INDEX TO APPENDICES

APPENDIX A

Glossip v. State, No. PCD-2023-267, Order Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing, Motion for Discovery, and Joint Motion to Stay Execution (Apr. 20, 2023)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 20 2023

JOHN D. HADDEN
CLERK

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 Glossip, thereafter, filed an initial application for post-conviction relief, which was denied in an unpublished opinion.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

---

[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*

---

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).

---

[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

---

[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.

ATTORNEYS FOR PETITONER:

WARREN GOTCHER
GOTCHER & BEAVER
323 E CARL ALBERT AVENUE
McALESTER, OK 74501

DONALD R. KNIGHT
7852 S. ELATI STREET
SUITE 201
LITTLETON, CO 80120

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. BOX 4544
NEW YORK, NY 10163

AMY P. KNIGHT
KNIGHT LAW FIRM, P.C.
3849 E. BROADWAY BLVD # 288
TUCSON, AZ 85716

JOHN R. MILLS
PHILLIPS BLACK, INC.
1721 BROADWAY
SUITE 201
OAKLAND, CA 94612

JOSEPH L. WELLS
P.O. BOX 720597
OKLAHOMA CITY, OK 73172
ATTORNEY FOR AMICI

ATTORNEYS FOR RESPONDENT:

GENTNER F. DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105

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.

APPENDIX B

Glossip v. State, No. PCD-2022-819, Order Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing and Motion for Discovery (Nov. 17, 2022)

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. PCD-2022-819
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

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

LEWIS, JUDGE:

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 one aggravating circumstance: that Glossip committed the murder for remuneration or the promise of remuneration or employed

[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.

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.

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 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 has filed other successive applications for post-conviction relief. Glossip's execution is currently scheduled for February 16, 2023.[3]

He is now before this Court with his third subsequent application for post-conviction relief (his fourth application for post-conviction relief) along with a motion for evidentiary hearing and motion for discovery. The facts of Glossip's crime are sufficiently

---

[2] 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.

[3] Honorable J. Kevin Stitt, Governor of Oklahoma, has issued two executive orders staying Glossip's execution.

detailed in the 2007 direct appeal Opinion; however, facts relevant to Glossip's propositions are outlined below. Glossip raises five propositions in support of his subsequent post-conviction appeal.

1. The State withheld material evidence favorable to the defense of Justin Sneed's plan to recant his testimony or renegotiate his plea deal.

2. The prosecutor committed prejudicial misconduct when she violated the rule of witness sequestration to orchestrate Sneed's testimony, intending to cover a major flaw in the State's case.

3. The State presented false testimony from Sneed about attempting to thrust the knife into Van Treese's heart.

4. The State suppressed impeachment evidence of Sneed's knife testimony.

5. The cumulative effect of the State's suppression of exculpatory and impeachment evidence requires reversal of the conviction and sentence.

As this is a subsequent post-conviction proceeding, this Court's review is limited by the Oklahoma Post-Conviction Procedure Act. Title 22 O.S.2011, § 1089(D)(8) (provides for the filing of subsequent

applications for post-conviction relief.)[4] The Post-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

---

[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:
>
> 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.

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 limit issues which can be raised in a subsequent application.

> 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 (2022).[5]

These time limits preserve the legal principal 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 (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

[5] These rules have the force of statute. 22 O.S.2021, § 1051(B).

foundation. *Id.* Glossip is not raising a claim of factual innocence in this application.

This Opinion only addresses the claims raised in this application. Numerous attachments and arguments not related to the propositions will not be addressed.

These propositions raise issues which were either raised in earlier appeals, thus are barred by this Court's rules, or are issues which clearly could have been raised earlier with due diligence; or were not raised within sixty days of their discovery. 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." None of Glossip's propositions raise error of this magnitude.

Although there are no claims of factual innocence in this application, the State, "with reluctance," has determined to forgo argument that the claims in this fourth application are waived or barred under this Court's rules. They do so because of their concern that irreparable harm will come to capital punishment jurisprudence

based on Petitioner's "one-sided and inaccurate narrative" through a public media campaign. The State asks that this Court adjudicate these claims on the merits. This Court alone will determine whether the rules of this Court should be abandoned. We will not base that determination on any of the parties' public relations campaigns.

Glossip's claims in this application center around the actions of the prosecutors. He claims in his various propositions that the State engaged in prosecutorial misconduct by withholding material information favorable to the defense; by violating the rule of sequestration; by presenting false testimony; and by suppressing impeachment evidence.

Glossip raised claims that the prosecutor committed prosecutorial misconduct and violated the sequestration order in his direct appeal. Glossip also raised a claim of prosecutorial misconduct in his initial post-conviction application. In fact, this Court found that his claim of prosecutorial misconduct, raised again in the post-conviction application, was barred by *res judicata*. *Glossip v. State,*

PCD-2004-978 (slip op at 15). Glossip relies on information received during an investigation by the Reed-Smith Law firm.[6]

The basis of Glossip's claim, in Proposition One, that the State withheld material evidence favorable to the defense is procedurally barred. This claim is based on speculation that Sneed did not want to testify at Glossip's second trial either because he lied during the first trial or because he wanted a better deal from the State. Petitioner couches the hesitance in Sneed's desire to testify as a recantation. Nothing could be further from the truth. There is no evidence that Sneed had any desire to recant or change his testimony. His desire was either to get a better deal than his life sentence without parole or to protect himself in his new prison life.

Glossip's trial attorneys knew prior to his retrial that Sneed did not want to testify in the new trial. Evidence, in a light most favorable to the State, reveals that Sneed was hopeful that he would not have to testify during the retrial, because he was disturbed about testifying again. Sneed had already become comfortable with prison life and did

[6] The Reed-Smith investigation is an investigation independent of the Oklahoma Attorney General's office and the attorneys representing Glossip.

not want that life disrupted by testifying against Glossip a second time.

Glossip's attorney, Lynn Burch, visited with Sneed in prison and provided him with caselaw, specifically *State v. Dyer*, 2001 OK CR 31, ¶ 1-7, 34 P.3d 652, which Burch used to inform Sneed that the State could not revoke his plea deal. The fact that Burch visited Sneed was the subject of a trial court hearing on November 3, 2003, and which caused Burch to be removed as Glossip's lead attorney.

These facts support a conclusion that, first, this issue is one which could have been raised during the second trial, because his attorneys knew or should have known that Sneed was reluctant to testify. Second, the information that Sneed was reluctant to testify does not qualify as *Brady* evidence, which would have been subject to disclosure by the State.

The facts are that during this second trial, Sneed confirmed that he believed that his plea deal would be void and he would face the death penalty if he did not testify. Attorney Burch attempted to rid Sneed of that belief before the trial and tried to convince him that he did not have to testify again. The attorneys representing Glossip at trial were associated with Burch as co-counsel during the time Burch

talked to Sneed. They either knew or should have known that Burch approached Sneed and talked to him about testifying. If they did not know before trial, they found out during the evidentiary hearing where Burch was allowed to withdraw from his representation. This is not new evidence under Oklahoma law, and this claim could have, and should have, been raised on direct appeal.

Even if this claim overcomes the waiver hurdle, the claim does not rise to the level of a *Brady* violation.[7] To establish a *Brady* violation, a defendant must show that the prosecution failed to

---

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

> 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.

> To establish a *Brady* violation, a defendant must show that the prosecution failed to disclose evidence that was favorable to him or exculpatory, and that the evidence was material. . . .

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.* Here, the information was not material. There is no reasonable probability that the result would have been different had Sneed's attitude toward testifying been disclosed. Sneed testified at trial that he was subpoenaed to testify by the State and that he believed that he could receive the death penalty if he refused to testify. The jury was well aware of his deal; they knew he was the

---

> Material evidence must create a reasonable probability (a probability sufficient to undermine confidence in the outcome) that the result of the proceeding would have been different had the evidence been disclosed . . . The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality.

Brown v. State, 2018 OK CR 3, ¶103, 422 P.3d 155, 175. [citations omitted]

actual killer; and they knew that Sneed was receiving a great benefit from testifying. Glossip assumes that Sneed intended to testify differently in the second trial than he had in the first. The evidence does not support that assumption. There is no clear and convincing evidence that, had Glossip's defense team known that Sneed did not want to testify, the information could have been used to change the outcome of this trial. This claim requires no relief.

Glossip raises additional prosecutorial misconduct claims in Propositions Two, Three, and Four. These claims are based on Sneed's trial testimony about a knife found at the scene compared to his statements to the police about the knife. Sneed told police that the knife was his but that he did not stab or attempt to stab Van Treese with the knife. Conversely, at trial, Sneed testified that he tried to stab Van Treese a couple of times, but the knife would not penetrate.

Sneed told the police that the knife was his. He testified that the tip of the knife was broken off when he acquired it. He testified that, during the struggle with Van Treese, he dropped the bat, grabbed Van Treese with both hands, tripped him down to the ground, pulled out the knife, opened it, and attempted to stab Van Treese who was

lying on his back. Van Treese then rolled over to his stomach, and Sneed picked up the bat and hit Van Treese 7-8 times. He didn't think he used the knife again, but he was uncertain.

The claim, in Proposition Two, is that Sneed amended his testimony to include facts about attempting to stab the victim during the attack because the prosecutor violated the rule of sequestration, 12 O.S.2011, § 2615. Defense counsel, at trial, objected to this testimony on discovery grounds.

Glossip relies on a memo from the prosecution files as evidence to show that the prosecution coached Sneed's testimony and the evidence of coaching constitutes new evidence. During the trial, however, the prosecution told the trial court that it spoke with Sneed's attorney after the medical examiner testified about numerous marks on Van Treese's body consistent with superficial stab wounds. The fact that the prosecution talked to Sneed or his attorney about other testimony during the trial is not new evidence. There is nothing new in this claim that could not have been raised earlier. This is a claim that could have been raised with due diligence in prior appeals. Under our rules, this claim is waived.

Were we to address the claims raised in Propositions Two, Three, and Four, we would find that they have no merit. Glossip's claim, in Proposition Two, that the discussion violated the rule of sequestration, 12 O.S.2011, § 2615, is not persuasive. Section 2615, when invoked, prevents witnesses from hearing testimony of other witnesses. The rule excluding, or sequestering, witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. *Dyke v. State*, 1986 OK CR 44, ¶ 13, 716 P.2d 693, 697. The rule is intended to guard against the possibility that a witness's testimony might be tainted or manipulated by hearing other witnesses. *Bosse v. State*, 2017 OK CR 10, ¶ 45, 400 P.3d 834, 852, *citing McKay v. City of Tulsa*, 1988 OK CR 238, ¶¶ 5-6, 763 P.2d 703, 704; *Weeks v. State*, 1987 OK CR 251, ¶ 4, 745 P.2d 1194, 1195.

The statute does not prevent either side from discussing testimony with their witnesses during a trial. Glossip presents no evidence that the memo is evidence that Sneed was coached to fabricate his testimony, nor is there evidence that Sneed's testimony was tainted. Sneed was fully cross-examined regarding his inconsistent testimony regarding the knife, and nothing new exists

that, "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."

His second attempt, utilizing the memo as support, in Proposition Three, is that the prosecutor orchestrated and elicited false evidence from Justin Sneed about attempting to stab the victim. Glossip assumes the content of unsubstantiated conversations with Sneed to support his argument here. He cites the correct case law, but his argument is based on a false premise.

> It is well established that the State's knowing use of perjured testimony violates one's due process right to a fair trial. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). Due process demands that the State avoid soliciting perjured testimony, and imposes an affirmative duty upon the State to disclose false testimony which goes to the merits of the case or to the credibility of the witness. *See Napue v. Illinois, supra,* 360 U.S. at 269, 79 S.Ct. at 1177.

Hall v. State, 1982 OK CR 141, ¶ 16, 650 P.2d 893, 896-97.

Like the previous proposition, this claim is not based on newly discovered evidence as defined by this Court's rules. Glossip's claim here is pure speculation. Like most of his claims in this application and previous applications, he makes false assumptions that Sneed did not act alone. He claims that Sneed could not have hit Van Treese with the bat and also stabbed him with the knife. These inconsistencies were available to Glossip during trial. This claim has no merit.

Glossip's claim, in Proposition Four, is that the State withheld impeachment evidence about the knife recovered from underneath Mr. Van Treese. The impeachment evidence is the memo itself, according to Glossip. Had the defense team had this information regarding alleged conversations between the prosecutor and Sneed or his attorney, according to Glossip, they could have impeached Sneed even further.

Sneed could not have been impeached any further than he had already been impeached. He admitted that he was testifying to save himself from the death penalty. He had not told anyone about using the knife until he testified at trial. In fact, Sneed told police that he did not use the knife. This was all a part of his impeachment during

the trial. Nothing in this memo would have increased the probability that the jury would have reached a different verdict. This proposition must fail.

In his final proposition of this application, Proposition Five, Glossip claims that the cumulative effect of the suppression of this exculpatory and impeachment evidence requires reversal of Glossip's conviction. Obviously, Glossip is trying to combine the propositions in this application, as well as "substantial problems chronicled in Mr. Glossip's . . . subsequent application filed July 1 . . . coupled with . . . the Reed Smith reporting" to make this claim of cumulative error. 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. *Tafolla v. State,* 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263.

Petitioner's reliance on *Valdez,* to overcome the procedural bars is, likewise, not persuasive. None of his claims convince this Court that these alleged errors have resulted in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right. *Valdez,* 2002 OK CR 20, ¶ 6, 46 P.3d at 704.

Glossip's application for post-conviction relief is denied for the foregoing reasons. We find, therefore, that neither an evidentiary hearing nor discovery is 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 are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS FOR PETITONER:

WARREN GOTCHER
GOTCHER & BEAVER
323 E CARL ALBERT AVENUE
McALESTER, OK 74501

DONALD R. KNIGHT
7852 S. ELATI STREET
SUITE 201
LITTLETON, CO 80120

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. BOX 4544
NEW YORK, NY 10163

AMY P. KNIGHT
KNIGHT LAW FIRM, P.C.
3849 E. BROADWAY BLVD # 288
TUCSON, AZ 85716

JOHN R. MILLS
PHILLIPS BLACK, INC.
1721 BROADWAY
SUITE 201
OAKLAND, CA 94612

JOSEPH L. WELLS
P.O. BOX 720597
OKLAHOMA CITY, OK 73172
ATTORNEY FOR AMICI

ATTORNEYS FOR RESPONDENT:

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA
JOSHUA L. LOCKETT
JENNIFER L. CRABB
ASSISTANT ATTORNEYS GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105

OPINION BY: LEWIS, J.
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
MUSSEMAN, J.: Concur
WINCHESTER, J.[8]: Concur

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

APPENDIX C

Rex Duncan, *Independent Counsel Report in the Matter of Richard Eugene Glossip, Oklahoma County Case CF-1997-244* (Apr. 3, 2023)

Rex Duncan
Independent Counsel
P.O. Box 486
Sand Springs, OK 74063

April 3, 2023

Honorable Gentner Drummond
Oklahoma Attorney General
313 NE 21st Street
Oklahoma City, OK 73105

Re: Independent Counsel Report in the matter of Richard Eugene Glossip, Oklahoma County case CF-1997-244

Attorney General Drummond,

Following your January 2023, engagement, I reviewed available materials associated with Oklahoma's prosecution, conviction, sentencing, and post-conviction appeals of Richard Eugene Glossip. His first charge was Oklahoma County case CF-1997-256, Accessory to a Felony, to Wit Murder, and subsequently CF-1997-244, Murder in the First Degree.

Additionally, I have met with and spoken to attorneys, investigators, legislators and others. Additional work products developed by private attorneys, law firms and legal experts were also provided for review.

As promised in January, your office provided full and transparent access to every available document and did not influence my investigation. You also ordered critical case file information previously withheld from Glossip's trial attorneys, referred to as "Box 8" under claims of work product, to be shared with his current attorney, Don Knight, and attorneys with law firms Reed Smith LLP, Jackson Walker LLP, and Crowe & Dunlevy LLP. Box 8 yielded significant discoverable information.

Thousands of hours of investigation and voluminous reports from Reed Smith LLP and Jackson Walker LLP were instrumental in navigating a reported 146,000 pages related to the

case. The scholarly arguments of attorneys Christina Vitale and David Weiss were of particular benefit. Their reports have been provided to your office, legislators and online for public consideration.

Veteran assistant attorneys general (AAG) also contributed in a professional manner to my understanding of the history and nuances of this case from the State's perspective.

Several in-person meetings with Don Knight and Amy Knight, attorneys for Glossip, assisted my understanding of their client's defense.

Finally, my investigation incorporated several legal expert opinions from the Oklahoma City University School of Law Dean Emeritus, Professor Lawrence Hellman. Two of those expert opinions have been incorporated into Glossip's Notice of Conflict and Request for Recusal, filed March 27, 2023, in PCD-2023-267. As that pleading details Professor Hellman's analysis of two separate issues, I will not address them herein, but direct your attention thereto.

My opinions and recommendations are my own. On issues calling for a determination of compliance, disclosure is presumed appropriate, especially in death penalty cases.

The overriding consideration by a prosecutor should always be (i) what charge(s) is supported by the evidence and (ii) whether a jury can be convinced, unanimously, beyond a reasonable doubt, that admissible evidence proves each element of a crime. In this prosecution, Glossip was initially charged, in case CF-1997-256, with Accessory After the Fact to Murder. That case was subsequently dismissed, and Glossip was added as a co-defendant to Justin Sneed's murder case, CF-1997-244, by Amended Information.

