred in McClain County, Oklahoma, Was Committed Within the Original Undiminished Boundaries of the Chickasaw Reservation, and Thus, Occurred in Indian Country.**

As noted above, for purposes of determining jurisdiction, 18 U.S.C. § 1151(a) defines "Indian Country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

The Chickasaw reservation encompasses all or parts of thirteen counties, including all of McClain County. *See* https://www.chickasaw.net/Our-Nation/Government/Geographic- Information.aspx (last visited January 31, 2019).

A thorough review of McClain County land records confirms the land where the offenses occurred was originally allotted directly from the Choctaw and Chickasaw Nations to Mary Roberts and George Roberts. *See* Att. 6 (Affidavit of Julie Gardner). Because the crimes occurred on land located within the boundaries of the Chickasaw Reservation, it occurred in Indian Country. Therefore, Oklahoma had no authority to prosecute Mr. Bosse in this case.

**E. The 1866 Chickasaw Reservation Was Never Disestablished or Diminished by Congress.**

Only Congress creates reservations, and only Congress can disestablish or diminish a reservation. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Allotment without more does not disestablish or diminish a reservation. *Matz v. Arnett*, 412 U.S. 481, 497 (1973) (explaining allotment can be "completely consistent with continued reservation status"). Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation. *DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444 (1975). The "rule by which legal ambiguities are resolved to the benefit of the Indians" is applied to its "broadest possible scope" in disestablishment and diminishment cases. *Id.* at 447.

There is a presumption that an Indian reservation continues to exist until Congress acts clearly to disestablish or diminish it. *Solem v. Bartlett*, 465 U.S. 463 (1984) (successful federal habeas challenge to state jurisdiction over an attempted rape by member of the Cheyenne River Sioux Tribe).

In *Solem*, the Court held:

> The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

*Id.* at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Congressional intent to diminish a reservation "will not be lightly inferred," and Congress must "clearly evince an intent . . . to change . . . boundaries before diminishment will be found." *Solem,* 465 U.S. at 470 (ellipses in original). Absent evidence of such intent, courts "are bound . . . to rule that diminishment did not take place and that the old reservation boundaries survived." *Id.* at 472.

The framework to determine whether a reservation has been diminished or disestablished is well-settled. *Nebraska v. Parker*, ___ U.S. ___, 136 S. Ct. 1072, 1078 (2016). As with any question of statutory construction, that analysis begins with (1) the text of the statute itself, then (2) the history surrounding passage of the statute, and finally (3) the demographic history and treatment of the lands by the federal, state, and tribal governments. *Solem*, 465 U.S. at 471-72; *Parker*, 136 S. Ct. at 1078-79. In *Parker*, the Court said this third factor is the least probative of the three. *Id.* at 1079-82. Specifically, the Court noted:

> Our cases suggest that such evidence might "reinforc[e]" a finding of diminishment or non-diminishment based on the text. *Mattz*, 412 U.S., at 505, 93 S.Ct. 2245; *see also, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–605, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (invoking subsequent history to reject a petitioner's "strained" textual reading of a congressional Act). *But this Court has never relied solely on this third consideration to find diminishment.*

*Parker*, 136 S. Ct. at 1081 (emphasis added).

## F. The Chickasaw Nation's Treaty History.

The original homeland of the Chickasaw people in America consisted of vast lands scattered across parts of southwestern Kentucky, western Tennessee, northern Mississippi, and northwestern Alabama. https://www.chickasaw.net/Our-Nation/History/Homelands.aspx (last visited January 31, 2019). For the first part of their history in Indian Territory, the Chickasaw shared territory with the Choctaw Nation. But in 1855, the Nations entered an agreement to split their shared territory.

In the Treaty of Doak's Stand, Oct. 18, 1820 ("1820 Treaty"), 7 Stat. 210, the Choctaw Nation exchanged "approximately half of its remaining Mississippi lands for a large tract of land in the Arkansas Territory and an even larger one further west," to which it was to remove until it became apparent that at least a portion of the Arkansas Territory lands was already occupied by settlers. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 624 (1970).[3] That "made many of [the Choctaws] doubt that the United States would protect them in their new lands." *Id.* at 625.

To overcome some of those concerns, the Choctaws and the United States entered into the Treaty of Dancing Rabbit Creek, Sept. 30, 1830, 7 Stat. 333 ("1830 Treaty"). That treaty secured "a tract of country west of the Mississippi River" to the Choctaw Nation to "exist as a nation and live on it," *id.* art. 2, and the "jurisdiction and government" over "all the persons and property" within that

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[3] The Choctaws ceded the Arkansas Territory lands granted to them in the 1820 Treaty back to the United States in the Treaty of January 20, 1825, 7 Stat. 234. In so doing, the 1825 Treaty used very clear cession language. Specifically, in Article 1 of the Treaty, "The Choctaw Nation do hereby cede to the United States all that portion of the land ceded to them by the second article of the Treaty of Doak Stand." Article 2 then provides, "In consideration of the cession aforesaid, the United States do hereby agree to pay the said Choctaw Nation the sum of six thousand dollars, annually, forever."

territory (the "Treaty Territory")." *Id.* art. 4. The 1830 Treaty "provide[s] for the [Nations'] sovereignty within Indian country." *Okla. Tax Comm'n*, 515 U.S. at 466.[4]

Then, in 1837, in the Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573, the Chickasaw Nation secured an undivided one-fourth interest to the Treaty Territory "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws)." *Id. See also Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995); *Choctaw Nation*, 397 U.S. at 626.

Because the Treaty Territory was secured to the Nations by the 1830 Treaty, their right to those lands is protected by federal law. As the term "reservation" simply refers to lands reserved for a tribe over which Congress intended that primary jurisdiction be exercised by the federal and tribal governments, *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 974 (10th Cir 1987); *see United States v. McGowan*, 302 U.S. 535, 538-39; (1938); *United States v. Chavez*, 290 U.S. 357, 364 (1933), the Treaty Territory is a reservation, as Articles 2 and 4 of the 1830 Treaty make clear. Were that in doubt, it would be resolved by the rule "that treaties with the Indians must be interpreted as they would have understood them," and "any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation*, 397 U.S. at 631 (citations omitted); 1830 Treaty art. 18 (restating that rule).

At about this same time, Congress passed the Indian Removal Act, on May 28, 1830, which gave the President direct authority to negotiate removal treaties for the "Five Civilized Tribes" from

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[4] The Nations' right to the reservation granted under the 1830 Treaty was reaffirmed in Article 1 of the 1855 Treaty of Washington ("1855 Treaty"), 11 Stat. 611.

their southeastern homelands to the Indian Territory.[5] https://www.britannica.com/topic/Indian-Removal-Act (last visited January 28, 2019). The Five Civilized Tribes consisted of the Choctaws, Chickasaws, Cherokees, Creeks/Muscogees, and Seminoles. *See* ch. 209, 27 Stat. 645 (March 3, 1893).

The Chickasaws were among the last tribes to remove to Indian Territory. Though they met with hardship and death during removal, they were spared some of the worst because they had negotiated for more control over their departure and were able to travel during more favorable seasons than people of the other tribes. Most Chickasaws removed to Indian Territory from 1837-1851. Chickasaws originally settled in their own district within Choctaw Territory pursuant to the Treaty of Doaksville. However, in 1856, the Chickasaw separated from the Choctaws and created their own constitution for their separate lands. https://www.chickasaw.net/Our-Nation/History/Removal.aspx (last visited January 31, 2019).

In 1855, in the Treaty of Washington, the Choctaws, Chickasaws, and the United States agreed to separate districts within the 1830 boundaries of the Treaty Territory for each Nation, thereby creating a Choctaw District and a Chickasaw District. *See* https://www.choctawnation.com/sites/default/files/2015/09/29/1855treaty_original.pdf (last visited January 31, 2019). Although the exterior boundaries of the reservation were in no way altered, the territory within those boundaries was divided between the Nations. Then, following the Civil War, the Nations entered

[5] With this Act, so began the "Trail of Tears" that led to the forced relocation of several Indian tribes from their ancestral land to the Indian Territory.

into the 1866 Treaty of Washington ("1866 Treaty"), Act of Apr. 28, 1866, 14 Stat. 769, in which the Nations "cede[d] to the United States the territory west of the [98th meridian]," *id.* art. 3, modifying only the Reservation's western boundary. But, other than the western portion ceded back to the United States, "[t]he United States reaffirm[ed] all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations" with regard to the remainder of the Nations' territory. *Id.* art. 10.

The borders of the Chickasaw (and Choctaw) Reservation have remained unaltered since this 1866 Treaty.

## G. Application of the *Solem/Parker* Factors Demonstrates That the Chickasaw Reservation Has Not Been Diminished or Disestablished.

