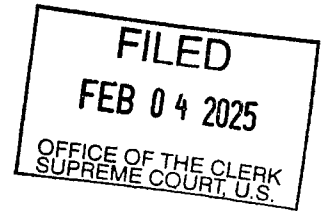


No. 24-6617

---

**IN THE SUPREME COURT  
OF THE UNITED STATES**

---



CEDRIC DWAYNE POORE,  
PETITIONER,  
V.  
STATE OF OKLAHOMA,  
RESPONDENT.

---

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

---

PETITION FOR WRIT OF CERTIORARI

Cedric Dwayne Poore  
ODOC#238752  
DCCC  
129 Conner Road  
Hominy, Oklahoma 74035

## QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals ruling that an omitted claim implicating an excited utterance, an exception to the hearsay rule, is meritless is in contrary to Petitioner's constitutional right to counsel on Petitioner's first appeal as of right calling into question Oklahoma's Post Conviction Procedures Act codified at OKLA. STAT. T.22, § 1080 *et seq.*.
2. Whether a mandated court hearing constitutes a critical stage implicating the right to appointment of counsel calling into question Oklahoma's Postconviction DNA Act codified at OKLA. STAT. T.22, § 1373 *et seq.* (2015).

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iv
QUESTIONS PRESENTED .....	1
LIST OF PARTIES.....	2
RELATED CASES.....	2
OPINIONS BELOW .....	3
JURISDICTION .....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE PETITION .....	7
1. Petitioner was denied the effective assistance of appellate counsel. ....	8
a. The OCCA's determination that Susie Canady had made so many inconsistent statements is baseless.....	9
b. The OCCA ruling is in contrary to <i>Crawford v. Washington</i> , 541 U.S. 36, 124 1354, 158 L.Ed.2d 177 (2004). ....	11
c. Canady's statement in the form of testimony is enough to create reasonable doubt. ....	15
2. Petitioner was denied counsel at a critical stage: an evidentiary hearing mandated by statute law. ....	18
a. An evidentiary hearing is clearly established as a critical stage.....	18
b. The OCCA's reasoning is in contrary to federal law. ....	19
CONCLUSION .....	21

PROOF OF SERVICE .....	22
APPENDIX .....	23
1. Order Affirming Denial of Post-Conviction Relief.....	1a - 6a .....23
2. Oklahoma Court of Criminal Appeals Opinion on Direct Appeal.....,,.....	7a - 57a .....23
3. Transcripts from Susie Canady hearing.....	58a - 99a ..23
4. Susie Canady Affidavit (Defendant's Exhibit 22).....	100a - 101a ...23

## TABLE OF AUTHORITIES

### State Cases

<i>Cedric Dwayne Poore v. State of Oklahoma</i> , F-2017-67 (Okl. Cr.) .....	6
<i>Cedric Dwayne Poore v. State of Oklahoma</i> , PC-2024-555 (Okl. Cr.) .....	7
<i>Fortson v. State</i> , 532 SE.2d 102 (Ga. 2000) .....	21
<i>Hancock v. State</i> , 514 P.3d 1088 (Okl. Cr. 2022) .....	7, 19
<i>James Stanford Poore v. State of Oklahoma</i> , F-2016-375 (Okl. Cr.) .....	5
<i>Logan v. State</i> , 293 P.3d 969 (Okl. Cr. 2013) .....	9, 16
<i>Randall v. State</i> , 801 P.2d 314 (Okl. Cr. 1993) .....	21
<i>Slaughter v. State</i> , 950 P.2d 839 (Okl. Cr. 1997) .....	16

### Federal Cases

<i>Coleman v. Thompson</i> , 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1992) .....	18
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) .....	11
<i>Evitts v. Lucey</i> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) .....	15
<i>Herrera v. Collins</i> , 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) .....	18
<i>Idaho v. Wright</i> , 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) .....	12, 14, 16
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	17
<i>Jones v. Barnes</i> , 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) .....	15
<i>Mempa v. Rhay</i> , 389 US. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1963) .....	20
<i>Michigan v. Bryant</i> , 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) .....	12
<i>Smith v. Robbins</i> , 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) .....	8, 11, 16
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	12
<i>Swazo v. Wyoming Dept. of Corrections State Penitentiary Warden</i> , 23 F.3d 332 (10th Cir. 1994) .....	18