As you know, in general some witnesses are reluctant to testify, while others can have credibility problems. The State is required to disclose information in its possession about its witnesses. For example, in my view, the defense is entitled to know if a jail psychiatrist has

diagnosed the State's star witness with [redacted] and prescribed lithium shortly after his arrest. Such a fact would raise questions about that witness' mental health condition prior to arrest. In my view, withholding such information could be a violation of *Brady,*[1] and in my opinion, could change the outcome of a trial.

The prosecutor is, without exception, a minister of justice. When prosecutors lose sight of that duty, justice is the first casualty. When due process failures result from mere indifference, negligence or policy, justice is still a casualty.

FINDINGS

There was sufficient evidence of Glossip's involvement in the murder of Barry Van Treese to support his 1997 prosecution. Glossip incriminated himself as an accessory after the fact, both during 1997 custodial interviews and 1998 sworn jury trial testimony. Circumstantial evidence, tenuous as it was, also supported the State's argument that Glossip was a principal, subject to prosecution for Murder in the First Degree.

The State's prosecution of Glossip for first-degree murder hinged almost entirely on co-defendant Justin Sneed. Sneed testified against Glossip, basically to save himself from the death penalty.[2]

The State's murder case against Glossip was not particularly strong and would have been, in my view, weaker if full discovery had been provided. Given the passage of 26 years, death of witnesses, destruction and loss of evidence, and 2023 evidentiary disclosures, it is, in my view, less tenable today.

Concurrently, I believe Glossip was deprived of a fair trial in which the State can have confidence in the process *and* result. What I believe are violations of discovery mandates under

[1] *Brady v. Maryland,* 373 U.S. 83 (U.S. Supreme Court, 1963). The State must disclose exculpatory, mitigating and impeachment evidence.

[2] The State offered Sneed a plea agreement in return for his testimony against Glossip.

Brady[3] and disclosure requirements of *Napue*[4] prevent such confidence. Further, I believe Glossip was deprived of a fair clemency hearing in 2014 before the Oklahoma Pardon and Parole Board (PPB) and in his subsequent Successive Applications for Post-Conviction Relief. The cumulative effect of errors, omissions, lost evidence, and possible misconduct cannot be underestimated.

HISTORY OF THE CASE

On January 7, 1997, Barry Van Treese was murdered at the Best Budget Inn, an Oklahoma City motel located at 301 S. Council Road, owned by Barry and his wife Donna. The investigating agency was the Oklahoma City Police Department (OKCPD). Several OKCPD officers and detectives were involved, and the lead investigators were Inspectors Bob Bemo and Bill Cook.

The initial investigation was brief and immediately focused on Glossip and Sneed, to the exclusion of all others. Sneed was arrested January 14, 1997, after a week on the run and charged the following day with the murder of Van Treese.

Glossip, after making self-incriminating statements over the course of two interviews, was arrested and charged with the crime of Accessory to Murder. On January 15, 1997, the Oklahoma County District Attorney's Office, under District Attorney Bob Macy, charged Glossip with Accessory to Murder, in Oklahoma County Case CF-1997-256.

Bemo and Cook employed interrogation tactics to get Sneed to identify Glossip as a principal rather than a mere accessory. In addition, Bemo told Glossip that Sneed was pointing the finger at him, stating, "The people involved in this are going to get the needle."[5] Sneed

---

[3] *Supra.*

[4] *Napue v. Illinois,* 360 U.S. 264 (U.S. Supreme Court, 1959). The State has a duty to correct known false testimony by its witnesses.

[5] January 8, 1997, Police Interrogation of Glossip, at p. 111.

eventually claimed the murder was Glossip's idea and he (Sneed) finally went along with it because he saw no other way out.

Bemo and Cook interviewed Glossip over the course of January 7 and January 9, 1997. Glossip initially denied any knowledge of, or participation in, the disappearance of Barry Van Treese. During the first interview, Bemo and Cook asked Glossip to submit to a polygraph exam. Glossip agreed to do so later, tentatively scheduled for January 9, 1997.

On January 9, 1997, Glossip met with David McKenzie, an Oklahoma City criminal defense attorney. Upon exiting McKenzie's office, the OKCPD detained Glossip and placed him in a police vehicle. Glossip's girlfriend, DeAnna Wood, had accompanied him to the law office; she was also detained and placed in a separate police vehicle. Glossip and Wood were transported to OKCPD.

Bemo and Cook accused Glossip of failing to appear for his scheduled polygraph exam, advising him he was under arrest and not free to leave. Glossip then expressed a desire to take the polygraph, and after repeatedly waiving his right to remain silent, submitted to an exam of some sort, administered by the OKCPD.

Bemo and Cook subsequently advised Glossip he failed the polygraph. Interestingly, Glossip maintains he was not administered a polygraph, but fitted only with a simple fingertip device like an oximeter. No reports or graphs were ever provided to the State or to Glossip. On January 9, 1997, following the "polygraph exam," Glossip was arrested and jailed.

Glossip's 1998 trial for Murder in the First Degree resulted in a conviction and death sentence. The Oklahoma Court of Criminal Appeals (OCCA) reversed the conviction due to ineffective assistance of counsel. His 2004 retrial also resulted in a conviction and death sentence

for the same charge. Glossip appealed the conviction and sought post-conviction relief in state and federal courts.

Specific concerns include:

1. ***Whether a police polygraph examiner conducted an actual polygraph exam of Glossip on the day of his arrest, and whether a reference thereto was wrongfully employed against Glossip during his 2014 clemency hearing***

The alleged polygraph results were not provided to and secured by the DA's Office, but instead were purportedly destroyed by the OKCPD after two years. Failure to secure, transfer and safeguard the polygraph results opened the door to defense claims of discovery violations.

Throughout the pendency of Glossip's first case number, second case number, first jury trial, second jury trial and all appellate review, the OKCPD, DA, and later the Office of the Attorney General (OAG) maintained Glossip had been administered a legitimate polygraph exam by a qualified OKCPD employee examiner.

Bemo, Cook, the OKCPD and the DA had an obligation to retain the results as evidence and make them available to Glossip. The results were never provided and were allegedly destroyed well prior to the July 17, 2001, reversal and 2004 retrial.

Glossip's first attorney, Wayne M. Fournerat, filed proper Motions to access discovery materials. Prior to the first jury trial, Fern Smith, the prosecuting assistant district attorney (ADA), maintained the polygraph results were in evidence – although she had not personally seen them – and while she did not plan to admit them, they were available for Fournerat's examination.

No ADA or defense attorney stated on the record he or she saw the polygraph results. It is still disputed whether a polygraph was conducted. In my view, evidence in murder cases is to be maintained in perpetuity.

The State argued against clemency during Glossip's 2014 clemency hearing. An AAG referenced Glossip's polygraph results, telling the Pardon and Parole Board that "he (Glossip) failed it miserably." Polygraph exams are inadmissible at trial, yet the State weaponized such "results" to deny Glossip clemency from a death sentence. Regardless of whether the Rules of Evidence apply, the State's reference to never-seen evidence contributed, in my belief, to the cumulative unfairness of the State's handling of this case.

2. ***Items of physical evidence, including a box containing ten (10) items, lost or destroyed by the DA's Office or the OKCPD***

This box contained the victim's wallet, which Sneed testified had been handled by Glossip while retrieving a $100 bill; two motel receipt books and one deposit book; a shower curtain allegedly handled by Glossip; and other items that should have been maintained in the property room.

It is undisputed these items were destroyed while Glossip's first conviction was on direct appeal, and therefore prior to his 2004 retrial. While attorneys in the second trial were aware of these missing items of evidence, no modification was made to the plea offer. In my view, evidence in murder cases is to be maintained in perpetuity.

3. ***Evidence returned to the Van Treese family prior to the first trial***

Barry Van Treese's wallet was either returned to his brother, Ken Van Treese, at Ken's request, or left among the 10 items destroyed in the evidence box. In either scenario, failure by

the State to preserve evidence cannot be dismissed as inconsequential or without harm to the defense. In my view, evidence in murder cases is to be maintained in perpetuity.

4. ***Missing security camera footage from the Sinclair gas station adjacent to the Best Budget Inn crime scene***

Various explanations have been provided over the years as to why this footage is not among the existing evidence. Former ADA Gary Ackley stated he believes he viewed the video and found it boring, notwithstanding his memory of events in 2003-2004. Ackley cannot state definitively whether the video was ever in the possession of the DA's Office, but he admits it should have been secured and made available to Glossip.

Former ADA Connie Pope Smothermon, the lead prosecutor in the second trial, stated the security video was not provided to the State. The video was never made available to the defense. While memories fade over time, in my view, evidence in murder cases is to be maintained in perpetuity.

5. ***Failure of Glossip's second trial attorneys to challenge Sneed's 1998 plea agreement***

That agreement was used as leverage to compel Sneed's reluctant testimony in the 2004 retrial (to avoid the death penalty). It is my opinion the 2001 OCCA decision in *Dyer*[6] entitled Sneed to a new plea agreement or, in the alternative, relief from testifying at Glossip's retrial. Neither Glossip's defense attorneys in the 2004 retrial nor Sneed's attorney, Gina Walker, challenged the post-*Dyer* use of the 1998 plea agreement. The record is silent on this issue.

[6] *Dyer v. State,* 2001 OK CR 31, 34 P. 3d 652, decided in 2001, held plea agreements not specifically waiving double jeopardy protections are not enforceable if a retrial is ordered and co-defendant's testimony is again needed. Sneed's 1998 plea agreement did not waive his double jeopardy protections. Sneed testified again, in 2004, without benefit of a renegotiated plea agreement or conversation about that possibility.

Smothermon stated her demand of Sneed to appear as a witness for the State was pursuant to a trial subpoena. During direct examination, Sneed was asked the following:

> Question by Smothermon: "Mr. Sneed, do you believe that in order to escape the death penalty, there are certain things you have to say today or to escape the death penalty, you have to testify today?"
>
> Answer by Sneed: "To escape the death penalty, I have to testify today."[7]

The 2001 *Dyer* case, big news among criminal law practitioners at the time, was featured in the November 10, 2001, edition of the *Oklahoma Bar Journal*. Yet the Court, the ADAs and both defense attorneys (all State employees) were silent in 2004, failing to make a record with respect to Sneed's 1998 plea agreement.

6. ***Following the medical examiner's (ME) 2004 trial testimony, a written communication by Smothermon to the attorney for Sneed, an endorsed witness for the State***[8]

In 1998, Gina Walker represented Sneed and had secured for him a Life Sentence Without Possibility of Parole (LWOP), avoiding the death penalty. Smothermon's memo to Walker during the second trial read, "Our biggest problem is still the knife," relating to the use of a knife during the murder.

In the first jury trial, Sneed testified he did not stab Barry Van Treese. However, during the second trial, the ME testified some injuries on the body of the victim were consistent with stab wounds from a blunt tip knife (broken tip). A pocketknife with a broken tip was found under Van Treese's body. Sneed admitted that the pocketknife belonged to him.

A plausible purpose of Smothermon's memo to Walker was to communicate the ME's previously unheard testimony and coach Sneed's testimony to match the ME's opinion. The next

---

[7] 2004 Trial Transcript, Volume XII, 62.

[8] "Smothermon Memo." ADA Connie Pope Smothermon's memo to endorsed State's witness Gina Walker, who was also Justin Sneed's attorney, regarding testimony by the Medical Examiner.

day, Sneed testified he stabbed Van Treese, but that the knife failed to penetrate the victim's chest.[9] My investigation found no other explanation for the memo or change in Sneed's trial testimony.

Handwritten notes in the margin of the memo have been independently verified as those of Walker, confirming Smothermon's memo was received and presumably shared with Sneed (a violation of the Rule of Sequestration). Sneed's testimony the next day conformed with Smothermon's "Our biggest problem is still the knife" memo by testifying he had stabbed Van Treese.

7. ***Violations of Brady for failing to disclose actual repair expenditures by the Van Treese family***[10]

This fact was handwritten on a legal pad, made contemporaneously during a pre-trial meeting with State's witness Bill Sunday.

Sunday, responsible for overseeing motel repairs following the murder, told ADA Ackley that $25,000 was spent on repairs and maintenance. This is material to the guilt phase of the trial. Glossip never had access to $25,000 for motel maintenance. Ackley did provide a summary of Sunday's proposed testimony as discovery. However, that summary excluded reference to the $25,000 expenditure.

On cross-examination of Sunday, however, defense attorney Wayne Woodyard asked the following:

---

[9] 2004 Trial Transcript, Volume XII, 102.

[10] State's witness Ken Van Treese testified delinquent motel repairs were $2,000 to $2,500. However, State's witness Bill Sunday told ADA Gary Ackley he spent approximately $25,000 on repairs during the 60-90 days following the murder. This fact was noted on ADA Ackley's handwritten legal pad, but not disclosed to Glossip's attorneys. The only death sentence aggravator found by the jury was remuneration, from three alleged aggravators available. Money was central to the State's theory Glossip killed Barry Van Treese for financial gain and to prevent discovery of $2,000 to $2,500 neglected motel maintenance.

Question by Woodyard: "Sir do you know how much money was expended by the family who had control of the checkbook for purchases of mattresses and repair items and things of that nature?"

Answer by Sunday: "I really don't. I just…it would be a guess."[11]

In my view, failure to correct Sunday's false testimony also constituted a violation of *Napue*.[12]

8. ***Prosecutorial failure to correct false testimony from Sneed about his medical condition and treatment by a psychiatrist constituted a violation of Napue.***[13]

Sneed testified he had asked Oklahoma County jail personnel for Sudafed for a cold or dental work. He claimed he did not know why subsequently he was prescribed lithium, and he denied ever seeing a psychiatrist. In 1997, a prescription for lithium in a county jail was treatment for mental health issues, and it could only be prescribed by a medical doctor.

In handwritten notes from an interview with Sneed, ADA Smotherman referenced lithium and "Dr. Trumpet" adjacent to each other. The notes were found in Box 8. If the defense knew Dr. Lawrence "Larry" Trombka, (spelled in Smothermon's notes as Dr. Trumpet) had diagnosed Sneed as [redacted] and prescribed lithium, Glossip's attorneys could have impeached Sneed's credibility, memory and truthfulness.

During all relevant dates, Dr. Trombka was the only medical doctor at the jail diagnosing mental health issues and prescribing lithium.[14] Mental health issues, including [redacted] and lithium, go hand in hand.

---

[11] Trial Transcript Volume XII, 35.
[12] *Supra.*
[13] *Supra.*
[14] March 17, 2023, Affidavit of psychiatrist Dr. Larry Trombka, who diagnosed Sneed as [redacted] and prescribed lithium. Notations about "Dr. Trumpet" and lithium were not disclosed to Glossip's attorneys. The State presented

Instead, Sneed testified falsely why he was on lithium and denied being seen by a psychiatrist – and the jury never heard the truth. During direct examination of Sneed, the following discussion took place:

> Question by Smothermon: "After you were arrested, were you placed on any type prescription medication?
>
> Answer by Sneed: "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."
>
> Question by Smothermon: "So you don't know why they gave you that?"
>
> Answer by Sneed: "No."[15]

In my opinion, these are *Brady*[16] and *Napue*[17] violations that go to the guilt phase. At a minimum, Smothermon's notes prove the State's knowledge that Sneed was on lithium and, in the same conversation, had disclosed the name of "Dr. Trumpet" (believed to reference Dr. Trombka). I believe that seasoned capital homicide prosecutors in the DA's Office could be expected to make the connection between the jail psychiatrist and prescriptions (lithium) for mental health issues. Dr. Trombka was the only psychiatrist on staff.

I also believe that Glossip's experienced capital defense attorneys easily would have made the connection between "Dr. Trumpet" and lithium if they had been provided full discovery. Any reference to "Dr." (any name whatsoever) in conjunction with lithium would have been a red flag, irrespective of the doctor's identity or medical specialty.

Sneed, its star witness in a light far more favorable than he was entitled, and his false testimony went unchallenged. The State's case primarily relied on Sneed's credibility, his perception of reality and memory recall.

[15] 2004 Trial Transcript of ADA Smothermon's direct examination of Sneed, page 64.

[16] *Supra.*

[17] *Supra.*

The 1998 trial disclosed Sneed was given lithium, but not why, or by whom, leaving the impression it was for dental work or a cold, and merely administered by a jail nurse. Smothermon (now retired) stated she is not convinced Dr. Trombka and "Dr. Trumpet" are the same person, and that she and ADA Ackley tried a "clean" case.

9. ***PPB Member Patricia "Pattye" High's failure to disclose, during Glossip's 2014 clemency hearing, her professional relationship with ADA Smothermon***

Both High and Smotherman had served concurrently as ADAs in the Oklahoma County DA's Office. In 2001, then-ADAs High and Smothermon tried a death penalty case together.[18] Despite her lack of disclosure, High asked Glossip two dozen cross-examination questions and voted against clemency.

After viewing the video of the clemency hearing, I believe High had an interest in the outcome and should have recused. Asked for an expert legal opinion, Professor Lawrence Hellman opined:

> "High had a conflict of interest that required disclosure and her recusal from the 2014 proceeding. It is my professional opinion that Patricia High's participation in Glossip's 2014 clemency hearing resulted in (a) proceeding in which neither Glossip nor the public could have been assured that no member of the decision-making body was predisposed to vote against him."[19]

10. ***2015 pleadings by Glossip seeking, among other relief, an evidentiary hearing for discovery of Sneed's medical records***

---

[18] *Harris v. State*, 2004 OK CR 1.

[19] Professor Lawrence K. Hellman's professional opinion. March 21, 2023.