### 1. Step One – Statutory Text.

The first step in considering reservation disestablishment – the statutory text – is the "most important step" of the *Solem* framework. *Parker*, 136 S. Ct. at 1080. This step requires the examination of the text of the statute purportedly disestablishing or diminishing the reservation. The express statutory language is "[t]he most probative evidence of congressional intent." *Solem*, 465 U.S. at 470. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* When such language is combined with language committing Congress to compensate the tribe for its land with a fixed sum, Congress's intent to diminish a reservation is especially clear. *Id.* at 470-71. Restoration of the land to the public domain may also be an indicator of Congressional intent to disestablish or diminish a reservation. *Id.* at 475. *See also Parker*, 136 S. Ct. at 1079.

The Tenth Circuit recently reviewed, in detail, the federal policies and statutes from the allotment and post-allotment eras as they relate to the Five Tribes. *Murphy*, 875 F.3d at 939-48.[6] It did so to provide historical context. The circuit relied primarily on *Indian Country, U.S.A.* to review some of the more significant federal statutes affecting the Five Tribes Nations. In the end, the court identified no statutory text that acted to diminish or disestablish the Creek Reservation. The same is true of the Chickasaw Reservation.

Congress knows how to alter reservation boundaries when that is what it wants to do. These examples of text are hallmarks of disestablishment or diminishment demonstrating that Congress knows how to clearly reflect its intent to alter reservation boundaries:

- "[T]he Smith River reservation is hereby discontinued." Act of July 27, 1868, ch. 248, 15 Stat. 198, 221 (cited in *Mattz v. Arnett*, 412 U.S. 481, 504, n.22 (1973) an example of "clear language of express termination").

- The Colville reservation was "vacated and restored to the public domain." Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 62-63 (cited in *Mattz*, 412 U.S. at 504, n. 22 (1973), as an example of "clear language of express termination"; and referenced in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) as example of diminishment language).

- "[A]ll the unallotted lands within said [Unitah] reservation shall be restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 245, 263 (discussed in *Hagen v. Utah*, 510 U.S. 399, 412 (1994), which noted that "Congress considered Indian reservations as separate from the public domain").

- "[T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished." Act of April 21, 1904, ch. 1409, 33 Stat. 189,

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[6] In *Murphy*, the Tenth Circuit was specifically considering whether the Creek Reservation had been diminished or disestablished, but many of the statutes it reviewed for that purpose applied equally to the rest of the Five Tribes.

218 (cited as example of "clear language of express termination" in *Mattz*, 412 U.S. at 504, n.22).

- "Subject to the allotment of land . . . and for the considerations hereinafter mentioned . . . [the] Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in" an identified tract in Indian Territory. Act of June 6, 1900, ch. 813, art. 1, 31 Stat. 672, 676-77 (discussed in *Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950), as example of language "disestablish[ing] the organized reservation").

- Indians "belonging on" the Shoshone or Wind River reservation "do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation." Act of March 3, 1905, ch. 1452, 33 Stat. 1016, 1016 (described in *Wyoming v. EPA*, 849 F.3d 861, 871 (10th Cir. 2017) as "express language of cession" notwithstanding the absence of the words "sell" or "convey").

*Murphy*, 875 F.3d at 948-49.

There are no statutes that use any of the hallmark language above that would demonstrate congressional intent to alter the Chickasaw Nation reservation's boundaries as they existed after the 1866 Treaty.[7] There are also no statutes providing for payment of a fixed sum to the Chickasaw Nation or restoring the Nation's reservation to the public domain. The Chickasaw reservation remains intact.

2. Step Two - Events Surrounding the Enactment of the Allotment Act.

"At step two of the *Solem* analysis, courts consider how pertinent legislation was understood to affect the reservation when it was enacted. Evidence of this contemporary understanding may include

[7] In *Murphy*, both in its briefing and during oral argument, the State conceded that it could not point to any statutory text clearly disestablishing the Creek Reservation. *Murphy*, 875 F.3d at 938-39, 948. Because most of the statutes relied upon by the State in *Murphy* applied to all of the Five Tribes, the same concession is expected here.

the negotiations between the tribe and the federal government, congressional floor debates, and committee reports about the relevant statutes." *Murphy*, 875 F.3d at 954 (citing *Solem*, 465 U.S. at 476-78). "When the statutory text at step one does not reveal that Congress has disestablished or diminished a reservation, such a finding requires 'unambiguous evidence' that 'unequivocally reveals' congressional intent." *Murphy*, 875 F.3d at 954 (citing *Parker*, 136 S. Ct. at 1080-81). *See also Solem*, 465 U.S. at 478 ("[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish [a reservation].").

The *Murphy* court examined all the "Step Two" evidence presented by both the State and Mr. Murphy (along with the Creek Nation), *Murphy*, 875 F.3d at 954-60, and found "there is no unequivocal evidence of a contemporaneous understanding that the legislation terminated or redrew the Creek Nation's borders at step two." *Id.* at 960. Because the majority of that evidence was applicable to all of the Five Tribes, the same result applies here.

For example, one such item of evidence of contemporary understanding is an Attorney General opinion from 1900. 23 U.S. Op. Atty. Gen. 214 (U.S.A.G.), 1900 WL 1001.

> Responding to an inquiry from the Secretary of the Interior about the presence of non-Indians in the Indian Territory, the Attorney General explained that the Tribes, even after passage of the Curtis Act, still had the power to exclude intruders and to set the terms upon which non-members could enter the Tribes lands. *See id.* at 215-18. The opinion said the Tribes could regulate activity within their borders because, although outsiders could purchase town lots, "the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation." *Id.* at 217. Tribal laws "requiring a permit to reside or carry on business in the Indian country" were still in effect. *Id.* Non-members grazing cattle or otherwise occupying Indian lands were "simply intruders" who "should be removed, unless they obtain such

permit and pay the required tax, or permit, or license fee." *Id.* at 219. The Attorney General concluded the Secretary of the Interior had

> the authority and duty . . . to remove all persons of the classes forbidden by treaty or law, who are there without Indian permit or license; to close all business which requires a permit or license and is being carried on there without one; and to remo[v]e all cattle being pastured on the public land without Indian permit or license, where such license or permit is required; and this is not intended as an enumeration or summary of all the powers or duties of your Department in this direction.

*Id.* at 220.

*Murphy*, 875 F.3d at 957-58. Indeed, in that opinion, the Attorney General notes, "So far as concerns the Choctaw and Chickasaw nations . . . this question was passed upon by my predecessor, Attorney-General [sic] Wayne MacVeagh, who held (17 Opin. 134) that such permit and license laws, with their tax, were valid and must be enforced." 23 U.S. Op. Atty. Gen. at 216.

The 1894 Dawes Commission Report to Congress "discussed the Commission's negotiations and explained the Tribes had refused to discuss changes 'in respect either to their form of government or the holdings of their domains.' Dep't of the Interior, H.R. Doc. No. 53-1, at LIX-LX (3d Sess. 1894). The Commission explained to Congress it had proposed allotment after 'abandon[ing] all idea of purchasing' tribal lands because '*the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government.*' *Id.* at LVX." *Murphy*, 875 F.3d at 957 (emphasis added).

Similarly, in its 1900 report to Congress, the Dawes Commission again noted the impossibility of achieving cession from any of the Five Tribes:

> Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, the tribes to receive its equivalent in value, preferably

> a stipulated amount of the land thus ceded, equalizing values with cash, the duties of the commission would have been immeasurably simplified, and the Government would have been saved incalculable expense. . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions.

Dep't of the Interior, H.R. Doc. No. 56-5, at 9 (2d Sess. 1900). *See also Murphy*, 875 F.3d at 958.

There is not unequivocal evidence of a contemporary understanding that Congress intended for the Chickasaw Nation's reservation to be diminished or disestablished. Again, the territory remains intact.

3. Step Three – Events Subsequent to Enactment of the Allotment Act.

At step three, courts "consider . . . 'federal and local authorities' approaches to the lands in question and . . . the area's subsequent demographic history." *Id.* at 960. *See also Solem*, 465 U.S. at 471, 104 S. Ct. 1161; *Parker*, 136 S. Ct. at 1081 (considering tribal presence in contested territory). This step is the least probative of the three and will never support a finding of diminishment on its own. *Id.* Here, though, this step also weighs in favor of finding the 1866 boundaries of the reservation have been preserved.

The Chickasaw Nation exercises sovereignty under a constitution approved by the Secretary of the Interior. Chickasaw Const. arts. XII, XIII, *available at* https://chickasaw.net/ getattachment/Our-Nation/Government/Chickasaw-Constitution/ CN_Constituion_Amended2002.pdf.aspx?lang=en-US (last visited January 28, 2019). The Chickasaw Nation governs within the boundaries described in the 1855 and 1866 Treaties. Chickasaw Const. prmbl. Its citizenship is defined by the Constitution, *id.* art. I, and legislative authority is vested in a Tribal Council, elected from districts defined with reference

to the Treaty Territory boundaries, *id.* art. VI, §§ 1, 3. Adjudicatory authority is held by the Judicial Department. *Id.* arts. XII, XIII. The Tribal District Court has territorial jurisdiction over "all territory described as Indian Country within the meaning of Section 1151 of Title 18 of the United States Code over which the Chickasaw Nation has authority." Chickasaw Code tit. 5 § 5-201.3, *available at* https://code.chickasaw. net/Title-05.aspx (last visited January 28, 2019). And the Chickasaw Supreme Court has appellate jurisdiction "coextensive with the Chickasaw Nation." *Id.* Amend. V, § 4.

