

No. _____

IN THE
Supreme Court of the United States

ISAAC LUNA ASHTON,
PETITIONER,

v.

RICK WHITTEN,
RESPONDENT.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States District Court For the Northern District of Oklahoma erred in denying Petitioner Ashton a Certificate of Appealability when it found that Petitioner Ashton's ineffective assistance of counsel claims lacked merit?

Whether the United States District Court For the Northern District of Oklahoma erred in denying a Certificate of Appealability when it found that Petitioner Ashton failed to satisfy the burden of persuasion for his ineffective assistance of counsel under the AEDPA?

Whether the United States District Court For the Northern District of Oklahoma erred in denying Petitioner Ashton an evidentiary hearing for his claims?

Whether the Court of Appeals for the Tenth Circuit erred in denying Petitioner Ashton a Certificate of Appealability when it affirmed the District Court's recommendation?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Isaac Luna Ashton. Rick Whitten.

LIST OF PROCEEDINGS

UNITED STATES District Court For the Northern District of Oklahoma

Trial Court Case No. 19-CV-0229-GKF-JFJ

ISAAC LUNA ASHTON V. R.C. SMITH, WARDEN

Petition DENIED 10/31/2018

District Court of Tulsa County

Case No. CF-2014-4108

Petition DENIED 10/31/2018

Oklahoma Court of Criminal Appeals

Case No. F-2016-15

Petition DENIED 10/31/2018 Affirmed in a written, published, opinion styled *Ashton v. State*, 2017 OK CR 15, 400 P.3d 887 (June 1, 2017).

Oklahoma Court of Criminal Appeals

Case No. PC-2018-1291

Petition AFFIRMED 04/26/2019 Relief denied in a written, but unpublished, Order in *Isaac Luna Ashton v. State*, No. PC-2018-1291 (Okl.Cr., April 26, 2019).

UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

Case No. CIV-19-229-GKF-JFJ

ISAAC LUNA ASHTON v. RICK WHITTEN

Judgment Dated 04/14/2023 Application for
Certificate of Appealability DENIED. Court of
Appeals Order is not reported and is reproduced in the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ashton respectfully requests that a Writ of Certiorari be issued to review the granting of summary judgment by the United States District Court for Oklahoma and subsequent affirmation of the same by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The April 14, 2023, order denying Certificate of Appealability in the United States Court of Appeals for the Tenth Circuit is reproduced in the Appendix (App.1-12).

The August 9, 2022, Opinion and Order and Judgment in the United States District Court for the Northern District of Oklahoma is reproduced in the Appendix (App.13-72).

BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the Tenth Circuit entered its Order on April 14, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides:

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

U.S. Const. amend. VIII.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2253(c)(1)-(3) provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c)(1)-(3).

Title 28 U.S.C. § 2254(d)(1)-(2) provides:

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States; or

- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.
- (3) 28 U.S.C. § 2254(d)(1)-(2).

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The Incident In Question

As explained by the Tenth Circuit Court of Appeals - on August 18, 2014 Petitioner and Respondent were an argument over a missing cellphone that escalated into fatal shootings. Mr. Ashton, his fiancé Tyesha Goff, and his friend Doneka Brown became embroiled in an argument with Verdell Walker and his girlfriend, Tiara Sawyer, because Goff's cell-phone had gone missing. The argument escalated to where Mr. Ashton brought out his gun in self-defense, Walker grabbed for the gun, and Mr. Ashton started shooting striking Walker in the abdomen, the head and Sawyer, who was standing behind Walker, was struck once in the head.¹

¹ The 3-D illustrations are illustrations, presented to the Court as a demonstrative exhibit, that visually recreates Ashton's testimony as it conformed to the physical evidence at the scene as depicted in the crime-scene photographs (State's Exhibits #3-17) and testimony of the first responders concerning where Walker's body was found, and the blood-pool in the parking lot.

Notably, after the argument had concluded, the perpetrators came a second time and attacked Petitioner's fiancé. This is when Petitioner intervened and he threatened Petitioner and pulled a gun on Petitioner. Any shooting involving Walker was simply self-defense and accidental pertaining to Sawyer.

B. Procedural History

Petitioner Ashton was indicted for capital murder by the Grand Jury of Tulsa County, Oklahoma. On December 10, 2015, Ashton, represented by Trial Counsel Stanley D. Monroe, was convicted by a jury of Counts 1 and 2, First Degree Murder and Count 4, Carrying a Weapon Unlawfully in Tulsa County Case No.CF-2014-4108. Mr. Ashton entered a plea of not guilty and did not testify at trial. On January 6, 2016, Mr. Ashton was convicted of Counts of Murder in the First Degree and sentenced to life imprisonment without the possibility of parole.

