

IN THE SUPREME COURT OF THE UNITED STATES

---

MICHAEL DEWAYNE SMITH,

*Applicant,*

v.

CHRISTE QUICK, Warden  
Oklahoma State Penitentiary,

*Respondent*

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

---

MARK HENRICKSEN, OBA #4102  
LANITA HENRICKSEN, OBA #15016  
HENRICKSEN & HENRICKSEN  
LAWYERS, INC.  
2915 N. Classen Blvd., Suite 215  
Oklahoma City, Oklahoma 73106  
(405) 609-1970 telephone  
[mark@henricksenlaw.com](mailto:mark@henricksenlaw.com)  
[Lanita@henricksenlaw.com](mailto:Lanita@henricksenlaw.com)

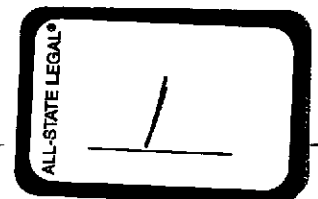
April 3, 2024

# AFFIDAVIT OF SHEENA JOHNSON

STATE OF OKLAHOMA            )  
  )  
COUNTY OF OKLAHOMA        )     ss.

Before me the undersigned notary, on this 9th day of December, 2009, personally appeared Sheena Johnson, known to me to be a credible person and of lawful age, who being sworn, on her oath, deposes and says:

1. My name is Sheena Johnson and I was a State's witness in *State of Oklahoma v. Michael Dewayne Smith*, Oklahoma County Case No. CF-02-1329.
2. Mr. Smith's case was before the Honorable Twyla Mason Gray.
3. Prior to my testimony, I received a call telling me that I was needed at court and that a taxi would be sent for me. I brought my 3 week old and one year old children with me. After waiting in the witness room, I was told that there was a mistake and that there was not a court hearing. I was told a cab would be called to take me home. I waited and when I saw a cab, the cab driver told me that I was not who he was assigned to pick up. I took my children and went back to let someone know my cab had not arrived. At this time I was told that Judge Gray wanted to see me in her chambers.
4. I was brought back into Judge Gray's chambers and I was asked to leave my children with someone in the witness room. There were about 5 - 7 people in Judge Gray's chambers, but the only one's I recognized were OCPD Detectives McNutt and Sterling. Judge Gray informed me that if I ignored the subpoena that she would hold me in contempt, place me in jail, and make me pay for the days I was incarcerated. I had expressed fear for my safety because of living in the same place I was in when the crimes happened. I wanted help moving somewhere else before I testified so my children and I would be safe. I informed her that I could not go to jail because I was a single mother.
5. Judge Gray then told me that "I had too much on my plate," without further explanation, and that protective services were here and that they were taking my



children away that day. My children were immediately taken from me, while I was still in Judge Gray's chambers. I asked one of the OCPD detectives, either Sterling or McNutt, if I would get my children back after I testified. She told me that I would and that she knew I was a good mother. I testified because I wanted my children back, however, I did not get them back at the completion of my testimony.

6. Prior to trial, Detectives Starling and McNutt came to my house to see me approximately 10 times. During these visits, I was told about the cash register and the clerk being set on fire at the convenience store and that this needed to be in my testimony even though Michael Smith said nothing about setting fires in the convenience store. I did what the detectives told me to do, because I wanted to get my children back.
7. The same detectives also told me about the convenience store shooting being a gang-related revenge murder and that this also needed to be in my testimony. Michael did not tell me why the convenience store clerk was shot, but I testified that he did.
8. I believe Judge Gray and the detectives held my children in order to force me to testify against Michael Smith.
9. I swear and affirm that the foregoing statement is true and correct.

Sheena Johnson  
Sheena Johnson

Subscribed and sworn to before me this 9 day of December, 2009.



Julie Gardner  
NOTARY PUBLIC

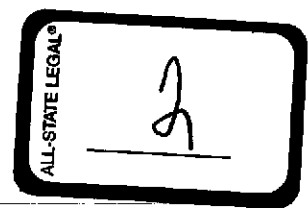
AFFIDAVIT OF SHEENA JOHNSON

STATE OF OKLAHOMA )  
COUNTY OF OKLAHOMA )

ss.

Before me, the undersigned notary, on this 24<sup>th</sup> day of March, 2024, personally appeared Sheena Johnson, known to me to be a credible person and of lawful age, who being sworn, on her oath, deposes and says:

