

No. 23-7136
CAPITAL CASE

In the
SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE SMITH,
Petitioner,

-vs-

STATE OF OKLAHOMA,
Respondent.

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

BRIEF IN OPPOSITION

Gentner F. Drummond
Attorney General of Oklahoma
Aspen J. Layman
Asst. Attorney General
*Counsel of Record**
Jennifer L. Crabb
Asst. Attorney General
Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
aspens.layman@oag.ok.gov
jennifer.crabb@oag.ok.gov
(405) 522-4418

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**CAPITAL CASE
QUESTION PRESENTED**

Whether this Court has jurisdiction over claims procedurally defaulted by adequate and independent state law grounds?

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**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

The State respectfully urges this Court to deny Petitioner Michael Dewayne Smith’s Petition for Writ of Certiorari to review the unpublished opinion of the Oklahoma Court of Criminal Appeals (“OCCA”) entered in this case on April 3, 2024. *Smith v. State*, Case No. PCD-2024-256, slip op. (Okla. Crim. App. Apr. 3, 2024) (unpublished). Pet. App., unnum. 7-14.

STATEMENT OF THE CASE

A. Factual Background.

The OCCA set forth the relevant facts in its opinion on direct appeal:

The Appellant, Michael DeWayne Smith, was a member of the Oak Grove Posse, a subset of the Crips gang in Oklahoma City. On November 8, 2000, three members of the Oak Grove Posse attempted to rob Tran’s Food Mart in south Oklahoma City. The three robbers were Teron “T–Nok” Armstrong, Kenneth “Peanut” Kinchion, and Dewayne “Pudgy–O” Shirley. During the course of the robbery attempt, the owner of the store shot and killed Armstrong. Kinchion and Shirley were eventually arrested. Smith was not involved in the attempted robbery but had close personal ties to Armstrong.

On Friday, February 22, 2002, two days before the trial of Kinchion and Shirley was scheduled to start, Smith left his apartment in the Del Mar Apartments in Oklahoma City early in the morning. His roommate, Marcus Berry (also known as Marcus Compton), saw Smith take a .357 caliber revolver with him. Smith went first to Janet Moore’s apartment looking for her son Phillip Zachary who he believed was a police informant. Smith had earlier told Berry that “snitches need to be dead.”

The evidence supports the conclusion that Smith arrived at

Moore's apartment sometime before 6:30 a.m. Shoe prints indicated that Smith kicked in her front door and then her bedroom door. Moore began screaming, and, at approximately 6:30 a.m., a downstairs neighbor heard arguing between a man and a woman and then a single "pop" followed by footsteps.

Later that morning around 7:30 a.m. Smith arrived at A-Z Mart, a convenience store approximately fifteen miles from the Del Mar Apartments. A-Z Mart was immediately next door to Tran's Food Mart, the site of the earlier robbery attempt where Armstrong had been killed. The clerk on duty that morning at A-Z Mart was Sarath "Babu" Pulluru. Pulluru was filling in for the store owner who was taking the day off. Smith told detectives that he emptied two pistols into Pulluru, took some money, and used bottles of Ronsonol lighter fluid to start fires in the store. Smith said he set fire to the cash register, Pulluru's body, and a back room in order to destroy evidence. Shoeprints at the scene tracked Pulluru's blood from the cash register area, where his body was found, down the aisle to where the Ronsonol lighter fluid was displayed for sale. The bloody shoe prints at the A-Z Mart were similar to the shoe prints found at Moore's apartment.

At 1:00 or 2:00 a.m. the next morning, Smith returned to his apartment and told Berry that he had killed Janet Moore. He also told Berry that he had done something else to "take care of business," that he had avenged his family.

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.