### State Statutes

OKLA. STAT. T. 12, § 2804.1.....	12
OKLA. STAT. T. 21, § 801 (2011) .....	4
OKLA. STAT. T.21, § 1283.....	4
OKLA. STAT. T.21, § 701.7.....	4
OKLA. STAT. T.22, § 1051.....	5
OKLA. STAT. T.22, § 1080 <i>et seq.</i> .....	1, 6, 9
OKLA. STAT. T.22, § 1082 (2011) .....	4, 7, 19
OKLA. STAT. T.22, § 1373 <i>et seq.</i> (2015) .....	1, 8
OKLA. STAT. T.22, § 1373.2(B).....	6
OKLA. STAT. T.22, § 1374.4(A) (2013) .....	4, 19

#### **Federal Statutes**

28 U.S.C. § 1257(a) .....	3, 7
---------------------------	------

#### **Federal Court Rules & Procedures**

##### **Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District**

Courts .....	4, 19
--------------	-------

#### **State Constitutional Provisions**

Okla. Const. Art. II, § 20 .....	6
Okla. Const. Art. II, § 30 .....	6
Okla. Const. Art. II, § 7 .....	6

#### **U.S. Constitutional Provisions**

U.S.C.A. Const. admt. IV .....	6
U.S.C.A. Const. admt. V.....	3, 5, 6, 15
U.S.C.A. Const. amdt. VI .....	3, 5, 6, 11
U.S.C.A. Const. amdt. XIV.....	3, 5, 6

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## RELATED CASES

James Stanford Poore v. State of Oklahoma, CF-2013-865 (Tulsa County); F-2016-375.

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals Order Affirming Denial of Post-Conviction Relief appears at Appendix 1a - 6a to the petition is reported at PC-2024-555 (Okl.Cr. November 15, 2024) and not for publication.

The opinion of the Oklahoma Court of Criminal Appeals Opinion appears at Appendix 7a - 57a to the petition is reported at F-2017-67 (Okl.Cr. September 12, 2019) and not for publication.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: “No person shall ... be deprived of life, liberty, or property, without due process of law.”

The Sixth Amendment to the United States Constitution provides in relevant part: “In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.”

The Fourteenth Amendment to the United States Constitution provides in pertinent part: “nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”



Oklahoma Statutes Title 22, § 1374.4(A) (2013) prescribes: After the motion requesting forensic DNA testing and subsequent response have been filed, the sentencing court shall hold a hearing to determine whether DNA forensic testing will be ordered.

Oklahoma Statutes Title 22, § 1082 (2011) in pertinent part prescribes: Counsel necessary in representation shall be made available to the applicant after filing the application on a finding by the court that such assistance is necessary to provide a fair determination of meritorious claims.

Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts prescribes: If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

## STATEMENT OF THE CASE

On February 21, 2013, the State of Oklahoma filed an Information in Tulsa County District Court Case No. CF-2013-865 charging the Petitioner, Cedric Poore, and his brother, James Poore with four (4) counts of first degree malice aforethought murder, or in the alternative, first-degree felony murder with robbery with a firearm as the predicate offense, pursuant to Oklahoma Statutes Title 21, § 701.7 (2011); two (2) counts of robbery with a firearm, pursuant to Oklahoma Statutes Title 21, § 801 (2011). The State of Oklahoma charged Petitioner separately with one (1) count of possession of a firearm after former felony conviction pursuant to Oklahoma Statutes Title 21, § 1283 (2011). In support of the latter count, the State of Oklahoma alleged that Petitioner had six (6) prior felony convictions.

Petitioner was bound over for trial but the matter was severed for separate trials with James Poore being tried first. James Poore's trial by jury was held on February 29, through March 14, 2016. James Poore was convicted as charged.

*James Stanford Poore v. State of Oklahoma*, F-2016-375 (Okl. Cr.).

Petitioner's jury trial was held from December 5, 2016 through December 30, 2016. The jury found Petitioner guilty of four (4) counts of first-degree felony murder and two (2) counts of robbery with a firearm, but acquitted Cedric Poore of possession of a firearm. The trial court sentenced Petitioner to four (4) Life Without Paroles but merged the two (2) counts of robbery with a firearm with the companion counts of first-degree felony murder.