On June 1, 2017, the Oklahoma Court of Appeals decided to affirm the lower court's decision and

Ashton's testimony is corroborated perfectly with the physical evidence presented by the State and supports his claim of self-defense as the result of a close-quarter confrontation. The State also presented the testimony of Juan Rolland, Jr. Rolland testified that Ashton was standing in the gateway of the fence. Tr. 692. He also stated that Walker was in front of the car parked in the second parking space where second parking block in State's Exhibit #4 (photo of parking lot); see Tr. 693-94. State witness Veronica Willis also testified that at all times Ashton and Walker were at least seven to ten feet apart. Tr. 769. Veronica Willis' preliminary testimony matches Mr. Aston's jury trial testimony. Ms. Willis' preliminary testimony is directly contradictory to her jury trial testimony.

Petitioner Ashton's request for an evidentiary hearing was denied. On direct appeal, Mr. Ashton was represented by James H. Lockard.

On August 21, 2018 Petitioner Ashton filed his post-conviction application. The State filed a response on October 30, 2018. The next day, on October 31, 2018, the district court filed its Order denying relief.

On December 28, 2018, Petitioner Ashton, by and through counsel James L. Hankins, appealed to this Court from an order of the District Court of Tulsa County, Case No.CF-2014-4108, denying Ashton's application for Post-Conviction relief. The district court's order denying Ashton's application for post-conviction relief was AFFIRMED on

On April 26, 2019, the Oklahoma Court of Criminal Appeals denied the petition, adopting the State's proposed findings of fact and conclusions of law almost verbatim.

On May 1, 2019, attorney James L. Hankins filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United Stated District Court for the District Court of Tulsa County, State of Oklahoma.

On August 9, 2022, Mr. Ashton's writ of habeas corpus petition was dismissed without granting a Certificate of Appealability. On September 7 ,2022, Petitioner appealed this District Court's decision not to issue a Certificate of Appealability to the Court of Appeals for the Tenth Circuit.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DISTRICT COURT AND TENTH CIRCUIT ERRED WHEN BOTH FOUND THAT MR. ASHTON WAS NOT ENTITLED TO THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*.

A court may issue a Certificate of Appealability (“COA”) when an applicant makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). If a district court denies a petitioner’s habeas petition on procedural grounds “without reaching the merits of the petitioner’s constitutional claim,” the district court *must* issue a COA if the petitioner at least shows that: (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citing 28 U.S.C. § 2253(c)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The movant does not need to show that he would prevail on the merits, but rather show that the issues he presents are subject to *debate among jurists of reason*. *See Miller-El*, 537 U.S. at 327. A court could resolve the issues differently, or the issues are worthy of encouragement to proceed further. *See id.*; *see also Buck v. Davis*, 137 S. Ct. 759, 781 (2017) (Thomas, J., dissenting) (“A court may grant a COA even if it might ultimately conclude that the underlying claim is meritless, so long as the claim is debatable.”).

In this case, the District Court should have issued a COA because the issues of the dismissal of Mr. Aston's § 2254 petition could be debated by reasonable jurists on both substantive and procedural grounds. Specifically, Mr. Ashton has made a significant showing that he was denied effective assistance of his trial counsel under (1) *Strickland v. Washington*, 466 U.S. 668 (1984).

A. THE DISTRICT COURT ERRED WHEN IT FOUND THAT MR. ASHTON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS LACKED MERIT UNDER STRICKLAND.

This Court has held that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Under *Strickland*, a defendant demonstrates ineffective assistance of counsel by showing that (1) the trial counsel's performance was deficient, meaning that he or she made errors so egregious that they failed to function as the “counsel guaranteed the defendant by the Sixth Amendment,” and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *See id.* at 686; *Guidry v. Lumpkin*, 2 F.4th 472, 489 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1212 (2022). To establish prejudice, the defendant must show that there “is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695.