Three days after Smith was detained, detectives interviewed him. Smith was given *Miranda* warnings, waived them, and agreed to talk. 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 and in retaliation for disrespectful comments about Armstrong in the press attributed to someone from the A–Z Mart Mart. According to Smith, as he fired off the initial barrage of bullets, Pulluru asked “what did I do?” Smith told him: “[M]y mother-f* * * * * little homey, my people on the set, like, bam, bam, before he died I let him know, like this is for my little homey that’s dead. Bam, bam, bam.” Smith also told detectives that he had disposed of the clothes he had worn during the murders, that he had wiped down Moore’s apartment to eliminate fingerprints, and that he set fire to whatever he had touched in the A–Z Mart to destroy evidence.

Smith v. State, 157 P.3d 1155, 1160-62 (paragraph numbers omitted).

B. Procedural Background.

In 2003, a jury convicted Smith of two counts of first degree murder and sentenced him to death for each offense, finding the existence of two aggravating circumstances (that there existed a probability that Smith would commit future acts of violence which would constitute a continuing threat to society and that the murders were heinous, atrocious, and cruel). *Smith*, 157 P.3d at 1160. After exhausting all

state and federal appeals, Smith is now scheduled for execution on April 4, 2024, over two decades after murdering Janet Moore and Sharath Pulluru. *See Smith v. Duckworth*, 824 F.3d 1233 (10th Cir. 2016), *cert. denied*, *Smith v. Royal*, 580 U.S. 1202 (2017) (habeas appeal); *Smith v. Trammell*, No. CIV-09-293-D, 2014 WL 4627225 (W.D. Okla. Sept. 16, 2014) (unpublished) (habeas petition); *Smith v. State*, No. PC-2024-216 (Okla. Crim. App. Apr. 2, 2024) (unpublished) (appeal from Oklahoma County District Court’s denial of post-conviction DNA testing); *Smith v. State*, No. PC-2024-154 (Okla. Crim. App. Mar. 25, 2024) (unpublished) (appeal from Oklahoma County District Court’s order denying stay of execution); *Smith v. State*, No. MA-2024-195 (Okla. Crim. App. Mar. 25, 2024) (unpublished) (denying request for stay of execution); *Smith v. State*, No. PCD-2021-981 (Okla. Crim. App. July 7, 2022) (unpublished) (third post-conviction application); *Smith v. State*, 245 P.3d 1233 (second post-conviction application); *Smith v. State*, No. PCD-2005-142 (Okla. Crim. App. Feb. 24, 2009) (unpublished) (first post-conviction application); *Smith v. State*, 157 P.3d 1155, *cert. denied*, *Smith v. Oklahoma*, 552 U.S. 1191 (2008) (direct appeal). The Oklahoma Pardon and Parole Board held a clemency hearing on March 6, 2024, and voted 4-1 to deny clemency.

On April 2, 2024, Smith filed his fourth application¹ for post-conviction relief, along with a motion for discovery, a motion for an evidentiary hearing, and an emergency motion for a stay of execution.

¹ Smith has also filed two post-conviction applications related to a request for DNA testing.

In his most recent application, Smith claimed that his convictions and sentences are unreliable because they were based on allegedly false testimony. Smith claims he has “new” evidence—an affidavit executed by Sheena Johnson on March 29, 2024, stating that portions of her 2002 testimony against Smith were false and were induced by the state trial court, police, and state prosecutors. Notwithstanding Smith’s claim otherwise, this evidence is not new at all. In fact, Smith has raised this claim in the past, and that claim—based on a December 2009 affidavit by Ms. Johnson—was rejected by the OCCA, United States District Court for the Western District of Oklahoma, and the Tenth Circuit Court of Appeals. *See Smith*, 824 F.3d 1233 (appeal of denial of habeas petition); *Smith*, 2014 WL 4627225, at *9-13 (habeas petition); *Smith*, 245 P.3d at 1238 (second post-conviction application).