On March 13, 2017, Petitioner, through appointment of counsel, perfected his first appeal as of right to the Oklahoma Court of Criminal Appeals pursuant to Okla. Stat. Title 22, § 1051 *et seq.*

Appellate counsel raised eight (8) Propositions of error in support of Petitioner's direct appeal:

1. The Trial Court violated Mr. Poore's rights to compulsory process and to present a defense under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, when It refused to admit into evidence the sworn affidavit of a critical defense witness who was unavailable after invoking her right to privilege against self-incrimination;
2. The State failed to present sufficient evidence to support a conviction for First Degree Felony Murder because it failed to prove all the elements required for the underlying offense, thereby violating Mr. Poore's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and Article II, § 7 of the Oklahoma Constitution;
3. The Trial Court committed reversible error by allowing the State to introduce inadmissible bad character evidence of unrelated, uncharged, other crimes/bad acts, which violated Mr. Poore's rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the

- United States Constitution, and Arti. II, § 7 & § 20 of the Oklahoma Constitution;
4. Tainted identification violated Mr. Poore's right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article II, § 7 & § 20 of the Oklahoma Constitution;
  5. The State's evidence was insufficient to support convictions for First Degree Felony Murder, as it failed to corroborate the testament of accomplice, Jamila Jones, thereby violating Mr. Poore's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and Article II, § 7 or the Oklahoma Constitution;
  6. The admission of historical cell phone records obtained without a warrant violated Mr. Poore's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and Article II, § 30 of the Oklahoma Constitution;
  7. The admission of evidence obtained as a result of an illegal search and seizure violated Mr. Poore's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and Article II, § 30 of the Oklahoma Constitution; and
  8. Cumulative errors deprived Mr. Poore of a fair trial.

On September 19, 2019, the Oklahoma Court of Criminal Appeals ("OCCA") issued its OPINIION and AFFIRMED the Judgments and Sentences of the Tulsa County District Court. *Cedric Dwayne Poore v. State of Oklahoma*, F-2017-67 (Okla. Cr.). App. 7a - 57a. Petitioner did not seek certiorari in the United States Supreme Court to review the Opinion of the OCCA.

On August 18, 2023, Petitioner, *pro se*, submitted Application for Post-Conviction Relief ("APCR") pursuant to Okla. Stat. Title 22, § 1080 *et seq.* & § 1373.2(B).

In the APCR, Petitioner asserted:

1. Mr. Poore is ACTUALLY INNOCENT of the crimes charged against him and Appellate Counsel failed to preserve and argue the issue under admissibility of the evidence standard of review;
2. Appellate Counsel omitted the claim that Petitioner is subject to double punishment for the convictions of felony murder and the underlying predicates of robbery with a firearm; and
3. Petitioner moves this court for DNA testing.

Pursuant to *Hancock v. State*, 514 P.3d 1088 (Okl. Cr. 2022), the Tulsa County District Court, ultimately set a hearing for the APCR on June 12, 2022. Thereafter, Petitioner submitted a motion with affidavit for appointment of counsel pursuant to OKLA. STAT. Title 22, § 1082. However, counsel was not provided and on the same date, June 12, 2022, as the hearing the Tulsa County District Court issued its ORDER denying Petitioner's APCR and Petitioner timely appealed the denial to the OCCA.

On November 15, 2024, the OCCA issued Order Affirming Denial of Post-Conviction Relief, *Cedric Dwayne Poore v. State of Oklahoma*, PC-2024-555 (Okl. Cr.) App. 1a - 6a.

## REASONS FOR GRANTING THE PETITION

Petitioner respectfully request this Court to grant a writ of certiorari to review the November 15, 2024 Order Affirming Denial of Post-Conviction Relief issued by the Oklahoma Court of Criminal Appeals. Pursuant to 28 U.S.C. § 1257 “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where the validity of a statute of any State is drawn into question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States.” *Id.*

Accordingly, Petitioner submits two questions: (1) Whether the Oklahoma Court of Criminal Appeals ruling that an omitted claim implicating an excited

utterance, an exception to the hearsay rule, is meritless is in contrary to Petitioner's constitutional right to counsel on Petitioner's first appeal as of right calling into question Oklahoma's Post Conviction Procedures Act codified at OKLA. STAT. T.22, § 1080 *et seq.*; and (2) Whether a mandated court hearing constitutes a critical stage implicating the right to appointment of counsel calling into question Oklahoma's Postconviction DNA Act codified at OKLA. STAT. T.22, § 1373 *et seq.* (2015).

**1. Petitioner was denied the effective assistance of appellate counsel.**

In the case of *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), this Court reaffirmed that "indigents generally have a right to [the effective assistance of] counsel on a first appeal as of right[.]" *Id.* 120 S.Ct. at 760. In that case, this Court specifically recognized the viability of claims of ineffective assistance of appellate counsel alleging that even though an appellate attorney appealed certain issues, the attorney "failed to raise a particular claim" that the defendant maintains should have been appealed. *Robbins, supra*, 120 S.Ct. at 765.

