IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

WILLIAM S. HURT, III,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC-2024-684**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF MOTION FOR POST-CONVICTION DNA TESTING

Petitioner, pro se, appeals to this Court from an order of the District Court of Tulsa County denying his motion for post-conviction DNA testing in Case No. CF-2010-1963. On October 7, 2011, a jury convicted Petitioner of one count of First Degree Murder. Pursuant to the jury's verdict, Petitioner was sentenced to life imprisonment. This Court affirmed Petitioner's conviction. *See Hurt v. State*, No. F-2011-1057 (Okl. Cr. May 17, 2013) (not for publication).

On June 14, 2024, Petitioner, pro se, filed a motion for post-conviction DNA testing pursuant to the Postconviction DNA Act, 22 O.S.Supp.2013, §§ 1373.1-1373.7. Pursuant to Section 1373.4 of Title 22, a court shall order DNA testing only if the court finds:

> 1. A reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution;
>
> 2. The request for DNA testing is made to demonstrate the innocence of the convicted person and is not made to unreasonably delay the execution of the sentence or the administration of justice;
>
> 3. One or more of the items of evidence the convicted person seeks to have tested still exists;
>
> 4. The evidence to be tested was secured in relation to the challenged conviction and either was not previously subject to DNA testing or, if previously tested for DNA, the evidence can be subjected to additional DNA testing that will provide a reasonable likelihood of more probative results; and
>
> 5. The chain of custody of the evidence to be tested is sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. For purposes of this act, evidence that has been in the custody of law enforcement, other government officials or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subsection absent specific evidence of material tampering, replacement or alteration.

22 O.S.Supp.2013, § 1373.4.

The trial court held a hearing and the Honorable Clifford Smith, Associate District Judge, in an August 19, 2024 order, denied Petitioner's request upon finding he had not demonstrated "[a]

reasonable probability that [he] would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution." *See* 22 O.S.Supp.2013, § 1373.4(A)(1). Specifically, Judge Smith held that Appellant failed to satisfy Section 1373.4(A)(1) because Appellant never identified any piece of evidence that if tested could change the outcome in this case. We agree.

We review the district court's determination for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Petitioner baldly asserted in the trial court that items were not tested that could now prove probative if tested. Petitioner offered nothing to support this claim and the record contains no support for the claim. This proposition is without merit. Moreover, in his pleadings filed with this Court, Petitioner does not address Judge Smith's order. Petitioner has not presented this Court with either evidence or argument that the District Court erred in denying his request for post-

conviction DNA testing. "There is a presumption of regularity in the trial court proceedings. As a consequence, it becomes the burden of the convicted defendant on appeal—whether on direct appeal or post-conviction—to present to this Court sufficient evidence to rebut this presumption." *Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324-25 (citations omitted). Petitioner must do more than express his disagreement with the District Court's ruling by appealing it. He must specifically identify how the District Court's decision was error and cite relevant authority supporting his argument. Petitioner has made no showing that he is entitled to the requested relief. Failure to cite authority in support of a contention is insufficient to raise the issue for consideration by the reviewing court. *Wilson v. State*, 1987 OK CR 86, ¶ 12, 737 P.2d 1197, 1203. This Court will not make an appealing party's arguments for him. *Fox v. City of Oklahoma*, 1991 OK CR 19, ¶ 5, 806 P.2d 79, 80.

The record sufficiently establishes that the District Court's determination that Petitioner failed to satisfy Section 1373.4(A)(1) was neither clearly erroneous nor clearly against the logic and effect of the facts presented. Petitioner has failed to demonstrate that

favorable DNA testing results would create a probability sufficient to undermine confidence in the outcome of his trial.

As a result, Petitioner has failed to demonstrate entitlement to DNA testing under the Postconviction DNA Act. Therefore, the order of the trial court denying Petitioner's motion for post-conviction DNA testing is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 4 day of October, 2024.

Scott Rowland

SCOTT ROWLAND, Presiding Judge

Willis J. Musseman

WILLIAM J. MUSSEMAN, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

Robert L. Hudson

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden

Clerk

PA

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

WILLIAM STEFVON HURT,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CF-2010-1963**
	)	
STATE OF OKLAHOMA,	)	Judge Cliff Smith
	)	
	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION DNA TESTING

This matter came on for consideration on 8/14/2024 pursuant to the "Petitioner's Motion for DNA testing Pursuant to the Post Conviction DNA Act and Brief in Support" filed on June 14, 2024.

STATEMENT OF THE CASE

On October 7, 2011, a jury found Petitioner guilty of one count of Murder – First Degree along with his co-defendant Jerlon Demont Morgan. The Honorable District Judge James Caputo sentenced Petitioner in accordance with the jury's recommendation of life with the possibility of parole.

Petitioner appealed to the Oklahoma Court of Criminal Appeals. He raised the following propositions of error:

1. The evidence is insufficient to support Appellant's conviction.
2. Appellant's trial was infected with improper, irrelevant, and speculative expert opinion, which denied him a fair trial.
3. Appellant was prejudiced by prosecutor misconduct.
4. Appellant received ineffective assistance of trial counsel.
5. The cumulative effect of all errors denied Appellant a fair trial.

The OCCA denied relief. *Hurt v. State,* F-2011-1057 (Okla. Crim. App. May 17, 2013) (not for publication).

Petitioner filed his First Application for Post-Conviction Relief on June 12, 2013. In it, he raised the following claims for relief he believed entitled him to relief:

1. I was denied a fair trial du to the trial from the state was effected with improper, irrelevent and purely speculative expert opinion.
2. My attorney Kevin Adams was ineffective for (1) failing to object to data collected cell phone, (2) failing to object to the prosecution's cross examination towards my witnesses and (3) failed to present additional testimony to corroborate my witnesses testimony.
3. In the third proposition, I claim prosecutor acted unethical, both in cross examination towards my witnesses and in closing arguments by challenging the credibility of my defense theory when the prosecutor (Benjamin Fu) knew of additional evidence corroborating that theory.
4. The evidence was insufficient to support my conviction.

The District Court denied relief by Order filed on August 6, 2013.

Now, Petitioner is requesting post-conviction DNA testing by motion filed on June 14, 2024.

STATEMENT OF FACTS

I. RELEVANT FACTS ESTABLISHED AT PETITIONER'S JURY TRIAL

A. The Relationships Among the Persons Involved in the Confrontation

All five young men present at the killing of Marcus Lewis knew each other. Jerlon Morgan and Petitioner were cousins. Joseph Thomas and Jarred Miller, who were Lewis' friends, had been friends since school days. Miller was also distantly related to Petitioner and Morgan. At the time of the murder, all were in their twenties.

(PHT: 8-9, 36, 65-66. TT: 411-415, 537-540, 561-563, 593, 604-605, 629-630, 941-942.)

B. The Prequel to the Confrontation – a Dice Game

Some weeks before the murder, Marcus Lewis and Jerlon Morgan were involved in a dispute over a dice game and Morgan tried to rob Lewis at a residence. As a result, hard feelings between the two young men continued into the ensuing weeks.

(PHT: 39-41, 43. TT: 652.)[1]

C. Night of the Murder – Ute Park Confrontation

On the Sunday evening of May 16, 2010, Joseph Thomas met Miller and Lewis at Ute Park on North Harvard Avenue in Tulsa. Thomas drove his maroon Caprice. At Ute Park, they encountered Petitioner and Morgan, who were in a white Taurus. A dice game was going on at the park. Morgan and Lewis exchanged words and the tension between the two ramped up. Lewis wanted to fight Morgan; Morgan did not want to fight Lewis. As the situation became more heated, Thomas and Miller convinced Lewis to leave Ute Park and forget about fighting Morgan. They had been at the park about an hour, from sunset until dark.

(PHT: 10-11, 42-44. TT: 415-481, 563-566, 599, 649.)

D. Night of the Murder – the Lull

From Ute Park, Thomas, Miller, and Lewis, all in the maroon Caprice, went to King's store on North Harvard, where they spent about 15 minutes. After that, they drove to the residence of Miller's sister Shamika, who lived about a block from the store. On the way, Lewis answered calls on his phone (number 918-951-1995) from Jerlon Morgan during which Thomas and Miller could hear Lewis say that he didn't want to fight.

---

[1]This incident, though not described at length at trial, was the subject of a pretrial notice filed by the state (August 5, 2011) and order by Judge Caputo (August 11, 2011). Keyondre Andrews, a witness to the robbery incident who was endorsed by the State to testify at trial, was not actually called as a witness.

At Shamika's house, the three men were getting out of the maroon Caprice when the white Taurus pulled up, with Petitioner driving and Morgan in the passenger's seat. Morgan taunted Lewis about fighting, and Lewis repeated that he didn't want to fight. Another car also arrived at Shamika's house – a gray Lincoln, with unidentified occupants. They did not get involved with the ongoing confrontation between Lewis, Morgan and Petitioner, but they appeared to be following the situation.

As a result of the encounter on the street at Shamika's house, the five young men in the two cars – maroon Caprice and white Taurus – decided to move the dispute to Cheyenne Park, which was not far away. Morgan was ready to fight without guns; Lewis was more "iffy." On the drive over, Thomas and Miller saw and heard Lewis get calls and texts; Lewis told the caller that he didn't want to fight.

(PHT: 10-11, 16, 39, 42-44. TT: 418-422, 440, 471-473, 567-75, 602, 604-611.)

E. The Night of the Murder – Cheyenne Park – the Morgan/Lewis Fight

At Cheyenne Park, in the 1600 block north on Cheyenne Avenue in Tulsa, Thomas arrived first, parking his maroon Caprice heading south. Lewis was in the front passenger seat, and Miller was in back behind Lewis. It was around 11:00 p.m.

Petitioner's white Taurus pulled up behind the Caprice; Morgan was in the passenger seat. The gray Lincoln parked behind the Taurus and several people got out from it.

As Lewis was sitting in the maroon Caprice with his window down, Jerlon Morgan ran up and punched him in the head. Lewis got out of the Caprice and the fight was on. He and Morgan punched and grappled for several minutes. At one point, Lewis knocked Morgan to the ground. At another point, the two were up against a car and Lewis grabbed Morgan's testicles. Morgan screamed and yelled for Lewis to let go of his nuts. Lewis hung on.

(PHT: 44-45, 50-52, 54-56. TT: 422-425, 474-485, 576-581, 616-625.)

F. The Night of the Murder – Cheyenne Park – the Shooting

Now Petitioner joined the fight. Up to this time, the conflict had just been between Morgan and Lewis, with Thomas and Miller standing by, but now Petitioner ramped up the battle by drawing a pistol from his waistband and pointing it in Lewis' face. Petitioner told Lewis to let go of Morgan's nuts, which he did. Miller, watching from the sidelines with Thomas and the people from the gray Lincoln, grabbed Petitioner's neck from behind with his arm and told him to cool down and put the gun away. No one else had guns.