It is clear the Chickasaw Nation continues to exercise sovereign authority over their treaty-guaranteed reservation lands to this day. The Nation provides governmental services within its Treaty boundaries that benefit both Indians and non-Indians. It maintains a police department that protects public safety.[8] The Nation operates a hospital and health centers.[9] The Nation also provides various educational services, including childcare and early childhood programs;[10] family support services;[11] summer programs; Adult Education, High School Equivalency certification;[12] vocational rehabilitation

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[8] *Lighthorse Police*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Government/Lighthorse-Police.aspx (last visited January 28, 2019).

[9] *Chickasaw Nation Medical Center*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Locations/Chickasaw-Nation-Medical-Center.aspx (last visited January 28, 2019).

[10] *Chickasaw Nation Early Childhood and Head Start Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Nation-Early-Childhood-and-Head-Start-Program.aspx (last visited January 28, 2019).

[11] *Chokka Chaffa' (One Family),* Chickasaw Nation, https://www.chickasaw.net/Services/Chokka-Chaffa%EA%9E%8C-(One-Family).aspx (last visited January 28, 2019).

[12] *Adult Learning Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Adult-Learning-Program.aspx (last visited January 28, 2019).

programs;[13] a Chickasaw Language Revitalization Program;[14] and an Adolescent Treatment Center that offers a "multi-level program" for adolescents and their families.[15] The Nation provides direct services to public schools that operate within its boundaries.[16] The Nation also provides services for substance abuse recovery, family preservation, family violence prevention,[17] domestic violence shelters, and a group home for Indian children.[18]

The Chickasaw Nation drives the economy in south-central Oklahoma, operating travel stops.[19] It also owns and operates several hotels and casinos and a premium quality chocolate business. Its Chickasaw Nation Industries is wholly owned by the Chickasaw Nation and serves as a holding

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[13] *Vocational Rehabilitation*, Chickasaw Nation, https://www.chickasaw.net/Services/Vocational-rehabilitation.aspx (last visited January 28, 2019).

[14] https://www.chickasaw.net/Services/Chickasaw-Language-revitalization-Program.aspx (last visited January 31, 2019).

[15] https://www.chickasaw.net/Services/Aalhakoffichi-(A-Place-For-Healing).aspx (last visited January 31, 2019).

[16] https://www.chickasaw.net/Services/Direct-Service-to-Public-Schools.aspx (last visited January 31, 2019).

[17] https://www.chickasaw.net/Services/Domestic-Violence-Services.aspx (last visited January 31, 2019); https://www.chickasaw.net/Services/Batterer's-Intervention-Services.aspx (last visited January 31, 2019); https://www.chickasaw.net/Services/Behavior-Health-Psychiatry.aspx (last visited January 31, 2019); https://www.chickasaw.net/Services/Behavioral-Health-Services.aspx (last visited January 31, 2019).

[18] *Chickasaw Children's Village*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Children's-Village.aspx (last visited January 28, 2019).

[19] https://www.chickasawtravelstop.com/daily-deals (last visited January 31, 2019).

company with over a dozen subsidiaries engaged in multiple lines of business.[20]

The Nation also exercises sovereign authority under federal statutes. For example, the Chickasaw Nation maintains a sex offender registry under the Adam Walsh Child Protection and Safety Act, 34 U.S.C. § 20912(a).[21] *See* Chickasaw Code tit. 17, ch. 2, art. A § 17-201.7, *available at* https://code.chickasaw.net/Title-17.aspx (last visited January 28, 2019). And the Nation receives Indian Child Welfare Act grants to operate Indian child and family service programs on or near their Indian country. 25 U.S.C. §§ 1931(a), 1903(10).

All of this, as with the other steps, demonstrate the Reservation remains intact.

**H. Conclusion.**

In *Indian Country U.S.A., Inc.*, 829 F.2d at 976, the Tenth Circuit recognized that Indian tribes retain sovereignty over both their members and their land, and tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. Once Congress creates a Reservation, as it did in this case with the Chickasaw Nation in the 1830 Treaty, only Congress can extinguish or diminish that Reservation. And Congress can only do so through legislative action. Congress has never extinguished nor diminished the Chickasaw Reservation since the 1866 Treaty.

The crimes in this case were committed on that Reservation, and therefore in Indian Country. Under the General Crimes Act, 18 U.S.C. § 1152, only the federal court had jurisdiction to prosecute

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[20] https://www.chickasaw.net/Our-Nation/Resources.aspx (last visited January 31, 2019).

[21] Indian tribes are "jurisdictions" under the Act, *see id.* § 20911(10)(H), if, like the Chickasaw Nation, they elect to maintain a sex offender registry, *id.* § 20929(a)(1)(A).

it. Bosse's prosecution in state court was therefore void *ab initio* for lack of jurisdiction. This Court should vacate his convictions and remand the case to the District Court for McClain County with instructions to dismiss for lack of jurisdiction or, at a minimum, remand for an evidentiary hearing.

## PROPOSITION TWO

**TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ADEQUATELY INVESTIGATE BOSSE'S LIFE HISTORY, AND FAILING TO ADEQUATELY PREPARE WITNESSES, WHICH DEPRIVED HIM OF A FAIR AND RELIABLE SENTENCING. DIRECT-APPEAL AND POST-CONVICTION COUNSEL WERE EQUALLY INEFFECTIVE FOR FAILING TO RAISE THAT ISSUE. THESE FAILINGS ALL VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

### A. Introduction.

Bosse's life can best be described as filled with dysfunction. He was raised in a family where dysfunction and abuse were rampant. Then, after being arrested, he was assigned a legal team also beset by dysfunction. His lawyers failed him at every step of the process – trial, direct appeal, and post-conviction – and left him with little chance of avoiding a death sentence in this emotionally-charged, sympathy-filled case. The Constitution demands better than what Bosse received.

The penalty phase of a capital trial is "a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). It ensures capital sentencing is "humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Bosse's penalty phase fell below these constitutional guarantees due to trial counsel's failures.

The United States Supreme Court has time and again dictated relief for defendants who have

fallen prey to ineffective assistance of counsel (IAC). In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court made clear that when counsel perform deficiently, resulting in prejudice to their clients, judicial relief is necessary. Despite the fact Bosse's case was a classic second-stage case, insofar as the evidence of guilt in the first stage was overwhelming, trial counsel failed to adequately investigate, present, and marshal compelling mitigating evidence, leading to a deficient second-stage presentation, which greatly prejudiced Bosse. *See* Att. 7, ¶ 6 (Affidavit of Joe Robertson) ("There is no logical reason why Bosse's case should have been treated as a first-stage case. The energy and focus in that case should have been on preparing the best second-stage case possible").

Counsel is aware of the presumption of reasonableness reviewing courts afford trial counsel's actions. *See Mayes v. Gibson*, 210 F.3d 1284, 1288 (10th Cir. 2000). Closer scrutiny applies, however, to performance during the penalty phase of a capital case. *See Littlejohn v. Trammell*, 704 F.3d 817, 859 (10th Cir. 2013). Courts are "compelled to insure the sentencing jury makes an individual decision while equipped with the 'fullest information possible concerning the defendant's life and characteristics,' and must scrutinize carefully any decision by counsel which deprives a capital defendant of all mitigation evidence." *Mayes*, 210 F.3d at 1288 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Here, the jury did not have the "fullest information possible" concerning Bosse's life. In fact, as set out below, the information the jury had was not only incomplete, it was inaccurate.

Even a defendant who has committed a brutal and horrific crime can be prejudiced by ineffective counsel. *See Williams v. Taylor,* 529 U.S. 362, 368 (2000) (finding prejudice even where petitioner "brutally assaulted an elderly woman"); *Rompilla v. Beard*, 545 U.S. 374, 397 (2005)

(Kennedy, J., dissenting) (characterizing crime as "brutal" where victim was stabbed sixteen times, beaten with a blunt object, gashed in the face with bottle shards, and set on fire); *Wiggins v. Smith*, 539 U.S. 510, 553 n.4 (2007) (Scalia, J., dissenting) (characterizing crime as "bizarre" where elderly victim was found drowned in her bathtub, missing her underwear, and sprayed with insecticide). While the crimes for which Bosse was convicted were brutal, the evidence presented here is quantitatively and qualitatively different than the mitigation case presented at trial. Bosse was prejudiced by that difference.

Because Oklahoma law requires a unanimous jury to impose the death penalty, *see* 21 O.S. § 701.11; *Castro v. Oklahoma*, 71 F.3d 1502, 1516 (10th Cir. 1995), Bosse need only demonstrate a reasonable probability at least one juror would have voted for a sentence less than death had the information discovered by subsequent counsel been presented at trial. *See Wiggins*, 539 U.S. at 537. Here, such reasonable probability exists.

