No. 22-6500
(CAPITAL CASE)

IN THE
Supreme Court of the United States

RICHARD EUGENE GLOSSIP, PETITIONER,

v.

STATE OF OKLAHOMA, RESPONDENT.

APPENDIX TO APPLICATION FOR STAY OF EXECUTION

2023 OK CR 5

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	**FOR PUBLICATION**
	)	
Petitioner,	)	
	)	
v.	)	**Case Nos. PCD-2023-267**
	)	**D-2005-310**
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF, MOTION FOR EVIDENTIARY HEARING, MOTION FOR DISCOVERY, AND JOINT MOTION TO STAY EXECUTION

LEWIS, JUDGE:

¶1 Petitioner, Richard Eugene Glossip, was convicted of First-Degree (malice) Murder in violation of 21 O.S.Supp.1996, § 701.7(A), in Oklahoma County District Court Case No. CF-1997-244, after a jury trial occurring in May and June 2004, before the Honorable Twyla Mason Gray, District Judge.[1] The jury found the existence of

[1] This was Glossip's retrial after this Court reversed his first Judgment and Sentence on legal grounds in *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

one aggravating circumstance: that Glossip committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration and set punishment at death.[2] Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

¶2 This Court, on direct appeal, affirmed Glossip's murder conviction and sentence of death in *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143. Glossip, thereafter, filed an initial application for post-conviction relief, which was denied in an unpublished opinion. *Glossip v. State*, No. PCD-2004-978, slip op. (Okl.Cr., Dec. 6, 2007). Glossip has filed other subsequent applications for post-conviction relief, which this Court has denied.[3] Glossip's execution is currently scheduled for May 18, 2023. He is now before this Court with his fifth application for post-conviction relief, a motion for evidentiary

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[2] The jury did not find the second aggravating circumstance: the probability that Glossip will commit criminal acts of violence that would constitute a continuing threat to society.

[3] Glossip has been denied subsequent post-conviction relief in Oklahoma Court of Criminal Appeals case numbers PCD-2015-820, PCD-2022-589, and PCD-2022-819.

hearing, and a motion for discovery, as well as a joint motion for a stay of execution filed in Oklahoma Court of Criminal Appeals Case No. D-2005-310.

¶3 The Attorney General of Oklahoma has filed a response requesting that this Court vacate Glossip's twenty-five-year-old murder conviction and sentence of death and send the case back to the district court for a new trial. Despite the request, Attorney General Gentner F. Drummond is "not suggesting that Glossip is innocent of any charge made against him" and "continues to believe that Glossip has culpability in the murder of Barry Van Treese." The Attorney General's "concession" does not directly provide statutory or legal grounds for relief in this case. This Court's review, moreover, is limited by the legislatively enacted Post-Conviction Procedure Act found at 22 O.S.Supp.2022, § 1089(D)(8).

¶4 The Attorney General has also joined Glossip in a joint motion for stay of execution asking that Glossip's execution be stayed until August 2024, because he believes Glossip's application satisfies the requirements of 22 O.S.2021, § 1001.1(C). The Attorney General takes no position on the merits of Glossip's claims in the motion. The Attorney General also stated, in the joint motion, that more time is

required for his special prosecutor to complete a review of the case. That review, however, is now complete according to the Attorney General's response to Glossip's application for post-conviction relief. For the reasons below, Glossip is neither entitled to post-conviction relief, nor a stay of execution.

I.

¶5 The facts of Glossip's crime presented at trial were detailed in the 2007 direct appeal opinion. We reiterate a few of the facts here. Justin Sneed, the co-defendant, pled guilty, received a sentence of life without parole, and agreed to testify against Glossip. The law required Sneed's testimony be corroborated, and the jury was asked to determine whether it was corroborated in the trial court's instructions.

¶6 Among the corroborating evidence noted in the direct appeal was that Barry Van Treese was the owner of the Best Budget Inn in Oklahoma City. Richard Glossip worked as the manager, and he lived on the premises with his girlfriend D-Anna Wood. Glossip hired Justin Sneed to do maintenance work at the motel. By all credible accounts, Sneed was under Glossip's control.

¶7 In the early morning hours of January 14, 1997, Sneed entered room 102 and bludgeoned Van Treese to death with a baseball bat. Sneed then went to Glossip's room and told him he had killed Van Treese and that a window was broken during the attack. Glossip told D-Anna Wood that two drunks had broken out a window.

¶8 Glossip went to Van Treese's room to help cover the busted window, but later denied seeing Van Treese's body. Glossip told Sneed to drive Van Treese's car to a nearby parking lot and retrieve money that would be under the seat. The envelope contained $4,000.00, which Glossip divided with Sneed. Police later recovered $1,700.00 from Sneed and $1,200.00 from Glossip.

¶9 That morning, Billye Hooper noticed that Van Treese's car was gone and asked Glossip where it was located. Glossip told Hooper that Van Treese left to obtain supplies to repair and remodel rooms. Glossip told the housekeeper that he and Sneed would clean the downstairs rooms, including 102. Glossip, Wood, and part owner and security guard Cliff Everhart later drove around looking for Van Treese. Glossip kept Everhart away from Room 102.

¶10 Later, Everhart and Oklahoma City Police Sgt. Tim Brown began discussing Glossip's conflicting statements, so they decided to

check Room 102 on their own. At about 10:00 p.m. they discovered Van Treese's body in his room. Glossip later told investigators that he was deceitful because he felt like he was involved in the crime; he said he was not trying to protect Sneed.

¶11 Sneed later told investigators and testified at trial that Glossip offered him $10,000.00 to kill Van Treese. Glossip feared he would be fired due to discrepancies in the motel's finances, so he employed Sneed to kill Van Treese. Sneed has never come forward stating that he wishes to recant or change his trial testimony.

II.