Lewis and Morgan broke apart and Lewis went back toward the maroon Caprice. Morgan approached Lewis with an outstretched hand, as though he wanted to shake hands and make sure they were "good," but Lewis ignored the gesture. Lewis began to rant that Petitioner's pulling a gun was a "weak move," that only "nigger ass bitches" or "bitch niggers" bring guns to a fight. His companions tried to get him into the maroon Caprice to leave, but Lewis continued with the verbal insults, standing toward the front of that car.

Petitioner moved forward in the line of cars and took out his pistol again. He fired at Lewis, first at his feet, then moving up his torso. Lewis began to twist away but, when Petitioner hit Lewis around the waist, Lewis fell to the ground.

Petitioner ran back to his white Taurus, where Morgan was watching. As Petitioner got to the white Taurus, Miller heard Morgan say, "Finish him off." Petitioner ran back to the front of the maroon Caprice, where Lewis lay on his back, immobile, and fired more rounds from directly above Lewis, into the helpless man's head. Petitioner then ran back to the white Taurus, got in, and drove off with Morgan. The gray Lincoln also fled the scene.

(PHT: 46-49, 52-54, 62. TT: 426-438, 486-495, 516-519, 527-529, 581-90, 625-629, 656-659.)

G. The Night of the Murder – the Immediate Aftermath of the Shooting

In the confusion of the moments after the fatal shots, Thomas and Morgan lost track of their cell phones and ran to a house across the street from the park, where they asked the residents to call the police. Then the two men decided between themselves that they would rather not get involved with the investigation and any potential court proceedings. They concocted a story that they had gone to Cheyenne Park in response to a call from their friend Lewis, that they were arriving at the scene just as they saw the tail end of the shooting, in which three men all dressed in black attacked Lewis and sped away, leaving him for dead. They could not identify the assailants and described their vehicle as a blue Honda. None of this was true.

Tulsa Police Officer William Toliver was the first on the scene. The hour was nearing midnight. He had heard the shots, as he had been in the neighborhood responding to another situation. He heard the first volley, a lull, then another volley, spaced several seconds from the first. He arrived on scene within 90 seconds to two minutes of the shots. He first went to Lewis, outstretched on the ground in front of the maroon Caprice, and saw him take his final breath without a word. Securing the scene, he took initial statements from Thomas and Miller, who stuck to their concocted narratives, and turned the investigation over to Detectives Hill and Kennedy, who interviewed Thomas and Miller at the police station. The two men were not suspects and, after telling their false story to their respective detectives (Miller/Hill and Thomas/Kennedy), they were allowed to go home. Thomas and Miller spent a sleepless night.

At Cheyenne Park, TPD recovered a cell phone of Allen Andrews in the grass near the scene of the shooting – the phone for the account of Joan Allen, Jerlon Morgan's aunt, with the number 918-951-2095. Allen had come to the scene after the shooting and tossed the phone in frustration.

(TT: 441-452, 454-468, 513-516, 544-546, 590-592, 594-597, 612-616, 632-642, 651-653.)

H. The Next Day – Truth Be Told

The following day, Joseph Thomas had a talk with his father, who said that Joseph and Jarred should tell the truth to the police. Rethinking their original position, both young men met again with detectives and told the truth. In his interview on this occasion, Miller told Detective Hill that Morgan had directed Petitioner to "finish off" Lewis.

(PHT: Miller: TT: 444-445, 461, 470-471, 524-527, 550: Thomas: 597-599, 642-643; Det. Hill: 707-713.)

I. Court – the Preliminary Hearing

On September 27, 2010, the State presented Miller and Thomas as the two witnesses to substantiate the charge of first-degree murder against Petitioner and Morgan.[2] Morgan testified to the "finish him off" part of the evidence against Morgan, among other aspects of the events. As to be expected, he was subjected to considerable cross-examination by Morgan's attorney at the time, Caesar Latimer, on the issue of the "finish" statement.[3] Latimer was aware of the critical nature of that testimony, and referred to that part of the State's case in pretrial hearings.[4] Miller repeatedly

---

[2]Miller's testimony is found at PHT: 8-64. Thomas' testimony is found at PHT: 65-108. This brief only cites to Miller's testimony, to demonstrate that, contrary to the assertions of his recent affidavit, he emphatically stood by his corrected version of the facts at both the preliminary hearing and trial.

[3]*See, e.g.*, PHT cross at 28, 29, 31, 32; redirect at 52, 53; re-cross at 62.

[4]*See, e.g.*, Transcript of Proceedings (February 14, 2011), before Judge Caputo, at 3 (arguing that Morgan was merely present at the scene.) Supplement, Ex. 4. Morgan's trial counsel, Kathy Fry, also recognized the importance of the testimony in pretrial papers: *See* Defendant Morgan's Motion to Quash, filed July 14, 2011, in which he claims that he was just an innocent bystander, and Transcript of Proceedings (July 22, 2011), before Judge Caputo, at 4-7. Supplement, Exs. 5 and 6.

asserted that he was there to testify, in spite of his initial reluctance, because it was the right thing to do, and he was appearing voluntarily, even though he had been arrested on a material witness warrant.[5] Special District Judge David Youll bound over both defendants for trial on the charge of first degree murder based upon the State's evidence.[6]

J. Court – the Trial

At trial, the State presented evidence through Miller and Thomas, and a number of other witnesses.[7] Again, Miller was the witness who established the statement made by Morgan to

---

[5]*See, e.g.*, PHT: "Q. Would your testimony be any different if you were not in jail? A. It would be the same." (26-27), able to go home from jail after testifying (37), his testimony is free and voluntary; before he just didn't want to come to court (56-60).

[6]Morgan was bound over on October 11, 2010, after his counsel was given time to review the medical examiner's report.

[7]The State called 13 witnesses:

1. Leatta Downing, the mother of Marcus Lewis, identified his photograph. (TT 403-08)
2. Jarred Miller (TT 410-553)
3. Joseph Thomas (TT 559-665)
4. Steven Broom, a resident of the Cheyenne Park neighborhood, testified about hearing shots and seeing persons with a white car at the time of the murder. (TT 665-681)
5. Denise Dickerson, another resident of the Cheyenne Park neighborhood, testified about hearing gunshots at the time of the murder. (TT 681-688)
6. TPD Officer William Toliver testified about being the first officer on the scene of the murder after hearing gunshots. (689-701)
7. TPD Detective C. Kevin Hill testified about conducting the investigation of the murder and interviewing Jarred Miller on several occasions. (TT 702-823)
8. Dr. Andrew Sibley, medical examiner, testified about the autopsy of Marcus Lewis. (TT 826-851)
9. TPD Corporal Andrew Schilling testified about processing the crime scene at the site of the murder. (TT 859-904)
10. TPD Corporal Richard Coleman testified about cellular telephones obtained from the crime scene. (TT 905-934)
11. Janice Allen, Jerlon Morgan's aunt, testified about her residence location, two cell phones that she owned (946-9596 and 946-9590), and not knowing or calling Marcus Allen. (TT 937-941)
12. Joan Allen, Jerlon Morgan's mother, testified about her residence and Jerlon's at the time of the murder. (TT 943-953)

Petitioner about finishing off Lewis. As at the preliminary hearing, Miller's testimony, both as to the switch he made in narrative in general and as to the "finish him off" statement in particular, was forcefully challenged by defense counsel for Morgan, Kathy Fry (who had replaced Caesar Latimer), and by Petitioner's attorney, Kevin Adams. Despite their repeated attempts to dislodge and disparage his testimony, Miller repelled their assaults and stood by his second report to the police – Morgan had told Petitioner to "finish off" Lewis.[8]

Although no one else at trial testified to that specific remark by Morgan, the circumstances of the murder were confirmed and corroborated by other evidence. First, Thomas' account of the events of the deadly night were consistent with Miller's. Both men explained that Lewis and

---

13. Aislinn Burrows, custodian of records for Cricket Communications, sponsored records pertaining to 918-946-9590. (TT 956-962)

[8]*See* Miller (TT: decided to tell the truth day after murder; "Really I have to do what's right . . . for Marcus and his family and just everybody, you know." (444), "I'm here to tell the whole complete truth, yeah." (490), extensive cross-examination by Hurt's counsel, Kevin Adams, about his lies to the police and his veracity (495-508), he's being honest now (496), he admits he lied (496), "this is serious business." (498), he hasn't lied since the first night (498), "I'm telling the truth today." (504), "I lied to you off in the preliminary, but I'm not lying today." (504) "I'm telling you the truth about everything today." (508), the night of the murder he lied, but he's telling the truth now (512), when he called the police the day after the murder "I just felt like I had to come forward and do what was right . . . . I'm here to do the right thing for Marcus." (523), he identified the defendants to police the next day "because that's the truth." (550), he failed to appear at court once, "But I'm testifying for myself, though. I'm doing this like – regardless of whatever." (551); and Thomas (TT: after telling Lewis' father the true story, "how am I going to come up here and continue with that lie [told the police the night of the murder] when he knows the truth?" (598), Thomas told the detective the next day "the exact truth" (599), extensive cross-examination by Hurt's counsel regarding the fabricated story to police (634-643), everything told the police the second time is the truth (643), he and Miller tried to fabricate a believable story for the police the night of the murder, but now he wants everyone to know the truth (651-652), "Now I'm going to tell the truth how it is, and it's up to them to figure out the truth and lie." (652)) for instances in which they repeatedly insisted that their testimony at preliminary hearing and trial was the truth. Their testimony was also challenged through cross-examination of other witnesses. *See, e.g.*, Det. Hill in regard to Miller's "finish him off" statement. (TT: 760-761). Nonetheless, the jury found in favor of the State.

Morgan had a conflict, a fight was in the offing at Ute Park, Lewis was reluctant to fight, they moved on to King's store and Shamika's house, Petitioner and Morgan showed up there in the white Taurus, the parties moved on to Cheyenne Park, Morgan assaulted Lewis, the fight ensued, Lewis grabbed Morgan below the belt, Petitioner pulled a gun, the fighters broke apart, things cooled down, things heated up when Lewis began a rant, and then Petitioner shot Lewis, ran back to his car, only to return to Lewis on the ground and plug him in the head.

Second, witnesses in the area who testified – Officer Toliver, Steven Broom, and Jean Dickerson – distinctly heard two sets of gunfire, with an interval between, which was exactly as the shots were fired in two volleys by Petitioner.[9] Moreover, Thomas, though he did not hear Morgan incite the second round, did see Petitioner go back to his car, where Morgan was located, and then run toward Lewis again to fire the second volley of bullets as Lewis lay on the ground. The fact that Petitioner acted in that sequence is entirely consistent with reacting to Morgan's instructions to "finish him off." Why else would Petitioner, who seems to have done all he intended to do and get back to his car to make his escape, delay his getaway? Something, someone, incentivized him to complete the job at hand – to finish off Lewis. Morgan's words were just the pull he needed on the trigger of his will.