**B. This Claim Is Not Waived.**

This claim was not and could not have been raised previously, and the facts presented herein are sufficient to establish by clear and convincing evidence that, absent counsel's ineffective performance, no reasonable jury would have sentenced Bosse to death. *See* 22 O.S. § 1089(D)(8) (2011). Further, the claim raised here is based on newly-discovered evidence in the form of recent witness interviews and a more fully-informed expert evaluation by Dr. Matthew John Fabian, all received in late January and February 2019. *See* Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*. The claim is that Bosse

was prejudiced by trial counsel's failures in their investigation and presentation of mitigation. It follows that both Bosse's direct-appeal lawyers and post-conviction lawyers were equally ineffective for failing to raise this meritorious claim. *See Pickens v. State*, 910 P.2d 1063, 1068 (Okla. Crim. App. 1996) (reviewing claim of post-conviction IAC); *Hale v. State*, 934 P.2d 1100, 1102 (Okla. Crim. App. 1997) (noting in a second post-conviction application, "[c]omplaints addressed to the performance of counsel during post-conviction, being raised now at the first available opportunity, will be addressed on the merits").

For purposes of establishing the claim is not defaulted, Bosse here focuses on two related actions that undermined his ability to bring this claim sooner. First, immediately prior to trial, counsel presented Bosse with a form to sign in which Bosse ostensibly is asked to choose his own trial strategy. (Attachment 8).[22] Second, at the close of the second-stage evidence, Gary Henry (lead trial counsel) engaged Bosse in an *ex parte* on-the-record colloquy in which he systematically, through a series of mostly leading questions, got Bosse to agree with him that counsel had done everything required of them and that Bosse was fully satisfied with all of the actions taken and decisions made by trial counsel during the course of their representation. (Tr. XII 154-60). These actions by Henry were highly improper, unethical, and fell well below the standard of care expected of capital-defense

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[22] That counsel had not yet devised a trial strategy a mere 19 days before trial (when they had been representing Bosse for over 2 years) is an aspect of their ineffective assistance. It is addressed here only with regard to the effect it had on effectively foreclosing Bosse's opportunity to pursue this claim earlier.

counsel in Oklahoma. They served no legitimate purpose other than to attempt to shield Henry and the other trial counsel from potential exposure to IAC claims such as this. *See* Affidavit of David Autry, Attachment 9; Affidavit of Joe Robertson, Attachment 7, ¶ 8 ("This is not a colloquy a competent, effective capital-defense attorney would ever do with a client. . . . Had I known about this practice sooner, I would have immediately put a stop to it").

Despite being clearly improper, trial counsel's actions had their desired effect. Bosse's direct-appeal counsel have acknowledged the only reason they abandoned their plan to pursue an IAC claim was because of Henry's actions, not because of the merits of the claim. (Affidavit of Jamie Pybas, Attachment 10, ¶ 4; Affidavit of Michael Morehead, Attachment 11, ¶ 4). Moreover, both direct-appeal counsel note that Henry "admitted he took these measures because he had previously been accused of IAC and did not want that to happen again." (Pybas Affidavit at ¶ 3; Morehead Affidavit at ¶ 3).[23]

The United States Supreme Court has recognized that unprofessional conduct by an attorney can sometimes be an "extraordinary circumstance" that justifies excusing an otherwise applicable waiver rule. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). As stated by Justice Alito: "Common sense dictates that a litigant cannot be held constructively

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[23] As for post-conviction counsel, the Original Application for Post-Conviction Relief (APCR) speaks for itself in demonstrating counsel's ineffectiveness. This Court concluded none of the claims brought in that application were appropriately brought in an APCR. *See* Opinion Denying Post-Conviction Relief, No. PCD-2013-360 (Dec. 16, 2015).

responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.* at 659 (Alito J., concurring). *See also Maples v. Thomas*, 565 U.S. 266 (2012) (finding cause for default where counsel had abandoned petitioner).

Here, Henry was "not operating as [Bosse's] agent in any meaningful sense of the word" when he, in an effort to protect himself against an IAC claim, led Bosse through a colloquy that subsequent counsel felt precluded them from even bringing the claim, which they otherwise would have pursued. In essence, Henry effectively abandoned Bosse with regard to Bosse's ability to bring claims otherwise available to him. *See* Autry Affidavit at ¶ 4 ("Counsel's most important professional obligation, especially when a client's life is on the line, is to protect the client's rights and to make as complete a record as possible to allow the client to pursue all available avenues of relief should the trial not end successfully. These lawyers did exactly the opposite of that, and at least on this issue, were actively working against their client's interests"); Robertson Affidavit at ¶ 8 ("In my opinion, this colloquy created a conflict of interests between Henry and Bosse and forced Bosse to reveal information that would otherwise be protected by the attorney-client privilege. It appears from this colloquy that Henry was concerned with protecting himself and, to do so, pressured a client into pursuing statements against the client's best interests").

Had Henry not actively worked against Bosse's interests in order to protect his own, direct-appeal counsel would have pursued an IAC claim. But because of Henry's unprofessional abandonment and his undermining of Bosse's interests, they felt prohibited

from raising such a claim, and therefore, did not even investigate it. Original post-conviction counsel also failed Bosse by failing to raise this issue.

Undersigned counsel just recently uncovered the full extent of the evidence necessary to bring this claim, and this claim is being brought in a timely fashion. This Court should consider the claim on the merits.

**C. Factual Background for Claim.**

1. Family Background.

Shaun Bosse was born in 1982 into a family full of dysfunction, sexual deviancy, and abuse that went back generations. His parents, Jack and Verna, married in 1971, and had their first son, Matt, in 1974. Att. 12, ¶ 3 (Affidavit of Verna Bosse). Jack was not home often, but when he was, he subjected Verna and Matt to various types of abuse, including yelling, physical and emotional violence, torturing and killing family pets, and withholding food. *Id.* at ¶¶ 5-9. Although Verna worked a full-time job, Jack would take her paycheck, give her a minimal allowance and control what food she could buy. She was often forced to rely on her parents for support to buy food and clothes for her children. Att. 12, ¶ 7. Verna finally worked up the courage to leave Jack when Shaun was three months old and Matt was eight years old.

Unfortunately, leaving Jack did not end the dysfunction – not even close. Verna and the boys lived in a rented home directly behind Verna's parents, Ruby and Vernon Darnell, in Blanchard, Oklahoma. Verna fell into a deep depression; all she did was work and sleep.

She did not have the energy or the will to take care of the home or the boys. Att.14, ¶ 2 (Affidavit of Jimmy Darnell); Att. 25, ¶ 18 (Affidavit of Valerie Barnett). The boys were forced to live in filth, with so many dirty dishes and food left in the kitchen that it filled with maggots and roaches. The house smelled so bad that other family members would not go there or let their children go there. Att, 14, ¶ 3; Att. 25, ¶ 19. The boys wore dirty, smelly clothes to school. Att. 25, ¶ 20. When it got too bad, Verna's mother, Ruby, and younger brother, Jimmy, would go over and clean the house. Att, 14, ¶ 3. Shaun's respite was to walk to his grandparent's house.

Unfortunately, Ruby and Vernon's home was no less dysfunctional. Ruby was a strong, outspoken woman who ran the family. And Vernon, a quiet man, was in reality a child molester and cross-dresser. Vernon had several police interactions for cross-dressing (which earned him a dishonorable discharge from the U.S. Army), indecent exposure and masturbating in public, and eventually improperly touching a young niece. Att. 12, ¶¶ 52-53. For that improper touching, Vernon was placed on probation and had to move out of the house for a period because he was prohibited from having contact with children. *Id.*, ¶ 57; Att. 15, ¶ 25 (Affidavit of Shaun Bosse). No matter where Shaun turned, deviancy and dysfunction were all around.

Shaun's brother, Matt, was an angry child, who grew into an angry and violent adult. He also had unlimited access to Shaun since Shaun's birth. Shaun can remember being abused by Matt – eight years his senior – beginning when he was about five years old. Att.

15, ¶ 6. From as early as Shaun can remember, Matt would tie Shaun's hands behind his back and bind his feet together so he could neither fight back nor run away. *Id.* Then Matt would beat him. Because Matt was in karate and quickly worked his way up to being a black belt, these were not ordinary beatings. And like their dad, Matt was also cruel to animals. Shaun remembers Matt hog-tying their husky, and leaving the dog that way for hours. When he was about five, Shaun once tried to help the dog, so Matt hog-tied Shaun the same way and left him there with the dog. *Id.*, ¶ 31. Given Verna's constant depression, she was not there to protect Shaun from Matt's abuse.

Shaun spent much of his childhood in fear of somehow triggering Matt with the smallest movements and sounds. He could not predict what would set Matt off; it might be chewing too loudly, or making a chair creak, or maybe rolling around too much when he slept. *Id.*, ¶ 7. But whatever the cause, once Matt was triggered, Shaun paid the price. The two brothers shared a room. Shaun remembers Matt would often threaten to kill him during the night, pointing a .22 rifle at Shaun's bed and telling him if he made a sound, Matt would shoot him. *Id.*, ¶ 9. Both Shaun and Verna remember numerous occasions when Shaun would come into her bedroom in the middle of the night begging to sleep with her. Att. 12, ¶ 21; Att. 15, ¶ 10. Matt also would pull Shaun's pants down, sometimes at home in front of friends, and sometimes in public. Att. 12, ¶ 21; Att. 15, ¶ 10.