In the context of claims involving appellate counsel, the Sixth Amendment guarantees the right to effective representation on direct appeal. *Evitts v. Lucey*, 469U.S. 387, 396-97, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985). The Strickland standard applies to claims relating to appellate counsel as well as trial counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L.Ed.2d 756 (2000); *Ellis v. Hargett*, 302 F.3d 1182, 1186-87 (10 Cir. 2002). Strickland requires a look at the merits of the issues that appellate counsel failed to raise. *Logan v. State*, 2013 OK CR 2, ¶ 6, 293 P.3d 969. Here, as outlined by the OCCA on direct appeal, the issue that appellate counsel failed to raise was ineffective assistance of trial counsel for failing to have the gun and the ammunition tested (along with the “soot” on the shirt worn by Walker) in order to determine with reasonable scientific certainty the distance of the gun from the shirt when it was fired. As outlined in the facts above, the distance between Ashton and Walker when the shooting occurred was a contested and critical aspect of this case. Ashton testified that Walker was close enough for physical contact (Walker was “pushing his chest up against my arm” Tr. 1189) and went for the gun; but the State witnesses testified that Walker was 4-10 feet away at the time of the shooting, thus supporting the State’s theory of premeditated murder. Ashton testified that those witnesses were lying, and the presence of gun powder residue on the shirt suggests strongly that they were.

In its motion denying Mr. Ashton’s request for a certificate of appealability, the District Court held as follows;

The OCCA arguably addressed Petitioner's ineffective assistance of appellate counsel claim on the merits by finding trial counsel did not render ineffective assistance on direct appeal. In *Grant v. Royal*, 886 F.3d 874, 928 (10th Cir. 2018), petitioner argued in his post-conviction application that trial and direct-appeal counsel rendered ineffective assistance, and the OCCA applied a res judicata bar finding petitioner reformulated an argument presented and addressed on direct appeal. The Tenth Circuit explained that in Cone, the state post-conviction court refused to consider a petitioner's claim based on its "erroneous finding" that the claim was previously adjudicated. *Id.* 886 F.3d at 929. The Tenth Circuit found that because the OCCA addressed petitioner's ineffective assistance claim on direct appeal, de novo review did not apply and gave the OCCA's decision on direct appeal AEDPA deference. *Id.*

Petitioner Ashton's Strickland claim has merit. The District Court did not address one of the most critical elements of Mr. Ashton's claim under *Martinez*. The Magistrate Judge failed to engage in de novo review, viewing his complaints as already failed. By accepting the Magistrate's report and recommendations in their entirety, the District Court unfairly dismissed Mr. Ashton's claims without reaching their merits, and the Tenth Circuit further erred in affirming the order.

Mr. Ashton's trial counsel committed numerous errors that fell below an objective standard of reasonableness under prevailing professional norms. Significantly, Trial counsel failed to test relevant evidence which would have supported Ashton's claim

that he shot Verdell Walker in self- defense. The issue is the proximity of the alleged victim to Mr. Ashton. The gun residue would have helped prove Mr. Ashton's self-defense case, namely, that Mr. Walker and Mr. Ashton were close together and there was a real threat to Mr. Ashton. This would have also shown the truth to the witness testimonies about how far the alleged victim was from Mr. Ashton. This failure clearly caused Mr. Ashton prejudice since it deprived him of an adequate record for his appeal on issues of fact that are outside of the record. Appellate counsel identified correctly that the "soot" on the shirt needed to be tested, after all, the Medical Examiner had noticed it, but failed to recognize the importance of testing the gun and the ammunition. This constituted deficient performance because the importance of testing the gun and the ammunition was outlined in the trial record in the testimony of Joy Patterson, a Firearms Examiner with the Tulsa Police Department Forensic Laboratory, when she explained the process to the jury of establishing the distance of the shooting as involving testing of the not only the shirt, but of the gun and the ammunition. Thus, the importance of testing the gun and the ammunition was something that was discussed at trial by the State's expert witness, which should have put trial counsel on notice of the importance of this issue. The ineffective assistance provided by trial counsel becomes even more evident when it is considered with counsel's other errors, including a blatant failure to investigate the case adequately.

These errors alone should raise questions of adequacy under the "reasonable jurists" standard

found in *Miller-El*. 537 U.S. at 327. Consequently, this Court should grant Mr. Ashton's petition for a COA under *Strickland* so that he may continue to seek justice under the law.

B. THE TRIAL COURT ERRED WHEN IT FOUND THAT GOFF'S INVOCATION OF HER RIGHTS UNDER THE TENTH AMENDMENT DEPRIVED MR. ASHTON OF HIS RIGHTS TO COMPULSORY PROCESS AND TO PRESENT A DEFENSE.