Third, the testimony of the officers and medical examiner confirmed that Lewis was shot partly while he was standing, albeit moving, and partly while he was supine on the ground, inert. The direction of the bullets striking Lewis varied considerably. Some were not necessarily fatal; others were lethal. The shot to his head was from the front. A shot to his back, which severed his spine and incapacitated him, was from behind. Thus, the shot to the head was consistent with the

[9]*See* Off. Toliver (TT: 691-692), Broom (TT: 665-680), and Dickerson (TT: 681-688).

testimony that Petitioner stood over Lewis and fired down into his skull, just as Thomas and Miller testified at preliminary hearing and at trial.[10]

Finally, testimony about cell phones at the scene corroborated the testimony of Thomas and Miller that Lewis had received calls while they drove from Ute Park to Cheyenne Park, and after. The incoming calls were not dated or fixed in time, but police examination and telephone account records did establish that a series of calls were made by 918-946-9590 to Lewis' telephone, and that several were not answered. The calls came from a cellular telephone belonging to Jerlon Morgan's aunt, Janice Allen, who testified that she had no contacts with Lewis herself and did not know the man. The only rational explanation for the contacts was that Morgan used the phone himself to contact Lewis, just as Thomas and Miller testified.[11]

Morgan presented no witnesses in his defense. The jury heard testimony from witnesses presented by Petitioner who tried to establish an alibi defense. They were unconvinced. The jury returned guilty verdicts against both men and recommended sentences of life in prison, with the possibility of parole. Judge Caputo sentenced the men accordingly.

II. FACTS SET FORTH BY PETITION IN HIS AFFIDAVIT REQUESTING DNA TESTING.

As part of his "Application," Petitioner provided an "Affidavit" as required by 22 O.S. § 1373.2 (C) wherein he states the following:

---

[10]*See* Off. Toliver (TT: 694); Dr. Sibley (TT: 830-850); Cpl. Schilling (TT: 888-889 as to .45 caliber cartridge casings from the murder scene).

[11]*See* Det. Hill (TT: 728-753); Cpl. Schilling (TT: 868-871, 883-886, 890-891, 897-903 as to cell phones); Cpl. Coleman (TT: 905-934 as to cell phone examinations); Janice Allen (TT: 937-943) and Aislinn Burrows, Cricket Communications custodian of records (TT: 956-961), as to cell phone 918-946-9590 (which, according to the State's theory at trial, was the phone by which Morgan contacted Marcus Lewis' phone on the evening of the murder).

1. That I am a resident of the State of Oklahoma and I am over the age of eighteen (18) years and am qualified to make this statement.
2. That I have personal knowledge of the facts set forth in this Affidavit.
3. I state under penalty of perjury under the laws of the State of Oklahoma Title 12 O.S. 2002 § 426 that the statements contained herein are true and correct.
4. I am currently serving a Life with Parole in violation of 701.7 First Degree Murder, Case No. 2010-1963, which I am actually innocent.
5. I was found guilty by a joint jury trial on Oct 7, 2011. I presented an alibi defense with multiple witnesses regarding my whereabouts during the time of Marcus Lewis' death. I have consistently and continuously proclaimed my innocence.
6. There is DNA evidence that can be obtained from the evidence in custody of law enforcement and state agencies and submitted for testing that will conclusively establish that I did not commit the crime of which I was accused and convicted.
7. The accusation surrounding me are false and I seek justice of my innocence.
8. Results from DNA will conclusively establish that I am factually innocent of the offenses above for which I am convicted. Had the evidence been provided to a jury, the jury would not have convicted me of and the proceeding would have been different.

ARGUMENTS AND AUTHORITIES

The Post-Conviction DNA Testing Act provides a mechanism by which a petitioner, upon the filing of a proper motion and affidavit, may make application to the Court for DNA testing of the biological material collected in his matter. *See* 22 O.S. § 1373.2. A petitioner is eligible to make such a request if he is "a person convicted of a violent felony crime or who has received a sentence of twenty-five (25) year or more and who asserts that he . . . did not commit such crime." 22 O.S. § 1373.2 (A).

In the case at bar, Petitioner has attested to this Court that he continues to maintain his innocence and he has requested testing of the DNA evidence preserved in the above-styled matter. He has also submitted an affidavit with his motion, setting forth facts in support of his request, as required by 22 O.S. § 1373.2 (C). Petitioner has also received a sentence of twenty-five years or more as required by § 1373.2 (A).

Pursuant to 22 O.S. § 1373.2 (D), the State submitted a response to the Court which included an inventory of the evidence related to the case and its custodian.

I. EVIDENCE COLLECTED IN THE INSTANT CASE

Attached to the State's Response is State's Exhibit 1, which is a property receipt pertaining to the evidence recovered by the Tulsa Police Department in the investigation of the incident in the above-captioned case. State's Exhibit 1 is identified as a property receipt with property receipt number BE5880. The State has been informed by a representative of the Tulsa Police Department that with regard to PR # BE5880, they presently have custody of all items with the exception of items 8, 32, and 33, which were released to Detective K. Hill.

II. CUSTODIAN OF EVIDENCE

The Tulsa Police Department has custody of all items of evidence with the exception of the items mentioned above.

III. PREVIOUS TESTING/POSSIBILITY OF ADDITIONAL TESTING

The State has been informed by the Tulsa Forensic Laboratory that no prior testing has been conducted on the evidence in the case at bar.

IV. PETITIONER IS NOT ENTITLED TO POST-CONVICTION DNA TESTING.

Petitioner has failed to meet his burden on his application for post-conviction DNA testing, as he has failed to show a reasonable probability that he would not have been convicted if favorable results had been obtained through DNA testing or that additional DNA testing will provide a reasonable likelihood of more probative results. *See State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, 337 P.3d 763. In *Russell v. Cherokee County District Court,* 1968 OK CR 45, 438 P.2d 293, 294, the Court stated:

> It is fundamental that where a petition for writ of habeas corpus, or for post-conviction appeal is filed, the burden is upon the Petitioner to sustain the

> allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court. Error must affirmatively appear, and is never presumed.

"Granting any relief based upon bald allegations or suspicions would clearly go against the presumption of correctness we attach to trial proceedings . . ." *Hatch v. State,* 1996 OK CR 37, 924 P.2d 284, 296. A court shall order DNA forensic testing pursuant to a motion under the Post-Conviction DNA Act *only if* it finds that five specific criteria are met:

1. A reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution;

2. The request for DNA testing is made to demonstrate the innocence of the convicted person and is not made to unreasonably delay the execution of the sentence or the administration of justice;

3. One or more of the items of evidence the convicted person seeks to have tested still exists;

4. The evidence to be tested was secured in relation to the challenged conviction and either was not previously subject to DNA testing or, if previously tested for DNA, the evidence can be subjected to additional DNA testing that will provide a reasonable likelihood of more probative results; and

5. The chain of custody of the evidence to be tested is sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. . . .

22 O.S. § 1373.4(A).

First and foremost, it goes without saying that in order to obtain post-conviction DNA testing, the Petitioner must articulate what item he wishes testing to be completed on and how such testing would create a reasonable probability that he would not have been convicted. In his motion, Petitioner fails to identify what piece of evidence he is testing to occur on. In addition, he fails to make any conceivable argument how DNA testing on a piece of evidence would exculpate him. A

post-conviction request for DNA testing is not a discovery expedition. Petitioner must meet specific statutory criteria, and he is not entitled to a blanketed "testing" on every piece of evidence in his case. Applying these standards to the case at bar, Petitioner's request for blanketed DNA testing must fail as he has failed to even articulate there exists "[a] reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution." 22 O.S. § 1373.4(A)(1).

In this matter, no additional DNA testing can provide favorable results that would somehow create a reasonable probability that Petitioner would not have been convicted. The primary piece of evidence connecting Petitioner as the shooter was Miller, who informed the jury that Morgan told Petitioner to "finish off" Lewis. In response, Petitioner initiated the fatal shots, which are corroborated by the medical examiner testimony that Lewis received gunshot wounds both when he was standing and laying down. Thomas also provided eye witness testimony of observing Petitioner return to Lewis and shoot him while standing over his body. The jury heard other corroborative evidence which included evidence of motive leading up to the murder and the cell phone activity the night of the murder. No DNA result would change that evidence, and no DNA result from the aforementioned evidence would create a reasonable probability that the Petitioner would not have been convicted. Therefore, Petitioner has failed to meet his burden to obtain post-conviction DNA testing. *See* 22 O.S. § 1373.4 (A) (1); *Neuwirth*, 337 P.3d 763; *Russell,* 438 P.2d at 294.

Petitioner's request fails on its face because he has failed to meet his burden. When looking at his blanketed requests in light of the evidence established at the jury trial, his request further fails and should be denied. The Court denies his request for post-conviction DNA testing for all the reasons articulated above.

CONCLUSION

Because there is not a reasonable likelihood that additional DNA testing in the instant matter would produce more probative results and since there is not a reasonable probability that Petitioner would not have been convicted if favorable results were obtained through DNA testing at the time of the original prosecution, Petitioner's request for Post-Conviction DNA testing is denied.

Based on the foregoing, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioner's application for post-conviction DNA testing is hereby **DENIED.**

SO ORDERED this 14 day of Aug, 2024.

CLIFF SMITH
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING/DELIVERY

I certify that on the date of filing, a file stamped certified copy of the above and Foregoing Order was mailed to:

William Stefvon Hurt
Dick Conner Correctional Center
129 Conner Road
Hominy, OK 74035-0220

And I further certify that on the date of filing, a file stamped certified copy of the above and the foregoing Order was hand delivered to:

Meghan Hilborn
Assistant District Attorney
Tulsa County District Attorney's Office
800 County Courthouse
500 S. Denver Ave.
Tulsa, OK 74103

DON NEWBERRY
TULSA COUNTY COURT CLERK

BY: _____
DEPUTY COURT CLERK

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS FOR
THE STATE OF OKLAHOMA

WILLIAM S. HURT III,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Case No. _____

Tulsa County District Court
Case No. 2010-1963

PETITION IN ERROR

COMES NOW, William S. Hurt III, Petitioner herein, hereby submits this instant document as his petition in error, pursuant to Rule 5.2 (C) of the *Rules of the Oklahoma Court of Criminal Appeals*.

I

Petitioner filed his Application for Post-Conviction DNA Testing in the Tulsa County District Court on June 14, 2024.

II

The State filed its response to the Application on July 17, 2024.

III

District Court Judge, Cliff Smith denied Petitioner's application on August 14, 2024. Attached hereto as "Attachment A."

IV

Petitioner filed his Notice of Post-Conviction DNA Appeal in the District Court of Tulsa County on August 27, 2024

APPENDIX: C

V

Petitioner respectfully requests that this Court find the District Judge's ruling to be in error and grant him relief in the form of, but not exclusive to, the granting of a new trial, a favorable sentence modification, or any other relief as this Court may deem appropriate.