In opposition, then-Attorney General E. Scott Pruitt called the pleadings "nothing more than a fishing expedition."[20]

In 2013, the 10th Circuit Court of Appeals reversed the OCCA decision in *Browning,*[21] in which Pruitt defended the trial court's refusal to compel production of (a witness') mental health records. Regarding mental health records of the State's star witness, the 10th Circuit held,

> "We only inquire whether the Oklahoma courts could have reasonably decided that the mental health evidence would not have mattered. The answer is no. This evidence would have mattered, even in light of the State's corroborating evidence."[22]

This investigation leads me to believe the State should not be so quick to oppose discovery of mental health records of the State's star witness, especially when other evidence against the defendant is slim. In *Browning,* as in Glossip's case, "what the jury did not know – and the defense attorneys also did not know – was that (witness), who became the most important witness at trial, had been diagnosed with a severe mental disorder."[23]

Death penalty cases must receive the greatest scrutiny of discovery compliance, erring on the side of transparency and disclosure.[24] In my view, such was not the case herein, and too much – everything – is at stake.

11. ***Former Attorney General John O'Connor exercised dominion over boxes 1-7, bringing them to the OAG and making them available to Glossip's attorneys in the final days of August 2022, years after Glossip's earliest scheduled execution date.***

---

[20] State's Response to Petitioner's Successive Application for Post-Conviction Review, Emergency Request for Stay of Execution, Motion for Discovery, and Motion for Evidentiary Hearing. PCD-2015-820, at p. 43. However, *Brady* materials were found in Box 8, sourced from Boxes 1-7.

[21] *Browning v. Trammell,* 717 F.3d 1092 (2013).

[22] *Id,* at 33.

[23] *Id,* at 2.

[24] *See Cone v. Bell,* 556 U.S. 449 (U.S. Supreme Court, 2009).

However, prior to that release, O'Connor directed an AAG to scour boxes 1-7, identifying materials thought to be attorney work product, thereby creating Box 8.

Box 8 materials were never provided to Glossip during O'Connor's administration. In my view, materials found in Box 8 represented violations of *Brady, Napue* and the Oklahoma Rules of Professional Conduct.

RECOMMENDATIONS

In my view, the State must vacate Glossip's conviction due to its decades-long failure to disclose what I believe is *Brady* material, correct what I believe was false trial testimony of its star witness, and what I believe was a violation of the Court ordered Rule of Sequestration of witnesses (The Rule). In my view, this case is also permeated by failures to secure, safeguard and maintain evidence in a capital murder case.

In my view, this case demonstrates why withholding entire documents is dangerous. Legal pads with contemporaneously handwritten witness-interview notes are documents.

Trying any case a third time is unfortunate and rare, but I believe it is appropriate in this case.

In my view, *Brady* facts were found in handwritten interview notes belonging to both ADAs. Full disclosure is, in my opinion, the only guarantee of complete discovery compliance. This case would have benefited from the appointment of a Special Master, or independent review, to exclude privileged information from boxes 1-7. The easier solution would have been an actual open-file policy in 2004, or every year since.

ADDITIONAL OBSERVATIONS

DA Macy signed the Bill of Particulars in the 1997 case. DA Wes Lane signed the Bill of Particulars for the 2004 retrial. In each case, subsequent pleadings were signed by various

ADAs. The respective records do not indicate involvement by either elected DA after signing the Bill of Particulars.

Prior to the 2004 retrial, the State offered Glossip a plea agreement requiring a guilty plea to Murder in the First Degree for a Life sentence, with the possibility of parole. The Van Treese family, by and through Donna Van Treese, was consulted by the State, and agreed to the plea offer of Life, with the possibility of parole. Glossip agreed to a Life sentence but wanted an Alford Plea.[25] Judge Gray may not have accepted an Alford Plea. Negotiations ceased, and the trial began.

The killer, Justin Sneed, is serving a sentence of Life, without the possibility of parole (LWOP). Prior to Glossip's 1998 trial, the State, by and through ADA Smith, spared Sneed's life in exchange for his testimony against Glossip. Sneed pleaded guilty and is in prison. As Glossip would not plead guilty and accept a Life sentence, the DA asked the jury to recommend death, bypassing LWOP altogether. This disparate sentencing is permissible, at the discretion of the DA.

Unaware the Van Treese family agreed to Life, jurors subsequently heard their Victim Impact statements and recommended death. If this murder was deserving of the death penalty, I believe the wrong co-defendant is on death row.

Members of the jury served honorably and undertook the tasks before them with the due diligence required by law. No criticisms of the jury were identified as causes of the failures herein.

[25] Allows a defendant to avoid pleading guilty but requires acknowledgment the evidence is sufficient to support a finding of guilt. The Court finds the defendant guilty and can impose the sentence agreed upon pursuant to plea negotiations.

Your predecessor released boxes 1-7 in late August 2022, but never released Box 8 materials. After taking office, you directed the release of Box 8 materials. *Brady* materials were among Box 8 documents withheld until January 2023.

Staff attorneys at the OAG have worked this case for years pursuant to Oklahoma statute and guidance from previous Oklahoma Attorneys General. They have diligently defended Glossip's 2004 conviction. Each has supported my investigation to understand the State's defense of the conviction and have identified what they describe as legal and factual errors with my analysis. All OAG policy decisions were made by the elected Attorneys General at the time, and I find no deviation from those policies by the OAG's staff attorneys. They were simply following orders.

Specific discussions with the AAGs revealed points with which I agreed. For example, Glossip having $1,757 on his person at the time of his arrest, coupled with his inability during his statements to police, or the during the 1998 trial, to account for that sum is an indicator of his involvement in the murder. Glossip's attorneys and Reed Smith attorneys disagree with this opinion.

The AAGs and I agree Glossip made false statements regarding his knowledge of Barry Van Treese's whereabouts after he was murdered, and his lies incriminated him therein. Glossip's attorneys disagree with our opinion.

The AAGs and I agree Glossip is not actually innocent of criminal culpability in this case. Glossip's attorneys disagree.

On other points, the AAGs and I disagree. For example, there were allegations Glossip planned to flee the jurisdiction in 1997. In my experience, suspects in criminal investigations intending to flee, generally flee. They don't keep appointments with criminal defense attorneys

before fleeing. It is my belief Glossip's appointment with a criminal defense attorney undermines the State's theory he was planning to flee. On this point, I find myself agreeing with Glossip's attorney and Reed Smith attorneys.

The AAGs and I disagree regarding the nature of Sneed's release of his jail records. Until March 2023, it was the State's position that Sneed's release of records included medical, psychological, and psychiatric records, and that Glossip had access thereto. As it turns out, Sneed's release specifically excluded his medical, psychological, and psychiatric records. A release of all Sneed's records would have made a monumental difference in his cross-examination, and possibly, the jury's verdict.

There are many more points of debate, but suffice it to say, the AAGs zealously represent the State, Glossip's attorneys zealously represent their client, and my investigation sought to reach unbiased conclusions and opinions. Other than discovering the truth, I don't have a vested interest in the outcome.

The State's first case file against Glossip, Oklahoma County case CF-1997-256, (Accessory to Murder) was provided in March 2023, by the Oklahoma County DA's Office, following Glossip's February 2023, request. The file contained handwritten summaries of witness statements - information that I believe Glossip was always entitled to receive. These notes indicate additional interviews were conducted of Donna Van Treese and Cliff Everhart, after discovery of the murder. Material facts within these summaries were not provided to Glossip, prior to the 1998 trial. Unfortunately, the State's case file summaries were first provided in 2023.

As Chairman of the Oklahoma House of Representatives Judiciary Committee, 2006-2010, I supported pro-death penalty legislation, guided pro-death penalty bills through

committee and co-authored such a bill signed into law by then-Governor Brad Henry. In 2010, I witnessed an execution at Oklahoma State Penitentiary in my capacity as Judiciary Chairman. As District Attorney, I signed and filed one Bill of Particulars. With 34 years of courtroom experience in criminal law cases, I am an advocate for the death penalty in the "worst of the worst" cases.

However, I believe the numerous trial and appellate defects throughout the history of this case can be remedied only by remand for a new trial. Such remand is, in my view, required.[26] In my view, further advocacy in support of the case's current posture does not serve the interests of justice; instead, it rewards the defects and errors in the process. In my view, a new trial is necessary to restore integrity to the process herein. Given Box 8 revelations, a dispassionate review of this case cannot reach a different conclusion.

But for your election last year, the State of Oklahoma likely would have executed Richard Glossip on February 16, 2023. Your decision to seek a stay of execution and more thoroughly examine this case may be the bravest leadership decision I've ever witnessed, and it was absolutely the correct legal decision.

Respectfully,

Rex Duncan
Independent Counsel

[26] *Banks v. Dretke*, 540 U.S. 668 (U.S. Supreme Court, 2004). When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.

APPENDIX D

Successive Application for Post-Conviction Relief with Attachments, *Glossip v. State*, No. PCD-2023-267 (Mar. 27, 2023)

ORIGINAL

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

IN THE COURT OF CRIMINAL APPEALS

MAR 27 2023

THE STATE OF OKLAHOMA

JOHN D. HADDEN
CLERK

PCD 2023 267

RICHARD GLOSSIP,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Oklahoma County
Case No. CF-97-256

Court of Criminal Appeals
Direct Appeal Case No. D-2005-310

Post-conviction Case No. PCD-2004-978
Post-conviction Case No. PCD-2015-820
Post-conviction Case No. PCD-2022-589
Post-conviction Case No. PCD-2022-819

No. _____

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
DEATH PENALTY – EXECUTION SCHEDULED MAY 18, 2023

Warren Gotcher, OBA # 3495
Gotcher & Beaver
323 E Carl Albert Avenue
McAlester, OK 74501
918-423-0412
warren@gotcher-beaver.com

Donald R. Knight*
Attorney at Law
7852 S. Elati Street, Suite 201
Littleton, CO 80120
303-797-1645
don@dknightlaw.com

Amy P. Knight*
Phillips Black, Inc.
1721 Broadway, Suite 201
Oakland, CA 94612
520-878-8849
a.knight@phillipsblack.org

Joseph J. Perkovich*
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
212-400-1660
j.perkovich@phillipsblack.org

John R. Mills*
Phillips Black, Inc.
1721 Broadway, Suite 201
Oakland, CA 94612
888-532-0897
j.mills@phillipsblack.org

*Temporarily Admitted

IN THE COURT OF CRIMINAL APPEALS

THE STATE OF OKLAHOMA

RICHARD GLOSSIP, *Petitioner*, v. STATE OF OKLAHOMA, *Respondent.*	Oklahoma County Case No. CF-97-256 Court of Criminal Appeals Direct Appeal Case No. D-2005-310 Post-conviction Case No. PCD-2004-978 Post-conviction Case No. PCD-2015-820 Post-conviction Case No. PCD-2022-589 Post-conviction Case No. PCD-2022-819 No. _____

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
DEATH PENALTY – EXECUTION SCHEDULED MAY 18, 2023

Warren Gotcher, OBA # 3495
Gotcher & Beaver
323 E Carl Albert Avenue
McAlester, OK 74501
918-423-0412
warren@gotcher-beaver.com

Donald R. Knight*
Attorney at Law
7852 S. Elati Street, Suite 201
Littleton, CO 80120
303-797-1645
don@dknightlaw.com

Amy P. Knight*
Phillips Black, Inc.
1721 Broadway, Suite 201
Oakland, CA 94612
520-878-8849
a.knight@phillipsblack.org

Joseph J. Perkovich*
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
212-400-1660
j.perkovich@phillipsblack.org

John R. Mills*
Phillips Black, Inc.
1721 Broadway, Suite 201
Oakland, CA 94612
888-532-0897
j.mills@phillipsblack.org

*Temporarily Admitted

COURT OF CRIMINAL APPEALS FORM 13.11A

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, Richard E. Glossip, through undersigned counsel, submits this Successive Application for Post-Conviction relief under Section 1089 of Title 22. This is the fourth application for post-conviction relief filed in Mr. Glossip's case. Rule 9.7A (3)(d) requires copies of the Original Application for Post-Conviction Relief and the prior Successive Applications for Postconviction Relief to be attached. Given that the most recent prior successive application remains pending before the Supreme Court of the United States (No. PCD 2022-589; *Glossip v. Oklahoma*, No. 22-6500 (U.S.)), Mr. Glossip has not re-attached them here, to avoid duplication and confusion. Should the court need additional copies of those applications, Mr. Glossip will provide them immediately on request.

The sentence from which relief is sought: Death.

1. **Court in which sentence was rendered:**
   i. Oklahoma County District Court
   ii. Case Number: CF-1997-256
2. **Date of sentence:** August 27, 2004
3. **Terms of sentence:** Death
4. **Name of Presiding Judge:** Hon. Twyla Mason Gray
5. **Is Petitioner currently in custody?** Yes
6. **Where?** Oklahoma State Penitentiary, McAlester, Oklahoma
7. **Does Petitioner have criminal matters pending in other courts?** No

8. **Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions?** No

I. CAPITAL OFFENSE INFORMATION

Petitioner was convicted of the following crime, for which a sentence of death was imposed: First Degree Murder, in violation of Okla. Stat. tit. 21, § 701.7(A).

Aggravating factors alleged:

1. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
2. The murder was especially heinous, atrocious, or cruel [dismissed by Court prior to trial];
3. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society [rejected by jury].

Aggravating factors found:

1. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration.

Mitigating factors listed in jury instructions:

1. The defendant did not have any significant history of prior criminal activity;
2. The defendant is 41 years of age;
3. The defendant's emotional and family history;
4. The defendant, since his arrest on January 9, 1997, has been incarcerated and has not posed a threat to other inmates or detention staff;
5. The defendant is amenable to a prison setting and will pose little risk in such structured setting;
6. The defendant has family who love him and value his life;
7. Has limited education and did not graduate from high school. He has average intelligence or above. He has received his G.E.D.;
8. After leaving school, the defendant had continuous, gainful employment from age 16 to his arrest on January 9, 1997;
9. The defendant could contribute to prison society and be an assistance to others;
10. Prior to his arrest, the defendant, had no history of aggression;
11. The defendant was not present when Barry Van Treese was killed; and
12. The defendant has no significant drug or alcohol abuse history.

Was Victim Impact Evidence introduced at trial? Yes

Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X).

If found guilty after plea of not guilty, check whether the finding was made by:
A jury (X) A judge without a jury ( )

Was the sentence determined by:
A jury (X), or ( ) the trial judge?

II. NON-CAPITAL OFFENSE INFORMATION

Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).

Petitioner was not convicted of any offense other than the single capital offense.

III. CASE INFORMATION

Name and address of lawyer in trial court:
Silas Lyman
1800 E. Memorial Rd.#106
Oklahoma City, OK 73131
(405) 323-2262

Names and addresses of all co-counsel in the trial court:
Wayne Woodyard
Oklahoma Indigent Defense System
610 South Hiawatha
Sapulpa, OK 74066
(405) 801-2727

Was lead counsel appointed by the court? Yes

Was the conviction appealed? Yes
To what court or courts? Oklahoma Court of Criminal Appeals
Date Brief in Chief filed: December 15, 2005
Date Response Brief filed: April 14, 2006
Date Reply Brief filed: May 4, 2006
Date of Oral Argument: October 31, 2006
Date of Petition for Rehearing (if appeal has been decided): May 3, 2007

Has this case been remanded to the District Court for an evidentiary hearing ondirect appeal? No

If so, what were the grounds for remand? n/a

Is this petition filed subsequent to supplemental briefing after remand? No

Name and address of lawyers for appeal:
Janet Chesley
Kathleen Smith
Capital Direct Appeals
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
(405) 801 2666

Was an opinion written by the appellate court?
Yes, for D-2005-310
Yes, for D 1998-948[1]

If "yes," give citations if published:
Glossip v. State, 2007 OK CR 12, 157 P.3d 143 (2007)
Glossip v. State, 2001 OK CR 21, 29 P.3d 597 (2001)

Was further review sought? Yes

a. After this Court affirmed Mr. Glossip's death sentence in D-2005-310, he sought certiorari in the U. S. Supreme Court, which was denied on January 22, 2008 in Glossip v. Oklahoma, 552 U.S. 167 (2008).

b. An Original Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2004-978, on October 6, 2006. The court denied Mr. Glossip's original application in an unpublished opinion on December 6, 2007. The following grounds for relief were raised in the original application:

PROPOSITION I

PROSECUTORIAL MISCONDUCT DEPRIVED MR. GLOSSIP OF A FAIR TRIAL-AND RELIABLE SENTENCING PROCEEDING.

PROPOSITION II

TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OKLAHOMA CONSTITUTION.

---

[1] This Court reversed Mr. Glossip's conviction and death sentence in his first appeal.

PROPOSITION III

TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE THAT JUDICIAL BIAS SO INFECTED THE PROCEEDINGS THAT MR. GLOSSIP WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTIONS 6, 7, 9, AND20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION IV

MR. GLOSSIP WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO KEEP THE JURY SEQUESTERED DURING DELIBERATIONS.

PROPOSITION V

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW.

c. On November 3, 2008, Mr. Glossip filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma. Glossip v. Trammell, Case No. 08-CV-00326-HE. The federal district court denied the petition on September 28, 2010. The following grounds for relief were raised in Mr. Glossip's habeas petition:

GROUND ONE

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND SENTENCE OF DEATH UNDER THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

GROUND TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE INTO THE RECORD IN VIOLATION OF MR. GLOSSIP'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND THREE

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO DISPLAY SELECTIVE PORTIONS OF CERTAIN WITNESSES' TESTIMONY THROUGHOUT THE TRIAL BECAUSE IT OVEREMPHASIZED THAT TESTIMONY, CONSTITUTED A CONTINUOUS CLOSING ARGUMENT, AND VIOLATED THE RULE OF SEQUESTRATION OF WITNESSES.