In his second post-conviction application in state court, and in his federal habeas petition, Smith provided a 2009 affidavit from Ms. Johnson which “recant[ed] portions of [her] trial testimony” and claimed that she “testified falsely because [she was] threatened and coerced by police and the trial judge.” *Smith*, 245 P.3d at 1238. Ms. Johnson’s 2009 affidavit alleged that (1) her children were taken away from her by the trial judge in order to force her to testify against Smith, and (2) she testified falsely about certain aspects of Smith’s confession to Mr. Pulluru’s murder using information the police told her to include. *Id.* Smith’s post-conviction application claimed that Ms. Johnson’s affidavit demonstrated that (1) the State withheld exculpatory evidence; (2) the trial judge was biased (relating to the claim that the trial judge ordered Ms. Johnson’s children to be taken away); and (3) the State failed

to correct perjured testimony. *Id.* The OCCA reviewed Smith's claims, and the 2009 affidavit, and determined that his claims were procedurally barred:

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.⁷ 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" (P.H. 54). 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).

⁷ See Tr. Vol. 8 at 84–86.

Additionally, the single piece of new information contained in Johnson's affidavit (i.e., that she lied about Smith's statements concerning the Pulluru murder under police direction) was certainly available at the time the affidavit was executed on December 9, 2009, if not earlier. Under our rules, a second application for post-conviction relief must be filed within sixty days from the date a previously unavailable factual basis for an application is discovered. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2010). Based on the date of the affidavit, the factual basis for this claim was known for at least 132 days before the instant application

was filed. Thus this aspect of Smith's claim is also procedurally barred.

Id.

On the same day he initiated his second round of post-conviction proceedings, Smith filed a petition for federal habeas relief in the Western District. *Smith*, 2014 WL 4627225, at *4. In the first ground of his habeas petition, Smith made four claims for relief related to Sheena Johnson's 2009 affidavit. Smith claimed: (1) the prosecution failed to disclose this evidence; (2) the prosecution failed to correct the witness's perjured testimony; (3) he was denied the right to an impartial judge (relating to his allegation that the trial judge was involved in the removal of Ms. Johnson's children); and (4) that his trial counsel was ineffective (for failing to utilize and present this evidence to the jury). *Id.*

The Western District held that the procedural bar the OCCA applied to Smith's claim that Ms. Johnson was forced to testify "in order to get her children back" was independent and adequate, and therefore did not review the claim on its merits. However, because "the issue of whether Rule 9.7(G)(3) [a different state law ground known as the "sixty-day rule"] should be enforced as a procedural bar in this case [was] both complex and debatable," the court decided to address the remainder of Smith's claims "in a straightforward fashion on substantive grounds" rather than "address these thorny procedural issues" further. *Id.*, 2014 WL 4627225, at *9.

Prior to addressing the claim on its merits, the court expressed its skepticism about the veracity of Ms. Johnson's recantation. *Id.*, 2014 WL 4627225, at *10 ("not[ing] [the court's] grave doubt about the averments made by Ms. Johnson . . .

especially under the facts and circumstances of this case.” *Id.*, 2014 WL 4627225, at *10.

As Justice Brennan once stated, “[r]ecantation testimony is properly viewed with great suspicion. It upsets society’s interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction.” *Dobbert v. Wainwright*, 468 U.S. 1231, 1233–34 (1984) (Brennan, J., dissenting from the denial of certiorari and application for stay). At trial, [Ms. Johnson] made it abundantly clear that [she] did not want to testify against Smith. Smith is a Crips gang member and the crimes he committed were gang related. Ms. Johnson testified at trial that she was scared and that she was testifying against Smith only because she was under court order to appear.

Id. After discussing the applicable law relating to disclosure of evidence by the State, the knowing use of perjured testimony by the State, and ineffective assistance of counsel, the court held that, “[g]iven all of the presented evidence, and particularly Smith’s confession, the averments made by Ms. Johnson . . . do not cause this Court to question the outcome of Smith’s trial.” *Id.*, 2014 WL 4627225, at *11.

