

CASE NO _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE SMITH,

Applicant,

v.

CHRISTE QUICK, Warden
Oklahoma State Penitentiary,

Respondent

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

EMERGENCY APPLICATION FOR STAY OF EXECUTION PENDING FILING AND
DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH IMMINENT EXECUTION SCHEDULED
FOR APRIL 4, 2024 AT 10:00 A.M.

April 2, 2024

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EMERGENCY APPLICATION FOR STAY OF EXECUTION

QUESTION PRESENTED¹

1. Whether Mr. Smith's first degree murder convictions and sentence of death are unreliable and in violation of his constitutional rights to due process and a fair trial because false testimony was used to corroborate Mr. Smith's confession?

¹As of the time of this filing, the Oklahoma Court of Criminal Appeals has not yet ruled on Petitioner's Successive Application For Post Conviction Relief and Emergency Application For Stay of Execution filed April 2, 2024. Assuming that these are denied, undersigned counsel submits the following questions would be presented to this Court in a petition for certiorari.

i.

APPLICATION FOR STAY

To the Honorable Neil Gorsuch, Associate Justice of the Supreme Court of the United States and circuit Justice for the Tenth Circuit.

Petitioner, Michael DeWayne Smith, respectfully requests a stay of his execution which is scheduled for April 4, 2024, at 10:00 A.M. CST, at Oklahoma State Penitentiary. Petitioner asks this Court to stay his execution to maintain the status quo and preserve the Court's eventual jurisdiction to review a petition for certiorari to the Oklahoma Court of Criminal Appeals pursuant to 28 U.S.C. § 1254(1). The issues to be raised will become moot if Mr. Smith is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring); *see also Murphy v. Collier*, 139 S.Ct. 1475 (2019) (staying the execution pending the timely filing and disposition of a petition for a writ of certiorari). Under Supreme Court Rules 23.1 and 23.2 and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted. In the alternative, Mr. Smith requests a stay under the All Writs Act to preserve this Court's jurisdiction to review the case following orderly appellate proceedings in the Oklahoma Court of Criminal Appeals.² 28 U.S.C. § 1651.

RELEVANT BACKGROUND

² Counsel recognizes that the matter now before this Court and pending before the Oklahoma Court of Criminal Appeals was presented close in time to Mr. Smith's scheduled execution date and that this Court has a significant interest in deterring late-stage filings in capital cases. *Dunn v. Ray*, 139 S. Ct. 661 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Regarding Mr. Smith's Successive Application For Postconviction Relief filed April 2, 2024, it was only on the evening of Friday, March 29, 2024, that counsel was advised that a private investigator had obtained an affidavit from Ms. Sheena Johnson stating that her trial testimony, used in part to corroborate Mr. Smith's confession, was untruthful. The successive application, and Mr. Smith's Emergency Application For Stay of Execution was filed in the Oklahoma Court of Criminal Appeals at the earliest reasonable time on April 2, 2024.

Mr. Smith is a death row prisoner incarcerated at the Oklahoma State Penitentiary in McAlester, Oklahoma. Mr. Smith was charged by Information in the District Court of Oklahoma County, Case No. CF-02-1329 with the February 22, 2002, First Degree Malice Aforethought Murders of Ms. Janet Moore and Mr. Sarath Pulluru. He was tried by jury and convicted of both homicides. The jury found two aggravating circumstances and the jury assessed sentences of death for each conviction, and the Honorable Twyla Mason Gray pronounced judgment and sentence accordingly.

Mr. Smith made statements to Oklahoma City Police Detectives Teresa Sterling and Janet McNutt during an interrogation and ultimately confessed to both homicides which both occurred on February 22, 2002. As set out in the direct appeal opinion affirming Mr. Smith's convictions and sentence of death, the Court found that:

During the interview, Smith first denied committing the murders, then admitted only to being present, and finally admitted committing both murders. He explained he killed both victims in retaliation for wrongs done him or his family. He told detectives he went to Moore's apartment looking for her son, that Moore panicked and started screaming, so he had to kill her. He said he killed Pulluru in retaliation against the store owner who shot Armstrong³ and in retaliation for disrespectful comments about Armstrong in the press attributed to someone from the A-Z Mart.

