

CASE NO 23A878

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL DEWAYNE SMITH,

*Applicant,*

v.

CHRISTE QUICK, Warden  
Oklahoma State Penitentiary,

*Respondent*

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

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PETITION FOR WRIT OF CERTIORARI

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

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April 3, 2024

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## **QUESTION PRESENTED**

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

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## PETITION FOR CERTIORARI

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

Petitioner, Michael DeWayne Smith, respectfully files this Petition For Writ of Certiorari.<sup>1</sup>

## DECISION BELOW

The decision of the Oklahoma Court of Criminal Appeals is reproduced at App. 3.

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<sup>1</sup> Counsel recognizes that the matter now before this Court is presented close in time to Mr. Smith's scheduled execution date and that this Court has a significant interest in deterring late-stage filings in capital cases. *Dunn v. Ray*, 139 S. Ct. 661 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Regarding Mr. Smith's Successive Application For Postconviction Relief filed April 2, 2024, it was only on the evening of Friday, March 29, 2024, that counsel was advised that a private investigator had obtained an affidavit from Ms. Sheena Johnson stating that her trial testimony, used in part to corroborate Mr. Smith's confession, was untruthful. The successive application, and Mr. Smith's Emergency Application For Stay of Execution was filed in the Oklahoma Court of Criminal Appeals at the earliest reasonable time on April 2, 2024, and denied the afternoon of April 3, 2024.

## RELEVANT BACKGROUND

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

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

During the interview, Smith first denied committing the murders, then admitted only to being present, and finally admitted committing both murders. He explained he killed both victims in retaliation for wrongs done him or his family. He told detectives he went to Moore's apartment looking for her son, that Moore panicked and started screaming, so he had to kill her. He said he killed Pulluru in retaliation against the store owner who shot Armstrong<sup>2</sup> and in retaliation for disrespectful comments about Armstrong in the press attributed to someone from the A-Z Mart.

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

*Opper v. United States*, 348 U.S. 84, 91-94, 75 S. Ct. 158, 163-65, 99 L. Ed. 2d

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<sup>2</sup> "T-Nok" Armstrong, was a member of a gang which Mr. Smith was also involved in, and had been killed during a robbery of a convenience store next door to the A-Z Mart. *State v Smith*, 157 P.3d at ¶ 3.

101 (1954) requires the State to introduce substantial independent evidence to establish the trustworthiness of an extrajudicial statement.

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

The Court also said:

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

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

added.<sup>3</sup>

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

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

*Id.* at ¶ 13.

#### **Receipt of Newly Discovered Evidence on March 29, 2024.**

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<sup>3</sup> Now, in her March 28, 2024, Affidavit Ms. Johnson has denied she even made the call to Crimestoppers, as discussed below.



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

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

I was not the person that called crime stoppers, it was a family member. At the time, I told them I did call crime stoppers because I needed the extra money<sup>4</sup>, which I still to this day have not received.

Appendix 2, ¶¶ 8, 9.

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

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

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

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

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<sup>4</sup> Without further investigation it is assumed that there was a monetary award for information that leads to the arrest of the perpetrator of the crimes.

The newly discovered evidence contained in the March 29, 2024, Affidavit of Ms. Johnson could not have reasonably been discovered prior to this time. Ms. Johnson states in her Affidavit that “I had expressed fear for my safety and my children’s safety because I was living in the same place where the crimes happened. I wanted help moving somewhere else before I testified so my children and I would be safe.” Appendix 2, Affidavit, ¶4. It is clear that Ms. Johnson has always been a reluctant witness and her reluctance prevented her from providing all information within her knowledge. The statements contained in Ms. Johnson’s recent Affidavit have been unknown to all counsel since Ms. Johnson’s December 9, 2009, Affidavit. Now that Mr. Smith’s execution is imminent Ms. Johnson has come forward to disclose her actions which were previously known only to her and kept from attorneys representing Mr. Smith.

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

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

also was not before the OCCA at the time of ruling on the second application for post conviction relief either. Ms. Johnson’s lies which were used to help convict Mr. Smith

and sentence him to death, certainly renders her testimony unreliable and insufficient to corroborate Mr. Smith's confession to detectives. When the OCCA ruled on Mr. Smith's appeal the Court was without knowledge that Ms. Johnson has denied she even made the call to Crimestoppers or that her testimony was not the full truth. Mr. Smith filed in the OCCA a Motion For Evidentiary Hearing and Motion for Discovery both filed April 2, 2024, in order to learn what, if anything, the State or trial judge may have known regarding Ms. Smith's false testimony based on Ms. Johnson's statement at paragraph 8 of her March 29, 2024, Affidavit. Appendix 2.