GROUND FOUR

MR. GLOSSIP WAS DEPRIVED OF A FAIR TRIAL AND A FAIR SENTENCING HEARING BY THE IMPROPER TACTICS, REMARKS, AND ARGUMENTS OF THE PROSECUTORS DURING BOTH STAGES OF TRIAL.

GROUND FIVE

MR. GLOSSIP WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITEDSTATES CONSTITUTION.

GROUND SIX

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE AGGRAVATING CIRCUMSTANCE OF MURDER FORREMUNERATION.

GROUND SEVEN

ERRORS IN JURY INSTRUCTIONS GIVEN IN THE SECOND STAGE OF TRIAL DENIED MR. GLOSSIP'S RIGHTS UNDER THE EIGHTH ANDFOURTEENTH AMENDMENTS TO DUE PROCESS AND A RELIABLE SENTENCING PROCEEDING.

GROUND EIGHT

THE TRIAL COURT ERRED IN ALLOWING IMPROPER VICTIM IMPACT TESTIMONY DURING THE SENTENCING STAGE, VIOLATING MR. GLOSSIP'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND NINE

THE TRIAL COURT'S VOIR DIRE PROCESS VIOLATED MR. GLOSSIP'S RIGHTS PROTECTED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE OKLAHOMA CONSTITUTION.

GROUND TEN

THE ADMISSION OF A PRE-MORTEM PHOTOGRAPH OF THE VICTIM INJECTED PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS INTO THE SECOND STAGE PROCEEDINGS.

GROUND ELEVEN

TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH,AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OKLAHOMA CONSTITUTION.

GROUND TWELVE

TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE THAT JUDICIAL BIAS SO INFECTED THE PROCEEDINGS THAT MR. GLOSSIP WASDENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THEUNITED STATES CONSTITUTION.

GROUND THIRTEEN

THE ACCUMULATION OF ERRORS SO INFECTED THE TRIAL AND SENTENCING PROCEEDINGS WITH UNFAIRNESS THAT MR. GLOSSIP WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUEPROCESS AND A RELIABLE SENTENCING PROCEEDING IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Tenth Circuit affirmed the denial of habeas relief in Case No. 10-6244 on July 25, 2013. See Glossip v. Trammell, 530 Fed. Appx. 708 (2013). A petition for rehearing was filed on September 9, 2013 and was denied on September 23, 2013. A petition for writ of certiorari was filed in the Supreme Court and was denied on May 5,2014. See Glossip v. Trammell, 572 U.S. 1104, 134 S. Ct. 2142, 188 L.Ed.2d 1131 (2014).

d. A Subsequent Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2015-820, on September 15, 2015. The court denied Mr. Glossip's subsequent application in an unpublished opinion on September 28, 2015. The following grounds for relief were raised in the subsequent application:

PROPOSITION ONE

IT WOULD VIOLATE THE EIGHTH AMENDMENT FOR THE STATE TO EXECUTE MR. GLOSSIP ON THE WORD OF JUSTIN SNEED

PROPOSITION TWO

COUNSEL WERE INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT

PROPOSITION THREE

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE MURDER CONVICTION BECAUSE NO RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLEDOUBT THAT MR. GLOSSIP AIDED AND ABETTED SNEED

PROPOSITION FOUR

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 RELIABILTY OF THE VERDICT AND DEATH SENTENCE

The Court of Criminal Appeals denied a petition for rehearing on September 29, 2015. Mr. Glossip filed a petition for a writ of certiorari in the U.S. Supreme Court the same day, and it was denied September 30, 2015.

e. An additional subsequent Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2022-589, on July 1, 2022. The Court denied that Application on November 10, 2022. The following grounds for relief were raised in the subsequent application:

PROPOSITION ONE

RICHARD GLOSSIP IS FACTUALLY INNOCENT OF THE MURDER OF BARRY VAN TREESE.

PROPOSTION TWO

THE STATE'S BAD FAITH DESTRUCTION OF VITAL EVIDENCE DURING THE PENDENCY OF MR. GLOSSIP'S FIRST DIRECT APPEAL VIOLATED HIS RIGHT TO DUE PROCESS.

PROPOSITION THREE

MR. GLOSSIP'S TRIAL COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE FOR FAILING, ON BEHALF OF THEIR INNOCENT CLIENT FACING THE DEATH PENALTY, TO CONDUCT ANY INDEPENDENT INVESTIGATION OF THE CRIME, INVESTIGATE MR. GLOSSIP'S MENTAL IMPAIRMENTS AND DEFICITS, INTERVIEW MANY OF THE STATE'S WITNESSES, OR INVESTIGATE AND PURSUE

THE STATE'S DESTRUCTION OF EVIDENCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ART. II, §§ 7, 9 AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION FOUR

THE INVESTIGATION, TRIAL, AND APPEAL IN MR. GLOSSIP'S CASE FAILED TO MEET THE DEMANDS OF THE DUE PROCESS OF LAW.

PROPOSITION FIVE

MR. GLOSSIP IS INTELLECTUALLY DISABLED AND INELIGIBLE FOR THE DEATH PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ART. 2, § 9 OF THE OKLAHOMA CONSTITUTION.

f. An additional subsequent Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2022-819, on September 22, 2022. The following grounds for relief were raised in the subsequent application:

PROPOSITION ONE

THE STATE WITHHELD MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE OF JUSTIN SNEED'S PLAN TO RECANT HIS TESTIMONY OR RENAGOTIATE HIS PLEA DEAL.

PROPOSITION TWO

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN SHE VIOLATED THE RULE OF WITNESS SEQUESTRATION TO ORCHESTRATE SNEED'S TESTIMONY, INTENDING TO COVER A MAJOR FLAW IN THE STATE'S CASE.

PROPOSITION THREE

THE STATE PRESENTED FALSE TESTIMONY FROM SNEED ABOUT ATTEMPTIMG TO THRUST THE KNIFE INTO VAN TREESE'S HEART.

PROPOSITION FOUR

THE STATE SUPPRESSED IMPEACHMENT EVIDENCE OF SNEED'S KNIFE TESTIMONY

PROPOSITION FIVE

THE CUMULATIVE EFFECT OF THE STATE'S SUPPRESSION OF EXCULPATORY AND IMPEACHMENT EVIDENCE REQUIRES REVERSAL OF THE CONVICTION AND SENTENCE.

The Court denied the Application on November 17, 2022. Mr. Glossip petitioned for certiorari on January 3, 2023. That petition remains pending at the Supreme Court of the United States. *Glossip v. Oklahoma*, No. 22-6500 (U.S.).

PART C: FACTS

Mr. Glossip was convicted of the murder of Barry Van Treese, which everyone acknowledges was physically committed by Justin Sneed, on the theory that he hired Sneed to do it by agreeing to split with him the money Sneed could steal from Van Treese during the murder. The defense called no witnesses. Since present counsel became involved in 2015, it has become increasingly clear that Mr. Glossip did no such thing, and that the murder was instead a botched robbery by Sneed and a likely female accomplice attempting to steal money for drugs.

The Attorney General's Office provided the defense with access to most of the District Attorney's File—seven boxes—in September of 2022, and Mr. Glossip filed a petition shortly thereafter based on information contained in those files. However, they unilaterally withheld a box's worth of documents they deemed "work product." On January 27, 2023, they made the rest of the documents available in a box that has come to be known as Box 8, containing mostly prosecutors' notes.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

This Partial Application is not intended to be Mr. Glossip's full and final presentation of these claims. Rather, it is being filed now to comply with the requirement in Rule 9.7(G)(3) that a petition must be filed "within 60 days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." This Court has directed Petitioners to file applications within 60 days even if they are not fully developed or complete to "notify the Court" of the new grounds, and that "[o]nce a timely application is filed, an extension of time to further develop the application with added materials pertaining to the timely raised issue can be submitted to the Court." *Slaughter v. State*, 2005 OK CR 6, 108 P.3d 1052 (2005) at

¶ 21 fn 12. Accordingly, Mr. Glossip requests that the Court allow him to amend and/or supplement this Partial Application when he has had the opportunity to fully develop the claim. Mr. Glossip has consulted with the Attorney General's Office, which does not oppose the extension of time or future amendment or supplementation of this application.

This pleading's posture as a successive application does not constrain the Court's ability to grant relief. This Court may consider the merits and grant relief on a subsequent application where it "contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously . . . 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." Ok. St. T. 22 § 1089(8)(b)(1). The claims in this Application stem from information the Attorney General's Office withheld from the defense even when making available portions of the District Attorney's file in September of 2022, despite repeated diligent requests from the defense for access over the course of years. Those documents were not made available to the defense until January 27, 2023. Accordingly, this application is being filed within 60 days of that information being made available.

In any event, this Court maintains the power to grant post-conviction relief any time "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703, 710-11; *see also* Okla. Stat. tit. 20, § 3001.1. The rule announced in *Valdez* is not an anomaly. This Court has consistently followed similar rationale when addressing successive post-conviction applications. *See Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234; *Torres v State*, 2005 OK CR 17, 120 P.3d 1184; *Slaughter*, 2005

OK CR 6, 108 P.3d 1052; *McCarty v. State*, 2005 OK CR 10, 114 P.3d 1089; *Brown v. State*, Case No. PCD-2002-781 (Aug. 22, 2022) (unpublished).

The Court cannot consider these individual claims in isolation. For claims of state misconduct, the United States Supreme Court is clear: misconduct in general and suppression of evidence in particular is "considered collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Courts must consider the "cumulative effect" of the entirety of the suppressed evidence. *Id.* at 437. It is the "net effect" of the entirety of the suppressed evidence that must be accounted for in determining whether state misconduct renders a proceeding unfair. *Id.*; *see also Jones v. State*, 2006 CR 5 ¶58 (considering "cumulative effect" of *Brady* violations). Regardless of the type of claim, a weakly supported conviction is more vulnerable to the taint of state misconduct or ineffective assistance of counsel than one supported by robust evidence. As the OCCA has put it, "[a] sentence 'only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" *Brown v. State*, 1997 OK 1 ¶15 (quoting *Strickland*, 466 U.S. at 696). A weaker case is more vulnerable to reversal because the touchstone of the inquiry is fundamental fairness of the proceeding. *See Childress*, 2000 OK CR at ¶48. Oklahoma law requires decisionmakers to consider the "evidence as a whole" to assess the reliability and legality of a conviction in a range of situations. In the context of a subsequent application for post-conviction relief, section 1089(D)(8)(2) requires that consideration when assessing claims of actual innocence or challenges to a sentence of death. *See also Valdez*, 2002 OK CR at ¶27 (comparing new mental health evidence to assess whether the "jury's determination" might have been different).

PROPOSITION ONE: THE STATE WITHHELD MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE.

A. DUE PROCESS REQUIRES PROSECUTORS TO DISCLOSE EVIDENCE FAVORABLE TO AN ACCUSED.

The prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). As first declared by the Supreme Court in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), prosecutors in possession of evidence favorable to the defendant are required, by principles of due process and the guarantee of a fair trial, to disclose it. To obtain relief from a conviction for violation of this duty, a defendant must show both that the withheld information had exculpatory or impeachment value, and that it was material. *See Harris v. State,* 2019 OK CR 22, ¶¶ 38-40, 450 P.3d 933, 949-50. A defendant is *not* required to show the prosecutor acted deliberately. *Id.*

B. THE STATE FAILED TO DISCLOSE CRUCIAL IMPEACHMENT EVIDENCE PROSECUTORS OBTAINED FROM JUSTIN SNEED PRIOR TO THE SECOND TRIAL REGARDING MENTAL HEALTH AND DRUG USE.

Notes taken by prosecutors in a meeting with Justin Sneed reveal that Sneed told prosecutors not only that he had taken lithium in jail, but that he had seen a "Dr. Trumpet," quickly revealed by basic research to be Dr. Larry Trompka, the psychiatrist who served the Oklahoma County Jail in 1997. Attachment 1. This fact is important in light of Sneed's subsequent testimony that he "never seen no psychiatrist or nothing" (Tr. 6/16/04 at 63). Moreover, upon gaining this information, the defense was then able to learn that Dr. Trompka had in fact [redacted] when Sneed had testified he "asked for some Sudafed because I had a cold, but shortly after that they ended up giving me Lithium for some reason, I don't know why." *Id.* at 64. Now with the benefit of the information the prosecutor had about the psychiatrist, the defense was recently able to obtain information from Dr. Trompka, who explained that "[redacted] are exacerbated by illicit drug use, such as

methamphetamine," and a "manic episode may cause an individual to be more paranoid or potentially violent." Attachment 2.

This same page of notes contains the following notation: "meals not steady, no hungry, get crank from girls." This note contradicts the State's claim at trial that the reason Sneed did not have steady meals was that he was not paid, and was thus dependent on Glossip. It also suggests significant methamphetamine use (enough to make him not hungry), which, combined with the information from Dr. Trompka, would be significantly impeaching and offer the jury crucial information about Sneed's behavior both at the time of the crime and during his interrogation by Detectives Bemo and Cook.

Assistant District Attorney Gary Ackley, who helped try this case, agrees that the information about Sneed's mental health "goes to Mr. Sneed's state of mind and, depending on when he was administered the lithium, would have been discoverable." Attachment 3, ¶ 30. Given Sneed's centrality to the State's case, this impeachment evidence was material. *See Browning v. Trammell*, 717 F.3d 1092, 1107 (10th Cir. 2013) (materiality established "at least when the eyewitness testimony is 'the *only* evidence linking [the defendant] to the crime,' and the impeachment evidence casts substantial doubt upon its reliability." (quoting *Smith v. Cain*, 565 U.S. 73, 76 (2012) (emphasis in *Smith*))).

C. THE STATE FAILED TO DISCLOSE THAT WITNESS KAYLA PURSLEY HAD SEEN THE SINCLAIR VIDEO.

It has long been known in this case that police obtained a surveillance video from the Sinclair station across the street from the Best Budget Inn. It was not provided to the defense in discovery. In 2003, defense counsel prior to the second trial specifically requested access to the video, and were told by prosecutor Connie Smothermon via email that "OCPD never booked a video tape into evidence. There is some confusion as to whether one was looked at or actually

taken by an officer. Either way, it never made it to this case file. The information I have is that any video tape would be of the interior of the station only." Attachment 4.

In the recently disclosed notes from Box 8, Gary Ackley wrote, in an interview with Kayla Pursley, that the Sinclair video showed the inside of the station and she could not remember, but did not think, it showed the outside. He stated she watched the video to see what time Sneed had come in, and thinks OCPD took the video. The defense had never before been told that Pursley had seen the video.

Pursley testified at the second trial about Sneed coming into the Sinclair station, and about John Beavers coming in subsequently and talking with her about a broken window in Room 102, and her making a call. RT 5/21/04 at 26-32. The fact that the witness had watched a video of these events after they happened should have been disclosed to the defense—and so should the video, with which they could have cross-examined her. Moreover, the disclosure of these notes caused Ackley to recall he believed he had actually *seen* that video that had never been produced and "believe[d] it existed at the DA's office at one time." Attachment 3 ¶ 22. He also believed it should have been provided to the defense. *Id.* ¶ 23. This information—the video itself and Pursley's statements about it—were material and exculpatory.

D. THE STATE FAILED TO DISCLOSE DETAILS FROM WITNESS STATEMENTS THAT CONFLICTED WITH OTHER EVIDENCE.

Also contained in Box 8 were prosecutor Gary Ackley's notes from interviews with witnesses Bill Sunday and Cliff Everhart. In the notes from the Bill Sunday interview, Ackley wrote Sunday had told him he "spent $25K for repair." Attachment 6. While prosecutors disclosed portions of this interview to the defense, they omitted this statement. At trial, Ken Van Treese testified the "total expenditures for maintenance in that two-month period was about $2,000," a fact he used to claim that Glossip's negligence, and not the need for a significant

amount of money, was the reason the motel was in disrepair. RT 5/25/04 at 162-63. Thus, Sunday had told prosecutors something that contradicted testimony they presented and used to bolster their theory of Mr. Glossip's motive. Had that information been disclosed, the defense could have elicited that testimony from Sunday to impeach Ken Van Treese. Ackley believes this is information that should have been provided to the defense. Attachment 3 ¶¶ 37-39.

Box 8 also contained what appear to be Connie Smothermon's notes from an interview with witness Cliff Everhart. Those pages contain a note that says "Liquidated / Big screen / 900 couch." Smothermon has not provided an affidavit, and, thus, what precisely she meant by this notation is a question of fact on which her testimony is required. However, the most logical interpretation is that Everhart said the amount of $900 in conjunction with the sale of a big screen television and a couch.

Everhart testified about Glossip selling his possessions, and testified he personally gave him $100 for an aquarium and thought he received $150-200 for vending machines, but when asked about the big screen TV and couch, he stated, "I really don't know." Tr. 5/25/04 at 200-01. If in fact he had told prosecutors it was $900, as these notes strongly imply, that was crucial information the defense needed to have, because the source of the $1,757 Glossip was carrying when he was arrested outside his lawyer's office was a major issue in the case. Indeed, the existence of that money without other explanation was important evidence this Court found corroborated Sneed's testimony that Glossip was involved in the murder. *Glossip v. State,* 2007 OK CR 12, ¶ 48; dissent ¶ 30. As Everhart had personally accounted for up to $300, and police concluded he had over $100 left over from his most recent paycheck, accounting for an additional $900 went quite a long way toward explaining the cash Mr. Glossip was carrying, and

would have been both impeaching for Everhart, now claiming he did not know, and highly exculpatory to Mr. Glossip.