Given her statements to prosecutors, Ms. Goff's testimony was critical and would have corroborated Mr. Ashton's claim of self-defense. The state had no good faith basis to threaten to charge Ms. Goff, other than to use its prosecutorial power to scare her into invoking her Fifth Amendment rights. The state had no intention of prosecuting Ms. Goff and has not done so. The state's objective was to keep the jury from hearing how Walker, hyped up on meth, punched Ms. Goff over a cell phone, and how Ms. Sawyer twice threatened to kill them all.

On direct appeal, Mr. Ashton argued that his right to present a defense was impaired by the trial court's granting Ms. Goff's assertion of Fifth Amendment privilege, by the trial court's refusal to grant her immunity, and by the trial court's refusal to allow the admission of her hearsay statements. The OCCA declined to grant relief as to all three allegations of error. *Ashton*, 400 P.3d at 893-96. Mr. Ashton respectfully contends that the state court's denials were contrary to or an unreasonable application of clearly established federal law and/or based upon an

unreasonable determination of fact. 28 U.S.C. § 2254(d). In his habeas petition, Mr. Ashton challenged the OCCA's resolution of the Fifth Amendment and statement against penal interest hearsay exception aspects of this claim. Consequently, the district court limited its analysis to those arguments.

First, as to Mr. Ashton's claim that the trial court improperly allowed Ms. Goff to assert her Fifth Amendment rights, the OCCA reasoned that Ms. Goff "was confronted by a substantial and real hazard of incriminating herself for the offense of Accessory to Felony," and that the "prosecutor specifically mentioned this offense when she sought to protect Goff's rights at the pre-trial evidentiary hearing." *Ashton*, 400 P. 3d at 894 (emphasis added). While the OCCA acknowledged cases, such as *Maness v. Meyers*, 419 U.S. 449 (1975) and *Marchetti v. United States*, 390 U.S. 39 (1968), its application of them to the circumstances of Mr. Ashton's case was unreasonable. *Id.* The state court merely paid lip service to the standards articulated in *Maness* and *Marchetti*, and then claimed Ms. Goff's invocation passed Constitutional muster. *Id.* In reality, the prosecution was not seeking to protect Ms. Goff's rights; instead, it was seeking to chill her testimony through hollow threats that she would be prosecuted as an accessory. Despite the prosecutor's assertion, at the time of the Stand Your Ground Hearing, that there was "a very high likelihood" that Ms. Goff would be charged, by the time of trial no charges had been filed, nor have they ever been filed against Ms. Goff. The fact of no charges demonstrates that the prosecutor's true motive was to

impair Mr. Ashton's Constitutional right to present a defense and not to protect Ms. Goff's rights.

The district court overlooked these factual circumstances when it found the OCCA had reasonably applied Maness and Marchetti. And, it was further incorrect in finding that the OCCA was reasonable in its conclusion that the prosecutor was legitimately trying to protect Ms. Goff's Fifth Amendment rights. Instead, the state's claimed purpose of protecting Ms. Goff's rights was a subterfuge for preventing a material witness, who had been herself attacked by Walker, from testifying consistently with Mr. Ashton's claim of self-defense. Telling of this true motivation is that the prosecutor failed to assert that Ms. Goff had criminal liability as an accessory after the fact, when the defense sought to call her as a witness at trial. Instead, the prosecution claimed the "worst thing [Ms. Goff] says it was that she lied to the police" during initial questioning. Tr. 1253. And, upon questioning from the trial court, the prosecution agreed that such a lie would not provide a basis for a charge of perjury. *Id.* It was thus unreasonable for the OCCA and the federal district court to conclude that Ms. Goff's invocation of her Fifth Amendment rights was proper.

There was no "substantial and real" possibility of Ms. Goff incriminating herself; instead, the prosecution's claimed concerns were "merely trifling and imaginary" and did not support Goff's blanket invocation of the Fifth Amendment as to any events occurring on August 18, 2014. *United States v. Clark*, 847 F.2d 1467, 1474 (10th Cir. 1988) (finding blanket invocations of Fifth Amendment Privilege improper).