**The April 3, 2024 Ruling of the Oklahoma Court of Criminal Appeals.**

On April 3, 2024, the Oklahoma Court of Criminal Appeals denied Mr. Smith's Successive Application For Capital Post-Conviction Relief, Motion For Evidentiary Hearing, and Motion For Discovery in case No. PCD-2024-256. Appendix 3. The OCCA said that Ms. Johnson's March 29, 2024, Affidavit "reiterates substantially the same information contained within the original affidavit," and that she stated in her new affidavit that "she 'was not the person who called crime stoppers, it was a family member. At the time, [she] told them [she] did call crime stopper because [she] needed the extra money, which [she] still to this day has not received.'" *Id.* at 4, 5. The court found that "the additional evidence contained within Johnson's March 29 affidavit was discoverable through the exercise of reasonable diligence far earlier than this." *Id.* at 5-6. The Court said:

It bears mentioning that even if we were to consider the merits of Smith's claims, we would find the underlying facts insufficient to authorize post-conviction relief under the demanding statutory standard. We note initially that recanted testimony is properly viewed with suspicion. [citations omitted]. Additionally, when taken at face value, the information contained within Johnson's March 29 affidavit carries minimal probative force when considered in light of the remaining evidence."

*Id.* at 6.

### **REASONS FOR GRANTING THE WRIT**

This Court Should Grant Certiorari to that there is a "reasonable probability" that four Justices will grant certiorari, or agree to review the merits of the case; 2. that there is a "fair prospect" that a majority of the Court will conclude upon review that the decision below on the merits was erroneous. There is broad national significance regarding the issue in this case because the constitutional rights to due process and a fair trial are guaranteed to every criminal defendant and the use of perjured testimony as corroborating evidence to uphold a defendant's confession is of national concern not only in death penalty cases.

The decision of the OCCA rejected the information contained in Ms. Johnson's Affidavit without holding a hearing to determine the validity of her statements, finding merely that recantation is generally "looked upon with downright suspicion." App. at 6

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

The Oklahoma Court of Criminal Appeals erred in failing to grant Mr. Smith post conviction relief based on newly discovered evidence showing that Mr. Smith's confession to the murders of Ms. Janet Moore and Mr. Sarath Pulluru to law enforcement officers was corroborated in part by perjured testimony.

Mr. Smith filed his Application For Post Conviction Relief due to events which have occurred since late Friday, March 29, 2024, and which should have caused post conviction relief to be granted to Mr. Smith based on the withholding of exculpatory evidence and presenting perjured testimony, rendering his convictions and sentences unreliable and constitutes a violation of his rights to due process and a fair trial. His case presents the question of whether Mr. Smith's confession to law enforcement officials was sufficiently corroborated to allow it to stand as evidence supporting the jury's findings of guilt when perjured testimony of a witness was included as corroborating evidence. Mr. Smith's first degree murder convictions and sentence of death are unreliable and in violation of his constitutional rights to due process and a fair trial because false testimony was used to corroborate Mr. Smith's confession.

Oklahoma has a mechanism wherein Post-conviction relief is available pursuant to 1089(D)(8)(b) in the following circumstances which are present in Mr. Smith's case:

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

ascertainable through the exercise of reasonable diligence on or before that date, and

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

The newly discovered evidence contained in the March 29, 2024, Affidavit of Ms. Johnson could not have reasonably been discovered prior to this time. Ms. Johnson states in her Affidavit that “I had expressed fear for my safety and my children’s safety because I was living in the same place where the crimes happened. I wanted help moving somewhere else before I testified so my children and I would be safe.” Exhibit 2, Affidavit, ¶4. Ms. Johnson has always been a reluctant witness and her reluctance reasonably prevented her from providing all information within her knowledge, and her reluctance should not be attributed to Mr. Smith’s counsels’ failures to obtain Ms. Johnson’s whole situation and allegations in this case.