On direct appeal, counsel for Petitioner raised the proposition that "the Trial Court violated Mr. Poore's rights to compulsory process and to present a defense ... when it refused to admit into evidence the sworn affidavit of a critical defense witness [Susie Pauline Canady] who was unavailable after invoking her right to privilege against self-incrimination." The Oklahoma Court of Criminal Appeals ("OCCA") determined that "[i]n the affidavit, Canady wrote that she witnessed the murders and that [Petitioner] was not present." App. 14. The OCCA surmised that "[t]he focus of Appellant's argument on appeal is that the trial court erred in failing to admit Canady's affidavit under the residual hearsay exception codified at 12 O.S.2011, § 2804.1." *Ibid.* Ultimately, the OCCA found that "the trial court declined to admit the affidavit at trial because there was no indicia of reliability."

Furthermore, the OCCA concluded that "the trial court did not commit actual or obvious error in declining to admit Canady's affidavit because the statements

contained therein do not possess any circumstantial guarantees of trustworthiness *surrounding the making of the affidavit* necessary to authorize admission under Section 2804.1.” App. 18 (emphasis added).

Since the OCCA found that “Appellant presented no argument to the district court whatsoever concerning the admissibility of the affidavit” (App. 15) and “Appellant acknowledges that Canady’s affidavit does not fall under any established hearsay exception” (App. 17), Petitioner had to bring the omitted claim, *pro se*, that Canady’s affidavit should have been admitted under the hearsay exception as an “excited utterance” pursuant to Oklahoma Statutes Title 22, section 1080 *et seq.*

Accordingly, under the OCCA’s precedential case of *Logan v. State*, 293 P.3d 969 (Okla. Cr. 2013), “[c]laims of ineffective assistance of appellate counsel may be raised for the first time on post-conviction, because it is usually a petitioner’s first opportunity to allege and argue the issue.” *Id.* 293 P.3d at 973. In regards to the omitted claim the OCCA relied upon the *Robbins* case. Specifically, “[t]he *Robbins* Court further noted: “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Logan, supra*, 293 P.3d at 975.

However, the OCCA rejected the postconviction claim and agreed that “Judge Holmes found these claims to be meritless.” App. 5.

- a. **The OCCA’s determination that Susie Canady had made so many inconsistent statements is baseless.**

On January 11, 2013 a probable cause affidavit for Susie Canady’s arrest on a material witness warrant was drafted and granted. On the same day, Canady waived her *Miranda* rights and “relayed intricate details” to Tulsa Law Enforcement. Pat Dunlap, an officer swearing under oath, testified at a motions hearing that “[Canady] was present inside the victim’s apartment when they were shot and killed” and the “victims were bound prior to being shot.”

Furthermore, Canady provided “the exact location within the apartment where the victims were shot ... exact locations of the bullet wounds of each of the victims and the type of firearm used to shoot and kill each of the victims.” And most critical, Canady told police she observed “two black males inside the apartment and observe them shoot and bind the victims.” M.Tr. 05/14/2015 24 - 25. See also App. 86a (she provided all this information. The victims were bound prior to being shot. Provided the exact location within the apartment where the victims were shot. Provided the exact locations of the bullet wounds on each of the victims. Provided the type of firearm used to shoot and kill each of the victims. Described items that were gone through by assailants. States that two black males were also present inside the apartment and observed them shoot and bind the victims. Statements provided were corroborated through witnesses and crime scene investigations.). However, according to Canady, “[S]ome time later, when I was being interviewed by state and federal authorities, I told them that a photograph of Cedric Poore which they showed me did NOT look like either of the men I’d seen in Fairmont Terrace murdering the four victims, and I was told that I would no longer be needed as a witness.” App. 100a.

In addition to her “police interrogation,” *Crawford*, 541 U.S. 51 - 52, Canady provided the details of the murders to Morgan Garrett and Renee Hawkins while inside their apartment. Both these women gave statements that Canady “was distraught, and her clothing had blood on it.” App. 73a.

Most critical is that, when Canady saw James Poore, she knew he was one of the two men she saw shoot the four women in Rebeika Powell’s apartment on January 7, 2013. However, while waiting to testify at the preliminary hearing, Canady saw Petitioner and realized that he was not one of the two men she saw shoot the four women. See App. 71a (She [Canady] was subpoenaed in front of the grand jury. She went to the prep room where they prepare the witnesses before they

go into the grand jury. And her [Canady's] statement to use was, that she was shown a picture of Cedric Poore, and that she said "I don't think that's him." And that they said, well, you're not a witness anymore.). *See also* App. 67a (That she [Canady] recognize[d] that Cedric Poore was not the person who she had seen in the apartment where the women were murdered.); App. 100a - 101a (Affidavit of Susie Canady).