This claim could not have been brought sooner because the factual basis was not available until the State finally disclosed the Box 8 documents on January 27, 2023. Had these items from Box 8 been disclosed before trial as the State was constitutionally obligated to do, there is a reasonable probability that the result of the trial would have been different.

PROPOSITION TWO: THE STATE LOST OR DESTROYED (OR CONTINUES TO WITHHOLD) A KEY SURVEILLANCE VIDEO IT HAD IN ITS POSSESSION AS LATE AS 2003 WHILE CONTINUING TO TELL THE DEFENSE THEY DID NOT HAVE IT.

As discussed *supra* in Proposition One, police seized a surveillance tape from the Sinclair gas station next door to the motel covering the timeframe surrounding the murder. The State never disclosed the video to the defense, and when the defense requested to see it in 2003, they were led to believe the State did not have it, having been told the tape had not made it into the District Attorney's file. Attachment 4. Upon being presented with his notes from the Kayla Pursley interview that were discovered in January, 2023 in Box 8, prosecutor Gary Ackley thought he remembered watching the video himself after he was assigned to the case in 2003. Attachment 3 ¶¶ 11-12. He explains he was asked in 2022 to search for the video and did not locate it, but he "believe[s] it existed at the DA's office at one time," and it "should have been turned over to the defense." Id. ¶¶ 22-23.

While the State apparently felt the video was not useful evidence, they were looking only for evidence to support their case—and thus did not scrutinize the video for, for instance, evidence of another accomplice with Sneed, or any indication of what clothing he was wearing (to compare with bloody clothing found at the motel). Nor did they have any reason to scrutinize the timeline for the entire course of the evening, which could have shown problems with the

State's version of events. Presently, it is simply not possible to know *what* that video might have shown that could have been helpful to the defense, but there is no question it was potentially useful. The inability to prove that now is no fault of Mr. Glossip's; as Ackley says, the State had the video, and did not produce it when asked. That means *either* they lost or destroyed it, *or* they still have it somewhere. If they still have it, it is a massive *Brady* violation. If they don't, they lost or destroyed it when it was in their possession, despite a specific request, which constitutes bad faith and is a violation of Mr. Glossip's due process rights under the Fourteenth Amendment and Art. II, § 7 of the Oklahoma Constitution, pursuant to *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

Prior to the discovery of Ackley's notes in Box 8, Ackley had not recalled that the tape was (or is) in the State's possession as he does now. Accordingly, the factual basis for this claim was not reasonably available previously.

PROPOSITION THREE: MR. GLOSSIP'S DUE PROCESS RIGHTS WERE VIOLATED WHEN, FOLLOWING THE MEDICAL EXAMINER'S TESTIMONY THAT VAN TREESE HAD BEEN STABBED, THE PROSECUTOR SOUGHT TO CHANGE SNEED'S TESTIMONY.

A similar claim was presented to this Court in the September, 2022 application. However, at the time that claim was presented, the State had continued to withhold important evidence of the events surrounding this testimony. Because the record was not complete at that time due to the State's conduct, this Court must consider this claim now even though it is connected to a claim previously presented.

Specifically, the State recently disclosed trial notes from prosecutor Gary Ackley during the testimony of the medical examiner. Those notes are accompanied by post-it notes written by Connie Smothermon giving Ackley direction for re-direct examination. Attachment 7. Shown these newly disclosed notes, Ackley explained he "misunderstood the circumstances of those

wounds," and had gotten into a "quagmire" caused by "not understanding the laceration/puncture wounds came from a blunt knife." Attachment 3 ¶¶ 34-35. He explains Smothermon was "concerned" about his "mishandling of Dr. Choi's testimony." Id. ¶ 35.

The next witness—the last of the day, with Sneed set to testify in the morning—was Cliff Everhart, also examined by Ackley. Smothermon apparently took notes during that testimony, and wrote at the bottom "get Justin Sneed." Attachment 8.

These documents contained in Box 8 shed significant light on the memorandum Smothermon wrote to Gina Walker, Sneed's attorney and also a listed witness, after the day's testimony. Attachment 9. That memo, found in the boxes made available to the defense in September 2022, revealed Smothermon's plan to explain to Sneed the "problem" with the knife, as he had told police he did *not* stab Van Treese, to ensure he would not testify in a way that contradicted the medical examiner's testimony. Staff from the office where Gina Walker worked have confirmed the annotations on the memo are in Walker's handwriting, confirming she received the memo and discussed it with Smothermon. Attachment 10.

This new evidence provides additional support for the claim that the State realized mid-trial that its key witness's prior statements did not match the physical evidence, and rather than pause the proceedings to address the problem with the court and the defense—in a just attempt to discover what the truth actually was—it attempted to conform the testimony to the existing record. What's more, when the defense complained this information had not been disclosed, Smothermon told the court she "asked Mr. Sneed about this knife one time and that was last year [2003]. He told me that he had the knife open during the attack, that he did not stab Mr. Van Treese with it. I knew all the wounds to be blunt force trauma so I didn't pursue it any further." Tr. 5/26/04 at 105. The memo confirms the first statement is false—she discussed it with him

between Choi's testimony and his own the next day. The post-it notes, newly revealed, suggest that the last sentence—that she "knew all the wounds to be blunt force trauma"—is false, too. She was attempting during trial to explain to Ackley how knife-type wounds could have been made without a knife, and according to Ackley, she was upset with him, suggesting she *knew* there were wounds that they had not explained, and had wanted Ackley to avoid any implication that a knife had been used.

In addition, the State's failure to disclose that Sneed had talked with them about the medical examiner's testimony and the knife as a "problem" prior to his testimony constitutes material impeachment evidence that should have been disclosed.

It is impossible to know exactly what Smothermon meant, and what she knew and didn't know, without her testimony, and this claim depends upon what she knew when. Accordingly, it cannot be resolved without an evidentiary hearing. If indeed Smothermon knew that Sneed's prior statements were incompatible with the medical examiner's opinion, and she planned to "get" him to fix this "problem," as her notes and memo suggest, then a major violation of Mr. Glossip's due process rights occurred, and his conviction cannot stand.

PROPOSITION FOUR: RICHARD GLOSSIP IS ACTUALLY INNOCENT OF THE MURDER OF BARRY VAN TREESE.

Factual innocence of the crime provides a freestanding basis for relief in a capital case. *See, e.g., Slaughter v. State*, 2005 OK CR 6, ¶ 6, 108 P.3d 1052, 1054 ([T]his Court's rules and cases do not impede the raising of factual innocence claims at any stage of an appeal. We fully recognize innocence claims are the Post-Conviction Procedure Act's foundation."); *McCarty v. State*, 2005 OK CR 10, ¶¶ 17-19, 114 P.3d 1089, 1094 (claim of factual innocence fails because proffered evidence did not prove innocence); *see also Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming execution would be unconstitutional, and relief available from federal courts,

upon a "truly persuasive demonstration of 'actual innocence'" made after trial). This Court maintains the power to grant post-conviction relief any time "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11 (citing Okla. Stat. tit. 20 § 3001.1).

Evidence gathered by post-conviction counsel between 2015 and today demonstrates that this crime was a methamphetamine-fueled robbery gone wrong by Justin Sneed with another, likely female, accomplice, not involving Richard Glossip, rather than a plot by the manager of a motel to turn over proceeds to the owner, and then convince an employee to murder that owner so he could take back *half* of the money he had turned over and somehow end up controlling the motel.

A large amount of new evidence was presented to this Court in the application filed July 1, 2022. No hearing has ever been held on that evidence, and it remains the case that if the witnesses whose affidavits were presented are believed, Mr. Glossip simply had nothing to do with this murder. Mr. Glossip requests this Court to consider the entire record in assessing this, and every, proposition, including his July 1, 2022 application. Since then, additional information further supports this conclusion.

First, witness Paul Melton has provided additional, more detailed information about Sneed's explanations to him in jail of the crime. Attachment 11. The additional detail provided in this affidavit is broadly consistent with the physical evidence and is even more credible than the more limited information previously presented.

Additionally, highly qualified forensic pathologist Dr. Peter Speth has reviewed the case again in light of this new information and believes that although the work done by Dr. Choi was

so poor that it is not possible to tell definitively, there is some evidence that Van Treese may have been choked and/or smothered, rather than dying from blood loss or severe brain injury, of which there was little evidence. Attachment 12. This conclusion is highly relevant in light of Melton's statement that Sneed told him he had wrapped a cord around Van Treese's neck until he stopped breathing. Attachment 11 ¶ 26.

Melton's account of Sneed's explanation is also newly relevant in light of continuing revelations of the State's handling of the testimony about knife wounds. Specifically, according to Melton, Sneed described the girl who was in the room with him stabling Van Treese multiple times. *Id.* ¶ 25.

In sum, Melton's account is corroborated on multiple accounts from multiple sources. If Melton is being truthful, it is all but certain that Sneed and a female accomplice killed Van Treese in an attempt to rob him, without involvement by Richard Glossip. As this claim turns on the truthfulness of a witness, an evidentiary hearing is required.

PROPOSITION FIVE: CUMULATIVE ERROR RENDERED MR. GLOSSIP'S CONVICTION AND SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

"The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial." *Tafolla v. state,* 2019 OK CR 15 ¶ 45. Mr. Glossip has identified and raised a large number of errors over the course of this case. With the exception of the unanimous grant of relief on the ineffective assistance of counsel claim after the first trial, courts have not granted relief on any individual claim; many have been found to be waived by prior counsel who had a constitutional duty to assert them, and several have been recognized as errors or likely errors but

found, in isolation, to be harmless. Mr. Glossip requests this Court to consider the entire record in assessing this, and every, proposition. Doing so is in keeping with "the ultimate focus of our inquiry[:] . . . 'the fundamental fairness of the proceeding whose result is being challenged.'" *Childress v. State*, 2000 OK CR 10 ¶48 (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)).

Mr. Glossip has identified the following errors in this case:

1. **Intentional destruction of box of 10 items of evidence,** including items from inside Room 102 (shower curtain, duct tape, etc.) and motel documents possibly relevant to alleged motive, by OKCDP in 1999, with first appeal still pending, before second trial (possibly at direction of DA's office, per police personnel)

   Claim Status: Presented but never addressed on the merits.
   - Presented in July, 2022 application
     - This Court ruled: "The basis of Glossip's claim, in Proposition Two, that the State destroyed evidence during the pendency of his first direct appeal and before his ultimate retrial, was known before the second trial. This proposition is clearly waived under the post-conviction procedure act."
   - Failure to object to this at trial also presented as IAC in July, 2022 application; denied because it could have been raised in prior appeals (note direct appeal attorney Janet Chesley signed affidavit saying failure to raise this serious issue was an error on her part)

2. **Prosecutors coached Sneed to change his testimony about the knife** after medical examiner testified Van Treese had been stabbed, contradicting Sneed's previous statement; based on mid-trial memo from Smothermon to Walker. Smothermon lied to the court on the record about her prior conversations with Sneed.

   Claim status: Denied as waived and, in the alternative, on the merits; new evidence exists not yet presented
   - Presented in September, 2022 application; This Court ruled it waived because it was known at trial that Smothermon and Sneed had spoken; alternative merits denial that discussing prior testimony with witnesses does not violate rule of sequestration
     - This Court did not address new information that Smothermon provided Sneed and Walker, who was also a listed witness, with the testimony of a prior witness, referred to the knife as "our biggest problem"; this Court expressed doubt that Walker received the memo

- Box 8 contains further evidence on this claim that has not been passed upon; additional evidence establishes Walker received and annotated the memo; to be included in March, 2023 application

IMPORTANT NOTE: To this day Sneed's testimony directly conflicts with the autopsy findings. He has maintained he acted alone, and testified he stabbed Van Treese only once. The autopsy found six wounds likely caused by the broken-tipped knife, some on the back of the body. New information from Gary Ackley derived from matter found in Box 8 establishes that the prosecution did not fully assess the physical evidence before bringing the case to trial.

3. **Sinclair Video**, believed to show inside of station during evening of murder, including views of Justin Sneed, but no one can state whether it shows people other than Sneed and Kayla Pursley; it was never turned over to the defense, despite requests. It is now lost, destroyed, or still being withheld. Information from Box 8 revealed that prosecutors likely viewed it in 2003. The defense was told that it was not booked in evidence and state was unsure it was ever collected.

   Claim status: Discussed but never presented as stand-alone claim; to be presented in March, 2023 petition
   - Not discussed in direct appeal or state and federal habeas
   - Discussed as part of overarching due process claim in July, 2022 application
   - To be discussed in light of additional information from Box 8 in March, 2023 application

4. **Significant, important, and obvious investigatory steps never taken by police,** including interviewing all witnesses present at motel, securing crime scene, searching Sneed's room, collecting all available evidence from the motel (including financial records), investigating Sneed's background or interviewing his brother (whose involvement Sneed mentioned to police prior to any mention of Glossip), conducting complete interviews of key witnesses William and Marti Bender, investigating tainted $23,000 from the trunk of Van Treese's car, following up on known leads

   Claim status: Presented but never addressed on the merits.
   - Due process aspect presented in July, 2022 application as Proposition Four; this Court denied because it could have been raised in prior appeals

5. **Defense counsel did not investigate.** Neither the original nor subsequent defense lawyers conducted any significant factual investigation; defense called no witnesses at merits phase of second trial. Present counsel, as well as Reed Smith, have uncovered mountains of evidence about what really occurred in Room 102

   Claim status: Presented but never addressed on the merits (IAC)

- IAC claim presented as Proposition Three in July, 2022 application; denied as waived because it was not raised in an earlier proceeding.
- Previous IAC claims inexplicably did not address the complete failure to investigate the facts of the case.

6. **Multiple independent new witnesses** provide an account given to them by Sneed of the murder as a drug robbery not involving Glossip, broadly consistent with one another and with the physical evidence. If these witnesses are telling the truth, there is no case at all against Mr. Glossip for murder.

   Claim status: Denied without hearing
   - Presented as Proposition One in July, 2022 application. No hearing was granted and no explanation was given (by the Court or the OAG criminal division) for how the witnesses' testimony, if believed, was compatible with the conviction.

7. **Polygraph materials lost, destroyed, or fictitious**: repeatedly requested, from 1998 through present; never provided. Either destroyed by police (despite request during retention period), or never existed and detective's sworn testimony about it in court and State's argument in 2014 clemency was false. Notes from prosecutor disclosed in Box 8 indicate that as of 2003, this evidence, if it ever existed, was destroyed by police in the normal course of their business.

   Claim status: Not litigated. (While always a violation, only became highly material when relied on by the State in 2014 clemency proceeding).
   - Polygraph materials requested in September, 2015 motion for discovery, supplement to application for post-conviction relief
   - Continually requested by current team in correspondence to both DA and AG

8. **Use of posters** displaying witness testimony during second trial.

   Claim status: Denied on the merits
   - Denied by this Court in 3-2 vote without allowing posters to be added to the record; dissent noted "in the image of an American courtroom plastered with poster-size trial notes taken by the prosecutor, we see the practice gone badly wrong."
   - Denied on the merits in federal habeas; district court held the "trial court clearly erred in allowing the posters to remain on display in the courtroom throughout the trial" but were harmless; it was "a close question" (p. 38)

9. **Sneed wished to recant** before second trial; was falsely told the State would obtain a death sentence against him if he did not testify.

Claim status: Denied as waived (only part of the claim was addressed)

- *Brady* aspect of this issue presented in September, 2022 application in Proposition One. This Court denied on the basis that trial counsel knew Sneed was reluctant to testify so it should have been addressed previously.
- This Court did not acknowledge or address evidence that Sneed specifically inquired about *recanting* (as distinct from reluctance to be a witness); did not acknowledge or address the fact that Sneed was falsely told he would likely get the death penalty if he refused to testify, despite *State v. Dyer;* engaged in speculation as to what Sneed meant by recanting, rather than holding a hearing to determine the truth.
- Note this Court also relied on Sneed not having made efforts to recant in denying July application.
- Alternative merits denial finding the evidence (as mischaracterized by court) not material
    - Subject of still pending petition for certiorari in U.S. Supreme Court, re-listed and scheduled for conference multiple times

10. **Jury given incorrect corroboration instruction.** They were told they *may* eliminate accomplice testimony in assessing adequate corroboration, not that they *must* do so, contrary to *Pink v. State.*

    Claim status: Addressed obliquely

    - Direct appeal included claim that the corroboration was not adequate. Dissent found the issue "close" and noted the instruction was wrong but found that insignificant because the prosecutor did not argue the incorrect standard.

11. **Evidence released to family prematurely** without adequate (or in some cases any) testing or defense access, including the car and the $23,000 cash found in the trunk, and Van Treese's wallet. Similarly, motel records were never seized or copied, and when Donna Van Treese brought them to court at the first defense lawyer's request, the State did not retain them or even make copies to preserve evidence relevant to the asserted financial motive. (Nor did defense lawyer Wayne Fournerat, the one found ineffective). They were subsequently destroyed. All of these items were unavailable for the second trial.

    Claim status: Not litigated

12. **Impeachment Information about Justin Sneed's Mental Health Was Not Disclosed.** State had notice (actual or constructive) that Sneed had received a highly pertinent diagnosis and did not inform defense; this constituted significant impeachment evidence and contradicted Sneed's trial testimony.

Claim status: Presented in the present application.

13. **Mr. Glossip's IQ is at most 78**. State relied on theory Glossip was manipulative "mastermind;" defense never investigated plausibility or identified readily available contradictory evidence.