I declare under penalty of perjury, as required by 12 O.S. 2011, § 426, that I have examined all statements contained herein, and to the best of my knowledge and belief, they are true, correct, and complete.

Date: 9/3/2024.

William S. Hurt III #650799
D.C.C.C. N-217
129 Conner Rd.
Hominy, Ok 74035

IN THE COURT OF CRIMINAL APPEALS

STATE OF OKLAHOMA

Case No. PC-2024-684

District Court of Tulsa County Case No. CF-2010-1963

William S. Hurt III, *Pro se*, Petitioner,

v.

State of Oklahoma,

District Attorney of Tulsa County

Petitioner's *Pro se* Brief-In-Support of Post-Conviction DNA Testing

---

William S. Hurt III

129 Conner Road

Hominy, Oklahoma 74035-2100

Petitioner, *Pro se*.

APPENDIX: D

IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

WILLIAM S. HURT III,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	**Case No. PC-2024-684**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

BRIEF-IN-SUPPORT OF POST CONVICTION APPEAL

COMES NOW, William S. Hurt III, Petitioner *Pro se* herein, who is currently confined in the Dick Conner Correctional Center Penal Facility located at 129 Conner Road in Hominy, Oklahoma 74035, hereby submit the instant brief-in-support of his Post-Conviction DNA Appeal. In support of his appeal, Petitioner presents the following.

STATEMENT OF THE CASE

1. On October 7, 2011, Petitioner was convicted in the District Court of Tulsa County, Case No. Cf- 2010-1963, for First Degree Murder in violation of 21 O.S. § 701.7. and sentenced to Life with Parole.
2. Petitioner entered a plea of: Not Guilty
3. Petitioner's pronounced of guilt was made by a Jury.
4. In the trial court, Petitioner was represented by Kevin Adams who was retained.
5. Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals (OCCA). In an unpublished summary opinion, filed in May 17, 2013 case No. F 2011-1057, the OCCA affirmed the Judgments and Sentences of the Trial Court.

6. On June 12, 2013, Petitioner filed an application for Post-Conviction Relief in Tulsa County District Court. Petitioner did not have any legal assistance while he was housed at Davis Correctional Maximum Facility. Petitioner used his direct appeal brief to file his Post-Conviction Relief which was denied by Res Judicata. By order filed Aug 6, 2013, the district court judge denied the requested relief. Petitioner did not file a Post-Conviction Appeal.

7. On January 24, 2014, petitioner filed a petition for Writ of Habeas Corpus, using 28 U.S.C. § 2254 form. However, Petitioner's petition was stamped filed in Tulsa County District Court, which was delayed for three (3) years. Petitioner then filed a petition for habeas relief in Federal District Court. Petitioner reasserted two claims he made before the OCCA. After equitable tolling, the Federal District Court denied the petition and declined to issue a COA on 12/30/2019; Case No. 17-CV-005-JED-JFJ.

JURISDICTION

Jurisdiction is invoked pursuant to 22 O.S. § 1087 under the Oklahoma Uniform Post-conviction Procedures Act; *State ex rel. Smith v. Neuwirth,* Ok CR 16, ¶ 11, 337 P.3d 763, 765-66; also, pursuant to Rule 5.2, *Rules of the Oklahoma Court of Criminal Appeals*. The Petitioner has already submitted his Petition in Error, Affidavit in Forma Pauperis, with a CERTIFIED COPY of the Order attached. The instant document is the accompanying brief-in-support.

STANDARD OF REVIEW

Abuse of discretion is the applicable standard of review. *See Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 16, 170. (An "abuse of discretion" is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment.)

PROPOSITIONS OF ERROR

Petitioner presents the following propositions of error on appeal:

PROPOSITION I

THE DISTRICT COURT ABUSED ITS DISCRETION BY VIOLATING PETITIONER'S CONSTITUTIONAL AND STATUTORY RIGHTS TO COUNSEL FOR THE PURPOSE OF HIS POST-CONVICTION DNA HEARING.

ARGUMENT AND AUTHORITY

Petitioner was deprived the right to counsel at a critical proceeding. Okla. Const. Art. II, § 7, 20; U.S. Const. Amends. VI, XIV; *Mempha v. Rhay*, 389 U.S. 128 (1967); *Runnels v. State*, 896 P.2d 564, 565, (Okl. Cr. 1998); *United States v. Cronic*, 466 U.S. 648 (1984).

The District Court failed to make a record of its inquiry into Petitioner's financial ability to hire legal counsel prior to his hearing for a Post-Conviction DNA by Legislation pursuant to **22 O.S. § 1373.2 (E). Motion requesting testing:**

> **E. A guardian of a convicted person may submit motions for the convicted person under the provision of this act and shall be entitled to counsel as otherwise provided to a convicted person pursuant to this act.**

Petitioner filed an Application for Determination by System and Appointment of Representation By System on August 12, 2024 prior to his Post-Conviction DNA hearing with the district court that was ignored.

As an indigent defendant, Petitioner is entitled to appointment of counsel by district court because of the scientific complexity of DNA evidence analysis and that legal procedure authorized by 22 O.S. § 1373 (1)-(7) are too difficult for a layman to navigate.

Petitioner informed the district court at the beginning of his hearing via videoconference that he filed his application requesting counsel. The District Court proceeded to move forward

with the hearing without appointing counsel. The hearing is a critical stage in which the defendant's rights may be lost, defense waived privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way. *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999 (1970); *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157 (1961).

The District Court did not provide Petitioner with an effective time or date prior to his evidentiary hearing "via videoconference" in regards to his motion requesting DNA testing. Petitioner was without adequate representation for his hearing and Judge, Clifford Smith asked Petitioner about his motion requesting DNA testing and Petitioner explained that he was innocent of the crime and that he'll be able to prove his innocence through DNA testing, which would have exculpated himself and inculpate another suspect.

It was essential for Petitioner to receive counsel at his hearing to demonstrate that Petitioner has a reasonable possibility Pursuant to 22 O.S. § 1373.4 (A)(1)-(5) that he would not have been convicted if favorable results had been obtained through DNA testing at the time of his original prosecution and the evidence Petitioner sought to have tested still exist and has been preserved for testing. The State's case is based on impeached testimonial evidence made by Jarred Miller and Joseph Thomas. These allegations were fabricated after Detective C.K. Hill and Det. Kennedy initial interrogation with these witnesses. Petitioner was not able to give the district court a reasonable possibility that the jurors would not have convicted him in his original prosecution at the hearing held without counsel inside of Case Manager, Ms. Buchanan's office space, because he was not informed about the video conference call until he was called into her office. Petitioner was not prepared to conduct the hearing without legal assistance as needed to demonstrate that he meets the five (5) criteria for DNA testing.

Petitioner's hearing was held during facility count hours and petitioner was told by C/M Ms. Buchanan that she was unaware of the video conference call by the district court and that it would not take long. Petitioner was rushed through the video conference and was not giving the opportunity to effectively address his motion requesting DNA testing. Due to an extremely short hearing, Petitioner was not able to present the facts set out in his motion to this court because the district court ended the call in such a rush that Petitioner was not able to explain that there was a reasonable possibility that the outcome of his original trial would have been different. Petitioner has been incarcerated for 14 years and is not an expert in law. It would have been in the best interest of justice to appoint counsel for Petitioner at his hearing so that Petitioner can prove that he meets the five (5) criteria for DNA testing to establish that the state's circumstantial evidence were false and DNA testing would exculpate Petitioner and inculpate another suspect that committed the offense.

Had counsel been appointed at Petitioner's hearing then Petitioner would've had a more effective opportunity to demonstrate that the allegations made by Miller and Thomas were coerced by the state to convict Petitioner. The state's witnesses accused Petitioner of being involved in a physical altercation, which was fabricated, in order to hide and prevent the truth of what actually occurred the night of Marcus Lewis' death. There were items such as a keychain found in the roadway approximately 90 feet North of the victim's body that was introduced in Petitioner's original trial that has **no explanation** as to the ownership of the property receipt item #8 keychain as being involved in a fight (Tr. Trans. Vol III. Pg.869). Petitioner's jurors were left without any explanation as to the owner of that keychain, which is why Petitioner asked for the testing to be conducted to prove that the state used perjured testimony to convict him and that it has the potential to inculpate another suspect to the murder and exculpate Petitioner.

See state's response to DNA testing (I) Evidence collected in the instant case, "they presently have custody of all items with the exception of items #8 keychain, #32 contents from pocket (lighter, two earrings, pack of cigarettes, pack of orbits gum), #33 ring, which were released to Det. C. K. Hill." The district court erred in denying Petitioner's motion requesting DNA testing without appointing Petitioner counsel, which resulted in Petitioner not being to call the custodian, Detective C.K. Hill at his evidentiary hearing to hold a further investigation into the existence of the specific keychain, contents from the victim's pocket (lighter, two earrings, pack of cigarettes, pack of orbits gum), and a ring that has been released to Detective C. K. Hill, so that Petitioner could have the items tested. Petitioner's hearing was without any assistance in knowing that Det. C. K. Hill still works for the Tulsa Homicide Division and that these items were preserved over Twelve (12) years of petitioner's incarceration following his conviction. Also, Petitioner has never received any notice that those items were destroyed, lost, or that those items were released back to its owner, in which Petitioner nor his original jurors had known who those items belonged to. If Det. C. K. Hill had spoken or known who those items belonged to Det. C. K. Hill and the State is withholding information in regards to the ownership of these items that could inculpate another suspect.

Undoubtedly the loss of Petitioner's significant rights at such a critical proceeding is grounded upon *Brady v. Maryland,* 373 U.S. 83 (1963). In *Brady*, the High Court held that "suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material to guilt [ ], irrespective of good faith or bad faith of prosecution." *Id.,*373 U.S. at 87.

The United States Supreme Court has determined factors such as (1) failure to pursue strategies or remedies resulting in the loss of significant rights, (2) skilled counsel would be

useful in helping accused understand the legal confrontation, and (3) the proceeding tests the merits of the accused case constitutes a critical stage of criminal proceedings to which the right to counsel attaches. See *Mempha v. Rhay,* 389 U.S. 128, 134 (1967); *United states v. Ash,* 413 U.S. 300, 313 (1973); *Runnels v. State,* 896 P.2d 564, 565 (Okl. Cr. 1995) (The sixth Amendment protects the right to counsel in very "critical stage" of a criminal prosecution.)

Therefore, Petitioner was constructively denied counsel at a critical stage of the criminal proceedings and the results therefore are unreliable. As relief, the instant case must be remanded to District Court below with appointment of counsel.

PROPOSITION II

THE DISTRICT COURT ABUSED ITS DISCRETION DENYING PETITIONER MOTION BECAUSE THE STATE FAILED TO PRESUME SATISFIABLE CHAIN-OF-CUSTODY REQUIREMENTS OF SUBSECTION 22 O.S. § 1373.4 (A) (3) (5). THE ITEMS REQUESTED TO BE TESTED STILL EXIST AND IT HAS THE POTENTIAL TO ESTABLISH THE INTEGRITY OF THE EVIDENCE.