¶12 This case has been thoroughly investigated and reviewed in numerous appeals. Glossip has been given unprecedented access to the prosecution files, including work product, yet he has not provided this Court with sufficient information that would convince this Court to overturn the jury's determination that he is guilty of first-degree murder and should be sentenced to death based on the murder for remuneration or promise of remuneration aggravating circumstance. His new application provides no additional information which would cause this Court to vacate his conviction or sentence.

¶13 Glossip is filing this latest application for post-conviction relief because the Oklahoma Attorney General recently turned over a box of "prosecutor's notes" to his appellate attorneys. The Attorney General previously turned over seven (7) boxes of material in September 2022. Issues surrounding the material in these boxes were raised in two separate applications for post-conviction relief in 2022. This latest box (box 8) was turned over on January 27, 2023. Petitioner claims that this application is being made within sixty (60) days of the discovery of the evidence in box 8, as required by Rule 9.7, *Rules of the Oklahoma Court of Appeals,* Title 22, Ch.18, App. (2023).

¶14 Glossip also states that this application is not his full and final presentation of these claims. He seeks leave to amend and/or supplement this application when he has had the opportunity to fully develop the claims. He states that the Attorney General has no objection to this request.

¶15 Glossip's request to amend is not well taken. The Oklahoma Statutes provide that:

> All grounds for relief that were available to the applicant before the last date on which an application could be

> timely filed not included in a timely application shall be deemed waived.
>
> No application may be amended or supplemented after the time specified under this section. Any amended or supplemental application filed after the time specified under this section shall be treated by the Court of Criminal Appeals as a subsequent application.

22 O.S.Supp.2022, § 1089(D)(2). Further applications will be treated as required by statute.

III.

¶16 Glossip raises five propositions in support of this subsequent post-conviction appeal. Again, this Court's review is limited by the Oklahoma Post-Conviction Procedure Act. Title 22 O.S.Supp.2022, § 1089(D)(8), which provides for the filing of subsequent applications for post-conviction relief.[4] The Post-

[4] It provides:

> 8. . . . if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the . . . subsequent application, unless:

Conviction Procedure Act is not designed or intended to provide applicants with repeated appeals of issues that have previously been raised on appeal, or could have been raised but were not. *Slaughter v. State*, 2005 OK CR 6, ¶ 4, 108 P. 3d 1052, 1054. The Court's review of subsequent post-conviction applications is limited to errors which would have changed the outcome and claims of factual innocence. *Id.* 2005 OK CR 6, ¶ 6, 108 P.3d at 1054. This Court's rules also place time limits on the raising of issues in subsequent applications. *See*

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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.

Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2023).[5]

¶17 These time limits and the post-conviction procedure act preserve the legal principle of finality of judgment. *Sporn v. State*, 2006 OK CR 30, ¶ 6, 139 P.3d 953, 954, *Malicoat v. State*, 2006 OK CR 25, ¶ 3, 137 P.3d 1234, 1235, *Massaro v. United States*, 538 U.S. 500, 504 (2003). This Court's rules and our case law, however, do not bar the raising of a claim of factual innocence at any stage. *Slaughter*, 2005 OK CR 6, ¶ 6, 108 P.3d at 1054. Innocence claims are the Post-Conviction Procedure Act's foundation. *Id.*

¶18 Claims of factual innocence must be supported by clear and convincing evidence. 22 O.S.Supp.2022, § 1089(D)(8)(b)(2); *see Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Factual innocence claims are the method to sidestep procedural bars in order to prevent the risk of a manifest miscarriage of justice. *Cf. Herrera v. Collins*, 506 U.S. 390, 404 (1993) (holding that bars to federal habeas corpus claims can be overcome by a claim of actual innocence). The evidence of factual innocence must be more than that which merely tends to

[5] These rules have the force of statute. 22 O.S.Supp.2022, § 1051(B).

discredit or impeach a witness. *See Robinson v. State,* 1997 OK CR 24, ¶ 7, 937 P.2d 101, 106; *Moore v. State,* 1995 OK CR 12 ¶ 6, 889 P.2d 1253, 1256; *Smith v. State,* 1992 OK CR 3, ¶ 15, 826 P.2d 615, 617-618. We weigh any evidence presented against the evidence as a whole, in a light most favorable to the State, to determine if Glossip has met this burden. *See Slaughter,* 2005 OK CR 6, ¶ 21, 108 P.3d at 1056. Glossip's actual innocence claim is raised in Proposition Four.

IV.

¶19 In order to prevail on his factual innocence claim, Glossip urges this Court to re-examine the previous claim of actual innocence along with what he calls new evidence. The items he relies upon in this new post-conviction application do not meet the threshold showing that Glossip is factually innocent.

¶20 Glossip first submits an affidavit from Paul Melton who was incarcerated with Justin Sneed after the murder. Melton previously provided an affidavit in 2016. The current affidavit is not substantially different from the one provided in 2016. Now, however, time has passed, and Melton's recollection is more detailed. Because the affidavit basically contains the same information available in

previous applications, the matter is barred under the Post-Conviction Procedure Act. We are not convinced that the affidavit shows that Glossip is factually innocent. The affidavit merely provides impeachment evidence without showing that the outcome would be different.[6]

¶21 His second affidavit is from a medical doctor, Peter Speth, who attempts to discredit the medical examiner's report regarding Van Treese's cause of death. Dr. Speth provided a report to Glossip's attorneys in 2015. Glossip submitted medical affidavits attacking the medical examiner in his 2015 post-conviction application. This Court found, in 2015, that

> This is a claim that could have been raised much earlier on direct appeal or in a timely original application through the exercise of reasonable diligence. Furthermore, we find that the facts underlying this claim are not sufficient when viewed in light of the evidence as a whole to show that no reasonable fact finder would have found Glossip guilty or would have rendered the penalty of death. Moreover, Glossip has not suffered a miscarriage of justice based on this claim.

Glossip v. State, No. PCD-2015-820, slip op. at 7 (Okl.Cr. Sept. 26, 2015).

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[6] Melton never states in his affidavit that he is willing to testify if asked to do so.

¶22 There is nothing extraordinarily new in this affidavit; therefore, further review of this matter is barred under Oklahoma law. Moreover, the information is insufficient to cause this Court to believe that Glossip is factually innocent.