Based on the foregoing, the OCCA fails to articulate what statements, *if any*, to whom Canady made that rendered her an incredible witness. It is certain that on direct appeal, the OCCA merely concluded that "the focus of Appellant's argument below was to urge the trial court to grant transactional immunity to Canady to compel her testimony. The trial court overruled defense counsel's request to grant immunity to Canady and *sua sponte* ruled that he would not admit her affidavit but instead would give it to the court reporter for maintaining in the record for appeal purposes, if necessary." App. 15a. *See* App. 100a - 101a (Affidavit of Susie Canady).

By failing to preserve and argue Susie Canady's affidavit under the excited utterance exception to the hearsay rule, appellate counsel's performance was clearly deficient and the prejudice amounts Petitioner being denied a complete defense in contrary to the Sixth Amendment to the United States Constitution. As this Court stated: "Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Robbins, supra*, 120 S.Ct. at 765.

- b. The OCCA ruling is in contrary to *Crawford v. Washington*, 541 U.S. 36, 124 1354, 158 L.Ed.2d 177 (2004).

In the case of *Crawford v. Washington*, this Court held that in order for testimonial evidence to be admissible, the Sixth Amendment "demands ... unavailability and prior opportunity for cross-examination." *Id.* 541 U.S. at 68.



Furthermore, the *Crawford* Court determined that evidence gleaned from “police interrogations” were considered “testimonial evidence.” *Ibid*.

On direct appeal, the OCCA concluded that appellate counsel’s “argument on appeal is that the trial court erred in failing to admit Canady’s affidavit under the residual hearsay exception codified at 12 O.S.2011, § 2804.1<sup>1</sup>.” App. 14a. Since trial counsel did not preserve such an argument in the Tulsa County District Court, the OCCA reviewed appellate counsel’s claim under the “plain error” standard of review. App. 15a. Nonetheless, the OCCA rejected appellate counsel’s argument for “Appellant acknowledges that Canady’s affidavit does not fall under any established hearsay exception in the Oklahoma Evidence Code.” App. 17a.

Of course, pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), appellate counsel failed to articulate that by asserting privilege under the Fifth Amendment, Canady became an “unavailable witness.” *Crawford, supra*, 541 U.S. at 68. The actual prejudice from this omitted claim is that Canady’s statement is more akin to an “excited utterance” exception to the hearsay rule. *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (“The basis for the ‘excited utterance’ exception .. is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation ...”).

Under Oklahoma law, “[i]n reviewing a claim of ineffective assistance of appellate counsel under *Strickland*, a court must look to the merits of the issue(s) that appellate counsel failed to raise.” *Logan, supra*, 293 P.3d at 974 (footnote

---

<sup>1</sup> OKLA. STAT. Title 12, § 2804.1 prescribes: In exceptional circumstances a statement ... possessing equivalent, though not identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that: (1) The statement is offered as evidence of a fact of consequence; (2) The statement is more probative on the point for which it is offered than any other evidence that the proponent can produce through reasonable efforts; and (3) The general purpose of this Code [Title 12, § 2101 *et seq.*] and the interests of justice will best be served by admission of the statement into evidence. *Cf. Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) (recognizing state law exceptions to the hearsay rule).

omitted). On appeal from the denial of postconviction relief, the OCCA recognized that “Petitioner argues appellate counsel was ineffective for failing to argue Susie Canady’s statement exonerating him should have been admitted as an excited utterance,” App. 5a.

This exception is detailed in Volume 11B:

THE COURT: Okay. Did she make a statement at the courthouse that Mr. Leedy heard?

MR. ECHOLS: She was distraught in the hallway, as I recall. Mr. Leedy is an employee of Indigent Defense --

THE COURT: I know exactly who Steve Leedy is. Go ahead

MR. ECHOLS: She somehow got Mr. Leedy’s attention or he asked her what’s wrong; and **that’s when she told him that Cedric Poore was not the person that she had seen.**

We knew about the fact that she claimed to have been present because we had received the police reports from Detective Hill and others that describe her.

And it was not Mr. Drummond. My recollection now is refreshed. It was not Mr. Drummond who filed the Affidavit with the court that caused her to be arrested by the state as a material witness. It was, I believe, P.

Dunlap, D-U-N-L-A-P, a police officer who we’ve got under subpoena. Whom we have under subpoena.

App. 81a (emphasis added). However, in contrary, the “must look to the merits of the issue,” the OCCA simply concurred that the claim was “meritless.” *Ibid.*

To be sure, the OCCA recognized that the circumstance —trial counsel prepared the affidavit and the affidavit was notarized by an investigator— from

which the affidavit was produced was questionable. By concurring with the Tulsa County District Court that the “excited utterance” claim was “meritless,” the OCCA applied an unreasonable reading of *Crawford’s* holding: testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had prior opportunity to cross-examine. *Id.* 541 U.S. at 59 (footnote omitted).