The opinion of the OCCA in *State v Smith*, 245 P.3d 1233 (Okla. Cr. App. 2010) referred to Ms. Johnson’s earlier Affidavit and found:

Sheena Johnson’s affidavit is dated December 9, 2009. In the affidavit, Johnson alleges that: (1) her children were taken away from her by the trial judge to force her to testify against Smith; and (2) she testified falsely about certain statements Smith made to her about the Pulluru murder and that she did so using information police told her to include in her testimony. Johnson’s allegation about her children being taken from her as coercion was known at the

time of Smith's 2003 trial. It was discussed between Smith's trial attorney, the judge, and the prosecutor, in response to the prosecutor's objection to Smith's cross-examination of Johnson, in which defense counsel inquired into Johnson's reasons for testifying. Johnson's fear about losing her children was also known at the time of Smith's preliminary hearing in 2002, when she stated her belief that if she did not testify "I would have got arrested and my - I have a three-month-old baby and he would have - child welfare would have got him." . . . Obviously, Johnson's fear of having her children taken away from her as retribution for not testifying was information that was known at the time of Smith's trial and could have been used to raise this issue on direct appeal or in Smith's first application for post-conviction relief. This information cannot serve as the factual basis for a second application for post-conviction relief. 22 O.S. Supp. 2006, § 1089(D)(8).

*Id.* at ¶ 13.

The OCCA's ruling in *State v Smith*, 245 P.3d 1233 does not take into account that Ms. Johnson did not even make the call to Crime Stoppers, but she wanted the extra money, because this Court did not have that information before it at the time of Mr. Smith's second application for post-conviction relief. Ms. Johnson's lie certainly casts doubts on the credibility of her testimony which was used to help convict Mr. Smith and sentence him to death. Further, her testimony that the judge and district attorney knew she did not want to place her hand on the Bible because her testimony "was not the full truth" is evidence of the trial court's knowing and willing use of false testimony.

When the OCCA ruled on Mr. Smith's appeal the Court said:

At 3:00 or 4:00 a.m., Smith went to Sheena Johnson's apartment and told her that he had killed two people that day. During that

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

*Smith v. State*, 2007 OK CR 16, 157 P.3d 1155, ¶ 8 (Okla. Crim. App. 2007). Emphasis added. Now, Ms. Johnson has denied she even made the call to Crimestoppers.

**The confession was not sufficiently corroborated due to Ms. Johnson's false testimony.**

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

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



to establish the trustworthiness of an extrajudicial statement. Without Ms. Johnson's and Berry's testimony, and Mr. Smith's alleged confession, the State had no other direct evidence to directly link Mr. Smith to the murders of Ms. Moore and Mr. Pulluru.

**The State failed to produce exculpatory evidence.**

Further, production of exculpatory evidence is so important that evidence known only to the police is imputed to the individual assistant district attorney, since the district attorney's office can establish procedures and regulations to insure all relevant information is provided to the appropriate attorney. See *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceedings would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles*, 514 U.S. at 433-34. This occurs anytime confidence in the outcome is undermined.

**The State allowed perjured testimony.**

The State also allowed and failed to correct the perjured testimony of Ms. Johnson.<sup>5</sup> The deliberate deception of the trier of fact by the presentation of evidence

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<sup>5</sup> Only further discovery and investigation can determine if the trial court, detectives, or prosecutor knew that Ms. Johnson did not really make the call to Crimestoppers because Ms. Johnson makes no mention of that in her Affidavit, but she does allege that it was known that she was not telling the truth.

known to be false violates the Fourteenth Amendment. The same result is obtained when the government, although not soliciting false evidence, allows it to go uncorrected when it appears. *Giglio*, 405 U.S. 150 (1972). See also *Douglas v. Workman*, 560 F.3d 1156 (10<sup>th</sup> Cir. 2009). In other words the State cannot create a materially false impression regarding the facts of the case or the credibility of the witness(es). The knowing use of false testimony entitles the accused to a new trial “if there is a reasonable likelihood the false testimony could have affected the verdict.” *United States v. Agurs*, 427 U.S. 97(1976); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). This standard is even more favorable than the foregoing test under *Kyles*. In false testimony cases, the Court “has applied a strict standard of materiality, not just because they involved prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.” *Agurs*, 427 U.S. at 104

### **CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons Mr. Smith requests this Court grant a writ of certiorari in his case.

Respectfully submitted,

/s/ Mark Henricksen  
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