¶23 Clearly, the affidavits contain claims that were known, or could have been developed earlier with reasonable diligence. These affidavits do not provide the clear and convincing evidence that Glossip is factually innocent.

V.

¶24 Glossip claims in Propositions One and Two that the State withheld material, exculpatory evidence. Even if this claim overcomes procedural bar, the facts do not rise to the level of a *Brady* violation.[7] To establish a *Brady* violation, a defendant must show

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[7] *Brady v. Maryland*, 373 U.S. 83 (1963). Oklahoma clearly follows the dictates of *Brady* and have stated,

> Due process requires the State to disclose exculpatory and impeachment evidence favorable to an accused. *See United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d [104] (1972), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Wright v. State, 2001 OK CR 19, ¶ 22, 30 P.3d 1148, 1152.

that the prosecution failed to disclose evidence that was favorable to him or exculpatory, and that the evidence was material. *Brown v. State*, 2018 OK CR 3, ¶ 102, 422 P.3d 155, 175. Material evidence must create a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *Id.* 2018 OK CR 3, ¶ 103, 422 P.3d at 175. The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality. *Id.*

¶25 Glossip claims that the State failed to disclose evidence of Justin Sneed's mental health treatment and that Sneed lied about his mental health treatment to the jury. Though the State in its response now concedes that this alleged false testimony combined with other unspecified cumulative errors warrant post-conviction relief, the concession alone cannot overcome the limitations on successive post-conviction review.[8] *See* 22 O.S.Supp.2022, § 1089(D)(8). The State's concession is not based in law or fact.

[8] The State's citation to *Escobar v. Texas*, 143 S.Ct. 557 (2023), is misleading at best. Texas confessed error in a brief before the United States Supreme Court; there is no statement that Texas confessed error before its own state courts as the Attorney General has done in its brief presented to this Court.

¶26 This issue is one that could have been presented previously, because the factual basis for the claim was ascertainable through the exercise of reasonable diligence, and the facts are not 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.

¶27 Sneed, in 1997, underwent a competency examination by Dr. Edith King.[9] The State avers that this examination noted Sneed's lithium prescription. This report was available to previous counsel, so counsel knew or should have known about Sneed's mental health issues. Furthermore, Sneed testified at trial that he was given lithium while at the county jail prior to trial, but he didn't know why. Counsel did not question Sneed further on his mental health condition, which counsel knew about or should have known about. It is likely counsel did not want to inquire about Sneed's mental health due to the danger of showing that he was mentally vulnerable

[9] This competency examination and lithium medication was mentioned in Glossip's brief filed in the appeal of his first conviction. *See* Oklahoma Court of Criminal Appeals Case No. D-1998-948.

to Glossip's manipulation and control. Moreover, and controlling here, is the fact that this issue could have been and should have been raised, with reasonable diligence, much earlier than this fifth application for post-conviction relief.

¶28 The evidence, moreover, does not create a *Napue*[10] error. Defense counsel was aware or should have been aware that Sneed was taking lithium at the time of trial. This fact was not knowingly concealed by the prosecution. Sneed's previous evaluation and his trial testimony revealed that he was under the care of doctor who prescribed lithium. His testimony was not clearly false. Sneed was more than likely in denial of his mental health disorders, but counsel did not inquire further. Finally, this evidence is not material under the law. This known mental health treatment evidence does not create a reasonable probability that the result of the proceeding would have been different had Sneed's testimony regarding his use of lithium been further developed at trial.

¶29 Glossip next claims that the State failed to disclose that witness Kayla Pursley viewed a video tape recording of the Sinclair

[10] *Napue v. Illinios,* 360 U.S. 264, 269.

gas station taken the night of the murder. Kayla Pursley testified at trial that there were cameras at the station for the inside but not the outside. She testified that Sneed came in the station at around 2:00-2:30 a.m. No further inquiry was made about the cameras by either side during the trial. Arguably, the video tape was not disclosed to Glossip prior to trial, nor was it utilized at trial, and it has not been discovered as of this date. Pursley, prior to trial, possibly told prosecutors that she viewed the tape to see when Sneed came in the store.

¶30 Again, this issue could have been presented much earlier. Counsel should have known that there were cameras at the station in reading the trial transcript, and could have inquired about possible video tapes. Issues about missing tapes could have been raised much sooner. Glossip has waived this issue for review.

¶31 Obviously, the tape could have corroborated both Sneed's testimony and Pursley's testimony. Glossip offers mere speculation that the tape might have been exculpatory. He cannot show that the tape was material under the law.

¶32 Next, Glossip claims that the State failed to disclose details from witness statements that conflicted with other evidence. One

such statement relates to the amount of money spent on repairs after the murder. One witness testified they spent $2,000.00-$3,000.00 for repairs and the motel was in disrepair because of Glossip's negligence rather than the lack of money. Another person "Bill Sunday" possibly told prosecutor Gary Ackley they spent $25,000.00 for repairs. The amount spent presents a conflict, but it does not help Glossip. The theory was that Glossip was negligent in his job, he expected to be fired, and he chose to have Van Treese killed instead of being fired. There was money for repairs, but Glossip didn't do the repairs. This contradiction hurts, rather than helps Glossip.

¶33 Glossip next cites to notes by prosecutor Connie Pope Smothermon discovered in box 8. Glossip speculates that the notes relate to items sold by him. Glossip's theory at trial was that the money he had was from selling some of his items, rather than money stolen from Van Treese in conjunction with the murder.

¶34 Glossip speculates that these notes regarding amounts of money were amounts learned from Cliff Everhart. Everhart testified that Glossip sold some items for around $250.00-$300.00. The notes do not clearly have an amount of money. There is no factual basis for

this part of the claim. Moreover, Glossip has not shown that this information is material.