Second, after finding Ms. Goff to be unavailable as a witness, the trial court's refusal to admit her statements as contained in the prosecutor's summary as a statement against penal interests also served to impair Mr. Ashton's right to present a defense. The OCCA found that the trial court did not abuse its discretion in refusing to admit the summary. *Ashton*, 400 P.3d at 896. The state court found the summary constituted "hearsay within hearsay" which was not admissible because, while Ms. Goff's statements constituted statements against penal interests, Mr. Ashton did not argue the prosecution's summary containing Goff's statements also met a hearsay exception. *Id.* Oddly, this hearsay within hearsay argument was not asserted by the state in its Brief before the OCCA; the state instead argued that Ms. Goff's statements "did not tend to expose [her] to criminal liability." The OCCA invoked the hearsay within hearsay basis for its decision *sua sponte* and thus impaired Mr. Ashton's right to present a defense via the restrictive enforcement of evidentiary rules that "serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). Ultimately the OCCA held that Ms. Goff's statements would not "have created a reasonable doubt where none had existed before," and that the statements were "not critical to appellant's defense." *Ashton*, 400 P.3d at 896.

The district court found that the OCCA was not unreasonable in its determination that Ms. Goff's statements were not admissible; and further found the state court reasonable in its finding that the exclusion

of Goff's testimony and/or statements did not violate Mr. Ashton's right to present a defense. Mr. Ashton respectfully disagrees with the district court and contends that reasonable jurists could debate whether the exclusion precluded presentation of Mr. Ashton's defense. Ms. Goff's statements were powerful and could have easily "affected the trial's outcome." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868 (1982). Her statements supported Mr. Ashton's claim of self-defense and included that Sawyer threatened to kill Goff over the missing cell phone; Sawyer again threatened harm by stating "We'll come back, and all ya'll will be 6 feet under.;" Walker followed Ms. Goff into the residence and hit Goff three times; Walker and Mr. Ashton were "real close" at the time of the shooting; and Walker's menacing behavior culminated in him telling Mr. Ashton "If you're gonna pull that gun out, you better use it." Ms. Goff's statements are exactly the sort of evidence that "would create a reasonable doubt that did not exist without the evidence."

Mr. Ashton had a Constitutional right to present a meaningful defense at trial. The right was violated by the trial court's exclusion of Tyesha Goff's testimony and/or statements which served to corroborate Mr. Ashton's testimony. Given the close case of self-defense, this claim deserves encouragement to proceed further; this Court should grant Mr. Ashton's petition for a COA under *Richmond*.

C. THE DISTRICT COURT ERRED WHEN IT FOUND THAT MR. ASHTON FAILED TO SATISFY THE BURDEN OF PERSUASION FOR HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM UNDER THE AEDPA.

Mr. Ashton respectfully contends, as will be discussed infra, that relief may be properly granted. However, it must be kept in mind that at the COA stage Mr. Ashton need not demonstrate he is entitled to relief to proceed forward with this appeal; he needs merely convince the court that his Constitutional claims are debatable and/or adequate to deserve encouragement to proceed further. At this COA stage it would be error for the Court to conduct a full-on merits determination because the COA inquiry is not “coextensive with a merits analysis.” *Buck* at 115. “In fact, if a court of appeals ‘first decid[es] the merits of an appeal, and then justif[ies] its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.’” *United States v. Baker*, 49 F.4th 1348, 1354 (10th Cir. 2022) (citing *Buck*, at 115). In its decision denying Mr. Ashton’s request for a certificate of appealability, the District Court addressed his claim under AEDPA, holding that:

First, appellate counsel failed to argue that trial counsel was ineffective, not only for failing to test Walker’s shirt, but also for failing to test the gun and ammunition. Second, appellate counsel failed to test the gun and the ammunition despite clear evidence in the record that testing of those two items, long with Walker’s shirt, was necessary to determine the

distance between Ashton and Walker. Even assuming without deciding (1) that appellate counsel performed deficiently for both reasons alleged and (2) that testing of the gun and ammunition would have resulted in a reasonably certain scientific finding that Walker and Ashton were one foot or less away from each other when Ashton shot Walker, an evidentiary hearing is not needed because, as discussed next, Ashton cannot show that appellate counsel's allegedly deficient performance resulted in prejudice. See *Boyle v. McKune*, 544 F.3d 1132, 1136-40 (10th Cir. 2008) (assuming petitioner was diligent in developing the factual basis of his Strickland claim in state court, but finding petitioner was not entitled to an evidentiary hearing because even if petitioner's allegations were true, he could not show *Strickland* prejudice).

To support its decision, the District Court cited *Harrington v. Richter* as controlling precedent. The *Richter* Court interpreted the AEDPA as follows:

As amended by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) stops short of imposing a complete bar on federal court re-litigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with U.S. Supreme Court precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against extreme

malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

Harrington v. Richter, 562 U.S. 86, 102-103 (2011).