1. My name is Sheena Johnson, and I was a State's witness in *State of Oklahoma v. Michael Dewayne Smith*, Oklahoma County Case No. CF-02-11329.
2. Michael Smith's case was before the Honorable Twyla Mason Gray.
3. Before my testimony, I received a call telling me that I was needed at court and a taxi would be sent to pick me up. I brought my three-week-old and my one-year-old child with me that day. After waiting in the witness room, I was told that there was a mistake and that there would not be a court hearing. I was then told a cab would come pick me up to take me home. I waited until I saw the cab, and the cab driver told me that I was not who he was assigned to pick up. I took my two children and went back to let someone know my cab had still not arrived. At this time, I was told that Judge Gray wanted to see me in her chambers.
4. I was brought back into Judge Gray's chambers, and I was asked to leave my two children with someone in the witness room. There were about 5 – 7 people in Judge Gray's chambers, but the only ones I recognized were OCPD Detective McNutt and Sterling. Judge Gray then informed me that if I chose to ignore the subpoena she would hold me in contempt, place me in jail, and make me pay for the days I was incarcerated. 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. I informed her that I could not go to jail because I was a single mother.
5. Judge Gray then told me that, "I had too much on my plate," without any further explanation of that statement. Judge Gray then proceeded to tell me that protective services were here and that they were taking my children away that day. My children



were immediately taken from me, while I was still in Judge Gray's chambers. I asked one of the OCPD detectives, either Sterling or McNutt, if I would get my children back after I testified. She told me that I would get them back and she knew I was a good mother. I testified because I wanted my children back, however, I did not get them back after my testimony, it was roughly a year later before I got them back.

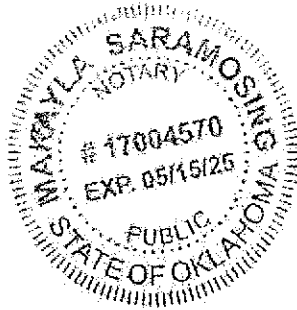
6. Before the trial, Detectives Sterling and McNutt came to my house to see me approximately ten times. During these visits, I was told about the cash register and the clerk being set on fire at the convenience store and that this needed to be in my testimony even though Michael Smith said nothing about setting fires in the convenience store and this was something I had no previous knowledge of. I did what the detectives told me to do and say because I wanted to get my children back.
7. Detectives Sterling and McNutt also told me about the convenience store shooting being a gang-related revenge murder and that this also needed to be in my testimony. I had no previous knowledge of this matter, Michael did not tell me why the convenience store clerk was shot, but I testified that he did because that is what I was told to do.
8. 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.
9. 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, which I still to this day have not received.
10. I believe Judge Gray and the detectives held my children to force me to testify against Michael Smith.
11. I swear and affirm that the foregoing statement is true and correct.

  
Sheena Johnson

Subscribed and sworn to before me this 24th day of March, 2024.

Dr. Mahay Saramsing

NOTARY PUBLIC





IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

APR - 3 2024

JOHN D. HADDEN  
CLERK

MICHAEL DEWAYNE SMITH,  
  
Petitioner,  
  
v.  
  
THE STATE OF OKLAHOMA,  
  
Respondent.

NOT FOR PUBLICATION  
  
Case No. PCD-2024-256

OPINION DENYING SUCCESSIVE APPLICATION  
FOR CAPITAL POST-CONVICTION RELIEF,  
MOTION FOR EVIDENTIARY HEARING, AND  
MOTION FOR DISCOVERY

ROWLAND, PRESIDING JUDGE:

A jury convicted Petitioner Michael Dewayne Smith of Burglary in the First Degree in violation of 21 O.S.2001, § 1431 (Count 1), Murder in the First Degree in violation of 21 O.S.2001, § 701.7 (Counts 2 and 3), Robbery with a Firearm in violation of 21 O.S.2001, § 801 (Count 4), and Arson in the First Degree in violation of 21 O.S.2001, § 1401 (Count 5), in Case Number CF-2002-1329 in the District Court of Oklahoma County. The jury found the existence of two aggravating circumstances and assessed punishment at death

for each of the murder convictions. The trial court pronounced judgment and sentence accordingly.

This Court affirmed Smith's convictions and sentences on direct appeal in *Smith v. State*, 2007 OK CR 16, 157 P.3d 1155. The United States Supreme Court denied certiorari in *Smith v. Oklahoma*, 552 U.S. 1191 (2008). We denied Smith's first application for post-conviction relief in *Smith v. State*, Case No. PCD-2005-142 (Feb. 24, 2009) (unpublished) and his second application for capital post-conviction relief in *Smith v. State*, 2010 OK CR 24, 245 P.3d 1233. We denied Smith's third application for capital post-conviction relief and accompanying motion for evidentiary hearing in *Smith v. State*, Case No. PCD-2021-981 (July 7, 2022) (unpublished).

Smith is now before this Court on his fourth application for capital post-conviction relief and accompanying motions for evidentiary hearing and discovery. This Court's review of claims on post-conviction in capital cases is set by 22 O.S.Supp.2022, § 1089. Applicants have very few grounds under Section 1089 on which to challenge their convictions:

The only issues that may be raised in an application for post-conviction relief are those that:

- (1) were not or could not have been raised in a direct appeal; and
- (2) support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

22 O.S.2022, § 1089(C). The merits of a successive post-conviction application will not be considered by this Court unless the following criteria are met:

- a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
- b. (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.Supp.2022, § 1089(D)(8). Additionally, under the rules of this Court, a successive post-conviction application will not be considered unless: (1) it contains claims which were not and could not have been previously presented in the original application because the factual

or legal basis for the claim was unavailable; and (2) it is filed “within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered.” 22 O.S.Supp.2022, § 1089(D)(8) & (9); Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024).