¶35 Next, Glossip raises a claim regarding the now missing Sinclair station video mentioned above. Glossip previously raised issues regarding this missing tape in Case No. PCD-2022-589. There was no dispute that a tape was retrieved from the Sinclair gas station, or that Sneed visited the station. Sneed testified that he was there before the murder. This claim is waived, as a claim regarding the missing tape could have been raised much earlier.

¶36 Glossip claims that he has now learned that witness Pursley possibly watched the video to confirm that she saw Sneed in the station at around 2:15 a.m. Glossip says this tape could have been helpful to the defense. That is far from being material. The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality. *Brown*, 2018 OK CR 3, ¶ 103, 422 P.3d at 175.

VI.

¶37 In Proposition Three Glossip claims that the prosecution tried to change Sneed's testimony to include the fact that in addition

to beating Van Treese with a baseball bat, he also attempted to stab Van Treese.

¶38 Glossip admits that this claim was raised in a previous application, but he has new information to support this claim. Despite Glossip's argument, this claim is substantially the same as the previous claim presented in in Proposition Three in Case No. PCD-2022-819. This claim is barred under our rules.

VII.

¶39 Lastly, in Proposition Five, Glossip raises a cumulative error claim, combining the propositions in this application with issues raised in previous applications. Only claims argued in this application may be combined under this claim. *Coddington v. State,* 2011 OK CR 21, ¶ 22, 259 P.3d 833, 840. His cumulative error claim must be denied. A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised. *Id.*

¶40 Petitioner's reliance on *Valdez v. State,* 2002 OK CR 20, 46 P.3d 703, to overcome the procedural bars to claims waived or barred is, likewise, not persuasive. None of his claims convince this Court that these alleged errors have resulted in a miscarriage of justice. *Valdez,* 2002 OK CR 20, ¶ 28, 46 P.3d at 710-11.

VIII.

¶41 This Court has thoroughly examined Glossip's case from the initial direct appeal to this date. We have examined the trial transcripts, briefs, and every allegation Glossip has made since his conviction. Glossip has exhausted every avenue and we have found no legal or factual ground which would require relief in this case. Glossip's application for post-conviction relief is denied. We find, therefore, that neither an evidentiary hearing nor discovery is warranted in this case.

¶42 Further, because Glossip has not made the requisite showing of likely success and irreparable harm, he is not entitled to a stay of execution. We have denied the application for relief; therefore, his reasons for a stay are without merit. The Legislature has set forth parameters for this Court in setting execution dates and in issuing stays of execution.

> Our authority to grant a stay of execution is limited by 22 O.S.2011, § 1001.1(C). The language of § 1001.1(C) is clear. This Court may grant a stay of execution only when: (1) there is an action pending in this Court; (2) the action challenges the death row inmate's conviction or death sentence; and (3) the death row inmate makes the requisite showings of likely success and irreparable harm.

Lockett v. State, 2014 OK CR 3, ¶ 3, 329 P.3d 755, 757. The joint request for a stay does not meet the standards of the statute. This Court has found no credible claims to prevent the carrying out of Glossip's sentence on the scheduled date.

CONCLUSION

¶43 After carefully reviewing Glossip's fifth application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Glossip's application for post-conviction relief, and related matters are **DENIED**. The joint application for a stay of execution in Case No. D-2005-310 is **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: LEWIS, J.
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Specially Concur
MUSSEMAN, J.: Concur
WINCHESTER, J.[11]: Concur

[11] Supreme Court Justice James R. Winchester sitting by special designation.

Lumpkin, J., Specially Concur:

¶1 Historians have documented that as some of this nation's founders contemplated its creation, John Adams wrote a series of essays as a member of the Massachusetts delegation to the First Continental Congress in 1775. This series, titled the "Novanglus" essays, includes Adams' conclusion that Aristotle, Livy, and Harrington defined a republic to be "a government of laws and not of men." The Court's opinion in this case comports with John Adams' finding, by following and applying the laws properly enacted by our Legislature and not depending on the various opinions voiced by men.

¶2 For over 20 years the facts, evidence, and law relating to this case have been reviewed in detail by judges and their staffs through every stage of appeal allowed under our Constitution. At no level of review has a court determined error in the trial proceeding of this Petitioner nor has there been a showing of actual innocence. As the Court's opinion notes, finality of judgments is a foundational principle of our system of justice. Petitioner has received every benefit offered by our system of justice and now his conviction and sentence are final. For these reasons, and the analysis set forth in the opinion,

I concur in the judgment of the Court and in the denial of this application.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

RICHARD GLOSSIP, *Petitioner,* v. **STATE OF OKLAHOMA,** *Respondent.*	**Case No. PCD 2023-267** **DEATH PENALTY CASE**

STATE OF OKLAHOMA'S RESPONSE IN SUPPORT OF PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF DEATH PENALTY – EXECUTION SCHEDULED MAY 18, 2023

The Supreme Court has long held that a "prosecutor's role transcends that of an adversary:" A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty… whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Bagley,* 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)). For the reasons set forth below, it is the view of the undersigned on behalf of the State of Oklahoma that setting aside Richard Glossip's conviction and remanding the case to the district court is the fair and just result.

On January 26, 2023, the State appointed an independent counsel to re-examine this case. After a thorough review, the Independent Counsel concluded that Glossip's conviction and sentence should be set aside. The State has reviewed the Independent Counsel's report and conclusions. The State has reached the difficult conclusion that justice requires setting aside Glossip's conviction and remanding the case to the district court.

Before discussing the reasons for the State's difficult conclusion, the State is not suggesting that Glossip is innocent of any charge made against him. The State continues to believe that Glossip has culpability in the murder of Barry Van Treese. Further, the State disagrees with many of the conclusions reached by the Independent Counsel. However, the State has concluded that Justin Sneed ("Sneed") made material misstatements to the jury regarding his psychiatric treatment and the reasons for his lithium prescription. Consistent with its obligations in *Napue v. Illinois,* 360 U.S. 264 (1959), the State is compelled to correct these misstatements and permit the trier of fact the opportunity to weigh Sneed's credibility with the accurate information. Additionally, and even though previously addressed by this Court, the State is concerned that there were multiple and cumulative errors, such as violation of the rule of sequestration and destruction of evidence, that when taken together with Sneed's misstatements warrant a remand to the district court.