Regarding the nature of the allegations in Ms. Johnson’s affidavit, and the effect it would have had on Smith’s trial had it been known to the jury, the court stated:

Assuming that all of this new information had been made known to defense counsel and presented to Smith’s jury, ***there is no reasonable probability or likelihood that the jury’s verdicts would have been affected.*** First and foremost, Smith confessed, and his confession was recorded on videotape. The recorded confession was shown to the jury during stage one (in redacted form) and stage two (unredacted) of Smith’s trial (J. Tr. 10, 10–14; J. Tr. 14, 79–80, 85, 89; State’s Exhibits 85 and 124). In his confession, Smith admits to killing both Ms. Moore and Mr. Pulluru.

With respect to Ms. Moore, Smith stated that he knew Ms. Moore's son, Phillip; that Phillip was a snitch; that he told numerous people that Phillip was a snitch; and that he did not like snitches. Smith stated that Ms. Moore was killed because she was in the wrong place at the wrong time. Although he was looking for Phillip and did not go to the apartment to kill Ms. Moore, Smith stated that because she panicked, he had no choice. On the videotape, Smith demonstrates the way he shot Ms. Moore, and the way he wiped down anything he had touched to remove fingerprints. Smith went directly from Ms. Moore's apartment to the convenience store. Smith admitted to killing Mr. Pulluru in retaliation for statements made in the newspaper about a fellow Crips gang member (T-Nok) who had been killed at a neighboring convenience store during a robbery. Smith stated that he shot Mr. Pulluru with multiple bullets from two .357 handguns. After the killing, Smith poured "gas" on Mr. Pulluru and the cash register and set a fire to cover the evidence.

In light of Smith's confession, Ms. Johnson's post-trial averments that a portion of her testimony was made at the urging of the police is without consequence. As noted above, in his confession, Smith himself provides these details. In addition, and contrary to Smith's assertions, this portion of her testimony was not needed to establish corroboration of his confession. See Smith, 157 P.3d at 1174 (citing Fontenot v. State, 881 P.2d 69, 77-78 (Okla. Crim. App. 1994), for the proposition that in order "[f]or a confession to be sufficiently reliable to support a conviction, it must be supported by substantial independent evidence tending to establish its trustworthiness"). Beyond other testimony given by Ms. Johnson regarding not only the murder of Mr. Pulluru but Ms. Moore as well, Smith's confession was corroborated by the crime scene evidence, including expert testimony that the same gun was used in both murders, and medical testimony regarding the manner in which both victims were killed. In addition, there was the evidence of Ms. Johnson's calls to Crime Stoppers, a police hotline. Prior to Smith's interview by police, Ms. Johnson called the hotline and stated that Smith had committed both crimes. At that point, the only other persons who

knew the crimes were connected were Smith, the police, and the ballistics expert (M. Tr. 5/12/03, 17–19; Defendant’s Exhibit 1) (J. Tr. 8, 42, 56–59; J. Tr. 9, 115–19, 190–91). This was significant and unchallenged evidence connecting the crimes.

Id., 2014 WL 4627225, at *11 (emphasis added). The Western District denied Smith’s claim on the merits. *Id.* The Tenth Circuit later denied a certificate of appealability on this ground. *See Smith*, 824 F.3d at 1238 & 1238 n.1. *See* 28 U.S.C. § 2253(c)(1)(A) (a state prisoner may not appeal a final order in a habeas proceeding unless the district court or court of appeals grants a certificate of appealability).

On April 3, 2024, the OCCA denied Smith’s fourth application for post-conviction relief, along with his related motions for discovery, an evidentiary hearing, and a stay of execution, in an unpublished opinion. *See* Pet. App., unnum. 7-14.