State v Smith, 157 P.3d 1155, 1161-62, ¶ 9 (Okla. Crim. App. 2007).

Opper v. United States, 348 U.S. 84, 91-94, 75 S. Ct. 158, 163-65, 99 L. Ed. 2d 101 (1954) requires the State to introduce substantial independent evidence to establish

³ "T-Nok" Armstrong, was a member of a gang which Mr. Smith was also involved in, and had been killed during a robbery of a convenience store next door to the A-Z Mart. *State v Smith*, 157 P.3d at ¶ 3.

the trustworthiness of an extrajudicial statement.

On direct appeal the Oklahoma Court of Criminal Appeals examined whether Mr. Smith's confession was sufficiently corroborated to allow it to stand as evidence supporting the jury's findings of guilt. *Smith v. State*, 157 P.3d 1175, ¶¶ 63, 64. The testimony of Ms. Johnson was one of the factors for the basis of upholding the murder convictions and sentence of death. The Court held that "Smith made two extra-judicial, post-crime statements in addition to confessing to detectives," including Sheena Johnson and Marcus Berry. *Smith v. State*, 157 P.3d at 1175, ¶ 65.

The Court also said:

At 3:00 or 4:00 a.m., Smith went to Sheena Johnson's apartment and told her that he had killed two people that day. During that conversation, Smith told her that he had killed Phillip Zachary's aunt because Zachary had been "snitching." Johnson had already learned of Moore's murder and told Smith that the victim was Zachary's mother, not his aunt. In response, Smith shrugged his shoulders, and said "oh well." Smith showed Johnson how he held his gun when he shot Moore and went on to say that he had also killed a person at a "chink" store. During his description of the second homicide, Smith mentioned something about one of his fellow gang members having his head blown off during a robbery. He said he would kill anyone who crossed his family. Smith also mentioned that someone had been on television "dissing" his set in regard to that robbery. *Subsequently, Johnson contacted CrimeStoppers and reported the conversation.* When she made that report, Smith was already in police custody on a different matter.

Smith v. State, 2007 OK CR 16, 157 P.3d 1155, ¶ 8 (Okla. Crim. App. 2007). Emphasis added.⁴

⁴ Now, in her March 28, 2024, Affidavit Ms. Johnson has denied she even made the call to Crimestoppers, as discussed below.

To refute the reliability of Ms. Johnson's testimony, Mr. Smith filed a Second Application for Post-Conviction Relief which was denied November 5, 2010. *Smith v. State*, 245 P.3d 1233 (Okla. Crim. App. 2010). Attached to that application was an Affidavit from Ms. Sheena Johnson dated December 9, 2009, admitting she testified falsely. Appendix 1. The court's opinion in *State v Smith*, 245 P.3d 1233 (Okla. Cr. App. 2010) referred to Ms. Johnson's 2009 Affidavit and found:

Sheena Johnson's affidavit is dated December 9, 2009. In the affidavit, Johnson alleges that: (1) her children were taken away from her by the trial judge to force her to testify against Smith; and (2) she testified falsely about certain statements Smith made to her about the Pulluru murder and that she did so using information police told her to include in her testimony. Johnson's allegation about her children being taken from her as coercion was known at the time of Smith's 2003 trial. It was discussed between Smith's trial attorney, the judge, and the prosecutor, in response to the prosecutor's objection to Smith's cross-examination of Johnson, in which defense counsel inquired into Johnson's reasons for testifying. Johnson's fear about losing her children was also known at the time of Smith's preliminary hearing in 2002, when she stated her belief that if she did not testify "I would have got arrested and my - I have a three-month-old baby and he would have - child welfare would have got him." . . . Obviously, Johnson's fear of having her children taken away from her as retribution for not testifying was information that was known at the time of Smith's trial and could have been used to raise this issue on direct appeal or in Smith's first application for post-conviction relief. This information cannot serve as the factual basis for a second application for post-conviction relief. 22 O.S. Supp. 2006, § 1089(D)(8).