At trial the State presented the testimony of Sheena Johnson to corroborate Smith’s confession. Subsequently, in Smith’s second application for post-conviction relief, Smith attached an affidavit from Johnson in which she recanted portions of her trial testimony.<sup>1</sup> In support of his current application for post-conviction relief, Smith has attached another affidavit from Johnson sworn on March 29, 2024. This latest affidavit reiterates substantially the same information contained within the original affidavit and includes

---

<sup>1</sup> In this affidavit, sworn on December 9, 2009, Johnson alleged 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 and that she did so using information police told her to include in her testimony. This Court found that some of the information contained within the affidavit was either known at the time of Smith’s preliminary hearing and trial and could have been raised on direct appeal or in Smith’s first application for post-conviction relief. The Court found that other “new” information contained within the affidavit was known for longer than sixty days prior to the filing of the post-conviction application. Accordingly, the Court found that the claim was procedurally barred.

additionally Johnson's statement that before she testified at trial, she said that she did not feel comfortable doing it and she did not want to do it because "it was not the full truth." She stated in the affidavit that, "[she] was told to just place my hand above the Bible but not to touch it if [she] was not comfortable doing so" and that the judge and district attorney knew that she did this. Johnson also 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 stoppers because [she] needed the extra money, which [she] still to this day has not received."

Smith attempts to overcome procedural bars by arguing that the March 29 affidavit contains newly discovered evidence that could not reasonably have been discovered prior to this time. His claim is neither supported by the record nor is it persuasive. Johnson was a known witness who was reluctant to testify against Smith and who had recanted portions of her testimony once before. It was not unforeseeable that another interview with Johnson might garner additional evidence. Accordingly, we find that the additional evidence contained within Johnson's March 29 affidavit was discoverable

through the exercise of reasonable diligence far earlier than this.<sup>2</sup> This Court, therefore, is barred from considering the merits of this claim along with his related ancillary claims.

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. *See United States v. Ramsey*, 726 F.2d 601, 605 (10th Cir. 1984). *See also United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980 ("Recantation of testimony given under oath at trial is not looked upon with favor. Indeed, such is generally looked upon with downright suspicion.")).<sup>3</sup> 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. Johnson does not deny that Smith confessed both murders

---

<sup>2</sup> The information contained within Johnson's March 29, 2024 affidavit was discovered by a private investigator engaged by Smith's family.

<sup>3</sup> We recognize, of course, that federal cases are not binding on this Court but provide persuasive authority. However, it is also noteworthy that the United States District Court for the Western District of Oklahoma, in considering Johnson's 2009 affidavit, noted its "grave doubt" about Johnson's averments under the facts and circumstances of this case. *Smith v. Trammell*, No. CIV-09-293-D, 2014 WL 4627225 (W.D. Okla. Sept. 16, 2014) (unpublished).

to her; she claims that she was forced to add some details. Without making an extensive restatement of the evidence shown at trial and recounted in our opinion on direct appeal, we note that Smith's confession was not corroborated solely by Johnson, but rather, was corroborated additionally by Marcus Berry and physical evidence. Additionally and importantly, Smith's confession contained details about the murders that were not known to the public. The proffered "new" evidence contained within the March 29 affidavit, even "if proven and viewed in light of the evidence as a whole," is not, in our view, "sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found [Smith] guilty of the underlying offense or would have rendered the penalty of death. 22 O.S.Supp.2022, § 1089(D)(8)(b)(2).

### **DECISION**

Petitioner Smith's Successive Application for Post-Conviction Relief, Motion for Evidentiary Hearing, Motion for Discovery, and Fourth Emergency Request for Stay of Execution are **DENIED**. 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 delivery and filing of this decision.

## **APPEARANCES BY COUNSEL**

LANITA HENRICKSEN  
MARK HENRICKSEN  
HENRICKSEN & HENRICKSEN,  
LAWYERS, INC.  
2915 N. CLASSEN BLVD.,  
SUITE 215  
OKLAHOMA CITY, OK 73106  
ATTORNEYS FOR PETITIONER

GENTNER F. DRUMMOND  
ATTORNEY GENERAL OF OKLAHOMA  
JENNIFER L. CRABB  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
ATTORNEY FOR STATE

## **OPINION BY: ROWLAND, P.J.**

MUSSEMAN, V.P.J.: Concur  
LUMPKIN, J.: Concur  
LEWIS, J.: Concur  
HUDSON, J.: Concur

Attachment 1.....Affidavit of Sheena Johnson of December 9, 2009

Attachment 2.....Affidavit of Sheena Johnson of March 29, 2024

Attachment 3..... Order of the Oklahoma Court of Criminal Appeals  
Denying Successive Application For Postconviction  
Relief

s/s Mark Henricksen

MARK HENRICKSEN, OBA #4102

LANITA HENRICKSEN, OBA #15016

HENRICKSEN & HENRICKSEN

LAWYERS, INC.

2915 N. Classen Blvd., Suite 215

Oklahoma City, Oklahoma 73106

(405) 609-1970 telephone

[mark@henricksenlaw.com](mailto:mark@henricksenlaw.com)

[Lanita@henricksenlaw.com](mailto:Lanita@henricksenlaw.com)

Counsel for Applicant