ARGUMENT AND AUTHORITY

Petitioner was deprived of his Fundamental Due Process of Law. Okla. Const. Art. II, § 7, 20; U.S. Const. Amend. XIV.

Petitioner requested DNA testing on all the biological material in the state's possession including #8 keychain, #32 the contents from the victim's pocket (lighter, two earrings, pack of cigarettes, pack of orbits gum), and item #33 ring, allegedly used in the commission of the offense, to prove his innocence. Petitioner argued that the DNA/biological material will establish that the keychain did not belong to him nor did he come in contact with any of the items collected at the scene. The blue keychain lanyard was located approximately 90 feet from the

victim's body and was introduced as exhibit #9 during Petitioner's original trial. Petitioner was accused by Joseph Thomas' of being involved in the physical altercation involving the victim and Mr. Miller. Mr. Thomas testified that, "Mr. Miller grabbed Petitioner around the neck." See (Tr. Trans. Vol. III Pg. 582). Without the exculpatory evidence the jury was left to insinuate that Petitioner had left evidence at the scene after the physical altercation. The exculpatory evidence requested to be tested has biological evidence whether it be from the suspect's or victim's DNA collected on the keychain, contents from victim's pocket, and a ring on the victim right hand. The victim's ring was found on his right hand and according to the state's witnesses Jarred Miller and Joseph Thomas, the victim was involved in a fist fight that would have contracted a substantial amount of biological material on the ring from his opponents that would have exculpated Petitioner from being involved.

Furthermore, Petitioner was limited to speak on DNA testing because the District Attorney, Ben Fu, requested DNA testing from Petitioner's Co-defendant, Jerlon Morgan, and thereafter received it. At the beginning of Petitioner's joint trial on Oct 5, 2011 a motion in limine was held regarding the still pending results of the DNA test. See. (Tr. Trans. Vol II. Pg. 368). Petitioner requested those results at his hearing and was told that Former District Attorney, Ben Fu did not follow through with the testing and that there was no prior testing done. As a result of Former District Attorney, Ben Fu, negligence to produce the requested DNA testing prior to trial caused both defendants to be limited to speak on DNA testing, which shows that along with the District Attorney, Ben Fu request for a trial continuance pending results that exculpatory DNA evidence should have been entered into petitioner's original trial. The DNA testing pertaining to this specific case has substantial relevance to Petitioner's claim of innocence.

Petitioner attached an affidavit to the Motion seeking DNA testing claiming he did not commit the offense that was sworn to under penalty of perjury and had that biological material came back as the Petitioner's he should be charged with perjury.

The Petitioner states "Biological evidence" exist must be retained and preserved pursuant to **22 O.S. § 1372, Preservation of evidence:**

> **A. A criminal justice agency having possession or custody of biological evidence from violate felony offense, as defined by subsection F of Section 982 of Title 22 of the Oklahoma Statutes, shall retain and preserve that biological evidence for such period of time as any individual convicted of that crime remains incarcerated.**

The offense which Petitioner were convicted under are violent felony offenses defined under 22 O.S. § 982 (F) (13) which states: "Murder in the first or second degree." Petitioner meets this threshold requirement to preserve the evidence containing biological material.

After the State responded on July 17, 2024, it was admitted that the items #8 keychain, #32 contents from the victim's pockets (lighter, two ear rings, a partially empty pack of cigarettes, and a pack of orbits gum), and #33 ring had been released to Detective C. K. Hill and never returned. Petitioner was without counsel and did not receive a full and fair evidentiary hearing to address this issue with the District Court, Judge Clifford Smith, because the court had concluded it's hearing before Petitioner could address the burden upon the state to provide the satisfied chain-of-custody and the existence of those items. During Petitioner's original trial the District Attorney, Ben Fu, introduced this evidence without Petitioner's acknowledgment of ownership. The District Court erred in its conclusion by failing to allow petitioner to interview the State's affiant, Det. C.K. Hill and was not afforded a reasonable opportunity to arrange for his interview or to respond to the state's representation when the trial judge denied the petition without appointing counsel to investigate Petitioner's claim.

The District Attorney was required to establish the custodian of the items related to Case No. Cf-2010-1963, in which Detective C.K. Hill has been in possession of the items over the years of Petitioner's incarceration without Petitioner's acknowledgment in the matter relating to this case that these items were removed and have been from the time the case closed.

Petitioner asserted in his Post-Conviction DNA Motion that he has never received a notice of these items he sought to have tested, as being returned to the owner or who the owner of those items were. The preservation of evidence was required under the statute as provided for under **22 O.S. § 1372 (C) which provides:**

> **C. The criminal justice agency in possession or custody of biological evidence may destroy or otherwise dispose of the biological evidence before the expiration of the period of time described in subsection A of this section only if:**

1. The agency notifies any person who remains incarcerated in connection with the case, the Oklahoma Indigent Defense System DNA Forensic Testing Program if still applicable, and any counsel of record or public defender organization for the judicial district in which the judgment of conviction for such person was entered, of:

    a. The intention of the agency to destroy the evidence, and
    b. The provisions of the DNA Forensic Testing Act, if still applicable;

2. No person submits a written objection to the destruction of the biological evidence to the agency within ninety (90) days of receiving notice pursuant to paragraph 1 of this subsection; and

3. No other provision of law requires that such biological evidence be preserved.

The District Court determined that the evidence released to the custodian Det. C.K. Hill has been preserved without the custodian's acknowledgment to the court. At the time of the

hearing, the district court did not ensure that the State's disclosure of the custodian has preserved evidence related to this case for testing. The fact that this evidence was released to Detective C.K. Hill without sufficient notice under 22 O.S. § 1372(C), Petitioner's due process rights were violated. Petitioner was not able to retain counsel at the hearing and was not able to call Detective C.K. Hill as a witness to testify about the existence of the evidence that has been in his possession. The case closed in 11/14/2011 and this evidence should have been preserved for DNA testing. The statutory language under 22 O.S. § 1372(C)(2) which is plain and unambiguous establish "[n]o person submits a written objection to the destruction of the biological evidence to the agency within ninety (90) days of receiving ***notice pursuant to paragraph 1 of this subsection...***" The Petitioner never received notice under this subsection or otherwise that his evidence would be destroyed. The fact that the evidence must be preserved cannot be ignored.

The State was provided notice that the evidence was potentially exculpatory when Petitioner entered a plea of not guilty. Petitioner proceeded to trial which automatically under 22 O.S. § 1372, required preservation of that evidence until notice was provided under this statute. Petitioner argues the Due Process Clause under the Fourteenth Amendment specially protects those fundamental rights and liberties which are, objectively, "**deeply rooted** in this Nation's history and tradition, "*Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L. Ed. 2d 531 (1977) (citing *Washington v. Glucksberg,* 521 U.S. 702, 720-721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). *Snyder v. Massachusetts,* 291 U.S. 97, 105 54 S.Ct. 330, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept liberty," such that "neither liberty nor justice would

exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Notice is that fundamental right implicit in the concept of ordered liberty.

Okla. Stat. tit. 22 § 1373.4 (A) (3)

One or more of the items of evidence the convicted person seeks to have tested still exists;

The District Court also erred in denying Petitioner's motion based on the state's response pertaining to the statutory burden of the state to provide an inventory of all the evidence related, including the custodian of such evidence. Petitioner should be lifted where prosecutors provide inadequate information to show whether evidence is available for testing. Such as an affidavit from an individual with direct acknowledgment of the status of the evidence or an official record indication its existence or nonexistence, regardless of whether the evidence itself is produced.

The State was required to provide Petitioner with the custodian of such evidence requested to be tested, but failed to do a follow-up as to the location of items #8 keychain, #32 contents from victim's pocket (lighter, two earrings, pack of cigarettes, pack of orbits gum), #33 ring. The victim was in possession of items #32 contents from victim's pocket (lighter, two earrings, pack of cigarettes, pack of orbits gum) and item #33 ring on the victim's right hand. In regards to item #8 keychain was introduced at Petitioner's trial as exhibit #9 without any proof of ownership.

The facts set forth in the state's response motion are false and misleading to the Petitioner and the District Court. As part of the state's Statement of Facts (I) (G) Relevant Facts Established at Petitioner's Jury trial, The Night of the Murder- The Immediate Aftermath of the Shooting. Petitioner requested that item #9 cellphone (918) 951-2095 to be tested because there wasn't any testimony at Petitioner's original trial that Allen Andrews owned or had thrown a cell

phone in the park after the shooting. This phone was collected by TPD Stoltz, after he seen two suspicious guys in that area looking toward the ground (Trace Report Pg.64). Petitioner and his jurors were left without any proof of ownership regarding the phone that was left in the park or when and how that phone was put in the park. It was the state's own belief that an Allen Andrews had thrown that phone in the park after he arrived. Petitioner requested DNA testing on the phone to prove that the phone was not his nor Janice Allen's phone, as the State has stated in the statement of facts that is false and misleading. See Bench Conference (Tr. Trans. Vol. IV Pg. 1117-23). This phone was relevant to the case and Petitioner asserts that he's innocent and the witnesses had fabricated a story to tell the officers and detectives that misled them in their investigation. The actual suspect could have dropped item #9 cellphone in the park, which would have corroborated Mr. Miller's and Mr. Thomas' initial statements gathered by Officer, William Toliver, were they seen the suspects ran south away from the scene See (Trace Report Pg. 26-27).

The District Court found that a requirement pursuant to 22 O.S. § 1373.4 (A) (5) is that the "chain of custody of the evidence to be tested is sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in any material respect or altered in any material respect." 22 O.S. 1373.4 (A) (5). Petitioner argues the evidence to be tested was not secured in relation to the challenged conviction and that the evidence is being withheld by the state that will provide a reasonable likelihood of more probative results that Petitioner is innocent. The state has not establish its burden of the preservation of evidence statute by depriving Petitioner the right to object to the custodian in possession of evidence over an unknown amount of time, in which, evidence was required by statute to be preserved. Legislative intent is determined first by the plain and ordinary language of the statue. *Johnson v. State, 2013*

Ok CR 12,¶ 10, 308 P.3d 1053, 1055. "A statute should be given a construction according to the fair import of its words taken in their usual sense, in conjunction with the context, and with reference to the purpose of the provision." *Id.* When language of a statute is unambiguous, resort to additional rules of construction is unnecessary. *Barnard v. State,* 2005 OK CR 13, ¶7, 119 P.3d 203, 205-06. "We must hold a statute to mean what it plainly expresses and cannot resort to interpretive devices to create a different meaning." *Johnson, supra.* See also *Newlun v. State,* 2015 OK CR 7, ¶8, 348 P.3d 209, 211.