On April 2, 2024, Smith filed in this Court an Emergency Application for Stay of Execution Pending Filing and Disposition of [sic] Petition for Writ of Certiorari. On April 3, 2024, Smith filed the instant petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Smith asks this Court to grant certiorari to consider a reprisal of claims that were raised and denied fourteen years ago. Although Smith asserts that his claims have a new factual basis, the OCCA soundly rejected that argument and found the claims procedurally defaulted. “A petition for a writ of certiorari will be granted only for compelling reasons,” such as to resolve conflicts in the law among federal circuit courts and/or the highest state courts or between this Court and lower courts. Sup. Ct. R. 10(a)-(c). “A petition for a writ of certiorari is rarely granted when the asserted

error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

Here, Smith’s case does not present a compelling issue for this Court’s review. Smith’s constitutional arguments are patently without merit—let alone do they present any compelling question warranting further consideration. First, Smith’s claims were found to be procedurally barred by the OCCA because he has raised such claims in the past and the “new” factual basis upon which he relies is not truly new. This Court lacks jurisdiction over Smith’s claims, which the OCCA denied pursuant to an adequate and independent state law ground.

In any event, Smith’s instant claims are unworthy of review because he seeks mere error correction. Finally, looking to the merits of his claims, the OCCA, the Western District, and the Tenth Circuit have all found Smith’s convictions and sentences to be constitutionally reliable, citing heavily to his highly corroborated confession to law enforcement. Smith’s petition breaks no new ground regarding the constitutionality of his convictions and sentences which has not been previously rejected by the courts.

The Petition for Writ of Certiorari should be denied.

CERTIORARI REVIEW ON THESE QUESTIONS PRESENTED SHOULD BE DENIED BECAUSE THE CLAIMS ARE PROCEDURALLY BARRED, SMITH SEEKS MERE ERROR CORRECTION, AND HIS CLAIMS LACK MERIT.

A. Smith's case does not warrant review because the claims therein were procedurally barred by the OCCA.

Smith's case is not entitled to certiorari review because this Court lacks jurisdiction over his claims. The OCCA began its analysis by recognizing that Smith presented an affidavit from Ms. Johnson, attempting to partially recant her trial testimony, in 2010. Pet. App., unnum. 10. The OCCA found the claim procedurally barred. Pet. App., unnum. 10 n.1. The court then found that Ms. Johnson's "latest affidavit reiterates substantially the same information contained within the original affidavit" with two additions: (1) that the trial judge and prosecutor knew Ms. Johnson did not place her hand on the Bible when sworn to testify because her testimony "was not the full truth" and (2) that she did not call Crime Stoppers, a member of her family did. Pet. App., unnum. 10-11.

Regarding Smith's contention that the information in Ms. Johnson's 2024 affidavit was not previously available, the court held that

[h]is 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.² This Court, therefore, is barred from considering the merits of this claim along with his related ancillary claims.

² The information contained within Johnson’s March 29, 2024 affidavit was discovered by a private investigator engaged by Smith’s family.

Pet. App., unnum. 11-12.

With limited exception, the OCCA does not consider claims raised in a successive post-conviction application which could have been raised in earlier proceedings. OKLA. STAT. tit. 22, § 1089(D)(8) (the OCCA “may not” grant relief for claims raised in successive post-conviction applications unless: 1) the legal or factual basis therefore was previously unavailable *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 OCCA adhered to state law, clearly and expressly applying § 1089(D)(8) to Smith’s claims. Pet. App., unnum. 8-9, 11-13. In doing so, the OCCA considered, and rejected, Smith’s arguments that the factual basis for his claims could not have been discovered previously. Pet. App., unnum. 11-12. The OCCA also alternatively found no merit to Smith’s claims “under the demanding statutory standard.” Pet. App., unnum. 12-13. This application of a state procedural rule, although it is substantive rather than procedural, nonetheless deprives this Court of jurisdiction. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (the adequate and independent state ground doctrine “applies whether the state law ground is substantive or procedural.”).

The OCCA's application of adequate and independent state law grounds to Smith's claims precludes this Court's review of his question presented:

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, 501 U.S. at 729 (citations omitted).