Except as expressly identified below, the State denies all allegations of error or legal conclusions made by Glossip in his *Successive Application for Post-Conviction Relief Death Penalty – Execution Scheduled May 18, 2023* ("Glossip's Application"). As this Court is well aware, many of the claims in Glossip's Application have been advanced numerous times and have been rejected. However, because the State now believes Glossip's conviction should be set aside and the case remanded to the district court, the State does not believe a thorough rehashing of these arguments is warranted. To the extent that they are consistent with this confession of error, the State adopts and incorporates by reference all prior State briefings to this Court related to Glossip's appeals and multiple applications for post-conviction relief.

Sneed Did Not Accurately Testify as to the True Reason for His Lithium Prescription or the Fact That He Had Been Treated by a Psychiatrist. The State Believes This Warrants Post-Conviction Relief.

The State's key witness at Glossip's second trial, Justin Sneed, appears to have been previously diagnosed with bipolar affective disorder. Sneed was prescribed lithium by a psychiatrist.[1] While it is not clear whether the prosecutor knew of Sneed's precise medical diagnosis, the record indicates that the prosecutor was aware that Sneed had been treated by a "Dr. Trumpet." In his Application, Glossip argues that the prosecutor should have concluded that "Dr. Trumpet" referred to Dr. Lawrence Trombka. The State believes this is a reasonable conclusion. Further, it is the State's understanding that Dr. Trombka was generally known to be the only psychiatrist treating patients at the Oklahoma County Jail in 1997. Moreover, Sneed was administered a competency exam by a psychiatrist, Dr. Edith King, in 1997, which likewise noted a lithium prescription.

Despite this reality, Sneed was able to effectively hide his psychiatric condition and the reason for his prior lithium prescription through false testimony to the jury. Specifically, Sneed testified as follows at the second trial:

> Q. After you were arrested, were you placed on any type of prescription medication?
>
> A. When I was arrested I asked for some Sudafed because I had a cold, but then shortly after that somehow they ended up giving me Lithium for some reason, I don't know why. I never seen no psychiatrist or anything.
>
> Q. So you don't know why they gave you that?
>
> A. No.

[1] These conclusions were reached from reviewing the Affidavit of Dr. Lawrence "Larry" Trombka submitted by Glossip along with the "Oklahoma County Sheriff's Office Medical Information Sheet" attached as Attachment A to the Affidavit. Further, the State's Independent Counsel reached the same conclusion.

Trial Transcript Vol. 12, p. 64, l. 3 – 10.

Nevertheless, as shown above, Sneed had in fact been treated by a psychiatrist in 1997. Further, he was not prescribed lithium for a cold. Instead, he was prescribed it to treat his serious psychiatric condition. Therefore, Sneed made misstatements to the jury.

The State believes post-conviction relief is appropriate with respect to Sneed's false testimony to the jury. To obtain post-conviction relief, Glossip needs to show that the issue could not have been raised in a direct appeal and supports a conclusion that the outcome of the trial would have been different. 22 O.S. Supp. 2022 § 1089(C).

Here, at a minimum, Glossip was not made aware of Sneed's treatment by Dr. Trombka at the second trial. Further, Glossip was not made aware of Dr. Trombka's treatment of Sneed until he recently received the prosecutor's notes. Consequently, this issue could not have been asserted in a direct appeal.

The State is also not comfortable asserting that the outcome of the trial would have been the same if Sneed had testified accurately. There is no dispute that Sneed was the State's key witness at the second trial. If Sneed had accurately disclosed that he had seen a psychiatrist, then the defense would have likely learned of the nature of Sneed's psychiatric condition and the true reason for Sneed's lithium prescription. With this information plus Sneed's history of drug addiction, the State believes that a qualified defense attorney likely could have attacked Sneed's ability to properly recall key facts at the second trial. Stated another way, the State has reached the difficult conclusion that the conviction of Glossip was obtained with the benefit of material misstatements to the jury by its key witness. Accordingly, the State believes Glossip is entitled to post-conviction relief.

The State believes it must acknowledge Sneed's misstatements on appeal to fulfill its obligations under *Napue*. This Court has recognized a three-prong test to determine a violation of *Napue*:

> (1) The status of a key part (witness or evidence) of the State's case was presented at trial with an element affecting its credibility intentionally concealed. (2) The prosecutor knew or had reason to know of the concealment and failed to bring the concealment to the attention of the trial court. (3) The trier of fact was unable properly to evaluate the case against the defendant as a result of the concealment.

Runnels v. State, 1977 OK CR 146, ¶ 30, 562 P.2d 932, 936

Here, it is undisputed that Sneed was the State's key witness at trial. Further, the prosecutor may have had reason to know of Sneed's misstatements. This is shown by the newly disclosed notes and the fact that Sneed was previously given a competency exam by a psychiatrist.[2] Further, as shown above, the State does not believe that the trier of fact was able to properly evaluate the case against Glossip as a result of the concealment. Therefore, the State believes it must concede error under *Napue*.

Accordingly, the State feels compelled, consistent with *Napue,* to correct these material misstatements and request the case be remanded to the district court.

Glossip's Conviction Should Be Set Aside and the Case Remanded to the District Court.

As explained above, the State has concluded that the conviction can no longer be supported based on Sneed's materially false testimony. In addition to the false testimony issue, Glossip also raises multiple errors in his Application such as violation of the rule of sequestration and the destruction of various pieces of evidence. While the State does not believe that these issues alone warrant reversal, when they are taken together with the incorrect testimony, they establish that

[2] While Glossip's defense certainly had access to Dr. King's competency examination, it appears that the defense did not have the information regarding Dr. Trombka.

Glossip's trial was unfair and unreliable. Consequently, the State is not comfortable advocating that the result of the trial would have been the same but for these errors.