    Claim status: Presented but never addressed on the merits
    - Presented as both stand-alone claim and IAC in July, 2022 application; this Court rejected because could have been presented earlier.

14. **Autopsy** was not conducted properly in accordance with professional standards, causing loss of evidence about true cause of death (little or no evidence of serious brain injury or bleeding to death; possible evidence of strangulation or asphyxiation)

    Claim status: Not litigated (although problems with medical examiner testimony were raised in 2015 application and denied without hearing); discussed in the present application.

15. **Unreliable and inappropriate opinion testimony** presented: State elicited completely improper testimony from Kayla Pursley and Billye Hooper that they did not think Sneed would have committed the murder alone.

    Claim status: Not litigated.

16. **Additional Brady material** withheld from defense as recently as January 2023 (Box 8)
    a. Cliff Everhart told prosecutors Glossip's selling of possessions was for "900," where he testified he knew no amount, which accounts for a lot of the money Glossip had on him at arrest that the State argued were robbery proceeds
    b. Bill Sunday told the State it cost $25K to repair the motel, in contrast to the $2-3,000 KVT testified to in implying Glossip could or should have done it

    Claim status: Presented in the present application.

17. **Arrest and intimidation of innocence witnesses** by OCDA and AG offices, including unauthorized and possibly illegal use of privileged prison medical records in the press against defense witness Michael Scott and coercive interview as recently as 2022.

    Claim status: Noticed given to this Court in 2015 and 2022, but not separately litigated.

IMPORTANT NOTE: The State obtained a witness's prison medical records in 2015 without a release. Presumably the records regarding Sneed's bipolar diagnosis were equally available to the State prior to 2004.

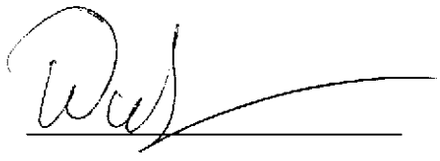
18. The state has never acknowledged that **Sneed has serious credibility problems**, and yet they do acknowledge Glossip's conviction depends entirely on his testimony. No known attempt by the state to independently vet Sneed's statements before putting him on the stand. Key details have changed repeatedly; account not born out by physical evidence.

    Claim status: Raised in 2015 application as 8th Amendment reliability claim and overall sufficiency of the evidence claim; denied as waived
    - This Court treated reliability claim as the same as previously raised claim regarding sufficiency of corroboration
    - Decision was 3-2.

While the courts have not granted relief on any of these claims individually, considered together, they establish that Mr. Glossip's trial was fundamentally unfair and constituted a breakdown of the adversarial process. He is entitled to a new trial.

PRAYER FOR RELIEF

Wherefore Mr. Glossip respectfully requests that this Court enter an order granting the requested discovery, remand the case for an evidentiary hearing in the district court, enter an order reversing his conviction and sentence, and any other relief as may be just and appropriate.



Warren Gotcher, OBA #3495

VERIFICATION

I, Warren Gotcher, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

3-27-23
Date

Warren Gotcher, OBA #3495

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2023, a true and correct copy of the foregoing Successive Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the Clerk of this Court, with one of the copies being for service on the Attorney Counsel for Respondent.

Warren Gotcher

GLOSSIP V. STATE OF OKLAHOMA
APPENDIX OF ATTACHMENTS
TO MARCH 27, 2023 APPLICATION FOR POST-CONVICTION RELIEF

1. Page from Connie Smothermon's notes from interview of Justin Sneed
2. Affidavit of Dr. Larry Trompka
3. Affidavit of Gary Ackley
4. October 29, 2003 email from Smothermon to Burch
5. Page from Gary Ackley's notes from interview of Kayla Pursley
6. Pages from Gary Ackley's notes from interview of Bill Sunday
7. Page from Gary Ackley's notes from medical examiner testimony, with post-its
8. Page from Connie Smothermon's in-trial notes re Cliff Everhart
9. 2003 Memo from Smothermon to Walker
10. Affidavit of Chuck Loughlin
11. 2023 Affidavit of Paul Melton
12. 2023 Certification of Dr. Peter Speth

ATTACHMENT 1

like ski gloves
Δ had gloves & said do you need gloves Justin?

Barry → looked got suspicious

Vi asking everyone

Barry thought someone opened his room
maybe female figure

$3,000

- meals not steady
- no hungry
- get crank from girls

Glossip said he got rid of keys to Rm 102

Δ said Vi took key to Rm 102

---

by appeal
women
waiver for records
IQ test
heavy set?
invest.
GED.
VoTech
Burch
30 min.
Succ. appeal
man
Con out testimony
by Jan.
Law (gave case)

Glossip no hard feelings
didn't want to testify
atty – can't legal advice

ATTACHMENT 2

AFFIDAVIT OF DR. LAWRENCE "LARRY" TROMBKA

STATE OF OKLAHOMA)
)
) ss.
COUNTY OF OKLAHOMA)

Dr. Lawrence "Larry" Trombka, a person of lawful age, being duly sworn, under penalty of perjury do state as follows:

1. I received my medical license in 1987. I graduated from medical school and did a four-year residency in psychiatric services. I am a licensed psychiatrist by the state of Oklahoma. I have worked for the Department of Corrections providing psychiatric and mental health services for inmates at various jails and prisons in the state of Oklahoma.

2. In 1997-1998, I was the sole psychiatrist at the Oklahoma County Jail providing psychiatric and mental health services to the inmates. I would visit the jail once a week.

3. At the time that I worked at the Oklahoma County Jail in the late 1990s, lithium was a first line drug used to treat patients diagnosed with [redacted]

4. I have reviewed Attachment A, which is entitled "Oklahoma County Sheriff's Office Medical Information Sheet."

5. Based on this document and my knowledge from working at the Oklahoma County Jail, this form is documenting that inmate Justin Sneed was going back to the Department of Corrections on July 8, 1998.

6. Based on my knowledge and experience working at the Oklahoma County Jail, the Jail would have had a file with Mr. Sneed's medical records. This file would contain my notes and diagnosis, as well as any medication I prescribed for Mr. Sneed's treatment. The Oklahoma County Jail maintained these records and I did not keep my own copy. At that time the Jail was run by the Oklahoma County Sheriff's Department.

7. Based on my knowledge and experience working at the Oklahoma County Jail, I was the only medical health professional who would have ordered Mr. Sneed to be prescribed

lithium, as it would need to have been ordered by a physician or psychiatrist. Nurses could administer the drug but only a physician could have ordered the lithium as a prescription.

8. Dr. Charles Harvey was another medical doctor also working at the Oklahoma County Jail who had a medical clinic at the Jail in 1997 but he was not a psychiatrist. I recall that he would not prescribe lithium or any similar psychotropic drug as he was only a medical doctor and not trained in psychiatry, but rather would refer the patient to me for evaluation.

9. Based on my medical training and experience, the use of lithium was not and has not been indicated for dental issues. Rather it is a psychotropic drug used for mental health disorders, [redacted]. Lithium would also not be prescribed for a cold or confused by medical health professionals with Sudafed.

10. Based on my training and experience, [redacted] symptoms can be exacerbated by illicit drug use, such as methamphetamine. That is, methamphetamine can make individuals with [redacted] feel euphoric, like they are manic. In addition, the manic episode may cause an individual to be more paranoid or potentially violent. The manic episode would last only for a few days when the individual is coming off the methamphetamine.

11. A manic episode could also affect an individual's perception of reality as well as their memory recall.

12. It was my experience that when a competency evaluation is conducted by a State psychologist, like Dr. Edith King, she would have access to the inmate's medical records maintained by the Jail.

I swear upon penalty of perjury that the statements in the foregoing two pages are true and accurate to the best of my knowledge and recollection.

Further, Affiant sayeth naught.

Dr. Lawrence "Larry" Trombka

Subscribed and sworn before me on this 17th day of March, 2023.

Notary Public

ROD BAKER
Notary Public in and for the
State of Oklahoma
Commission #15009573
My Commission expires 10/16/2023

OKLAHOMA COUNTY SHERIFFS OFFICE

MEDICAL INFORMATION SHEET

INTAKE NUMBER: IN97502547 NAME: SNEED, JUSTIN BLAYNE

DOB: 09/22/77

DATE IN CUSTODY: 01/17/97 DATE TRANSFERRED: 07-08-98

GENERAL BEHAVIOR: FAIR

MEDICAL PROBLEMS: [redacted]

ALLERGIES: NKDA

MEDICATIONS: PREVIOUS USE OF LITHIUM

REMARKS: USE UNIVERSAL PRECAUTION DURING TRANSPORT

MEDICAL SIGNATURE: Jerry Walker

ATTACHMENT 3

AFFIDAVIT OF GARY L. ACKLEY

STATE OF OKLAHOMA)
)
) ss.
COUNTY OF CLEVELAND)

I, Gary L. Ackley, being of lawful age and sound mind, and being duly sworn, under penalty of perjury, do state as follows:

1. I served as an Assistant District Attorney in the Oklahoma County District Attorney's Office ("DA's Office") from 1983 to 2015. During my time there, I prosecuted multiple cases, including the State's case against Richard Glossip in his 2004 retrial. My involvement in the case started sometime around October 2003, after the Oklahoma Court of Criminal Appeals had remanded the case back to Oklahoma County.

2. In 2022 and 2023, I spoke multiple times with the Reed Smith/Jackson Walker attorneys who I understand have been retained by a group of Oklahoma legislators to look into the Glossip case.

3. On March 2, 2023, I spoke by telephone with Rex Duncan, the Independent Counsel appointed by the Oklahoma Attorney General, the Honorable Gentner Drummond, to investigate the Glossip case.

4. While at the DA's Office, I was a member of the homicide committee. This was a committee that then District Attorney Wes Lane implemented, and it was comprised of several prosecutors from the office including Fern Smith, Connie Smothermon, Sandy Elliot, Steve Deutsch, and others at various times. The committee would review the homicide cases on how to proceed and any plea offers, and advise Wes Lane. Mr. Lane made the ultimate decisions.

5. It is my opinion that the DA's Office would not have agreed to modify Justin Sneed's plea agreement to offer him anything less than life without parole for his testimony in Glossip's 2004 retrial.

6. It is my opinion that had Mr. Sneed decided not to testify in Glossip's 2004 retrial, the State would have likely gone ahead to prosecute Mr. Glossip for murder 1 without Mr. Sneed's testimony, although I do not recall that ever being discussed at the time.

7. In May/June 2022, through my review of the DA's Case Files and discussions with investigators conducting the Reed Smith independent investigation, I was informed that a box of evidence containing 10 items was destroyed by the Oklahoma City Police Department. I do not recall, either before or during Glossip's retrial, being aware of the destruction of the evidence. It is likely that I was aware of that fact during the 2004

retrial, but, given that I was utterly powerless to change that fact, I had no choice but to confront it and proceed with the job at hand.

8. It is my opinion that destruction of evidence by the police in this capital murder case should not have happened. The Oklahoma County District Attorney's Office had a longstanding agreement with the Police Department to preserve all evidence in a capital murder case. That this happened horrifies me.

9. Based on my knowledge and experience, the Oklahoma Criminal Discovery statute covers recordings and requires production of any recording to the opposing party in criminal proceedings.

10. As part of my obligations and standard practice as a prosecutor, I would disclose any new or inconsistent statements made by witnesses to the defense.

11. After my assignment to the Glossip case in about October 2003 and before the 2004 retrial. I may have viewed a surveillance video from the Sinclair Gas Station ("Sinclair Gas Station Video" as part of general case preparation. I have discussed this video with Reed Smith attorneys, especially Christina Vitale, on at least 2 occasions. I have been very clear that, while at times I have thought I recalled certain portions of the video, that I am by no means certain. I stated to them at one point that I may even be recalling descriptions of the video from reports rather than the video itself.

12. I do not state that I did not see the video. At times I felt somewhat confident that I remembered certain passages of it. At other times, I entirely lack confidence that I saw it. I can only say that it has been a long time, almost 20 years, and that I have viewed dozens of convenience store/gas station video tapes, usually in connection with robbery. On 2-28-23 I pointed out that "I think I saw it, I think I remember seeing it". On 6-2-22 I said "In all honesty I don't remember seeing or handling that video. I vividly remember references to its existence. 18 years after the fact I lack confidence that I remember the video or the police reports about the video." I wish my memory was more clear.

13. I feel, now, that it is highly significant that no notes prepared by me have been produced regarding the contents of the video. As video became more common in my cases, I soon realized that merely viewing the video was a luxury my schedule could not afford. It was my practice to memorialize my viewing in a handwritten memorandum on legal pads, identifying date and the video viewed. I then took notes summarizing the contents of the video, with the counter reading to allow fast access to specific portions of videos.

14. According to police reports, the Sinclair Gas Station Video was a surveillance tape that depicted the inside of the Sinclair Gas Station in the early morning hours of January 7, 1997, before, during and after the murder of Barry Van Treese at the Best Budget Inn, which was next to the Sinclair Gas Station. Witness Kayla Purseley was on duty in the gas station during that time and testified.

15. If I viewed the Sinclair Gas Station Video prior to the 2004 retrial, it is highly unlikely that I went to the police station merely to view the videotape. Most likely, if I viewed the video it was either in my office or in the Oklahoma County District Attorney's conference room.

16. I do not recall at any time before May 2022 being aware that the Sinclair Gas Station Video was the subject of a motion to compel by Glossip's defense. I was not aware that Glossip's defense had been asking for the video in fall 2003. I was not aware that ADA Connie Smothermon had informed Glossip's defense prior to the 2004 retrial that the video never made it into the DA's case file nor did Oklahoma City Police Department ever book it into evidence. My present sense of those events is that they took place before I entered the case and that my duties dealt with the case in the state in which I found it.

17. I stated in March of 2023 that I thought the Sinclair Gas Station Video was of poor quality. that Kayla Pursely, the Gas Station clerk, may have even been visible in the video, and that it was boring (meaning that it had long periods of inactivity).

18. Reviewing my Kayla Pursley witness interview notes refreshed my memory that Ms. Pursley stated that she looked at the video while she was at the store that morning (of the murder) to see when Mr. Sneed came in

19. Based on my interview notes I believe Kayla Pursley must have seen Mr. Sneed on the Sinclair Gas Station Video coming into the Sinclair Gas Station at some point before the January 7, 1997 murder though I did not recall that fact until reviewing my notes. Based on my interview notes, Ms. Pursley indicated that the Oklahoma City police took the videotape. The Reed Smith investigators in February 2023 refreshed my memory that Ms. Pursley testified at trial regarding the time when Mr. Sneed came into the Sinclair Gas Station.

20. Kayla Pursley was ADA Smothermon's assigned witness at the 2004 retrial.

21. In May 2022, pursuant to an open records request by Reed Smith, then District Attorney David Prater requested that I come to look for the Sinclair Gas Station Video. As part of my search for the Sinclair Gas Station Video, I went through the DA's case file boxes on three occasions in the summer of 2022.

22. Though I was ultimately unable to locate the Sinclair Gas Station Video, I do believe it existed at the DA's office at one time.

23. Based on my knowledge and experience of the Oklahoma Discovery statute, I believe that the Sinclair Gas Station Video qualified as a recording, and should have been turned over to the defense.

24. I was also shown my notes from an October 22, 2003 interview of Justin Sneed.

25. ADA Smothermon, Gina Walker, Justin Sneed, and myself were present at this October

2003 interview. Based on my recollection, Gina Walker was Mr. Sneed's attorney at the time. Based on my interview notes, either Gina Walker or Justin Sneed indicated that he had been on lithium when his IQ test was administered.

26. Based on my interview notes, either Gina Walker or Justin Sneed also indicated and I wrote down that "the nurse's cart record discrepancies v. Mr. Sneed's jail permanent record."

27. In my interview notes, I also wrote down "tooth pulled?" I am not sure why I wrote that down other than to note that it was stated during the interview. Based on my general knowledge, I do not believe that lithium is a pain medication.

28. Justin Sneed was Connie Smothermon's assigned witness at the 2004 retrial.

29. I do not recall knowing or discussing with anyone that Justin Sneed was on lithium at any time as treatment for bipolar disorder. I do believe that would have been an important fact for the defense to know and think it is *Brady* impeachment material. I think this condition was disclosed to the parties to the litigation by filing of a written report in the case by Dr. King in a competency evaluation of Justin Sneed on July 17, 1997 per the OSCN Appearance Docket for this case, CF-97-244.

30. Based on my knowledge and experience, being administered lithium, if at a relevant time, goes to Mr. Sneed's state of mind and, depending on when he was administered the lithium, would have been discoverable.

31. I was not aware that Justin Sneed's attorney filed an application for mental health evaluation and competency prior to my being assigned the Glossip case.

32. I also recently reviewed my notes taken during the 2004 retrial, including when the medical examiner, Dr. Chai Choi was testifying. Dr. Choi was one of my assigned witnesses.

33. I remember and these notes document my concern during the cross examination of Dr. Choi regarding the lacerations and puncture wounds she found during the autopsy, and testimony by Dr. Choi about those wounds being caused by a knife.

34. My writing during the cross examination of Dr. Choi stating "reverse Dr. Choi" was my note to myself noting my perception that Dr. Choi did not testify regarding the laceration/puncture knife wounds consistent with my understanding of her report, but upon reflection I realized she had not contradicted her report. The laceration/puncture wounds were caused by a knife. At the time, I did not understand her statement. I misunderstood the circumstances of those wounds because of their unique nature. The victim was stabbed with a knife, but the sharp point of the knife had been broken off, apparently some substantial time before the fatal attack, creating wounds not typical of stab wounds in my experience.