In sum, Canady’s Affidavit reaffirms the statement she “uttered” to Steve Leedy, that she witnessed the murders and Petitioner was not present. Of course, when Canady saw Petitioner prior to the preliminary hearing, the “spontaneity of the statement in relation to the exciting event gives rise to trustworthiness and their nearness to the stimulating event excludes the possibility of premeditation and fabrication.” *Idaho v. Wright, supra*, 497 U.S. at 820.

Moreover, Canady was well aware when she waived her *Miranda* rights and gave a statement to Tulsa Law Enforcement her “statement [were] made under circumstances which would lead an objective witness to reasonably believe that such a statement would be available for use at a later trial.” *Crawford*, 541 U.S. at 51 - 52. In other words, Tulsa Law Enforcement found her credible when Officer Dunlap corroborated her police interrogation that (1) The victims were bound prior to being shot. (2) She provided the exact location within the apartment where the victims were shot. (3) She provided the exact locations of the bullet wounds on each of the victims. (4) She provided the type of firearm used to shoot and kill each of the victims. (5) She described items that were gone through by assailants. (6) She states that two black males were also present inside the apartment and observed them shoot and bind the victims. And (6) Her statements provided were corroborated through witnesses and crime scene investigations. *Cf. Michigan v. Bryant*, 562 U.S. at 354 ([Canady’s] identification and description of the shooter and the location of

the shooting were not testimonial statements because they had a “primary purpose.”)

Under such quantum of reliable witnesses, the OCCA erred that Petitioner was not denied effective assistance of counsel for his first appeal as of right for omitting the claim that Canady’s Affidavit ——admitted for appeal purposes—— should have been admitted as testimonial evidence under the excited utterance to the hearsay rule where it is clear that Canady became an “unavailable witness” when, through counsel, Canady exercised her Fifth Amendment right. *Crawford, supra*, 541 U.S. at 59.

**c. Canady’s statement in the form of testimony is enough to create reasonable doubt.**

In the case of *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), this Court held that “criminal defendant is entitled to effective assistance of counsel on first appeal as of right.” *Id.* The *Evitts* Court concluded that the right to counsel on appeal was “fundamental” to “assist the defendant to obtain a fair decision on the merits.” *Id.* 469 U.S. at 395. Additionally, the *Evitts* Court concluded, with its holding, that “[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant *does not have the effective assistance of an attorney.*” *Ibid.* (emphasis added) (footnote omitted). In such cases, the claim that appellate counsel was ineffective is reserved for collateral attacks. *Smith v. Robbins*, 528 U.S. 288 (citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)) (it is still possible to bring a *Strickland* claim based on appellate counsel’s failure to raise a particular claim.).

In the case at bar, appellate counsel omitted the “excited utterance” evidentiary claim on Petitioner’s first appeal as of right and the OCCA *unreasonably* concluded in light of the facts, on postconviction that the claim was “meritless.” App. 5.

According to the *Robbins* Court, “[i]n certain circumstances, appellate counsel’s omission of an issue may constitute ineffective assistance of under *Strickland*.” *Id.* 528 U.S. at 288. Of course, the OCCA recognized this principle of “clearly established law” in the precedential case of *Logan v. State*, 293 P.3d 969 (Okl. Cr. 2013). There, the *Logan* Court relied on *Smith v. Robbins. supra* in concluding that “in analyzing such claims, the court must consider the merits of the omitted issue.” *Logan*, 293 P.3d at 974.

Rather than consider the merits of the omitted issue, the OCCA deferred to the Tulsa County District Court in its finding that the claim was meritless. App. 5. To the contrary, Canady was never determined to be an “incredible” witness. Rather, (1) Canady was the *key* material witness that provided Tulsa Law Enforcement *intricate* details, of which was testified to in open court by Officer Pat Dunlap. App. 81a. **Moreover, the State does not dispute that Canady “heard a woman shouting I ain’t afraid of anybody” (App. 71a) is intricate to Laura Moore’s privileged information where during Moore’s 12:03 P.M. call to Rebeika Powell, Moore heard the same statement.** In addition, the State does not dispute that Canady was not at the scene of the homicides, for her presence is confirmed by the credible witnesses of Morgan Garrett and Renee Hawkins. *See* App. 73a (They left their apartment. And when they returned, Susie Canady was there. She was distraught, and her clothing had blood on it, according to them.) And (2) Canady’s utterance to Steve Leedy (App. 79a) that Petitioner was not the person she witnessed at the scene of the homicides, exonerating Petitioner, was without premeditation nor fabrication. *Idaho v. Wright, supra*, 497 U.S. at 820. *See also Slaughter v. State*, 950 P.2d 839, 852 (Okl. Cr. 1997)(An excited utterance under section 2803(2) must meet three foundational requirements (1) a startling event or condition; (2) a statement relating to that startling event or condition; and (3) made

while the declarant is under the stress of excitement caused by the startling event or condition.).