In reaching this conclusion, the State is mindful:

> that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.
>
> *Woodson v. North Carolina*, 428 U.S. 280, 304–305 (1976).

Moreover, in deciding to take this difficult stance, the State has carefully considered the voluminous record in this case, the constitutional principles at stake, and the interests of justice. While the State has previously opposed relief for Glossip, it has changed its position based on a careful review of the new information that has come to light, including its own Independent Counsel's review of the case. Given the admonition that the State has a duty to "use every legitimate means to bring about a just" result (*Viereck*, supra, at 248), it urges this Court to give credence to the State's considered judgment. *See Escobar v. Texas,* 143 S. Ct. 557 (2023) (mem.) (vacating judgment of Texas Court of Criminal Appeals that refused to give effect to State's confession of error in successor habeas petition).

Accordingly, the State requests that the Court vacate Glossip's conviction and that the case be remanded to the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 6th day of April 2023, a true and correct copy of the foregoing was mailed to:

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. PCD-2015-820
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF, MOTION FOR EVIDENTIARY HEARING, MOTION FOR DISCOVERY AND EMERGENCY REQUEST FOR A STAY OF EXECUTION

LEWIS, JUDGE:

Appellant, Richard Eugene Glossip, was convicted of First Degree (malice) Murder in violation of 21 O.S.Supp.1996, § 701.7(A), in Oklahoma County District Court Case No. CF-97-244, after a jury trial occurring in May and June 2004, before the Honorable Twyla Mason Gray, District Judge. The jury found the existence of one aggravating circumstance: that Glossip committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration and set punishment at death.[1] Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

This Court affirmed Glossip's murder conviction and sentence of death in *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143. Glossip, thereafter, filed an

[1] The jury did not find the existence of the second alleged aggravating circumstance: the existence of the probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

initial application for post-conviction relief, which was denied in an unpublished opinion. *Glossip v. State*, Oklahoma Court of Criminal Appeals Case No. PCD-2004-978 (Dec. 6, 2007). Glossip filed a successive application for post-conviction relief, a motion for evidentiary hearing, a motion for discovery, and an emergency request for stay of execution within twenty-four hours of his scheduled execution.[2]

The State filed a response to Glossip's application and related motions on September 16, 2015. This Court, out of an abundance of caution, and so that this Court could give fair consideration to his pleadings, ordered that Glossip's execution be stayed for two weeks and rescheduled his execution for September 30, 2015. Glossip has since filed a supplement to his post-conviction application, a motion to substitute an exhibit, and a notice of intent to file a reply and ongoing investigation.[3]

The Post-Conviction Procedure Act governs post-conviction proceedings in this State. 22 O.S.2011, §1080, *et seq.* It provides,

> 8. . . . if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent . . . application unless:
>
> 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

[2] Filed September 15, 2015, after the Governor of the State of Oklahoma had denied Glossip's request for a sixty (60) day stay of execution per her authority under § 10 Art. VI, of the Oklahoma Constitution.

[3] Glossip's motion to substitute attachment F with a notarized affidavit is granted.

> 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.2011, § 1089(D)(8). "No subsequent application for post-conviction relief shall be considered by this Court unless 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." Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2015). In order to overcome procedural bars, Glossip argues, citing *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11, that this Court has the power to grant relief any time an error "has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

After reviewing Glossip's "successive application" and related motions, we find that the law favors the legal principle of finality of judgment. *Sporn v. State*, 2006 OK CR 30, ¶ 6, 139 P.3d 953, 954, *Malicoat v. State*, 2006 OK CR 26, ¶ 3, 137 P.3d 1234, 1235, *Massaro v. United States*, 538 U.S. 500, 504,

.23 S.Ct. 1690, 1693, 155 L.Ed.2d 714 (2003). Moreover, Glossip has not shown that failure of this Court to review his claims would create a miscarriage of justice. The claims do not fall within the guidelines of the post-conviction procedure act allowing this Court to consider the merits or grant relief.

In this subsequent application for post-conviction relief Glossip raises several propositions which have an overarching claim of ineffective assistance of counsel relating to the actions of trial counsel, direct appeal counsel, and previous post-conviction counsel. In his initial claim he argues that it would violate the Eighth and Fourteenth Amendments to the United States Constitution to continue with the execution of sentence based solely on the testimony of codefendant Justin Sneed, especially based on new evidence he now claims casts more doubt on Sneed's credibility. In proposition two, his overarching ineffective assistance of counsel claim, he argues counsel's omissions to discover this evidence violated the provisions of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

This claim is similar to direct appeal issues. On direct appeal, Glossip urgued that the evidence was insufficient to convict him because Sneed's testimony was not corroborated or believable. His new evidence includes expert opinion which claims that the police interrogated Sneed in such a way as that would produce false and unreliable information. Glossip presents affidavits which claim that Sneed has since bragged about setting Glossip up and affidavits which allege that Sneed was addicted to methamphetamine at

the time of the crime and he was not dependent on Glossip, as he was portrayed during the trial.

First, this Court must determine whether the evidence is "newly discovered" and whether the facts, "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 . . . rendered the penalty of death." *See* 22 O.S.2011, § 1089(D)(8).

Glossip's "new" evidence merely expands on theories raised on direct appeal and in the original application for post-conviction relief. This evidence merely builds upon evidence previously presented to this Court. Furthermore, because similar issues were raised under ineffective assistance of counsel claim in the original application and on direct appeal, Glossip's claim of ineffective assistance of counsel presented in this application is barred. *See* 22 O.S.2011, § 1089.

Ineffective assistance of counsel claims were included on direct appeal and in his initial post-conviction application. On direct appeal, Glossip argued, in proposition five, that trial counsel was ineffective for failing to adequately impeach Sneed and Detective Bemo with the use of the police interrogation tape. Glossip also claimed that counsel was ineffective for failing to object to evidence that Sneed was a follower and to evidence eliciting sympathy for Sneed. Likewise, in his initial application for post-conviction relief, Glossip claimed counsel was ineffective for failing to fully investigate Justin Sneed and

discover evidence which would rebut the State's theory that Sneed was subservient to Glossip.