However, this Court's decision in *Wilson v. Sellers* casts doubt on the continued applicability of the Richter standard of applying AEDPA deference. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). In *Wilson*, this Court stated that when applying AEDPA deference, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again." *Wilson*, 138 S. Ct. at 1192.

The Supreme Court's holding in *Wilson* has led to other courts questioning whether the Richter standard has been overruled and, if so, for what type of claims. *Myers v. Superintendent*, 410 F. Supp. 3d 958 (S.D. Ind. 2019). For instance:

The Supreme Court in *Wilson* further explained that *Richter* does not control in all § 2254 cases, noting that if it "[h]ad intended *Richter*'s 'could have supported' framework to apply even where there is a reasoned decision by a lower state court," its decision issued the same day in

Premo v. Moore “would have looked very different.” *Wilson*, 138 S. Ct. at 1195. Instead, in *Premo*, the Supreme Court “focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA.” *Id.* at 1195-96. Indeed, throughout *Wilson* the Supreme Court juxtaposes the “look through” presumption it adopts with the “could have supported” framework, which is difficult to square if the latter approach applied in all cases, even when reasons are provided for a state court’s decision. *See id.* at 1193-95. *Wilson* casts serious doubt on the continued application of the *Richter* framework when the last state court decision provides reasons for the decision. *Id.* (citing *Premo v. Moore*, 562 U.S. 115 (2011)).

II. THE DISTRICT COURT ERRED WHEN IT DENIED MR. ASHTON’S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE THERE IS A FACTUAL DISPUTE THAT COULD ENTITLE PETITIONER ASHTON TO RELIEF.

In dismissing Mr. Ashton’s request for an appeal, the District Court relied on *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888,905-906, a standard this Court has indicated that may no longer be relevant. Although Petitioner Ashton has provided substantial evidence and strong legal arguments to support his claims, the District Court’s allegiance to an outdated standard seems to be a cause in its decision to deny his request for a certificate of appealability. As a result,

this Court should resolve this budding circuit split on the matter of AEDPA deference.

District courts may not refuse an evidentiary hearing when there is a factual dispute that would entitle him to relief if resolved in the prisoner's favor. See *Coleman v. Vannoy*, 963 F.3d 429, 435 (5th Cir. 2020). As found by this Court in *Martinez*, claims of ineffective assistance "often [turn] on evidence outside the trial record. 132 S. Ct. at 1119-20. Because while an inmate is in prison, he is not positioned to develop an evidentiary basis for his claim of ineffective assistance, evidentiary hearings are necessary to fill in gaps. See *id.*; *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011). An evidentiary hearing is ordinarily unavailable when the petitioner fails to diligently develop the factual bases of the claim in state court. See *Williams v. Taylor*, 529 U.S. 420, 432, (2000). But several circuits have found it necessary to remand a case for an evidentiary hearing where there are facts that impact the severity of the defendant's sentence or the defendant's offense. See *Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) ("Failure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." (quoting *Trevino v. Thaler*, 569 U.S. 413, 428 (2013))); *Harris v. Sharp*, 941 F.3d 962, 983 (10th Cir. 2019) (finding the defendant "did all that he could to develop the factual foundation for a showing of prejudice. By denying the opportunity for an evidentiary hearing, the OCCA left us with only a cold record and no factual findings for

the innately fact-intensive issue of prejudice.”); *Buhs v. Sec'y, Fla. Dep't of Corr.*, 809 F. App'x 619, 630 (11th Cir. 2020) (unpublished opinion) (remanding a case back to the District Court for an evidentiary hearing because the defendant “has never been afforded an opportunity to develop [his claimed] factual basis in the crucible of an evidentiary hearing—nor, just as importantly, has the State had the opportunity to challenge them in an adversarial hearing.”); *Kon v. Sherman*, 802 F. App'x 240, 243 (9th Cir. 2020) (unpublished opinion) (remanding a case for a limited evidentiary hearing).

Here, Petitioner Ashton alleges and has presented substantial evidence regarding his claim of ineffective counsel that creates a factual dispute. Specifically, Mr. Ashton maintains that his trial counsel failed to, among other things, conduct complete testing of all items and adequately investigate his case. Mr. Ashton alleges and has presented substantial evidence that the publicity of his case prejudiced him before trial. Evidentiary hearings on these factual disputes would entitle Mr. Ashton to relief if resolved in his favor. Thus, the district court erred when it denied Mr. Ashton’s request for an evidentiary hearing, and this Court should order a remand accordingly.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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