Id. at ¶ 13.

On Friday, March 29, 2024, Mr. Smith's counsel received information that a private investigator engaged by Mr. Smith's family had obtained an Affidavit dated March 29, 2024, from Sheena Johnson. Appendix 2. In addition to information already contained in her December 9, 2009, Affidavit, Ms. Johnson states among other

information regarding her testimony that:

During the trial, I said, “I do not feel comfortable doing it, I don’t want to do it,” because it was not the full truth. I was told to just place my hand above the Bible but to not touch it if I was not comfortable doing so. At the time, Judge Gray and the district attorney knew I did this.

I was not the person that called crime stoppers, it was a family member. At the time, I told them I did call crime stoppers because I needed the extra money⁵, which I still to this day have not received.

Appendix 2, ¶¶ 8, 9.

On April 2, 2024, Mr. Smith filed a Successive Application For Postconviction Relief in the Oklahoma Court of Criminal Appeals claiming that:

(1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S. 1089(D)(8)(b).

The newly discovered evidence contained in the March 29, 2024, Affidavit of Ms. Johnson could not have reasonably been discovered prior to this time. Ms. Johnson states in her Affidavit that “I had expressed fear for my safety and my children’s safety because I was living in the same place where the crimes happened. I wanted help moving

⁵ Without further investigation it is assumed that there was a monetary award for information that leads to the arrest of the perpetrator of the crimes.

somewhere else before I testified so my children and I would be safe.” Appendix 2, Affidavit, ¶4. It is clear that Ms. Johnson has always been a reluctant witness and her reluctance prevented her from providing all information within her knowledge. The statements contained in Ms. Johnson’s recent Affidavit have been unknown to all counsel since Ms. Johnson’s December 9, 2009, Affidavit. Now that Mr. Smith’s execution is imminent Ms. Johnson has come forward to disclose her actions which were previously known only to her and kept from attorneys representing Mr. Smith.

The OCCA’s ruling in *State v Smith*, 245 P.3d 1233 does not take into account that Ms. Johnson did not even make the call to Crime Stoppers, but she wanted the extra money, because the OCCA did not have that information before it at the time of Mr. Smith’s second application for post-conviction relief. Her claims in paragraph 8 regarding her testimony that:

During the trial, I said, “I do not feel comfortable doing it, I don’t want to do it,” because it was not the full truth. I was told to just place my hand above the Bible but to not touch it if I was not comfortable doing so. At the time, Judge Gray and the district attorney knew I did this

also was not before the OCCA at the time of ruling on the second application for post conviction relief either. Ms. Johnson’s lies which were used to help convict Mr. Smith and sentence him to death, certainly renders her testimony unreliable and insufficient to corroborate Mr. Smith’s confession to detectives. When the OCCA ruled on Mr. Smith’s appeal the Court was without knowledge that Ms. Johnson has denied she even made the call to Crimestoppers or that her testimony was not the full truth. Mr. Smith has pending

in the OCCA a Motion For Evidentiary Hearing and Motion for Discovery both filed April 2, 2024, in order to learn what, if anything, the State or trial judge may have known regarding Ms. Smith's false testimony based on Ms. Johnson's statement at paragraph 8 of her March 29, 2024, Affidavit. Appendix 2.

ARGUMENT

1. MR. SMITH SATISFIES THE *ROSTKER* STANDARD FOR A STAY PENDING THE FILING OF A PETITION FOR CERTIORARI.

The standard set out in *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980), governs Mr. Smith's application. Applying that four-part standard here requires a stay. First, there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Mr. Smith's case presents the question of whether Mr. Smith's confession to law enforcement officials was sufficiently corroborated to allow it to stand as evidence supporting the jury's findings of guilt when perjured testimony of a witness was included as corroborating evidence. This is a question Mr. Smith will ask this Court to review in his petition for certiorari, assuming the OCCA denies relief.