His claim that codefendant Sneed's testimony was insufficient has also been previously raised. On direct appeal this Court found that Sneed's testimony was sufficiently corroborated for a conviction. Even with this "new" evidence, presented in his successive application, Sneed's testimony is still corroborated. None of the trial witnesses have recanted their testimony, and Glossip has presented no credible evidence that the witnesses gave falsified testimony at trial. The thorough discussion of the facts and our conclusion that those facts were sufficient in our 2007 *Glossip v. State* Opinion has not been refuted with credible documentation. Glossip's conviction is not based solely on the testimony of a codefendant and the execution of the sentence will not violate the Eighth Amendment to the United States Constitution. We fail to find that Glossip has suffered or will suffer a miscarriage of justice based on these claims, thus we decline to exercise our inherent power to grant relief when other avenues are barred or waived.

In his third proposition, Glossip claims that the evidence was insufficient to convict him in the first trial because no rational trier of fact could find that Glossip aided and abetted Sneed, thus the second trial was prohibited by double jeopardy. Glossip cites no authority for the proposition that a second

:rial after an initial conviction is reversed on legal grounds is subject to double eopardy if the State presented insufficient evidence in the first trial.[4]

Glossip had opportunity to raise this issue on direct appeal after his first :rial. His claim, therefore, is waived under the post-conviction procedure act. We further fail to find that Glossip has suffered or will suffer a miscarriage of ustice based on this claim. *See Cannon v. State*, 1995 OK CR 45, ¶ 16, 904 P.2d 89, 98 (holding that double jeopardy bars retrial only when a conviction is ·eversed based on insufficient evidence).

In his final proposition, Glossip claims that counsel was ineffective for :ailing to adequately investigate and prepare for the testimony of the medical examiner, which he now claims was false, or at least misleading. He presents affidavits to rebut the medical examiner's conclusions. Glossip has never :aised claims attacking the credibility of the medical examiner's testimony with this Court. This is a claim that could have been raised much earlier on direct ıppeal or in a timely original application through the exercise of reasonable diligence. Furthermore, we find that the facts underlying this claim are not sufficient when viewed in light of the evidence as a whole to show that no reasonable fact finder would have found Glossip guilty or would have rendered the penalty of death. Moreover, Glossip has not suffered a miscarriage of ustice based on this claim.

Glossip did raise a similar issue in a motion for rehearing after this Court decided his first ıppeal and reversed on legal grounds, but this Court did not rule on the merits. *See Glossip v. State*, 2001 OK CR 21, ¶ 8, 29 P.3d 597, 599 ("we need not reach Appellant's claim going to the sufficiency of the evidence, because trial counsel's conduct was so ineffective that we have no confidence that a reliable adversarial proceeding took place.") See order denying petition for rehearing dated Aug. 20, 2001, *Glossip v. State*, Court of Criminal Appeals case number D-1996-948.

Glossip seeks a stay of execution, a motion for discovery, and application for an evidentiary hearing. Glossip merely wants more time so he can develop evidence similar to the evidence presented in his subsequent application for post-conviction relief. We find, therefore, an evidentiary hearing, discovery, or further stay of execution is not warranted in this case.

CONCLUSION

After carefully reviewing Glossip's subsequent application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Glossip's subsequent application for post-conviction relief is **DENIED**. Further, Glossip's motion for an evidentiary hearing and motion for discovery is **DENIED**. Any further request for a stay of execution is also **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: LEWIS, J.

SMITH, P.J.: DISSENTS
LUMPKIN, V.P.J.: SPECIALLY CONCURS
JOHNSON, J.: DISSENTS
HUDSON, J.: SPECIALLY CONCURS

SMITH, PRESIDING JUDGE, DISSENTING:

I dissent. Glossip claims to have newly discovered evidence that Sneed recanted his story of Glossip's involvement, and shared this with other inmates and his daughter. The tenuous evidence in this case is questionable at best if Sneed has, in fact, recanted. Previous attorneys, exercising due diligence, may not have been able to discover this new evidence. I would grant a stay of 60 days and remand the case to the District Court of Oklahoma County for an evidentiary hearing. Because Glossip's execution is imminent, he will suffer irreparable harm without a stay. *White v. Florida*, 458 U.S. 1301, 1302, 103 S.Ct. 1, 1, 73 L.Ed.2d 1385 (1982). On the other hand, the State's interests will not be harmed by this delay. *California v. Brown*, 475 U.S 1301, 1305-6, 106 S.Ct. 1367, 1369-70, 89 L.Ed.2d 702 (1986). While finality of judgment is important, the State has no interest in executing an actually innocent man. An evidentiary hearing will give Glossip the chance to prove his allegations that Sneed has recanted, or demonstrate to the Court that he cannot provide evidence that would exonerate him.

I further dissent to any preemptive denial of relief.

I am authorized to state that Judge Johnson joins in this dissent.

LUMPKIN, VICE PRESIDING JUDGE: SPECIALLY CONCURRING

I specially concur in the opinion of Judge Lewis and join with Judge Hudson in further defining and summarizing our decision today.

JOHNSON, JUDGE, DISSENTING:

A bare majority of this Court affirmed this case on direct appeal. dissented because Glossip's trial was deeply flawed. *Glossip v. State,* 2007 OK CR 12, ¶¶ 1-4, 157 P.3d 143, 175 (Johnson, J. dissenting). Because I believe Glossip did not receive a fair trial, I cannot join in the denial of this successive post-conviction application that further calls into doubt the fairness of the proceeding and the reliability of the result. "The death penalty is the gravest sentence our society may impose." *Hall v. Florida,* 572 U.S. ——, ——, 134 S.Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014). I would grant Glossip's request for evidentiary hearing to investigate his claim of actual innocence because those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.*

Furthermore, the majority's denial of any further requests for a stay of execution appears to be an attempt to preempt the filing of any additional last minute claims regardless of merit. I believe such a ruling to be in conflict with this Court's authority and purpose.