Yet another source of trauma and unpredictability in Shaun's life was his relationship with his father, Jack. The boys were supposed to spend every other weekend with him.

Sometimes Jack would pick them up as planned, and sometimes he just wouldn't show up. When they did stay with Jack, they were exposed to his unconventional lifestyle; Jack was married to a woman, but also had a male lover, and the three of them lived together as a family. Att. 15, ¶¶ 18-19. Shaun witnessed Jack impose the same types of abuse on their step-mother that he had imposed on Verna. Shaun remembers frequent disappointment with his father. He also remembers at least one occasion of waking up in the middle of the night with his father's hand down Shaun's pants, rubbing his buttocks. *Id.*, ¶ 20.

When Shaun was around eight, Matt finally left the house and joined the Marines. Matt continued on his path of sadistic abuse with a series of wives and step-children. Att. 16 (Declaration of Heather Steakley); Att. 17 (Declaration of Melinda Harvey). Eventually, Matt spent time in prison for violently raping his first wife. Att. 16, ¶¶ 15-16. In the meantime, with Matt gone, Shaun's life turned into one of quiet isolation, spending most of his time playing video games. Eventually, he started playing baseball, and finally found something he was good at. And it got his mother and grandparents out of the house to come watch his games. Although he enjoyed playing baseball, and really excelled at it, he also developed a sense of obligation to keep playing because his family expected him to. Att. 15, ¶ 23.

After getting out of prison for rape, Matt moved back to Blanchard, and Shaun once again became the target of his violent abuse. But it wasn't just Shaun; the entire family lived

in fear of Matt. Att. 12, ¶ 28.[24] Matt would not hesitate to throw objects or yell at anybody over the slightest things. On one occasion, he even threw his grandmother, Ruby, to the floor. *Id.* at ¶ 38.

Not surprisingly, while in high school, Shaun started using drugs and alcohol as a coping mechanism. Att. 15, ¶ 23. He found it lessened his anxiety and helped him feel more comfortable interacting with other people.

2. Background of Legal Representation.

Unfortunately, Shaun's family was not the only dysfunctional group he had to deal with. His legal team from the Oklahoma Indigent Defense System that turned out to be just as dysfunctional (albeit in different ways).

The only constant in Bosse's representation was lead counsel Gary Henry. Until shortly before trial, Bosse's legal team consisted of Henry, Vicki Floyd (second chair), and Dale Anderson (investigator). With trial to begin on October 1, 2012, OIDS reorganized the division on February 2, 2012, terminating Floyd and transferring Anderson to a different division (taking him off Bosse's case). Chaos ensued, much to Bosse's detriment. Att. 13, ¶ 2. After February 2, 2012, only three attorneys remained in the entire division, Henry (who was now Division Chief), Mary Bruehl (who everybody in the division and upper

[24] Matt has threatened to kill, beaten and otherwise tormented Shaun, Verna, and countless others in the family. All remain in fear of Matt to this day. *See, e.g.,* Att. 15, ¶ 12; Att. 24, ¶¶ 26-28; Att. 12, ¶ 41; Att. 21, ¶ 13 (Expert Affidavit of Dr. Fabian). Matt's ex-wives, Heather and Melinda, are so scared of Matt, they do not even want him to know what state they live in.

management believed was not capable of performing the duties required of capital-defense counsel[25] because of her severe anxiety about appearing in court),[26] and Bobby Lewis (who was new to the division and had never tried a capital case). All three attorneys were assigned to every capital case in the division.

Prior to the February, 2012 shake-up, Floyd and Anderson recognized this as a "second-stage case," meaning all efforts should be devoted to developing mitigation for use in the second stage rather than trying to challenge guilt in the first stage. Att. 19, ¶ 3 (Affidavit of Vicki Floyd); Att. 20, ¶ 3 (Affidavit of Dale Anderson). Ms. Floyd and Mr. Anderson were onto something: This was a second-stage case and should have been treated as such.[27] As noted by Anderson, an investigator with OIDS for twenty years:

> In my opinion, Shaun's case was not a first-stage case and I focused my investigation on second stage. During the time I worked on his case, I saw lots of red flags for abuse, possibly sexual, and I believed most of Shaun's problems could have stemmed from his older brother Matthew Bosse. Had I stayed on Shaun's case, I would have continued to thoroughly investigate those areas to develop mitigation evidence.

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[25] According to OIDS' Executive Director, Joe Robertson: "I had been told several times that [Ms. Bruehl] was not good in the courtroom and would become extremely nervous to the point of freezing up." Att. 7, ¶ 4. Indeed, Ms. Bruehl has acknowledged that right before trial started, she had to go to the emergency room due to symptoms of severe anxiety. Att. 18, ¶ 13 (Affidavit of Mary Bruehl). Bobby Lewis reports the same thing. Att. 13, ¶ 16.

[26] In fact, almost immediately after Bosse's trial, Ms. Bruehl was fired from OIDS "due to her inability to perform as a capital trial lawyer." Att. 7 ¶ 7.

[27] Bobby Lewis recognized this as well: "Given the overwhelming evidence connecting Shaun to the crime, more focus should have been on mitigation and preparing the mitigation experts. I know I did not focus on second stage." Att. 13, ¶ 13.

*Id.* Despite Anderson's informed view of the case, Henry noticed that Bosse had bad teeth during a meeting and immediately jumped to the conclusion that it was "meth mouth." *Id.* at ¶ 4. In reality, Bosse has genetically bad teeth, Att. 13, ¶ 29, and it was not "meth mouth." Nonetheless, that inaccurate conclusion was enough to cause Henry to ignore Anderson's plans for a more wide-ranging mitigation case and make methamphetamine use the centerpiece of his mitigation plans. Indeed, the defense team hired two experts to support Henry's erroneous conclusion of "meth mouth." They hired neuropharmacologist Jonathan Lipman and neuropsychologist Matthew John Fabian.[28] In the end, however, they did not use either, opting instead for a mitigation case devoid of expert explanation. Att. 10, ¶ 2; Att. 11, ¶ 2.

After the February 2012 shake-up, preparation for second stage stalled. For example, despite having evaluated Bosse in October, 2011, and January, 2012, Dr. Fabian heard nothing at all from the defense team until receiving a call from Henry in September, 2012 (less than a month before trial). Henry informed Fabian he needed to prepare a report, but Henry could not yet tell him what that report should focus on because the team had not yet determined what trial theory they were planning to pursue. Att. 22, ¶ 10 (Fact Affidavit of

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[28] As set out in Att. 21 and discussed *infra*, when retained by the trial team, Dr. Fabian was asked to evaluate Bosse and draw conclusions about the effects heavy meth use had on his neuropsychological picture and cognitive functioning. He was not provided detailed information about the complex trauma suffered by Bosse, nor was he asked to offer any opinions about how such trauma impacted Bosse's neuropsychological development. This limitation, dictated by trial counsel, resulted in him drawing incomplete and inaccurate conclusions.

Dr. Fabian). Even at this late date, Fabian was not informed that Vicki Floyd, the only member of the team with whom he had previously interacted, was no longer employed at OIDS. He did not learn until immediately before his anticipated testimony that the lawyer now responsible for his testimony would be Ms. Bruehl. *Id.* at ¶ 11. Ultimately, Dr. Fabian did not testify (despite having left a conference early to fly to Oklahoma) because he would not agree to Henry's demands that he not testify to a certain issue and that he lie about not remembering the same if asked about it on cross-examination. *Id.* at ¶ 12.

Unfortunately, Dr. Fabian's experience with the defense team was not unique among defense witnesses. The lawyers did not in any way prepare witnesses before they testified. The only time the lawyers actually met any of the witnesses was while they were being escorted into the courtroom for their testimony. According to trial counsel Bobby Lewis, "None of the second-stage witnesses I dealt with were prepared prior to their testimony. The only time I met with them was immediately before they took the stand, and I did not prepare them beyond what was discussed in the hall prior to them testifying." Att. 13, ¶ 13.The witnesses have confirmed this as well. None of the witnesses knew what they would be asked or how their testimony was applicable to the case. Att. 12, ¶ 65; Att. 14, ¶ 10; Att. 23, ¶ 19 (Affidavit of Joey Darnell); Att. 24, ¶ 33. One particularly egregious example of this lack of preparation comes from Chad Mitchell: "The first time I met with defense counsel to discuss my testimony was right before I took the witness stand. They made me think I was their star witness. I had no idea what they were going to ask me." Att. 25, ¶ 10 (Affidavit

of Chad Mitchell).