Further, Petitioner meets the threshold for DNA testing under 22 O.S. 2013 § 1373.2 which provides for the Eligibility and Procedures for Post-Conviction DNA Testing. Petitioner argues that the district court violated his due process law when Petitioner was unable to call Det. C.K. Hill as a witness during his hearing to provide each party with information about the evidence being preserved and how long the custodian has had possession of item #8 keychain, item #32 contents in the victim's pockets (lighter, two earrings, pack of cigarettes, pack of orbits gum), and item #33 ring from the victim's finger. The custodian Det. C.K. Hill should have been apart of Petitioner's Evidentiary Hearing to proscribe the district court with the whereabouts of the evidence that has not disclosed ownership, in which, Petitioner sought to have tested to prove his innocence as impeachment evidence to demonstrate that reasonable probability that the Petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution. However, it is the Petitioner's position that the right remedy to have done was to call Det. C.K. Hill as a witness to make a specific finding of facts as to the existence of the evidence related to Case No. 2010-1963. See 22 O.S. § 1084. Evidentiary Hearing—Finding of fact and conclusion of law.

Petitioner request this court to remanded his case back to the district court to appoint counsel and call the custodian Det. C.K. Hill to establish the existence of the items that were released and should have been preserved during Petitioner's incarcerated for DNA testing.

PROPOSITION III

THERE IS A REASONABLE PROBABILITY THAT THE JURY WOULD NOT HAVE CONVICTED PETITIONER OF FIRST-DEGREE MURDER HAD DNA TESTING BEEN AVAILABLE AT THE TIME OF HIS ORIGINAL PROSECUTION.

ARGUMENT AND AUTHORITY

Petitioner was deprived the right to present a Complete Defense and Fundamental Due Process of Law. Okla Const. Art. II §§ 2, 7. U.S. Const. Amend. XIV.

Petitioner is entitled to Post-Conviction DNA relief because he believes that if the evidence left at the scene had been tested, he would have proven by exculpatory DNA evidence to establishes his innocence and undermine all confidence in his conviction. Petitioner's conviction rests on Miller's and Thomas' identification and also rested significantly on untested evidence recovered from the scene by the Tulsa Police Department that was introduced at Petitioner's trial. The evidence recovered had substantial value in weight as to Petitioner's guilt, in which Petitioner requested that the specific items #8 keychain, #9 cellphone, #17 victim's left finger nails, #18 victim's right finger nails, #32 contents from victim's pocket, and #33 ring found on the victim's right hand. Petitioner has due diligently exclaimed his innocence throughout his court proceedings and has since requested DNA testing pursuant to 22 O.S. § 1373.2 Motion Requesting Testing.

Petitioner's Post-Conviction DNA testing should not have been denied based on whether DNA testing could have changed the witnesses' testimony, but relied on to create a reasonable

probability that Petitioner would not have been convicted had DNA testing been presented at his original prosecution. Petitioner's alibi defense was corroborated by Former District Attorney, Ben Fu and Detective C.K. Hill further inquiry into their investigation beyond their witnesses statements that excluded Petitioner as a suspect to the murder.

Petitioner had reasonable possibility to believe that the jury at his original trial would not have convicted him had DNA testing been presented. Petitioner's jury heard three versions of events that occurred the night of Lewis' death. The first version of statement's were gathered by Det. C.K. Hill, Det. Kennedy, and Officers at the scene regarding Miller's and Thomas's testimony the night of the murder as they were arriving at the scene and seen someone standing over Lewis, but could not identify any possible suspects. The second version of events were gathered on the following day by the victim's father, Marcus Lewis Sr., in which the witnesses recanted their initial statements and accused Petitioner as being the shooter involved an altercation with the victim. The third version of events were Petitioner's alibi defense in which Petitioner was at home during the time of the murder and earlier that day Petitioner rode horses with his Twin Sister, Willetta Hurt. (Tr. Trans. Vol. IV Pg. 1044-48) and was not present at the scene and had no involvement in the murder.

In Petitioner's case we have an analogous situation. Prior to trial the District Attorney Ben Fu and Detective C.K. Hill did a further inquiry into Petitioner's alibi defense and gathered conflicting evidence with their own witnesses' testimony, in regards to the vehicle that the witnesses accused Petitioner of driving the night of the murder. The District Attorney sent out an intern whom spoke with Takiala Marks who bought and had possession of the white ford taurus the night of the murder. See Bench Conference (Tr. Trans. Vol. III Pgs.769-70) and also spoke with the notary who processed the sale of the car. See Petitioner's (Tr. Exhibit #1 Bill of Sale)

neither interview was disclosed to Petitioner's counsel until a bench conference was held at trial. Also, The proof of motive was not established in this case because it was withdrawn by the state, which was in support of Petitioner's claim that the victim, Marcus Lewis was victimized by Jarred Miller, Joseph Thomas, Keyondre Andrews, and Jerlon Morgan in an attempt to rob the victim by gun point after a dice game, according to Keyondre Andrews which occurred approximately ten (10) day prior to the murder. There was no mention of Petitioner being present during this altercation, in which Keyondre Andrews and Jarred Miller were accomplices of Morgan's attempt to rob Lewis who fought off the gunman. The motive for murder wasn't reported to authorities until Keyondre Andrews was brought in for questioning regarding the murder. See *Notice of Res Gestae and Intent to Introduce Evidence of Other Crimes,* filed Aug 5, 2011 and withdrawn on Aug 11, 2011.

Petitioner alibi defense was corroborated by the medical examiner's testimony in regards to someone standing over Lewis as he laid in the middle of the street, in which, the jury could either believe Miller's and Thomas' initial statements made the night of the murder to Det. C. K. Hill were both witnesses seen someone standing over Lewis, as they were arriving at the scene but could not identify any possible suspects, or their impeached statements that was gathered by the victim's father, Marcus Lewis Sr,. There were also two residential witnesses Steve L. Broom and Jamie McCaslin that was unrelated to the murder and both witnesses wrote statements the night of the murder which corroborated Miller's and Thomas' initial statements about them arriving at the scene as the second round of shoots were discharged with no suspects identification (Trace Report Pg. 26 & 27). Steven Broom testified at Petitioner trial that he seen another car pull up a few minutes later. See (Tr. Trans. Vol. III Pg. 673). Petitioner's jury had to take that into consideration in regards to their verdict of finding the defendant guilty, but without

the DNA testing presented at trial, the jury was left to speculate whether or not Petitioner was the actual the suspect.

Petitioner's alibi defense was also corroborated with cell phone activity throughout the night of the murder that was obtained by Det. C.K. Hill in regards to another possible suspect John 'Jerzey" Seay whom appeared to be the last person on the victim's outgoing call log fourteen (14) times from phone number listed as Jerzey (918) 282-3944. According to Keyondre Andrews, Jerzey was at UTE Park driving a Lincoln. Jerzey's phone number was also found in item #9 cellphone call log as well. The state gathered the victim's phone in the floorboard of Thomas' vehicle and provided the jury with the call logs of the victim's cell phone (918) 951-1995 Item #11, which proves reasonable possibility that Petitioner would not have been found guilty based on phone records, which was based on the state's theory that Morgan called the victim. Both Miller and Thomas were acquaintance with Jerzey and during their initial interrogation, Miller stated that Jerzey phone number was his. The District Attorney called Janice Allen to the stand at Petitioner's trial to corroborate their witness's impeached testimony to prove that she was related to Morgan. It has not been determined if Janice Allen had given her phone to Morgan or if she gave it to another relative, Keyondre Andrews. The only fact known to the jury is that she is related to all parties in this case and that her phone was still active during both defendant's incarceration for over a year and a half. There was also a cellphone found in the park listed as T.P.D. Property Receipt BE880 Item #9 that was found in the park by Officer Stoltz after he seen two (2) men looking at the ground as if they were looking for something. He said they left without picking anything up and this struck him as suspicious (Trace Report Pg. 64). The phone found in the park has not been tested for DNA and was introduced at Petitioner's trial without any explanation as to who and how the phone got in that park. The only thing

known to the jury was that it was related to someone involved in the murder. Petitioner has requested DNA testing on item #9 cellphone and other items found at the park to be tested to prove that he was not present and did not have any involvement in Lewis' death.

The District Court Judge, Clifford Smith, also denied Petitioner, Co-Defendant, Jerlon Morgan's, Motion for Post-Conviction based on newly discovered evidence on June 6, 2022, in which, Jarred Miller has recanted from his second recantation to Petitioner's original jurors in support of Morgan's defense as being a by-stander. Petitioner turned himself in to authorities after being accused of murder and has presented the District Attorney and Defense Counsel with all of the available evidence pertaining to his innocence along with the evidence gathered by the state in support of his innocence.

Credibility or Believability Where the Critical Issues Before The Jury.

The critical issues before the jury, therefore, was whether it believed Miller's and Thomas' identification, i.e., whether it found their identification reliable. How the jury viewed Miller's and Thomas' identification, furthermore, would have impacted its assessment of Petitioner's alibi defense. If the jury found Miller's and Thomas' identification reliable (or credible), it undoubtedly would have found Petitioner's alibi defense incredible and presumably, a fabrication. In short, if the jury found Miller's and Thomas' identification believable (or reliable), such a finding substantially undercut and prejudiced Petitioner's defense at trial.

The prosecutor's assessment of the critical issue is consistent with the U.S. Supreme Court's assessment. According to the U.S. Supreme Court, the "Only duty of a jury in case in which identification evidence has been admitted will often be to asses the reliability of that evidence." *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (emphasis in original); accord *Perry v. New Hampshire,* 132 S.Ct. 716, 723 (2012) (holding that "state and federal statutes and rules

ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial."); *Kansas v. Ventris,* 556 U.S. 586, 594, n. (2009) ("our legal system... is built on the premise that it is the province of the jury to weigh the credibility of competing witness.").

At trial, Petitioner's Attorney tried to diligently expose, through cross-examination and argument to the jury, factors that called into question the reliability of Miller's and Thomas' identifications.

Trial Counsel, however, did not have "contrary evidence," See *Daubert v. Merrell Dow Pharmaceuticals,* Inc., 509 U.S. 579, 596 (1993) (observing that "vigorous cross examination, [and] presentation of contrary evidence... are the traditional and appropriate means of attacking shaky but admissible evidence.") (emphasis added), particularly contrary (and exculpatory) DNA evidence from the items at the scene, to persuade the jury that Miller's and Thomas' identification "should be discounted as unworthy of credit." *Perry v. New Hampshire,* 132 S.Ct. at 732; *District Attorney's Office v. Osborn,* 129 S.Ct. 2308, 2316 (2009) ("Modern DNA Testing can provide powerful new evidence unlike anything known before.")

Had the jury been informed that DNA testing on the evidence from the scene not only excluded Petitioner, but inculpate another individual proving that the evidence for Petitioner's Murder trial involved someone other than what the witnesses wanted the jury to believe, these new facts would have not only altered the jury's reliability assessment regarding Miller's and Thomas' identifications and the State's evidence, they would have also altered the jury's credibility assessment regarding Petitioner's alibi defense.