HUDSON, JUDGE: SPECIALLY CONCUR

I agree Glossip's successive application for post-conviction relief should be denied. It should be noted upfront that codefendant Sneed has not recanted his testimony. Had he done so, this would be an entirely different result. Glossip's claims for relief must be evaluated in light of the previous 11 years of proceedings since his second trial. *See Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 855, 122 L. Ed. 2d 203 (1993). Glossip has been afforded a fair trial and convicted of the offense for which he was charged; thus, his constitutional presumption of innocence no longer exists. *Id.* Glossip's alleged newly discovered evidence is hearsay—at best it may be used as impeachment evidence. 12 O.S.2011, § 2613. Glossip's proffered evidence is as dubious as that of a jailhouse informant. *See Dodd v. State*, 2000 OK CR 2, ¶ 22, 993 P.2d 778, 783 ("Courts should be exceedingly leery of jailhouse informants."). Moreover, the eleventh-hour nature of this evidence is suspect. Remand for an evidentiary hearing at this point would be superfluous. Under the total circumstances of this case, this evidence is insufficient to establish that no reasonable fact finder would have found Glossip guilty of the first degree murder of Barry Van Treese or would not have imposed the death penalty. 22 O.S.2011, § 1089(D)(8)(b)(2). *See Glossip v. State*, 2007 OK CR 12, ¶¶ 43-53, 157 P.3d 143, 152 – 153 (discussion of evidence corroborating Sneed's testimony); *Id.*, 2007 OK CR 12, ¶ 33, 157 P.3d at 175 (Chapel, J., dissenting) ("I agree with the majority that the State presented a strong circumstantial case against Glossip, which when combined with the testimony of Sneed

directly implicating Glossip, was more than adequate to sustain his conviction for the first-degree murder of Barry Van Treese.").

I write separately to focus on the real issues presented in this matter and clarify the Court's ruling by providing a succinct summary. "As we have repeatedly stated in our opinions, Oklahoma's Post-Conviction Procedure Act is not designed or intended to provide applicants repeated appeals of issues that have previously been raised on appeal or could have been raised but were not." *Slaughter v. State,* 2005 OK CR 6, ¶ 4, 108 P.3d 1052, 1054. The Court's review of subsequent post-conviction applications is limited to outcome-determinative errors and claims of factual innocence. *Id.* Moreover, "this Court's rules and cases do not impede the raising of factual innocence claims *at any stage* of an appeal." *Id.,* 2005 OK CR 6, ¶ 6, 108 P.3d at 1054.

To be clear, Glossip raised the following issues in his application, which have been thoroughly reviewed and vetted by this Court:

I. It would violate the Eighth Amendment for the state to execute Mr. Glossip on the word of Justin Sneed;

II. Counsel were ineffective in violation of the Sixth Amendment;

III. The evidence presented at trial was insufficient to support the murder conviction because no rational trier of fact could have found beyond a reasonable doubt that Mr. Glossip aided and abetted Sneed; and

IV. Counsels' performance violated Mr. Glossip's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the medical examiner testified in a way that misled the jury and undermines the reliability of the verdict and death sentence.

Glossip's allegations of error do not meet the requirements for filing a successive application as set forth in 22 O.S.2011, § 1089(D)(8). Glossip's claims are waived as they either were or could have been previously presented. *See Patton v. State*, 1999 OK CR 25, ¶ 2, 989 P.2d 983, 985. Moreover, with regard to Glossip's proffered "newly discovered evidence", Glossip has failed to show this evidence is sufficient to establish by clear and convincing evidence that—with this information—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.2011, § 1089(D)(8)(b)(2). Glossip is therefore not entitled to post-conviction relief.

Glossip's first proposition of error is twofold: (1) his execution would violate the Eighth Amendment because there was insufficient evidence of his guilt; and (2) a death sentence cannot be predicated solely on the testimony of a murderer whose stories changed. As to his first contention, the assertion is barred as the claim of insufficient evidence was raised and rejected in Glossip's second direct appeal. To the extent that Glossip is suggesting a new slant on his original evidentiary sufficiency claim, such claim is waived. As to his second contention, this claim also could have been raised and is thus barred. With regard to the proffered "new evidence" cited in support of this contention, Glossip fails to explain why this information could not have been developed with due diligence earlier. Moreover, pursuant to § 1089(D)(8)(b)(2), Glossip has failed to show by clear and convincing evidence that with this information

no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

In his second proposition of error, Glossip argues that trial counsel was ineffective for failing to attack Sneed's credibility. This claim was raised in Glossip's second direct appeal, and thus, it is parsed and *res judicata*. *Bryan v. State*, 1997 OK CR 69, ¶ 4, 948 P.2d 1230, 1235 (Lumpkin, J., concurring in results) (finding that the Court should not address on the merits the petitioner's single proposition of error parsed into sub-parts, part to be alleged on direct appeal and part on post-conviction because the issue is barred by *res judicata*).

In his third proposition of error, Glossip essentially asserts that the evidence at his first trial was insufficient to show he aided and abetted Sneed. Based upon this assertion, Glossip urges this Court to review the issue now and find that double jeopardy prohibited his second trial. This issue clearly could have been raised in Glossip's second direct appeal and is thus waived.

Finally, as to his fourth proposition of error, Glossip contends counsel were ineffective for failing to deal with aspects of the Medical Examiner's testimony. This claim could have been raised earlier and is waived. With regard to the proffered "new evidence", Glossip has failed to demonstrate that this information could not have been discovered earlier with due diligence. Additionally, this information does not demonstrate—by clear and convincing evidence—"that, but for the alleged error, no reasonable factfinder would have

found ... [Glossip] guilty or would have rendered the death penalty." 22 O.S.2011, § 1089(D)(8)(b)(2).

For the above reasons, I concur in the Opinion denying Glossip's subsequent application for post-conviction relief along with the denial of all other accompanying motions and supplements.

I am authorized to state that Judge Gary L. Lumpkin joins in this special concurrence.