35. There are post-it notes attached to my notes from the trial testimony of Dr. Choi which state "could cut be made by sharp furniture? Glass? Cut on elbow and hand," "cuts [do not equal]

knife cuts," and "cuts or splits in skin from impact?". I assume that ADA Smothermon passed them to me to try to help me understand and help me out of the quagmire (of my not understanding the laceration/puncture wounds came from a blunt knife) I had created. I recall ADA Smothermon being concerned at the time about my mishandling of Dr. Choi's testimony, as was I.

36. I also recently reviewed my interview notes from witness Bill Sunday's interview. Based on my notes, during the interview, Mr. Sunday indicated that he helped Ken Van Treese and Jim Gainey manage the motel after the murder. Mr. Sunday also indicated that they hired painters and spent $25,000 in repairs.

37. I was not aware this fact was not disclosed to the defense and thought it would have been disclosed through alternative sources, like Ken Van Treese. Mr. Sunday was my assigned witness and Mr. Van Treese was ADA Smothermon's assigned witnesses.

38. One of the State's motives for murder presented to the jury was disrepair of the motel, that Glossip neglected his duties to maintain the motel, and was concerned about being confronted or fired over that failure.

39. I do not recall that Ken Van Treese testified in the 2004 retrial that they spent $2,000-3,000 in repairs total for the motel following the murder. I agree that $25,000 is different than $2,000-3,000, and I consider this information that I would have given over to the defense though I do not specifically recall doing so. I have not seen any written communications disclosing such information.

I swear upon penalty of perjury that the statements in the foregoing are true and accurate to the best of my knowledge and recollection.

Further, Affiant sayeth not.

Gary L. Ackley
Assistant District Attorney, retired
OBA #123

Subscribed and sworn before me on this 21st day of March, 2023.

KATIE COWAN NOTARY # 19012102 EXP: 12/04/23 PUBLIC STATE OF OKLAHOMA

My commision expires - - 12/04/23

ATTACHMENT 4

EXHIBIT G

From: <ConnieP@oklahomacounty.org>
To: <Lynn@oids.state.ok.us>
Date: 10/29/03 8:57AM
Subject: RE: Richard Glossip

OCPD never booked a video tape into evidence. There is some confusion as to whether one was looked at or actually taken by an officer. Either way, it never made it to this case file. The information I have is that any video tape would be of the interior of the station only.

Gary is finishing the HAC response and will file it within the hour.
Thanks,
Connie

----Original Message----
From: Lynn Burch [mailto:Lynn@oids.state.ok.us]
Sent: Tuesday, October 28, 2003 2:24 PM
To: Silas Lyman; L Wayne Woodyard; ConnieP@oklahomacounty.org
Subject: RE: Richard Glossip

Connie:

I have reviewed my files in regard to any Joseph Harp documents regarding Justin Sneed. While I found some reports and memos generated by that investigator (who is no longer emloyed by OIDS) on the appeal issues, I did not find a release from Sneed or any documents concerning him from DOC or specifically Joe Harp.

I forgot to ask you yesterday if you had found out anything about the status of that video tape from the Sinclair station adjacent to the motel. Also, if you have data on when the motel financial documents provided to us yesterday were actually generated, I would appreciate it.

I have done some research on remuneration cases and will decide later today whether to supplement our motion by the Wednesday, 10 am deadline.

Thanks.
Lynn

LWW 29211

RGI 010411

ATTACHMENT 5

12-10-03 | Medley [illegible]

Δ G wasn't openly mean to Δ A, but over time Δ A became more dependent on Δ G b/c Δ A got less & had less independence of action & Δ G took > advantage

Δ G was never violent in front of W, but was mean to D Anda at times, very kind to her at times.

Sinclair Comeaux showed inside — N/R if outside — doesn't think so.

W looked at in books to see when Δ A came in on 1-7-03. Thinks Oct/Oct[illegible]. → acted normal.

Δ A had been in once, uninjured, & later, had a wound on eye "I hit on shower head" – Acting fidgety

W worked by 10 pm.

Jackie – Housekeeper

☆ → ☆

☆ Boss – ☆

On duty 11-3

[illegible] — Cliff Eversharts [illegible] then [illegible] when only girlfriend [illegible] until 11 a.m.

ATTACHMENT 6

M: 918-689-6798 3-2-97
Daughter 528-1996
John William Sunday 918-689-2195

→ No priors → 25 yrs Cop - MP US Army
Fed. [illegible] Eufaula [illegible] FBI

Robin Sunday R.N. Natl Guard Afghanistan

Helped Ken VanTreese by [illegible] motel w/ Jim Hainey after death.

W had day shift; Hainey had nights

1st stepped foot on motel prop day after - Thinks 1-8. 2 hours.

Saw death notice in paper + called Ken's daughter in Norman & talked to Ken to offer sympathy & assist. Ken asked w to meet him at motel ≈ 9:31-10 -

1-8-97: Motel office only - Jim Hainey already present - Ken explained it & asked them for help. Rooms [illegible] not clean. W assumed due to death of V - later found ordinary. [illegible] Would have chosen not to stay [illegible] as motel guest.

[illegible] closed [illegible] for maint. [illegible] Some furn broken, [illegible] heaters [illegible] mop, bulbs [illegible] containers [illegible] Bathrooms [illegible] goods, some [illegible]

(Case) 6-28-96

[illegible]

Dloc 7

→ M: 918-689-6798 3-2-47

Worked at motel until end of March — 3 yrs.

- Hired painters. Spent $25K for repairs

Still had $40-60K in back office[?]

- Knows D re carpet call —

Did replace some carpets.

- Never dealt w/ Glossip —

saw him leaving to go to OCPD in police car w/ D Ames Woods. 16

→ V had never made that kind of profit before.

2 rooms were full of junk — mattresses, etc

trashed & [illegible] refuse & broken equip

→ filled entire dumpster [illegible]

Bought 40 new & 40 new bedspreads

16 & Portland.

Rooms Stunk — grossly [illegible]

rented rooms, demanded refunds & left.

→ [illegible] stepped up

Washer & Dryer broken

→ replaced

[illegible] repaired entire motel

[illegible] movie capability

[illegible] installed a new central heat. system

[illegible] Room cords

[illegible] behind town — can't prove

[illegible]

[illegible] than she

[illegible] she was not

[illegible] gave J.J.

ATTACHMENT 7

5-26-04

Reverse - Dr. Choi -

Δ Δ tried to stab V w/ a ~~knife~~ blunt-pointed knife - Who's the brains in the operation?

Could cut be made by sharp furniture? Elbow? cut on elbow & hand

(Cuts ≠ knife cuts

Cuts OR splits in skin from impact?)

ATTACHMENT 8

10-10-03 Mtg w/ C [illegible] Donna

[in Storage Rm]

Cliff Everhart
433
0737

Looked for reg
not one!

Billie knew Evert 1%

20 min to clean room
- maid taking too long
- for # rooms

relaxed owner
would let get by w/ skipping 20 out
or give free room

Not look at rooms much

Sneed puppet

Drug family reg problem
Knew ∆ - Used MJ

saw Sneed 2 hrs then gone
bruising around eye

Common sense deposit under front seat

feel have to do everything
not a leader

not see Sneed have need for $

Gossip had [illegible]
not low [illegible] no [illegible]

Liquidated
B's screen
900 couch
Jewelry
Wanted $ for boobs

ATTACHMENT 9

Gina,

Here are a few items that have been testified to that I needed to discuss with Justin –

1 - Officer Vernon Kriethe says in his report that after he arrested Justin and was transporting him downtown Justin voluntarily said –

> It was my job to take him out and his to clean up
> The evidence –he didn't do a very good job

Does Justin remember making that statement?

2. -Kayla Pursley says she saw Justin leave in Glossip's car about 5:30 or 6:00 and she doesn't know how long he was gone or where he went. ?????

3 - Our biggest problem is still the knife. Justin tells the police that the knife fell out of his pocket and that he didn't stab the victim with it. There are no stab wounds, however the pocket knife blade is open and the knife is found under the victim's head. The victim and Justin both have "lacerations" which could be caused from fighting/ falling on furniture with edges or from a knife blade. It doesn't make much sense to me that Justin could have control of the bat and a knife, but I don't understand how/when the blade was opened and how/when they might have been cut. Also, the blade tip is broken off. Was the knife like that before or did that happen during?

4 - Justin's clothes were found in the canister in the laundry room. There was a small piece of duct tape stuck on one of the socks. I understand that he hid the clothes while everyone was looking at the car which was well after Glossip was with him and they were taping up the shower curtain – is that right?

5 - Officers testified that the shower curtain to room 102 was missing. Is that the room where they got the shower curtain? I have it listed as room 102 one place in my notes and room 101 in another place????

6 - Did they turn down the air conditioner in room 102? If so, when?

They have listed the statements in the PSI has a potential impeachment document. There doesn't seem to be anything inconsistent in them. Justin didn't make any statements – it is mostly family history that he and I are going to talk about.

Thanks - we should get to him this afternoon. Tina wasn't here on Monday so Justin may not get to the old jail until noon.

Connie

ATTACHMENT 10

[redacted]

AFFIDAVIT OF CHUCK LOUGHLIN

STATE OF OKLAHOMA)
)
) ss.
COUNTY OF OKLAHOMA)

Mr. Chuck Loughlin, a person of lawful age, being duly sworn, under penalty of perjury do state as follows:

1. I am an investigator licensed by the State of Oklahoma since 2016 and have specialized in criminal defense work.

2. I have worked for the Oklahoma County Public Defender's Office since 1997. In 1997, I worked under the direction of Assistant Public Defenders Tim "Tarzan" Wilson, George Miskovksy, and Gina Wilson on Justin Sneed's case.

3. During my time working in the Oklahoma County Public Defender's Office, I had frequent interaction and worked under the direction of Assistant Public Defender, Gina Walker, and several other attorneys.

4. In connection with my work in the Oklahoma County Public Defender's Office, I frequently reviewed handwritings from Gina Walker and became familiar with her handwriting.

5. I have reviewed Attachment A, which is a typed letter written by Connie Pope to Gina Walker. This letter contains handwritten notes in black ink on the right and left margins.

6. Based on my knowledge and familiarity with Gina Walker's handwriting, I believe the handwriting in Attachment A to be that of Gina Walker.

I swear upon penalty of perjury that the statements in the foregoing are true and accurate to the best of my knowledge and recollection.

Further, Affiant sayeth naught.

Charles R. Loughlin

Subscribed and sworn before me on this 27th day of February, 2023.

Donna Law
Notary Public

DONNA LAW NOTARY # 01012594 EXP. 08/04/25 PUBLIC STATE OF OKLAHOMA

ATTACHMENT 11

AFFIDAVIT OF PAUL MELTON

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, Paul Melton, being of legal age and sound mind, and under penalty of perjury, do hereby swear and affirm that the following is true and correct:

PM

1. I am 56 years old. My date of birth is December 12, 1966.

PM

2. I was incarcerated with Justin Sneed in the spring of 1997, either March or April, and spent about 13 months with him. At first, I hung out with him because he had cigarettes. For a while I considered him a friend. We talked a lot while in jail together. He told me all about his crime in detail, many times. I was worried about him at first because he kept on talking about his crime to everyone. I told him he was going to get himself killed.

PM

3. I remember all of what he told me. Everything that I am saying now came from Justin Sneed's mouth, and it is not coming from me. I remember everything he said like a movie playing in my mind.

PM

4. Justin Sneed told me he came to Oklahoma with his brother and a roofing crew from Texas. Justin had a warrant out for his arrest. They stayed at the Best Budget motel and both started working there as maintenance men. Justin and his brother weren't there long before Justin noticed that the owner had money when he picked up the motel deposits.

PM

5. Justin used to watch the owner when he would come to pick up the motel deposits. He would see him come out the office and get in his car and fiddle with his front seat. That's how he knew where the owner kept the money.

PM

6. Justin and his brother were trying to figure out a way to rob the owner. They figured they could get around $4000-$5000. Justin told me about one time when they were in the maintenance room together with the owner, and Justin told his brother to hit the owner over the head with a big wrench. His brother wouldn't do it and took off back to Texas not long after that.

PM

7. Justin Sneed was a dope head. After his brother left, Sneed started using his master key set to break into the rooms to steal things at the motel, but this was a dope motel, and dope heads don't leave a lot of stuff in their rooms, so he started breaking into cars and businesses around the motel to trade stuff like stereos and other stuff for dope.

PM 8. Justin told me he met several girls from the strip club. He could see how they were working their hustle at the motel. He tried to get in with a group of girls, trying to be their pimp, but they didn't need a pimp like he was trying to become. He saw that one girl from the strip club was sleeping with the motel owner and the security guard.

PM 9. Justin said he and that girl hooked up, and he told her about how he wanted to rob the owner. This was when he thought he could get $4000-$5000. Sneed thought of getting the owner in a room with a bunch of girls and then take a bunch of pictures to blackmail him.

PM 10. The girl didn't want to do that. The owner was giving her thousands of dollars regularly. She didn't need to rob him for that much. Justin said the owner even paid for her breast job. According to Justin, she had several sugar daddies giving her money.

PM 11. The girl was Sneed's age. And after they got together, Sneed was thinking that she belonged to him. But Sneed also said she was a stripper, and a meth head, and a prostitute. She was getting regular money but Sneed wasn't. Sneed and the girl were going through money fast, spending it on dope.

PM 12. Justin told me he saw that the manager of the motel could have been making a ton of money if he were to run girls and dope out of the motel. Sneed thought the manager was stupid for not doing it. Sneed said he wanted to manage the motel so he could make money, but the manager was always there and would never take a day off and let Sneed manage sometimes. Sneed really wanted to be the manager of the motel.

PM 13. The girl started to use Sneed to bring johns to the motel and use the rooms without paying because Sneed had the keys. No one would know. Then Sneed and the girl came up with a plan to rob johns in the motel rooms. The first guy they robbed had $1200; Sneed thought he hit the jackpot. Sneed kept the whole $1200 and he didn't share it with the girl. Sneed was using everybody else; no one was using Sneed. Including the manager.

PM 14. Sneed told me that when they would rob the johns, the plan was for the girl to get the guy in the shower. She would turn off the lights in the room to signal to Sneed they were going to the shower. Sneed would wait a few minutes, listen at the door, and if he didn't hear anything, he would go in and steal money from the guy's wallet. Then Sneed snuck out, the girl left, and they got $1200. They knew the guy wasn't going to call the police.

PM 15. Sneed said the second guy they lured was married and the girl knew it. She turned off the lights, they went into the shower, but when Sneed came in, the guy came out of the bathroom and caught him. The girl yelled, "Do you want your wife to find out?" The john just said, "Look, this is all I've got." He gave them his money and left and didn't call the police.

PM 16. Then the girl told Sneed she knew the owner had about $20,000-$30,000. She told Sneed she had seen bundles of hundred-dollar bills. The owner showed her a big wad of cash.

PM 17. Justin told me that he and the girl made a plan. If they could get $20,000-$30,000, they could set up shop in a new motel in Texas. They planned to run dope and girls out of a motel there, with Sneed as the manager.

PM 18. Sneed said that he and the girl planned to use the same MO on the motel owner that they used to lure and rob the other johns. But they wanted to get the most money they could. They needed the owner to have deposits from both the motels, the one in Oklahoma City and the other motel in Tulsa.

PM 19. Sneed told me the story of the night of the murder. He said the owner came to Oklahoma City and told the girl that he planned to go to Tulsa. Justin and the girl needed him to come back to OKC once he got the other deposit. The girl told the owner that she had to work until closing at the strip club, so he should go to Tulsa and come back to meet her past 1:00 a.m. when her shift ended. The owner said he would come back, but Justin said they didn't really know if he would.

PM 20. Sneed told me that he and the girl watched for the owner. When the owner came back, he didn't even stop at the office. They knew right then that he had a lot of money because he didn't have enough time to go home and come back to OKC. They watched the owner go in the room, and then she went in. Sneed watched and waited for the signal with the lights. He waited a few minutes, and planned to sneak in while they were in the shower, get the owner's car keys, get the money out of the car, and put the keys back.

PM 21. Sneed told me what happened in the room. He said he listened at the door and went in the room with a bat, but the girl and the owner weren't in the bathroom, they were in bed and the owner was in his underwear or naked. She had no clothes on. When Sneed came in, the owner jumped up and he said all hell broke loose.

PM 22. Sneed told me that the owner jumped up and jumped on Sneed. Sneed's arm was cocked back with the bat, but the owner knocked him back and it broke the window. The owner was on top of Sneed whooping his ass. The girl started screaming, "Do you want your wife to find out? Do you want your wife to find out?" But the owner didn't pay attention to that whatsoever. The owner had Justin pinned and was beating on him real good.

PM 23. Then the girl yelled, "Stop!" Sneed thought she just jumped on the owner's back, but he later figured that she had a knife and stabbed him. When she jumped on the owner's back, Justin said he had time to get up and get his bat. When he did, he hit the owner, but not in the head.

PM 24. He said now the owner was fighting them both off and tried to get to the door. Sneed then hit the owner in the head and dazed him really good, but the owner was still fighting them both off. Sneed said he pinned the owner against the wall, and he and the owner fought from one side of the room to the other. Sneed said, "You should have seen all the blood!" Sneed would laugh about it when he told me.

PM 25. Sneed said that if it wouldn't have been for the girl, he wouldn't have killed the owner. The owner had Justin down and was beating on him. Sneed said it only turned when the girl jumped on the owner's back. Otherwise, the owner was whooping his butt. Sneed said the girl flipped the tables because the owner couldn't fight them both off and she was stabbing him. I don't know how many times.