If after careful consideration of all the evidence in this case the jury entertains a reasonable doubt... as to whether the defendant was in or at the place where the crime was

alleged to have been committed when such crimes were committed, then that jury should give the benefit to the defendant... and acquit him. Thus, if the jury entertained a reasonable doubt the jury was required by law to acquit Petitioner. This is a lower standard of beyond a reasonable doubt.

Consequently, if Petitioner was in fact present at the scene and involved in a physical altercation, the jury could have reasonably expected to find his DNA on the evidence such as items from the T.P.D property receipt BE5880 #8 keychain, #9 Cellphone Motorola, #17 and #18 fingernails clipping from the victim, #32 contents from the victim's pockets (lighter, two earrings, pack of cigarettes, pack of orbits gum), and #33 ring from the victim's right hand, in which Petitioner requested for all of the items listed on T.P.D. property receipt BE5880. All the items mentioned above were allegedly involved in the physical altercation, which would have been a contributor to the Petitioner's defense that he was not present or involved in the physical altercation. If Petitioner could not have contributed his DNA on the evidence at scene, however, a properly-instructed jury could easily adhere to the following line of reasoning to acquit Petitioner.

i. The DNA from the evidence came from the assailant who was involved in Lewis' death on May 16, 2010.

ii. If DNA testing excluded Petitioner as a potential contributor of the evidence, Petitioner cannot be the assailant who was involved in the physical fight.

iii. If Petitioner is not the assailant with the evidence collected at the scene, Miller's and Thomas' identification must be incorrect, while Petitioner's alibi defense must be truthful.

iv. If Miller's and Thomas' identification is wrong, and Petitioner's alibi is truthful, Petitioner must be innocent.

v. Based on these findings, a properly-instructed jury may reasonably enter a judgment of acquittal in Petitioner's favor believing 100% in his innocence.

vi. This same reasoning applies to all of the evidence collected at the scene as well. If DNA testing excludes Petitioner as a contributor of the evidence, this means he could not be the assailant who was involved in Lewis' death.

A properly-instructed jury could also rely on a slightly different line of reasoning to reach a similar and reasonable conclusion.

i. Miller's and Thomas' identification to the jury has reliability issues, e.g., they were given the opportunity to fabricate their story between the night of the murder and accusing Petitioner of the murder to the victim's father. In the absence of exculpatory DNA evidence, however, these issues are inadequate to warrant an acquittal on Petitioner's behalf.

ii. In light of the exculpatory DNA evidence from the scene, however, the aforementioned reliability concerns obtain new meaning and significance, increasing the jury's belief that Miller's and Thomas' identification is unreliable, that Petitioner's alibi defense is truthful, and that Petitioner should be acquitted.

iii. Thus, because the State's case rests entirely on Miller's and Thomas' identification and the evidence at the scene, the doubt generated by the exculpatory DNA evidence and the reliability issues regarding Miller's and Thomas' identification is adequate to warrant a judgment of acquittal, even if the jury is not 100% certain Petitioner is innocent.

Consequently, there is reasonable probability that had the newly-discovered exculpatory DNA evidence been presented to Petitioner's jury, the outcome of his trial would have been different, i.e., the jury would have acquitted him. In other words, the new exculpatory DNA evidence puts the State's case "in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley,* 514 U.S. 419, 435 (1995).

Petitioner, therefore, is entitled to exculpatory DNA testing which could vacated and new a trial ordered in the interest of justice Pursuant to 22 O.S. §1373.5 (A) (1) (2) Results—relief.

Petitioner's Federal Constitutional Claims

1. **The New Exculpatory, Non-Match DNA Results Demonstrate That Petitioner's Conviction Is Premised On Unreliable Identification Evidence In Violation Of His Due Process Rights. U.S. Const. Amends. VI XIV**

The facts pled in all previous paragraphs are incorporated herein as if fully pled.

The exculpatory DNA results render Petitioner's trial fundamentally unfair under the Sixth and Fourteenth Amendments. In the absence of exculpatory DNA results, Petitioner did not have a meaningful opportunity to present a complete defense. *See* U.S. Const. Amends. VI, XIV.

Whether "rooted directly in the Due Process Clauses of the Fourteenth Amendments or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)) (emphasis added). Petitioner, consequently, has a constitutional right to present a complete defense against Miller's and Thomas' identifications.

As the U.S. Supreme Court recently acknowledged, "The Constitution... protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire,* 132 S.Ct. at 723 (emphasis added). For instance, under the Sixth Amendment, defendants are afforded the right to counsel, *see Gideon v. Wainwright,* 372 U.S. 335, 343-345 (1963), the right to compulsory process, *see Taylor v. Illinois,* 484 U.S. 400, 408-409 (1988), and the right to confront and cross-

examine witnesses. See *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2713-14 (2011); *Delaware v. Fenster,* 474 U.S. 15, 18-20 (1985). In regards to "shaky" testimony, like eyewitness testimony, the Supreme Court in *Daubert* emphasized that "[v]igorous cross-examination, *presentation of contrary evidence,* and careful instruction on the burden of proof are the traditional and appropriate means attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals,* Inc., 509 U.S. at 596 (emphasis added); *accord Rock v. Arkansas,* 483 U.S. 44, 61 (1987). "apart from these guarantees," however, "state and federal statutes and rules ordinarily govern the admissibility of evidence, and *juries are assigned the task of determining the reliability of the evidence presented at trial." Perry v. New Hampshire,* 132 S.Ct. at 723.

Petitioner exercised all three Sixth Amendment rights at his trial, particularly his right to counsel and confrontation. Indeed, trial counsel cross-examined Miller and Thomas in an attempt to expose certain factors that their perception in such a way to prevent their accurately identifying Petitioner as their assailant.

That Petitioner was able to freely exercise his Sixth Amendment rights to counsel and confrontation, however, does not mean he had an opportunity to present a "complete defense" or that his trial was fundamentally fair. Rather, the critical issue is whether Petitioner had the requisite contrary evidence and technology to persuade the jury, through either argument or cross-examination, that Miller and Thomas identification should be "discounted as unworthy of credit." *Perry v. New Hampshire,* 132 S.Ct. at 723.

Petitioner did not because he did not have access to the requisite contrary evidence, namely, the exculpatory DNA results from the evidence at the scene. Had Petitioner had access to this contrary evidence and technology, trial counsel's cross-examination of Miller and

Thomas, as well as his closing arguments to the jury, would have most certainly persuaded the jury to discount their identification as untrustworthy, which in turn would have resulted in Petitioner's acquittal. Thus, had Petitioner had access to contrary evidence and technology, there is a reasonable probability of a different outcome. In other words, in the absence of this contrary evidence, Petitioner's conviction is worthy of no confidence because the new DNA results put the State's case in an entirely different light.

Petitioner's case, in many ways, is analogous to the U.S. Supreme Court's *Brady* cases. In typical *Brady*-type case, the State withholds (either purposefully or inadvertently) material evidence (either exculpatory or impeachment) that prejudices the defendant in one or several ways rendering his verdict worthy of no confidence. See *Smith v. Cain*, 132 S.Ct. 627, 629 (2012) ("A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'") (quoting *Kyles v. Whitley*, 514 U.S. at 434). The primary prejudice in *Brady* cases stem from the defendant's inability to present a "complete" defense. In other words, although the defendant had effective trial counsel who compelled witnesses to testify on his behalf and cross-examined the State's witnesses, in the absence of the undisclosed evidence, the defendant's right to confrontation, cross-examination, and compulsory process was not "complete."

The U.S. Supreme Court articulated its rule in *Brady* not to deter prosecutorial misconduct, *cf. Stone v. Powell,* 428 U.S. 465, 484 (1979) (recognizing that the Fourth Amendment's exclusionary rule is specifically aimed at deterring police misconduct, and not at enhancing the truth-seeking function of the trial), but to ensure that a miscarriage of justice does not occur. *See United States v. Bagley,* 473 U.S. 667, 675 (1985); *California v. Trombetta,* 467

U.S. 479, 485 (1984). From the Supreme Court's perspective, the best way to guarantee fair and accurate convictions is to make certain that criminal defendants have a meaning opportunity to present a "complete defense" and the only way to present a "complete" defense is to have full discloser and access to all *material* facts and contrary evidence:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts[.]

United States v. Nixon, 418 U.S. 683, 709 (1974) (emphasis added); accord United States v. Nobles, 422 U.S. 225, 230 (1975).

Like the undisclosed, contrary evidence in *Smith* and other *Brady* cases, the new contrary and exculpatory DNA evidence demonstrates that Petitioner did not have a meaningful opportunity to present a "complete defense" and that his conviction is worthy of no confidence because, at this point, it is based on a "partial... presentation of the facts." *United States v. Nixon*, 418 U.S. at 709, and the new DNA results put the State's case in an entirely different light.

Again the U.S. Supreme Court's comment in *Daubert*, that the "appropriate" way to attack "shaky but admissible evidence" is to present "contrary evidence," 509 U.S. at 596, cannot be overemphasized. Here, the contrary (scientific) evidence needed to present a complete defense was not available until well after Petitioner's conviction. The new contrary (scientific) evidence, however, will finally allow Petitioner to present a "complete" defense and meaningfully argue to the jury that Miller and Thomas's identification is worthy of no credit and that there is sufficient doubt to enter a judgment of acquittal in Petitioner's favor.

Likewise had Petitioner's trial attorney had access to the exculpatory DNA results prior to trial, he could have moved to exclude Miller's and Thomas Identification at a pre-trial reliability hearing, arguing that the DNA results demonstrate that their identification is unreliable and inadmissible under the Due Process Clause. *See Neil v. Biggers,* 409 U.S. 188, 198 (1972) ("It is the likelihood of a misidentification which violates a defendant's right to due process…"); *Manson v. Brathwaite,* 432 U.S. 98 (1977); *Simmons v. United States*, 390 U.S. 377 (1968). Had Miller's and Thomas's identification been excluded, the State had no case because its entire case was dependent on their identification.

Petitioner, therefore, is entitled to a new trial so he may present a "complete" defense and a jury of his peers can accurately asses - in light of the new contrary (scientific) evidence— the credibility and reliability of Miller's and Thomas' identification. *See Kansas v. Ventris*, 556 U.S. at 594, n. (Our legal system… is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."). As the U.S. Supreme Court stated a half century ago: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.]" *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Here, there is no doubt that the new DNA results substantially undermine the reliability of Miller's and Thomas' testimony and identification.

Petitioner is entitled to relief.

2. The New Exculpatory DNA Results Demonstrate That Petitioner's Conviction Is Premised On Unreliable Identification Evidence In Violation Of His Due Process Rights. U.S. Const. Amends. VI, XIV

The facts pled in all previous paragraphs are incorporated herein as if fully pled.

The exculpatory DNA Process Clauses. *See Neil v. Biggers,* 409 U.S. 188, 198 (1972) (It is the likelihood of a misidentification which violates a defendant's right to due process... ."); *Simmons v. United States,* 390 U.S. 377 (1968).