With Susie Canady's Affidavit, the OCCA, reasonable jurists, could determine that reasonable doubt existed as to Petitioner's conviction. That is, this direct evidence —excluding Petitioner from the scene of the homicides— would have outweighed the circumstantial evidence, from the State's incredible witnesses, that Petitioner *may have been* a part of a robbery<sup>2</sup>, or *de minimus* may have been in possession of items arising from a robbery. Of course, trial counsel clearly erred when Mr. Echols was unpersuasive in arguing that Susie Canady, a witness to the crimes, be given "transactional immunity" in Petitioner's case. *See App. 87a* (And you're asking me to give her immunity, but I don't know quite what to give you immunity for. Is it for lying to everybody, or to nobody? Or is it getting ready to lie in court, or not lie in court? Or making a false affidavit? I don't know which to do.).

Mr. Echols' critically flawed argument deprived Petitioner of a complete defense when the trial court refused to admit the affidavit as evidence, instead, filed it with the court reporter for "appeal purposes, if necessary." *App. 97a*.

Thus, reasonable jurists would doubt that Petitioner was present at the scene to the crimes, *at the time the robbery and homicides occurred. In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)(proof beyond reasonable doubt is required to establish guilt of criminal charge). Simply put, Canady would have affirmed that the robbery was *in fact* occurring at 12:03 P.M. when Rebeika Powell exclaimed to Laura Moore that "she ain't afraid of anybody." This clearly supports Petitioner's ACTUAL INNOCENCE claim that he was not present, for the State's expert, Raymond MacDonald, testified that the last outgoing call from Petitioner's phone to the phone number identified as belong to James Poore prior to Petitioner

---

<sup>2</sup> Jamila Jones was given full immunity for her participation where she "cased" Rebeika Powell's apartment to be robbed by her boyfriend, James Poore.

*allegedly* arriving at Jamila Jones' apartment was made at 11:57 A.M. The State's expert testified that the call lasted 1.78 minutes, which factually excludes Petitioner from the Fairmont Terrace Apartments during the time of the robbery. In other words, Petitioner could not have been in Rebeika Powell's apartment when the State's witnesses *allegedly* places him in Jamila Jones' apartment, arriving after 12:00 P.M., for at least 10 minutes prior leaving and *allegedly* returning. *Herrera v. Collins*, 506 U.S. 390, 419, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (Since statements in the affidavits contradict the evidence received at trial, the jury would have had to decide important issue of credibility.)

Wherefore, Oklahoma's Post-Conviction Procedures Act pursuant to OKLA. STAT. tit. 22, § 1080 *et seq.* is inadequate to remedy Petitioner's ineffective assistance of appellate counsel claim.

**2. Petitioner was denied counsel at a critical stage: an evidentiary hearing mandated by statute law.**

On postconviction appeal, Petitioner "argues Judge Holmes abused her discretion by failing to appoint appellate counsel for his post-conviction DNA hearing." App. 2a. The OCCA rejected Petitioner's claim and concluded that "[b]ecause there is no constitutional right to counsel in state post-conviction proceedings, 'a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.'" App. 2a (quoting *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1992)).

**a. An evidentiary hearing is clearly established as a critical stage.**

The OCCA erred in reliance on *Coleman v. Thompson*, to answer the federal question implicating appointment of counsel in a mandated evidentiary hearing. *Cf. Swazo v. Wyoming Dept. of Corrections State Penitentiary Warden*, 23 F.3d 332, 333 (10th Cir. 1994) (However, there is a right to counsel in a habeas case when the district court determines that an evidentiary hearing is required.) Accordingly, the

OCCA's resolution of Petitioner's appointment of counsel claim is not independent of federal law. According to federal law, "[i]f an evidentiary hearing is required the judge *shall appoint counsel* for a petitioner who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g)." *Swazo*, 23 F.3d at 333 (emphasis in original). Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Court plainly provide that "[i]f an evidentiary hearing is warranted, **the judge must appoint an attorney to represent petitioner[.]**" *Id.* (emphasis added).