The dysfunction of the defense team was on full display in their second-stage presentation. Consistent with Henry's erroneous belief Bosse had "meth mouth," the team set out to establish in second stage that Shaun had a severe addiction to meth. They called no expert witnesses; rather, they called a parade of family members and others who knew Shaun in different facets of his life. A total of eleven witnesses were asked about Shaun's use of drugs.[29] Of those eleven, the only witness who testified he ever saw Shaun use drugs was Chad Mitchell, his lifelong friend. That defense counsel viewed this meth evidence as critical to their case is corroborated by the fact Mitchell was told he was the star witness. But had counsel actually done what is required of them and talked to their witnesses with a view toward developing an accurate theory, they would have known those witnesses would not support Henry's "meth mouth" theory. The only other evidence the lawyers presented, through many of the same witnesses, was that Shaun was a good, quiet person who was very gentle with kids, and that nobody expected him to commit a crime like this.

The dysfunction of the defense team was not limited to their lack of investigation and preparation; they exhibited dysfunction on a personal level as well. First, their personal dislike of each other and inability to work together were so obvious even the client recognized it: "As far as my attorneys, they did not get along with each other. There was a

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[29] These witnesses were Jeffrey Hirschler, Ricky Darnell, Jason Goines, Tony Hancock, Daryl Mitchell, Chad Mitchell, Jack Bosse, Joey Darnell, Jimmy Darnell, Glen Castle, and Matt Bosse.

lot of tension between Gary Henry and Mary Bruehl. They would have disagreements about witnesses or how to do the trial right in front of me. With all of this going on, I did not trust my attorneys, but they were the only attorneys I had." Att. 15, ¶ 3. *See also* Att. 18, ¶ 6.

As noted by the other lawyer on the team, Bobby Lewis, the entire Norman Capital Trial Division of OIDS was "was either in chaos or on the brink of it." Att. 13, ¶ 2. According to Lewis, the division was not concerned about providing effective representation; they simply wanted to make sure they did enough superficially to avoid IAC claims. *Id.* at ¶ 4 ("It was like there was a checklist for each case and they were just checking the boxes to ensure they were not found ineffective later, without giving much thought to what was substantively going on"). As for the other lawyer on the team, Mary Bruehl, she clearly was not up to the challenge of handling the case either:

> I recall that Mary had what seemed like anxiety trouble leading up to and during Shaun's trial. Although my memory is not as good as it was, I believe Mary was supposed to do the direct-examination of Shaun's father, Jack Bosse, but at the last minute, she said she couldn't do it. So, I did. I had never met Jack Bosse before and had to present him cold. As you can tell from reading the record, Jack was not an easy witness.

*Id.* at ¶ 16. *See also* att. 18, ¶ 13 (acknowledging Bruehl was not ready for trial and went to the hospital for anxiety right before it started).

Clearly, and unfortunately for Bosse, his trial team could not and did not work together to provide an adequate defense. Rather, they squabbled in front of him, failed to investigate and prepare witnesses, and paraded in a series of unprepared witnesses who served to undermine rather than advance the second-stage "meth mouth" theory.

Direct-appeal counsel also failed Bosse by not pursuing an IAC claim based on the egregious mishandling of the trial because they incorrectly assumed Henry's self-serving attempts at insulating himself from such a claim precluded them from bringing it. *See* Section B, *supra*. As for original post-conviction counsel, the paltry APCR speaks for itself. Counsel failed to raise any claims cognizable on post-conviction. *See* Opinion Denying Post-Conviction Relief, No. PCD-2013-360 (Dec. 16, 2015). These failures are perhaps best explained by the way counsel explained her role to Bosse during the only meeting they had: "After I was convicted and on death row, an attorney named Wyndi came to see me once about my post-conviction appeal. *She told me she was working alongside my direct-appeal lawyers*. I did not see her again. I never spoke to her on the phone and I don't really know what she did on my case." Att. 15, ¶ 5 (emphasis added). Clearly, post-conviction counsel merely saw herself as an extension of the direct-appeal team and did not fulfill her responsibility to provide Bosse with an independent post-conviction investigation.

**D. At Every Stage Counsel Were Ineffective for Failing to Adequately Investigate Bosse's Full Background and Life History or Raise the Issue on Appeal.**

In the early stages of the case, before the February, 2012 purge of the division, it appeared they were on the right track. Vicki Floyd recognized the case as a classic second-stage case and hired two experts (although at least one of the two - neuropharmacologist Jonathan Lipman - was unnecessary due to the inaccuracy of Henry's "meth mouth" theory). Att. 19, ¶ 3. And investigator Dale Anderson, who also knew this was not a first-stage case, recognized the numerous red flags pointing towards severe trauma and abuse suffered by

Bosse. Att. 20, ¶ 3. But once Floyd and Anderson were removed, all meaningful second-stage investigation and preparation ceased. Given it was obvious this was a second-stage case, counsel's failure to adequately prepare for that "constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson,* 428 U.S. at 304, was inexcusable. Failing to adequately investigate and prepare for the most important part of the trial certainly prejudiced Bosse's right to a fair and accurate sentencing, violating his Sixth, Eighth, and Fourteenth Amendment rights.

1. Counsel's Failures Began Immediately and Continued Throughout the Entire Case.

From the outset, experienced capital counsel should have known, given the publicity and emotion surrounding this case, the State would likely seek death. The professional standards to guide capital counsel are set out in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, ("ABA Guidelines") *reprinted in* 31 Hofstra L. Rev. 913 (rev. ed. 2003). *See Wiggins,* 539 U.S. at 524; *Strickland*, 466 U.S. at 688; *Williams*, 529 U.S. at 396; *Rompilla*, 545 U.S. at 374; *Anderson v. Sirmons*, 476 F.3d 1131, 1142 (10th Cir. 2007). Under these Guidelines, "the mitigation investigation should begin as quickly as possible . . . ." *ABA Guidelines*, Guideline 10.7 comment., 31 Hofstra L. Rev. at 1023. The prompt retention of a mitigation expert is critical in conducting an adequate mitigation investigation, which the Supreme Court has recognized "should comprise efforts to uncover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539

U.S. at 524.

Despite these clear requirements, counsel did none of them until right before trial. And this failing went beyond this case; it was the culture of the Norman Capital Trial Division to not treat capital cases with the care they require. As acknowledged by Bobby Lewis: "Problems tended to arise when a case needed to be tried because, as a division, we were disorganized and flew by the seat of our pants. . . . [W]e did not have well-crafted strategies for the most part." Att. 13, ¶ 8. The division seemed more concerned with protecting against IAC claims than in actually providing effective representation.[30] *Id.* at ¶ 4. The Executive Director knew about these failings, but did nothing:

> As Executive Director, one concern I had about the Norman Capital Trial Division was that it did not have success in death penalty cases, and I felt like it was due to a failure to properly prepare mitigation cases. Although Gary Henry was promoted to be the new Division Chief, I had reservations about doing so because I was not sure he had the kind of grasp of mitigation needed in capital cases.

Att. 7, ¶ 3.

Despite knowing the obligations placed on defense counsel in death penalty cases, Bosse's attorneys failed to conduct a satisfactory investigation. They talked to witnesses, but because Henry had already settled on his inaccurate "meth mouth" theory, the investigation

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[30] Lewis's "checklist" observation is borne out by the record in this case. Henry requested funds to hire a mitigation expert. And that request was approved. Att. 26 (Professional Services Justification Statement and Approval Notification). Of course, even this act of box-checking was not done until August 4, 2011, over a year after Henry was appointed to represent Bosse. *Id.* But having checked the required box, Henry then never actually hired a mitigation expert.

was stunted and not designed to discover accurate information. As a result, counsel failed to uncover the extent of the trauma and dysfunction in Bosse's life. This caused them to fail to provide accurate information to Dr. Fabian, which in turn caused Dr. Fabian to fail to include that trauma history in his evaluation and conclusions. Because Henry locked into his "meth mouth" theory before the case had been investigated, and failed to hire the mitigation expert he was approved to hire, the truth about Bosse's life was not discovered. The defense was left with their inaccurate and unpersuasive nice-guy meth-addict theory.

This case is quite similar to *Porter v. McCollum*, 558 U.S. 30 (2009), in which the Supreme Court concluded counsel provided ineffective assistance by failing to conduct an adequate mitigation investigation. In *Porter*, "[t]he sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." *Id.* at 32. Counsel's approach here was essentially the same as in *Porter*: Counsel attempted to put on evidence of Bosse's drug use and talked about how quiet and gentle he was. The problem here, as it was in *Porter*, is that counsel failed to conduct an adequate mitigation investigation that would have allowed them to make a reasonable tactical decision as to what the best mitigation strategy would be.

The mere fact that counsel's investigation included interviewing several members of Bosse's family does not save it from being unreasonable. Even an investigation that appears thorough on the surface can be unreasonable if, under the circumstances of the case, it failed to follow logical leads or uncover meaningful mitigation evidence. The Supreme Court

found as much in:

> This is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase. None of the sources proved particularly helpful.
>
> Rompilla's own contributions to any mitigation case were minimal. . . . There were times when Rompilla was even actively obstructive by sending counsel off on false leads.
>
> The lawyers also spoke with five members of Rompilla's family. . . and counsel testified that they developed a good relationship with the family.