The Tenth Circuit has repeatedly found § 1089(D)(8) to be adequate and independent. *Pavatt v. Carpenter*, 928 F.3d 906, 929 (10th Cir. 2019) (en banc). Smith does not attempt to avoid application of the bar. The claims presented in Smith's petition were denied based on adequate and independent state law grounds. This Court lacks jurisdiction. Smith's request for certiorari review should be denied.

B. Smith's case does not warrant review because it presents no compelling reason for this Court's intervention.

Smith's case is not entitled to certiorari review because it requests mere error correction. *See* Sup. Ct. R. 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Smith is not arguing that the OCCA's decision conflicts with decisions of this Court, or another state court of last resort, or a federal

circuit court of appeals. *See* S. Ct. R. 10. Rather, Smith simply claims his convictions and sentences are unreliable.

Such error-correction is “outside the mainstream of th[is] Court’s functions.” *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* § 5.12(c)(3), p. 351 (9th ed. 2007)); *see also* *McWilliams v. Dunn*, 582 U.S. 183, 201 n.2 (2017) (Alito, J., dissenting) (“the question decided is not just narrow, it is the sort of factbound question as to which review is disfavored”). This Court should deny the petition.

C. Smith’s case is not entitled to certiorari review because his claims lack merit.

This Court decides cases only “in the context of meaningful litigation,” and when the challenged issue may not affect the ultimate judgment of the court below, that issue “can await a day when [it] is posed less abstractly.” *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). Smith’s “new” evidence does nothing to detract from the overwhelming evidence of his guilt:

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.”). 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 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., § 1089(D)(8)(b)(2).

Pet. App., unnum. 12-13 (first alteration adopted, footnote omitted).

Smith's claims are entirely without merit in light of the overwhelming evidence of his guilt. The chain of events leading to the murders in this case began with the death of Smith's friend (and fellow Crip gang member) who was shot by a convenience store owner during an attempted robbery. *Smith*, 157 P.3d at 1160-61. Two days after the robbery attempt, The Oklahoman (a local newspaper) published a story covering the robbery. As part of the article, reporters interviewed a clerk from the A&Z Food Mart, the store next door to Trans Food Mart:

[M.J.], who works next door at the A&Z Food Mart, said he is proud of his neighbor.

'It makes me nervous, yeah,' he said. 'But it makes me proud more than nervous because a clerk did it. The rest of the kids will learn a lesson by him being dead and stop doing these things.'

(OCCA No. PC-2024-216 O.R. 123-24).

Two other individuals involved in the attempted robbery were scheduled to go to trial in Oklahoma County on February 25, 2002, approximately one year and three months following the offense (Trial Tr. IX 179). On February 22, 2002, Appellant decided to get revenge.

Appellant was sharing an apartment with Marcus Berry (Trial Tr. V 80). On the morning of February 22, 2002, Appellant left the apartment at 5:00 or 6:00 a.m., carrying a .357 revolver, and wearing all black clothing (Trial Tr. V 94-102). Appellant used a .357 caliber gun to kill Janet Moore as described in the Statement of the Facts (Trial Vol. VI 37, 79). *Smith*, 157 P.3d at 1161.

Next, instead of targeting the Trans Food Mart, Appellant decided to go after the clerk at the A&Z Food Mart who had “dissed his set” (Trial Tr. VIII 36-37). Around 7:50 a.m., Kimberly Solis, a regular of the A&Z Food Mart, stopped by the store on her way to work (Trial Tr. VI 112-13, 119). Mrs. Solis tried to open the door at the entrance to the store, but it was locked, which was unusual; Mr. Pulluru pushed the button at the counter to let Mrs. Solis inside when he saw her (Trial Tr. VI 125-26). When Mrs. Solis entered the store, Appellant (whom she identified with 90% certainty) was standing at the check-out counter wearing dark clothing, a dark, brimless cap, and tennis shoes (Trial Tr. VI 114, 121-23). Appellant was arguing with Mr. Pulluru, who was working the counter, because Appellant did not have enough money to pay for the items he had selected (Trial Tr. VI 115). During the interaction, Appellant was agitated, but also laughing inexplicably, “[g]iggling to himself under his breath like the situation was funny and it didn’t appear to be funny” (Trial Tr. VI

115). Appellant also kept one hand in his pocket throughout the interaction (Trial Tr. VI 137).