The introduction of their unreliable identifications rendered Petitioner's entire trial fundamentally unfair. *See Manson v. Brathwaite,* 432 U.S. 98 (1977); *Dowling v. United States, 493 U.S.* 342, 352 (1990).

Petitioner is entitled to relief.

3. The Newly Exculpatory DNA Results Will Demonstrate That The State Of Oklahoma Convicted An Innocent Person And His Continued Custody And Liberty Restraints Violate His Due Process And Eight Amendment Rights. U.S. Const. Amends. VI, VIII, XIV

The newly-discovered DNA results will establish that Petitioner is actually innocent and that his continues custody and liberty restraints violate his due process rights and right to be free of cruel and unusual punishment. *See* U.S. Const. Amends. VI XIII, XIV; *Schulp v. Delo,* 513 U.S. 298 (1995); *House v. Bell,* 547 U.S. 518, 538 (2006).

For these reasons, this Court should vacate the district court denial of DNA testing and remand with instructions to order DNA forensic testing to be conducted, in addition to the state assisting Petitioner in locating the evidence in the possession of any other governmental entity. Pursuant to 22 O.S. § 1373.4. (B).

Dated: 10/3/2024.

William S. Hurt III
129 Conner Rd.
Hominy, Ok 74035

VERIFICATION

STATE OF OKLAHOMA)
) ss.
COUNTY OF OSAGE)

VERIFICATION/DECLARATION UNDER PENALTY OF PERJURY

Pursuant to 12 O.S. Supp. 2002 § 426, the Petitioner states under penalty of perjury and under the laws of Oklahoma that the foregoing is true and correct; that the Petitioner has read the foregoing and affixed his signature here to at the Dick Conner Correctional Center on this 3rd day of October, 2024. Pursuant to 12 O.S. § 491 et seq., 22 O.S. § 748, Rule 4 (c) Rules of the District Courts of Oklahoma.

/s/ William S. Hurt III
William S. Hurt III
Dick Conner Correctional Center
129 Conner Rd
Hominy, Ok 74035

CERTIFICATE OF SERVICE

I, William S. Hurt III, the undersigned hereby certify that on the 3rd day of October, 2024, I mailed a true and correct copy of the foregoing by placing same into the institutional legal mailing system at the Dick Conner Correctional Center with postage prepaid thereon to:

/s/ William S. Hurt III
William S. Hurt III
Dick Conner Correctional Center
129 Conner Rd
Hominy, Ok 74035

OKLAHOMA
State Courts Network

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

William S Hurt III,
Petitioner,

STATE OF OKLAHOMA,
Respondent,

No. PC-2024-684
(Post Conviction)

Filed: 09/06/2024
Closed: 10/04/2024

Appealed from: TULSA County District Court

PARTIES

urt, William S III, Petitioner
TATE OF OKLAHOMA, Respondent

ATTORNEYS

Attorney	Represented Parties
urt, William S III 50799 OCC 9 CONNER RD MINY, OK 74035	Hurt William S III
sa County District Attorney S Denver Ave W#900 sa, OK 74103	STATE OF OKLAHOMA

EVENTS

one

LOWER COURT COUNTS AND OTHER INFORMATION

unt	Case Number	Statute	Crime	Sentence	Judge	Reporter
	CF-2010-1963	-			Smith, Clifford J.	

APPENDIX: E

DOCKET

Date	Code	Description
08-19-2024	[DOOA]	DATE OF ORDER APPEALED
09-06-2024	[CASE]	POST CONVICTION INITIAL FILING
09-06-2024	[PAUP]	PAUPER AFFIDAVIT FOR HURT, WILLIAM S III
09-06-2024	[PAY]	RECEIPT # 89789 ON 09/06/2024. PAYOR: HURT, WILLIAM S III TOTAL AMOUNT PAID: $ 0.00. LINE ITEMS: $0.00 ON POST CONVICTION INITIAL FILING.
09-06-2024	[TEXT]	ISSUED CERTIFICATE OF APPEAL
09-06-2024	[PETF]	PETITION IN ERROR Document Available (#1059560411) TIFF PDF
09-16-2024	[NTCP]	NOTICE OF COMPLETION OF RECORD ON APPEAL Document Available (#1059562534) TIFF PDF
09-16-2024	[RODC]	RECORD ORDERED FROM DISTRICT COURT Document Available (#1059562535) TIFF PDF
09-23-2024	[ORGR]	ORIGINAL RECORD - 109 PAGES
09-23-2024	[RCCT]	RECORD TO COURT
10-04-2024	[OPIN]	JE: ORDER; ROWLAND PJ, MUSSEMAN VPJ, LUMPKIN J, LEWIS J, HUDSON J; COPIES TO HON. CLIFFORD SMITH, DIST COURT CLERK, AND ATTORNEYS; ORDER AFFIRMING DENIAL OF MOTION FOR POST-CONVICTION DNA TESTING; PETITIONER HAS FAILED TO DEMONSTRATE ENTITLEMENT TO DNA TESTING UNDER THE POSTCONVICTION DNA ACT. THEREFORE, THE ORDER OF THE TRIAL COURT DENYING PETITIONER'S MOTION FOR POST-CONVICTION DNA TESTING IS AFFIRMED. Document Available (#1059563143) TIFF PDF
10-04-2024	[1003]	AFFIRMED (ORDER)
10-04-2024	[MAND]	MANDATE ISSUED Document Available (#1059563144) TIFF PDF

RECEIPT FOR MANDATE

Document Unavailable (#1059898588)

10-15-2024 [RTCC]

RETURN OF COURT CLERK

Document Unavailable (#1059898592)

Oklahoma Statutes Annotated
Title 22. Criminal Procedure (Refs & Annos)
Chapter 18.--Appendix. Rules of the Court of Criminal Appeals
Section V. Procedures for Appealing Final Judgment Under Post-Conviction Procedure Act

Effective: February 5, 2018

T. 22, Ch. 18, App., Rule 5.2

Rule 5.2. Appeal from Final Judgment

Currentness

A. Final Judgment on Post-Conviction Application. The appeal to this Court under the Post-Conviction Procedure Act constitutes an appeal from the issues raised, the record, and findings of fact and conclusions of law made in the District Court in non-capital cases. See Yingst v. State, 1971 OK CR 35, ¶¶ 6-7, 480 P.2d 276, 277. For appeal out of time see Rule 2.1(E).

B. Stay of Execution of Judgment Pending Appeal. The District Court may stay the execution of its judgment upon the filing of a verified motion to stay execution of the judgment pending appeal within ten (10) days from the date of the entry of the judgment. If the motion is granted, the party granted the stay shall file a certified copy of the petition in error in the District Court within five (5) days after the filing of the petition in error in this Court to ensure the District Court is notified of the perfecting of the appeal. See Section 1087 of Title 22. For capital cases, see Section IX of these Rules and Section 1089 of Title 22.

C. Petition in Error, Briefs and Record.

(1) The party desiring to appeal from the final order of the District Court under Section V of these Rules MUST file a Notice of Post-Conviction Appeal with the Clerk of the District Court within twenty (20) days from the date the order is filed in the District Court. See Rule 9.7 for post-conviction procedures in capital cases. The filing of the Notice of Post-Conviction Appeal in the District Court is jurisdictional and failure to timely file constitutes waiver of the right to appeal.

(2) A petition in error and supporting brief, WITH A CERTIFIED COPY OF THE ORDER ATTACHED must be filed with the Clerk of this Court. The petition in error shall state the date and in what District Court the Notice of Post-Conviction Appeal was filed. If the post conviction appeal arises from a misdemeanor or regular felony conviction, the required documents must be filed within sixty (60) days from the date the final order of the District Court is filed with the Clerk of the District Court. If post-conviction application is from a capital conviction, the documents must be filed within the time set in Section 1089 of Title 22 and Rule 9.7.

(3) The brief shall not exceed thirty (30) typewritten 8-1/2 by 11-inch pages in length. See Rule 9.7(A)(4) for page limits in capital cases.

(4) This Court may direct the other party to file an answer brief, if necessary. However, the respondent is not required to file an answer brief unless directed by the Court.

(5) Failure to file a petition in error, with a brief, within the time provided, is jurisdictional and shall constitute a waiver of right to appeal and a procedural bar for this Court to consider the appeal.

(6) The record on appeal of a denial of post-conviction relief shall be transmitted by the Clerk of the District Court in accordance with the procedure set forth in Rule 2.3(B), but

within the time requirements set forth in Rule 5.3. The record to be compiled by the Clerk of the District Court and transmitted to the Clerk of this Court is limited to the following:

(a) The Application for Post-Conviction Relief presented to the District Court and response, if filed by the State;

(b) The Findings of Fact and Conclusions of Law entered by the District Court, setting out the specific portions of the record and transcripts considered by the District Court in reaching its decision or setting forth whether the decision was based on the pleadings presented, and which includes a certificate of mailing. See Rule 5.3;

(c) The record of the evidentiary hearing conducted, if held;

(d) Supporting evidence presented to the District Court;

(e) Copies of those portions of the record and transcripts considered by the District Court in adjudicating the issues presented in the application for post-conviction relief as set forth in the findings of fact and conclusions of law entered by the District Court; and

(f) A certified copy of the Notice of Post-Conviction Appeal filed in the trial court.
PROVIDED HOWEVER, in capital cases the clerk of the District Court shall file the records as required by this Court in accordance with Section 1089 of Title 22 and Section IX, if this Court directs an evidentiary hearing to be held.

(7) Rule 3.11 applies to any request to supplement the record in an appeal of a denial of post-conviction relief in non-capital cases, to include allegations of ineffective assistance of appellate counsel.

(8) The party filing the petition in error shall be known as the petitioner. The party against whom the appeal is taken shall be known as the respondent.

(9) The Notice of Post-Conviction Appeal Form required by Rule 5.2(C)(1) shall be in substantial compliance with the following language:

The Petitioner gives notice of intent to appeal the order granting/denying application for post-conviction relief entered in the District Court of _____ County, on the ___ day of _____, 20 ___, arising from District Court Case No. ___. The Petitioner requests the preparation of the record on appeal as required by Rule 5.2(C)(6).

(10) Form 13.4, Section XIII, shall not be utilized in appeals from a granting/denial of post-conviction relief and the Clerk of the District Court shall not be required to accept for filing or act upon any pleading which does not comply with Rule 5.2 (C)(6) and (9).

Credits

Amended effective March 13, 1997. Amended December 10, 1997, effective January 1, 1998; January 15, 1998, effective retroactively January 1, 1998. Amended effective May 21, 2003; January 31, 2008. Corrected effective February 6, 2008; February 20, 2008. Amended effective February 5, 2018.

Notes of Decisions (19)

Court of Criminal Appeals Rule 5.2, 22 O. S. A. Ch. 18, App., OK ST CR A CT Rule 5.2
Current with amendments received through October 1, 2024. Some rules may be more current, see credits for details.

End of Document