*Rompilla*, 545 U.S. at 381. The Court even acknowledged that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Id.* at 383. Nonetheless, the Court found Rompilla's lawyers were ineffective because they failed to examine one of Rompilla's prior-conviction files even after they were on notice it would be used during the penalty phase. *Id.* at 383-84.

Counsel were similarly ineffective here. Although counsel's investigation might appear superficially reasonable, it clearly was not because they ignored obvious signs of Bosse's traumatic upbringing. The original investigator, Dale Anderson, recognized these red flags of trauma and abuse early and knew they were the building blocks for a good mitigation theory. Att. 20, ¶ 3. Despite Anderson's accurate perception of the real mitigation

theory in this case, that theory was never investigated or pursued.[31]

Nor should counsel be deemed effective for having hired experts. First, hiring experts was clearly just another box Henry needed to check off. Counsel's obligation is not satisfied simply by hiring an expert; counsel must also work with the expert to make sure the expert fits into the overall theory. That did not happen in this case, or apparently in the Norman Capital Trial Division in general: "Experts would be hired, but no one seemed to be paying any attention to what was being sent to the experts to review. There was no clear system in place for keeping track of what the experts even had in their possession. On more than one occasion this led to confusion in our office." Att.13, ¶ 4. Dr. Fabian confirms that the lawyers did not work with him in this case either:

- "My last evaluation of Bosse was on 01/06/2012. I did not hear from anybody on the trial team for about eight months, until Henry called me a few weeks before Bosse's trial commenced. He told me he might need me to testify at trial the following month [and] I would need to potentially prepare two forensic mental health reports . . . . [because] he had not decided what defense theory they were planning on pursuing." Att. 22, ¶ 10.

- "I eventually learned that Bosse's second chair attorney, Vicki Floyd, with whom I had the most contact, had been terminated from OIDS sometime around February of 2012. I was notified of this when I met with Mary Bruehl the day before my scheduled testimony. . . . I had very little communication from any of [Bosse's trial defense team]." *Id.* at ¶ 11.

- "During the mitigation trial phase, I was attending a . . . conference in St. Louis. I was told to be on call in case the defense wanted to call me . . . . Ms.

[31] As discussed, once current counsel followed those leads and uncovered the true extent of Bosse's traumatic life and presented the information to Dr. Fabian, Fabian conducted an accurate and more robust evaluation.

> Bruehl called me while I was in St. Louis and told me that they wanted me to testify at trial that week. I left the conference and flew from St. Louis to Oklahoma City. I met Ms. Bruehl at a restaurant to prepare for my testimony at approximately 9:00 p.m. the evening before my anticipated testimony. I had serious concerns about the limited trial preparation in this case." *Id.* at ¶ 12.

Fabian never testified. But counsel's decision not to call him was not a "tactical" one; rather, as explained by Dr. Fabian, the only reason Henry chose not to have him testify was because Fabian would not agree to Henry's demand that he commit perjury:

> [Gary] told me the only way he would allow me to testify would be if I agreed to not mention certain issues in my testimony. I asked Henry what would happen if I was asked specific questions on cross-examination. He told me I would have to "forget" about what I knew/believed. He was very clear that if I was not willing to "forget" about certain things . . . , he would not call me as a witness. I understood this to mean he wanted me to be dishonest . . . . I told him I was not comfortable with the situation, and he replied that he would not be calling me as a witness.

*Id.*

Despite the obvious failures of Bosse's trial attorneys' unreasonable mitigation investigation, direct-appeal counsel never pursued an IAC claim on that basis. They conducted no extra-record investigation and filed no 3.11 motion. As discussed in Section B *supra*, the only reason direct-appeal counsel did not pursue an IAC claim was because Henry unprofessionally and unethically manipulated the record in an effort to shield himself from such a claim. Appellate counsel wrongly believed Henry's actions "effectively insulated himself from any IAC claim." Att. 10, ¶ 4; Att. 11, ¶ 4. As further discussed in Section B, appellate counsel were incorrect in that conclusion and their decision to abandon a meritorious claim on that basis was unreasonable. In fact, appellate counsel should have

recognized that Henry's actions in themselves amounted to IAC. Att. 9, ¶ 5; Att. 7, ¶ 8. Appellate counsel performed deficiently in failing to recognize these issues and pursue them on appeal. Bosse was prejudiced because this claim had a reasonable probability of success. *Evitts v. Lucey*, 469 U.S. 387 (1985).

2. Bosse Was Prejudiced by Counsel's Inadequate Investigation.

All of these failures by counsel prejudiced Bosse and deprived him of a fair and reliable sentencing. Had counsel engaged in a reasonable mitigation investigation that allowed them to pursue a more persuasive mitigation theory, the jury would have heard about Bosse's history of complex trauma and, would have learned how that history affected Shaun's development and shaped his future behaviors.

The picture counsel painted of Shaun's life was woefully inadequate. A reasonable investigation would have provided the details that could have changed the opinion of at least one juror. For example, counsel missed a wealth of information about how Shaun's older brother, Matt, contributed to his trauma. Witnesses were available who would have educated the jury about Matt's cruel and violent tendencies. One such person was Matt's first wife, Heather Steakley. Att. 16. She was never contacted by Bosse's defense team, but would have been willing to testify. *Id.* at ¶ 30. If she had testified, the jury would have learned that Matt had cut her neck and shoulder with a knife, *Id.* at ¶ 5; hit her in the stomach while she was pregnant with his son and told her he hoped she lost the baby, *Id.* at ¶ 6; would "beat the hell

out of" her and then have sex with her, *Id.* at ¶ 8; "wanted to insert a baseball bat in [her] vagina," *Id.* at ¶ 9; "water-boarded" her in the bathtub and then put a (fortunately empty) gun in her mouth and pulled the trigger, *Id.* at ¶ 15; and raped her, for which he went to prison. *Id.* at ¶¶ 15-16. They also would have heard that Vernon (Shaun's grandfather) had molested Heather's son, Kyle. *Id.* at ¶ 21. Because of counsel's failure to investigate, however, the jury never heard any of this evidence about the true nature of Shaun's environment.

The jury also would have heard from Matt's second wife, Melinda Harvey, who also was never contacted by Shaun's trial (or appellate) team. She would have been willing to testify. Att. 17, ¶ 52. Had Melinda testified, the jury would have heard more about how cruel and sadistic Matt was, and how dysfunctional the family truly was. The jury would have learned Matt repeatedly threatened to kill Melinda and her daughter, Marissa, and dump their bodies in an oil field, *Id.* at ¶ 7; Matt is a very violent and angry person who could be set off by the slightest movement or comment, *Id.* at ¶ 9; Matt stabbed her in the hip while she was nursing their infant son, Zack, *Id.* at ¶ 11; Matt put a (thankfully unloaded) shotgun in her mouth and pulled the trigger, (*Id.* at ¶ 12; Matt had forced sex with her and raped her with objects, *Id.* at ¶¶ 14-15; Matt physically abused her daughter, Marissa, sometimes by holding her by her ankles and bashing her head against the floor, *Id.* at ¶¶ 17-22; and Matt killed every dog they ever owned. *Id.* at ¶ 28.[32] The jury also would have learned that in

[32] The testimony from Matt's ex-wives would have corroborated information about the same types of torture and abuse Matt inflicted upon Shaun as he was growing up.

addition to molesting Heather's son, Kyle, Vernon also molested Melinda's daughter, Marissa. *Id.* at ¶ 41.

The jury would have learned about the complex dysfunction surrounding Shaun had counsel conducted an adequate investigation. With this more detailed and accurate picture of Bosse's life, Dr. Fabian was able to conduct a more thorough evaluation, and reach more accurate conclusions than allowed at trial. These accurate conclusions would have been persuasive to the jury and helped them understand the forces that shaped Shaun's life and behaviors. Att. 21. Dr. Fabian affirms that at the time of trial, Bosse's counsel told him the primary issue was Shaun's drug use, and that he should focus his evaluation on that issue. *Id.* at ¶ 2. He goes on to note, now that he has been provided more complete and accurate information by federal habeas counsel, he realizes the original information was inaccurate and incomplete, which led him to inaccurate conclusions. *Id.* ¶ 3. Dr. Fabian now concludes (as would have been obvious at the time of trial if counsel had conducted a reasonable investigation): "The trauma I now know Shaun experienced as a child provides a more complete and accurate narrative that explains his cognitive deficits, his vulnerability to drug use, and his behavior during the time frame this crime occurred." *Id.*

With accurate and complete information, Dr. Fabian is now able to explain how Shaun's complex trauma would lead him to act impulsively, and cause him to have "exaggerated fear states, hyper arousal, and act[] out in excess to the perceived threat." *Id.* at ¶ 18. He can also explain how his testing demonstrates damage to the hippocampus region

of Shaun's brain, which would cause him to "[in]correctly interpret[] stressful and emotional environmental contexts." *Id.* at ¶ 19. Similarly, Dr. Fabian can now explain, due to the effect early complex trauma has on the amygdala and damage demonstrated to Shaun's prefrontal cortex, "individuals, such as Shaun, may exhibit fear, anxiety, and extreme distress even when faced with non-threatening stimuli due to exaggerated and misperceived stressors." *Id.* at ¶ 20.