Second, there is a fair prospect that a majority of the Court will conclude that a decision by the court below to hold that sufficient corroborating evidence existed to allow Mr. Smith's confession to law enforcement to stand, even though perjured testimony of Ms. Johnson was included as corroborating evidence, is wrong.

Third, irreparable harm is likely to result from the denial of a stay. See

Wainwright v. Booker, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (stating that the requirement of irreparable harm if stay is not granted “is necessarily present in capital cases”). Without a stay, the State of Oklahoma will likely execute a prisoner who has been denied his constitutional rights to due process and a fair trial. The denial of a stay will fail to ensure that Mr. Smith receives adjudication of his claim if the OCCA denies Mr. Smith’s application for post conviction relief.

Finally, balancing the equities to explore the relative harms to Mr. Smith, the Warden of the Oklahoma State Penitentiary, and the interests of the public weighs in Mr. Smith’s favor. A stay is in the interest of the public because all citizens have an interest in ensuring that the Constitution is upheld. The State will not be harmed by briefly delaying Mr. Smith’s execution to allow the proceedings pending below to be appropriately resolved, and to preserve this Court’s jurisdiction over certiorari review.

II. ALTERNATIVELY THIS COURT SHOULD EXERCISE ITS AUTHORITY UNDER ITS INJUNCTIVE POWER AND THE ALL WRITS ACT TO GRANT A STAY OF EXECUTION.

Mr. Smith requests a stay of execution to permit orderly appellate proceedings in the Oklahoma Court of Criminal Appeals to preserve the Court’s jurisdiction to review this case. The All Writs Act, 28 U.S.C. § 1651, empowers this Court to issue “all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principals of law.” This includes the power to “hold an order in abeyance,” *Nken v. Holder*, 556 U.S. 418, 426 (2009), and the power to issue a stay of execution, S.

Shapiro *et al.*, Supreme Court Practice 926 (10th ed. 2013).

The All Writs Act has been expansively interpreted to allow this Court to issue writs in aid of its *potential* jurisdiction. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (explaining that a court’s exercise of power under the All Writs Act “extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected”); *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943) (explaining that a court’s authority to issue writs in aid of its jurisdiction “is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected”); *see also LaBuy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) (holding that because a court could at some stage of the proceedings entertain appeals, it has the power to issue writs of mandamus reaching them); S. Shapiro *et al.*, Supreme Court Practice 661 (10th ed. 2013) (“The Supreme Court can issue extraordinary writs not only in aid of its jurisdiction over a case pending before it, but also in aid of its potential jurisdiction over a case pending before a court over which it has direct appellate power, and even in aid of its potential jurisdiction over a case pending before a court over which it lacks direct appellate power but may ultimately be able to review after a decision by an intermediate court.”) Stated otherwise, this Court can issue writs to prevent a case from becoming moot and protect its ultimate jurisdiction. *See, e.g., Mikutaitis v. United States*, 478 U.S. 1306, 1309-10 (1986) (Stevens, Circuit Justice) (granting application to extend

the stay of a district court contempt order because lack of a stay “may have the practical consequence of rendering the proceeding moot”).

Mr. Smith’s imminent execution qualifies as the “critical and exigent circumstances,” *Williams v. Rhodes*, 89 S. Ct. 1. 2 (1968) (Steward, J.) in which it is appropriate for the Court to exercise this power.

Absent a stay, Mr. Smith’s attempts to vindicate his right to due process and fair trial will not be resolved before his execution, causing irreparable injury for which Mr. Smith cannot seek any redress.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the considerations for granting a stay of execution weigh entirely in Mr. Smith’s favor, and thus Mr. Smith requests this Court enter an emergency stay of execution to permit it to preserve jurisdiction to review the final judgments of the lower courts, which will otherwise become moot by his execution.

Respectfully submitted,

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