Similar in context and construction, the OCCA interpreted OKLA. STAT. Title 22, § 1373.4(A) as requiring a mandatory evidentiary hearing. *Hancock v. State*, 514 P.3d 1088 (Okla. Cr. 2022). The *Hancock* Court determined that the statutory context of section 1373.4(A) "the sentencing court *shall hold a hearing*" was mandatory and the state district court abused its discretion in summarily disposing of Hancock's motion. *Ibid.* Of course, under federal law, any mandated hearing is prescribed with "the court shall appoint counsel" unless counsel is affirmatively waived. This principle is congruent with OKLA. STAT. Title 22, § 1082 where, "such assistance is necessary to provide a fair determination of meritorious claims." *Id.*

Without the assistance of counsel, Petitioner was deprived fundamental due process of law. Undoubtedly, the prosecutor is always involved at an evidentiary hearing where witnesses can be called and cross-examined, and legal issues are addressed and argued. Couple this with the mandate of Section 1373.4(A) where the "trial court shall receive and consider any relevant evidence from either party," it would appear clear that the *Hancock* Court envisioned the hearing as a "critical stage" invoking Petitioner's right to counsel.

**b. The OCCA's reasoning is in contrary to federal law.**

Although the OCCA is correct that Petitioner is not entitled to counsel in a postconviction proceeding, the OCCA errs in concluding that this collateral principle



also extends to a mandated evidentiary hearing. Such reasoning is contrary to the *Hancock* Court's holding: Specifically, we direct the trial court to ... conduct a hearing. At that hearing, the trial court shall receive and consider any relevant evidence from either party, including any proper stipulations of fact[.]" *Hancock*, 514 P.3d at 1089 - 90 (emphasis in original). In fact, the Tenth Circuit concluded the opposite in *Swazo*, *supra*.

The *Swazo* Court "agree with the district court to the extent that there is no constitutional right to counsel beyond the appeal of a criminal conviction, and that generally appointment of counsel in a § 2254 proceeding is left to the court's discretion ... However, there is a right to counsel in a habeas case when the district court determines that an evidentiary hearing is required." *Id.* 23 F.3d at 333 (citation omitted). Similarly, motions brought under OKLA. STAT. Title 22, § 1080 are considered "habeas cases" and OKLA. STAT. Title 22, § 1082 provides a discretionary remedy for counsel. But, in line with *Swazo*, the *Hancock* Court requires a hearing, according to its interpretation of statute law.

The State being necessarily present, the right to counsel must attach, for such constitutes a critical stage of criminal proceedings where the lack of counsel results in (1) failure to pursue strategies or remedies resulting in the loss of significant rights; (2) a misunderstanding of the legal confrontation, and (3) the proceeding cannot test the merits of the accused case involving the rules of evidence. *See Mempa v. Rhay*, 389 US. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1963).

It cannot be disputed that an "evidentiary hearing" involves both intricacies of law and advocacy by the prosecutor the proceeding qualifies as a "critical stage." *See Randall v. State*, 801 P.2d 314, 316 (Okla. Cr. 1993) (denial of counsel at critical stage was not harmless error). *Cf. Fortson v. State*, 532 SE.2d 102 (Ga. 2000) (denial of counsel at critical stage was deemed prejudicial, not harmless).

In contrary to federal law, the OCCA misapplied its own reading of OKLA. STAT. Title 22, § 1373.4(A) to erroneously conclude that Petitioner was not entitled, without adequate waiver, to counsel in his Post-Conviction DNA hearing.

Therefore, the denial of counsel is not independent of the federal question and the OCCA clearly erred in rendering such an opposite decision.

## CONCLUSION

The Oklahoma Court of Criminal Appeals applied a contrary reasoning to *Crawford v. Washington*, 541 U.S. 36 when it determined that Susie Canady's affidavit admissible as an excited utterance was meritless. In reaching the incongruent conclusion, the OCCA did not weigh nor compare the merits of the claim that appellate counsel raised on direct appeal to the omitted claim that Petitioner raised, under the standard of ineffective assistance of appellate counsel on collateral review to the opposite of *Smith v. Robbins*, 528 U.S. 259.

In addition to its contrary Order Affirming Denial of Post-Conviction Relief (App. 1a - 6a), the OCCA deprived Petitioner fundamental fairness and due process of law when it determined that Petitioner was not entitled to appointment of counsel at a critical stage, a statutorily mandated evidentiary hearing.

Therefore, Petitioner humbly prays this Court GRANT a writ of certiorari to review the November 15, 2024 Order of the Oklahoma Court of Criminal Appeals.

February 4<sup>th</sup>, 2025

Respectfully submitted,



Cedric Dwayne Poore

ODOC#238752

DCCC

129 Conner Road

Hominy, OK 74035