In short, Dr. Fabian acknowledges that his initial conclusions were inaccurate because trial counsel presented him with inaccurate and incomplete information. Now armed with accurate and complete information, Dr. Fabian is able to persuasively explain how Shaun's history and upbringing, and the effects those things had on his developing brain, explain the crimes for which he has been convicted and puts them in a totally different light. Based on the lack of explanation at trial, the jury was left no theory other than the one offered by the prosecution – that Bosse intentionally and with premeditation killed Katrina and her children after stealing their property. With Dr. Fabian's thorough evaluation after receiving complete information about Shaun's background, however, it becomes at least equally plausible Shaun overreacted to what he inaccurately perceived as a threat, after Katrina confronted him about the stolen property. There is a reasonable probability such information would have convinced at least one juror a sentence less than death was appropriate in this case.

Evidence of childhood trauma and abuse frequently has been recognized as important

mitigating evidence. *See, e.g., Sears v. Upton*, 561 U.S. 945, 948 (2010) (recognizing mitigating value of emotional abuse by parents, who fought physically and got divorced, and sexual abuse by cousin); *Wiggins*, 539 U.S. at 516–17; *Williams*, 529 U.S. at 395; *see also, e.g., Hooks v. Workman*, 689 F.3d 1148, 1203 (10th Cir. 2012) (defendant's "premature birth, . . . abusive father, frequent moves, educational handicaps, and personal family tragedies" constituted "a life story worth telling"); *United States v. Barrett*, 797 F.3d 1207, 1229-30 (10th Cir. 2016) ("evidence of childhood abuse, neglect and instability can play a significant role in mitigation").

In essence, a reasonable investigation would have allowed counsel to connect the pieces of information they already had, and present them in a more complete, thorough, and persuasive way. But, because counsel engaged in an unreasonably stunted investigation, they were left with only the unpersuasive and unreasonably incomplete theory they presented.

This case is similar to what the Supreme Court said in *Porter*:

> Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.

*Porter*, 558 U.S. at 33.

**D. Conclusion.**

> [N]ot all defendants who commit horrific crimes are sentenced to death. Some are spared by juries. The Constitution guarantees that possibility: It requires that a sentencing jury be able to fully and fairly evaluate "the characteristics of the person who committed the crime." *Gregg v. Georgia*, 428 U.S. 153,

> 197 (1976). That guarantee is a bedrock principle on which our system of capital punishment depends, and it is a guarantee that must be honored . . . .

*Elmore v. Holbrook*, 137 S. Ct. 3, 11 (2016) (Sotomayor, J., dissenting). Such guarantees must be honored especially for defendants like Bosse, whose life has been marked by extensive mitigating circumstances that might convince a juror to choose life over death. Only after hearing such facts can jurors properly make the weighty decision whether such person is entitled to mercy.

Bosse did not receive the effective assistance of counsel in the critical sentencing stage, or on appeal or post-conviction. As a result, this Court should vacate Bosse's death sentences and remand for a new sentencing hearing or, at a minimum, remand for an evidentiary hearing.

## PROPOSITION THREE

### THE CUMULATIVE EFFECT OF ERRORS DEPRIVED MR. BOSSE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR CAPITAL SENTENCING UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Even if none of the previously discussed errors, viewed in isolation, necessitates reversal of Bosse's conviction and sentence, the combined effect of these errors deprived him of a fair sentencing and requires the sentence to be reversed. *Cargle v. Mullin*, 317 F.3d 1196, 1200 (10th Cir. 2003); *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). Specifically, the cumulative effect of all of the errors and omissions at the trial and mitigation phases resulted in invalid death sentences. *See Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003) (finding that when assessing cumulative error,

only first-stage errors are relevant to the conviction, but all errors are relevant to the ultimate sentence).

It is well recognized a reviewing court, presented with established errors at trial, must consider the cumulative impact of those errors in light of the totality of the evidence properly presented to the jury. *Gonzales v. McKune*, 247 F.3d 1066, 1077 (10th Cir. 2001) (vacated on grounds of exhaustion); *Rivera*, 900 F.2d at 1471. Non-errors do not count in a cumulative analysis; however, error plus whatever form of prejudice or harm is associated with that particular error obviously need not be established for a violation to count in cumulation. Where error plus prejudice is present in the case of an individual error, relief would be warranted for that error alone. *Cargle*, 317 F.3d at 1207. The Tenth Circuit has explained the "cumulative-error analysis merely aggregates all the errors . . . found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Hamilton v. Mullin*, 436 F.3d 1181, 1196 (10th Cir. 2006) (quoting *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003)). The cumulative error analysis applies to such legally diverse claims as ineffective-assistance and juror-misconduct claims. *Cargle*, 317 F.3d at 1206-07.

On direct appeal, this Court found three errors, but concluded they were harmless. Specifically, the Court found as error: (1) the prosecution's use of Bosse's refusal to consent to a search of his truck, *Bosse v. State*, 2017 OK CR 10 ¶ 40, 400 P.3d 834, 851; (2) the admission of two "profoundly disturbing and particularly perturbing" photographs of the charred remains of Chasity Hammer, *Id.* at ¶¶ 50-51, 400 P.3d at 853-54; and (3) the improper admission of sentence recommendations from victim impact witnesses, *Id.* at ¶ 63, 400 P.3d at 857. In this proceeding, Bosse

raises an IAC claim.[33] In the event the Court finds deficient performance but no prejudice, that error should also be included in the harmless error analysis along with the others.

If this Court finds none of the errors set forth in this Application, when considered individually, necessitates the granting of relief, the Court should find the cumulative effect of all the errors described herein, as well as those found in earlier stages of this case, deprived Mr. Bosse of his Constitutional right to a fair trial and reliable sentence. This Court should grant relief.

## PRAYER FOR RELIEF

For the foregoing reasons, Mr. Bosse respectfully requests that the Court enter an order vacating his death sentences and remanding for a new sentencing. At a minimum, an evidentiary hearing should be ordered.

Respectfully submitted,

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[33] In addition, Bosse also raises a claim that Oklahoma lacked jurisdiction to try him at all. That error, if found, would not be subject to harmless error review, and therefore, would not be included in a cumulative error analysis. If the State lacked jurisdiction, Bosse's conviction must be vacated.

**VERIFICATION**

State of Oklahoma )
) ss:
County of Oklahoma )

Michael W. Lieberman, being first duly sworn upon oath, states he signed the above pleading as attorney for Shaun Michael Bosse, and that the statements therein are true to the best of his knowledge, information, and belief.

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Shaun Michael Bosse

Subscribed and sworn to before me this 20th day of February, 2019.

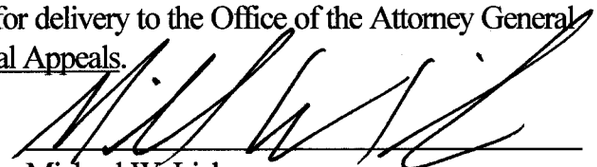
CATHY CONLEY NOTARY # 01009749 EXP. 06/11/21 PUBLIC STATE OF OKLAHOMA

Cathy Conley
Notary Public

Commission Number: 01009749
My commission expires: 6/11/21

## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2019 a true and correct copy of the foregoing Successive Application for Post-Conviction Relief along with a separately bound Appendix of Exhibits were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals.



Michael W. Lieberman

## INDEX OF ATTACHMENTS
**(Filed in Separately Bound Document)**

| Attachment | Document |
|---|---|
| 1 | Original Application for Post-Conviction Relief filed in PCD-2013-936 |
| 2 | Order Finding Shaun Bosse Indigent |
| 3 | Tribal Enrollment Verification for Katrina Griffin |
| 4 | Tribal Enrollment Verification for Christian Griffin |
| 5 | Tribal Enrollment Verification for Chasity Hammer |
| 6 | Affidavit of Julie Gardner |
| 7 | Affidavit of Joe Robertson |
| 8 | Form Dated September 19, 2012, signed by Shaun Bosse |
| 9 | Affidavit of David Autry |
| 10 | Affidavit of Jamie Pybas |
| 11 | Affidavit of Michael Morehead |
| 12 | Affidavit of Verna Bosse |
| 13 | Affidavit of Bobby Lewis |
| 14 | Declaration of Jimmy Darnell |
| 15 | Affidavit of Shaun Bosse |
| 16 | Declaration of Heather Steakley |
| 17 | Declaration of Melinda Harvey |
| 18 | Affidavit of Mary Bruehl |
| 19 | Affidavit of Vicki Floyd |
| 20 | Affidavit of Dale Anderson |
| 21 | Expert Affidavit of Dr. John Matthew Fabian |
| 22 | Fact Affidavit of Dr. John Matthew Fabian |

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|---|---|
| 23 | Affidavit of Joey Darnell |
| 24 | Affidavit of Valerie Barnett |
| 25 | Affidavit of Chad Mitchell |
| 26 | Professional Services Justification Statement and Approval |