After Mrs. Solis left, Appellant shot and killed store clerk Sarath Pulluru “and used bottles of Ronsonol lighter fluid to start fires in the store. . . . in order to destroy evidence.” 157 P.3d at 1161. The fire damage to the store, however, was minimal because of the properties of lighter fluid as an accelerant (Trial Tr. VI 197, 200, 203-05). One of the guns used to kill Mr. Pulluru (he was shot with two different guns) was used to kill Ms. Moore (Trial Tr. IX 43, 74). *Smith*, 157 P.3d at 1167.

After murdering both Ms. Moore and Mr. Pulluru by 8:30 a.m. on February 22, 2002, Smith returned home still wearing the same clothes and acting “crazy” (Trial Tr. V 108). There, Appellant told Mr. Berry that “[h]e did something he had to do,” and had “handled his business” (Trial Tr. V 80, 110). Appellant elaborated that he had killed Ms. Moore and had gotten revenge on the people who “crossed his family” (Trial Tr. V 13, 115). Mr. Berry left and went to a girl’s house to get some sleep (Trial Tr. V 115). When Mr. Berry eventually returned, Appellant had cut off all of his hair and shaved his face and eyebrows (Trial Tr. V 116).

When police discovered the similarities between the shoeprints (discussed in the Statement of the Facts), “the only person who knew that these crimes were related were the suspect, the homicide division, and the ballistics guy. Nobody else.” (Tr. IX 190). Yet, when Ms. Johnson called Crime Stoppers, she reported that H.K. (aka Hoover Killer, aka Michael DeWayne Smith) had committed both murders (Tr. IX 190; Tr. X 23).

With this amount of corroborative evidence, Ms. Johnson’s testimony could be excluded in its entirety with no effect on the jury’s verdict. *See Smith*, 2014 WL 4627225, at *10-11 (holding Ms. Johnson’s testimony was not necessary to corroborate Smith’s confession as the confession was otherwise corroborated by “the crime scene evidence, including expert testimony that the same gun was used in both murders, and medical testimony regarding the manner in which both victims were killed”).

Yet, Ms. Johnson does not actually recant her testimony, only portions of it. She does not deny that Smith confessed the murders to her or that this confession is what led to the Crime Stoppers tip. Whether Ms. Johnson made the call, or she relayed information to a member of her family who placed the call, the fact remains that Smith confessed to Ms. Johnson before the public knew the two seemingly unrelated murders were committed by the same person.

Smith cannot establish that his confession lacked adequate corroboration,² that the State withheld material evidence (evidence that would have created a reasonable probability of a different outcome), or that the State knowingly presented materially false testimony. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Napue v. Illinois*, 360 U.S. 264 (1959); *Smith*, 2014 WL 4627225, at *10-11 (holding “there [was] no reasonable probability or likelihood that the jury’s verdicts would have been affected” by Ms. Johnson’s 2009 affidavit, and that “Ms. Johnson’s post-trial

² For this claim Petitioner relies solely on a case arising out of a federal prosecution that did not state a constitutional requirement. *See Oppen v. United States*, 348 U.S. 84 (1954).

averments that a portion of her testimony was made at the urging of the police [was] *without consequence*” (emphasis added)).

Smith’s claims are without merit.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

GENTNER F. DRUMMOND
Attorney General of Oklahoma

ASPEN J. LAYMAN,
*Assistant Attorney General
Counsel of Record**
JENNIFER L. CRABB,
Assistant Attorney General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE TWENTY-FIRST ST.
OKLAHOMA CITY, OK 73105
aspens.layman@oag.ok.gov
jennifer.crabb@oag.ok.gov
(405) 522-4418
Counsel for Respondent

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