PM 26. When Sneed finally got the guy down, he said he just kept hitting him with the bat, but the guy wouldn't stop breathing. Justin said he then took a cord and wrapped it around the guy's neck until he stopped breathing. Justin told me he watched him take his last breath, and he thought it was funny. He thought "How dare this owner try to stop me." Justin Sneed was a meth head, and he had an attitude that what the owner had was his.

PM 27. Justin Sneed said once the guy was dead, he knew they couldn't just run out of the room because the window was broken and they made a lot of noise. They waited in the room to see if anyone was going to come by, and got high while they waited. The girl told Sneed she could not get the owner into the shower. She tried but the owner told her he wasn't staying and he was expected home. That's why he wouldn't go into the shower. No one came by the room.

PM 28. Sneed told the girl that he needed to cover the window. He told her to stay there and clean up what you can but try not to touch anything.

PM 29. Sneed told me he went to the maintenance room to get a shower curtain and duct tape. While he was there, he also changed into a maintenance man jumpsuit, the kind you wear when its cold out, because his clothes were all bloody. Sneed figured if anyone saw him, he would look like he was working and say he was cleaning up after two drunks broke the window. He went back in the room and Sneed and the girl taped up the shower curtain over the window.

PM 30. Sneed said the girl was naked when the murder happened, and she had blood on her. She wiped the blood off her with a towel and put her clothes on. Her clothes didn't get bloody because she was not wearing them during the fight. Sneed brought a maintenance man jumpsuit for her to wear over her clothes when she left the room. Sneed said he wanted it to look like it was two guys leaving the room if anyone saw them, so he could say it was the two drunks. They left the motel room and she went to a room upstairs, not in Sneed's room.

PM 31. Sneed said that when he counted the money, he was pissed. It was only a couple thousand. It wasn't a lot. He expected 20-30 thousand, like the girl had said.

PM 32. He told the girl he needed to put some plexiglass over the window because someone could still stick their fingers in the blinds if they wanted to look in. If he could leave the owner in the room until that night, then he could move the body and cut him up or bury him somewhere. Since the owner never stopped at the office, and Sneed moved the car, and no one seemed to care about the noise in the room, Sneed thought he could still get away with it.

PM 33. Sneed told me that, in the morning, when Sneed hung up the plexiglass, the manager came by, and he thought for sure he was busted. But the manager didn't look in the room. Sneed told me that if the manager would have gone in the room, Sneed said would have had to kill him too.

PM 34. Sneed said that later the security guard came by and he thought he was busted again. He thought the security guard would go in the room for sure because the window was broken, but he didn't. When the guard asked if Sneed had seen the owner, Sneed told the security guard he thought the owner was with a girl. Sneed said the security guard had covered for the owner before when he was with a girl, so he did not look in the room.

PM 35. Sneed told me he thought he won the lottery when both the manager and the security guard did not look in the room.

PM 36. Sneed said that later in the day the cops were all around the motel, so Sneed and the girl left. Sneed said he called a close friend of his from the roofing company to meet them somewhere and pick them up. When his friend picked them up, Sneed said he told his friend that he got in a fight with someone they tried to rip off. He asked his buddy to drive them to another hotel and rent a motel room for them because his face looked so bad, and the friend did that. Sneed's friend paid for the room for two or three days because Sneed's money had blood on it.

PM 37. Justin said that he and the girl stayed in this motel together for a couple of days. They were both angry about the little money they had taken from the owner. He said that the girl thought Justin was full of crap and didn't tell her about all the money he got from the car because she knew a lot more was there. And Justin thought she was full of crap about the money ever being there.

PM 38. Sneed told me that he began to worry that she was going to kill him. He said, "The only witness to her being there is me." He told me this girl was "pretty gangster," and that she always carried a bunch of knives. All those girls carried a bunch of knives.

PM 39. Sneed told me that while they were at the new motel. they were both getting paranoid and wanted to get high. The meth back then would keep them up for days. He said he sent her out to buy some meth because he looked all beaten up and the money had a bunch of blood on it. They decided she would have an easier job getting the meth from a dealer than he would. She went out to buy the dope. the dealer took the money and gave her the meth.

PM 40. Sneed said the second dope run is when she didn't come back. Justin called the guys he worked with again. There was no need for him to stay at the motel by himself. He called them and they picked him up. Later he got arrested at their place.

PM 41. Sneed never said the manager had anything to do with the murder. Not one time. Period. Ever. Sneed told me more than once he hated the manager because Sneed wanted to be the manager.

PM 42. Sneed started telling everyone in jail that he was a murderer. and the other guy was innocent. I told him to quit saying that or he'd get killed. That stuff follows you in prison. He said he was just snitching on the other guy who was snitching on him.

PM 43. Sneed told me about the time he talked with the police. He said that when he first got arrested. he told the detective that he didn't have anything to do with the murder. Then the detective said. he knew Sneed didn't do it alone. When the detective said this. Sneed thought they had arrested the girl. She had left him like 3-4 days before he was arrested and he didn't know if she was under arrest.

PM 44. Sneed said that the cop then said. "You know they are all saying that you didn't do this alone. They are all saying it's you." Sneed said he started to think "they all" were the strippers and hookers from the club. He didn't know if the girl went back to the club. That's who he thought the cops were talking about.

PM 45. Sneed said then the cops said they arrested the manager. He didn't know what the hell the manager was arrested for. He thought "they" were the hookers.

PM 46. Sneed told me that he told the police a few more stories. After they were done with the interview. Sneed said the detective took Sneed to the holding cell and told him. "Look either you can go down as the murderer here. or you and him will go down. Either way. the manager is going down." He told Sneed they would seek the death penalty. And if it was both of them robbing the owner to split the money. then they are both guilty. The detective told Seed that it had to be a murder for hire. There had to be someone above him or they were both guilty. Sneed said he just meant to rob the owner. The detective told him to stick to the story he told in the interrogation room. Sneed said the detective told him if he didn't go along with the murder for hire. Sneed would get the death penalty.

PM 47. I told Sneed he shouldn't trust the detective, that he doesn't know if they caught the girl. I asked him, "What if they find her?" He said he would still stick to the story that the manager did it. Sneed said, "If a man and a woman committed a murder together, who is going to get the death penalty out of the two of them? The man."

PM 48. Sneed told me he wanted to say that the manager was a meth head and needed money for meth. That's why the manager needed to rob the owner.

PM 49. Sneed told me that after a few months, the detective came to visit Sneed in the jail. Sneed told him what he was going to say about the manager being a meth head. The detective told him he couldn't say that. He told Sneed that, "I'm the detective, I'm running the investigation. This is what happened, the manager was embezzling money." When Sneed pushed back the detective said he already closed the case. That's when Sneed found out about the embezzlement. Justin never said anything about embezzlement. It was the cop. He was Justin's lifeline. The cop told Justin, "We can't find anyone else who would say Glossip is a meth head but you. The only person that everyone says is a meth head is you, Justin."

PM 50. I asked Sneed what he was going to do when the manager's attorney started testing the evidence in the case? The only thing Sneed was worried about was any evidence from the girl helping him tape the shower curtain and the knives. Sneed said the detective told him the case was closed. That the evidence there is, is all the evidence they have. They weren't looking for anyone else, and the case is closed.

PM 51. People don't know Justin like I did. At first, I thought he was my friend. He was a really weird guy, but they don't know how sick and demented his mind is. I had to sit there and listen to this stuff. I went to my attorney and my attorney tried to go to the DA, but they weren't interested.

PM 52. I wrote the girl's name on a piece of paper and had it with me until I went to prison. From there, I got rid of it. It's not safe to have that information on you in prison. I wish I could remember her name. I think her first name was "Sherri."

PM 53. I asked Justin what's he going to do if they kill an innocent guy? He said he would have the state over a barrel. He would threaten to tell the press after the manager gets executed that Oklahoma just killed an innocent guy. Then maybe they will give him a chance to be paroled someday.

PM 54. Justin told me he never went in the room to kill anybody. He only went in there with a bat. He was supposed to get the keys and the money. He didn't have any knives. The girl had the knives. He blames the girl for the murder. If she hadn't of come out of the bathroom to get the owner off of him, he would have gotten beat up but he wouldn't be sitting there in jail.

PM 55. I know the manager is innocent. I don't know him. This has nothing to do with me. I have no reason to even talk about this, except for I have to get up and look in the mirror.

PM 56. No one ever talked to me about the case, and I never heard anything about it until Don Knight came to see me with another woman while I was in prison in Nevada on a three-strikes charge. I know what I know about this case because I'm the one that Justin Sneed told everything to. I'm the one that knows what he said.

PM 57. Everything I have stated here came from Justin Sneed, right out of his mouth.

PM 58. This document has been read to me in its entirety. It is true and complete to the best of my knowledge.

FURTHERMORE, THE AFFIANT SAYETH NAUGHT.

Dated this 16 day of March, 2023.

Paul Melton

Paul Melton

SUBSCRIBED AND SWORN TO before me on this 16th day of March, 2023.

Notary Public

Signed Katrina Burden

My Commission Expires 3/15/2026

[Notary Stamp]

KATRINA BURDEN
Notary Public-State of Nevada
APPT. NO. 18-1575-2
My Appt. Expires 03-15-2026

ATTACHMENT 12

Certification

March 20, 2023

In the matter of the death of
BARRY VAN TREESE
Found deceased, room 102, Best Budget Inn,
Oklahoma City, January 7, 1997

Peter Speth, MD, being of full age, does hereby certify as follows:

1. On September 14, 2015, this affiant provided Attorney Jim Castle in Denver, Colorado, with a *Certification* in the matter of Richard Eugene Glossip, Appellant v. State of Oklahoma, Appellee. That *Certification* was based upon the limited review of the Autopsy Report of Mr. Barry van Treese prepared by Dr. Chai Choi on January 8, 1997, Autopsy Nr. 021-97, and the two transcripts of the Court of Criminal Appeals of Oklahoma, the first dated July 17 through August 20, 2001, and the second dated April 13, 2007.

2. In that *Certification*, this Affiant reviewed many aspects of the autopsy report and then opined the following:

> ***"9. Finally, there is a precipitating or contributory cause of death that was not previously considered to explain Mr. van Treese's rapid demise in the context of the known autopsy findings.***
>
> ***a. Autopsy findings consistent with an attempt to smother and/or apply pressure to the front of the neck -- - findings consistent with asphyxia as cause or contributory cause of death***
>
> ***(1) Dr. Choi's autopsy report describes a "red mark"" over the front of the neck.***
>
> ***(2) Dr. Choi also describes contusions and other injuries involving the nose, lips and tongue, with blood in the mouth.***
>
> ***(3) There are petechial hemorrhages involving the eyelids and conjunctivae and froth in the bronchi.***
>
> ***b. Essential autopsy procedures to help confirm a component of smothering and/or pressure to front of neck were omitted by Dr. Choi during autopsy***
>
> ***(1) It is essential to perform a layer-wise dissection of the strap muscles of the neck and larynx in-situ in a blood-free stage of the autopsy and to describe the positive and negative findings in the autopsy report --- this was not conducted by Dr. Choi.***
>
> ***(2) It is essential to perform a layer-wise posterior dissection of the retropharyngeal and neck region - - this was not conducted by Dr. Choi***
>
> ***c. We are left, then, with the likely inference of an asphyxial component in the cause of death, but without the necessary proofs. However, an asphyxial component would explain the unanswered findings and rapid demise."***

3. Renewed contact regarding the "Glossip case" ensued on March 8, 2023. Attorney Donald R. Knight informed this Affiant that information had been obtained with relevance to the above-quoted excerpt. This Affiant was then provided with autopsy diagrams that had been prepared by Dr. Choi, transcripts of testimony by Dr. Choi on June 4, 1998, and May 25, 2004, and transcripts of testimony by Ms. Billye Hooper, Mr. John Beavers, Mr. David Marcharmer, Police Officer Timothy S. Brown, Mr. Cliff Everhart and police officer John R. Fieley.

4. What follows in this Certification is meant to supplement and update the opinions which were rendered in the 2015 *Certification*.

A. Regarding head injury as cause of death

1. Dr. Choi has written and testified that brain injury was the cause or contributory cause of death.

2. In 1997 it had already long been firmly established that in all forensic medical examiner cases in which the brain may play a role with regard to cause of death, and especially in homicide cases, the brain is to be fixed before cutting! Here, as example, is an excerpted quote from *Knights Forensic Pathology*, a recognized authoritative text book:

> ***"After weighing [the brain], a decision has to be made whether to examine the brain immediately – the so-called 'wetcutting' – or to suspend it in formalin until fixed. The advantage of fixation is, of course, that the firmness of the tissue allows thinner and more accurate knife-cut sections to be taken, as well as better histological preservation. Where neurological issues are involved, either traumatic or from natural disease, it is almost mandatory for the brain to be fixed before cutting. Even the impatience of the investigative authorities can usually be overcome if the advantages of a higher standard of opinion are explained. The technique of brain fixation is well known..."***

Failure to have fixed the brain prior to cutting was a serious deviation of standards and prevented any possible accurate assessment of brain injury as a cause or contributory cause of death.

3. When traumatic brain injury (TBI) is the cause or contributory cause of death, there is notable, rapidly developing edema of the brain and lungs. But, Dr. Choi reports: "*The right lung weighs 380 gm, and the left weighs 280 gm.*" The lung weights are very normal for a male with the height and weight of Mr. Van Treese. Therefore, there is no notable edema of the lungs. And Dr. Choi reports: "*Externally the brain is slightly edematous.*"

4. These findings clearly indicate only two possible conclusions: Either there was no significant traumatic brain injury or Mr. Van Treese died very rapidly before the edema could form. If there was significant brain injury, it is not described anywhere in Dr. Choi's report and cannot now be ascertained, even if the brain was saved in formalin, because the brain was not properly fixed prior to cutting.

5. As such, these omissions and unscientific conclusions have jeopardized the fair and proper adjudication of this case.

B. Regarding loss of blood as cause of death

1. Dr. Choi has written and testified that blood loss was the cause or contributory cause of death.

2. It is accepted, undisputed science that loss of blood as cause or contributory cause of death results in poorly discernible postmortem dependent lividity, difficulty obtaining blood from the heart for lab studies, pallor of organs and pallor of the cortical regions of the kidneys when in the shock phase, with pallor throughout all regions of the kidneys in exsanguinations.

3. Here are two representative quotes from the abundant scientific literature (the second, a scientific article dealing with baseball bat "blows to the head":

> ***" Classical autopsy findings of blood loss, besides a secured source of bleeding and possible pooling of blood, include sparse lividity, organ pallor, subendocardial haemorrhage, wrinkling of the spleen capsule and 'shock kidneys'."***
>
> Potente, Stefan, et al. "Relative blood loss in forensic medicine—do we need a change in doctrine? " *International Journal of Legal Medicine* 134 (2020): 1123-1131

> ***" Due to the not immediately lethal nature of the cerebral injuries, the sparseness of the livores and the pallor of the inner organs, the cause of death was deemed to be exsanguination due to the scalp lacerations."***
>
> Gläser, Nadine, et al. "Biomechanical examination of blunt trauma due to baseball bat blows to the head." *Journal of Forensic Biomechanics* 2 (2011).

4. Dr. Choi check-marked 'Posterior' lividity and "Purple" at the beginning of her report and then added "PURPLE POSTERIOR" in all caps in the body of the report. She then described the kidneys as:

"*Sections show the organs to be slightly congested with unremarkable cortices, medullae...*" – Certainly not shock kidneys or exsanguination. The brain is described as: "*Multiple serial sections show marked congestion.*" The only suggestion of some blood loss is the wrinkling of the spleen.

5. It is well known among forensic pathologists that there is a tendency to grossly overestimate the amount of blood loss when observing blood pooling at scenes of death. This affiant has demonstrated that during teaching sessions, by distributing a known amount of blood on a surface or in garments and then allowing medical personnel to estimate the amount. It also was a key issue in a notorious murder case in Ventura, California, in 1980 in which a prominent medical examiner and another pathologist grossly overestimated blood loss (this affiant has a notarized certification describing that aspect of the case).

6. Clearly there was no evidence of significant blood loss at autopsy. Dr. Choi should have realized that on the basis of the "purple posterior" lividity and the appearance of the cut sections of the kidneys, also the general lack of pallor and the ability to obtain heart blood for toxicology.

7. By presuming blood loss without pathologic support, in addition to the faulty conclusion of brain injury, as the cause[s] or contributory cause[s] of death, Dr. Choi failed to look further for the true cause of death. Due to this unprofessional conduct, a grave, egregious error occurred.

C. Regarding scalp lacerations

1. When documenting injuries, each injury should be numbered, as Dr. Choi correctly did. However, from that point on, Dr. Choi departed from the accepted standards.

2. Dr. Choi deviated from the required standards by failing to photographically document injuries.

a. It must have been abundantly clear to Dr. Choi from the beginning that this case would be litigated. Therefore, it was an obligation on her part to provide objective evidence regarding the injuries (not just her interpretation or description). That is accomplished with professional photographic documentation of the injuries in accordance with standards (not just flawed diagrams). Here is the NAME standard that this affiant assisted in writing early in the 1980's:

> ***" Standard E14 Photographic Documentation***
>
> ***Photographic documentation complements written documentation of wounds and creates a permanent record of forensic autopsy details. Photographic documentation of major wounds and injury shall include a reference scale in at least one photograph of the wound or injury to allow for 1:1 reproduction.***
>
> ***The forensic pathologist or representative shall:***
>
> ***E14.1 photograph injuries unobstructed by blood, foreign matter, or clothing.***
> ***E14.2 photograph major injuries with a scale."***

> Photographs are taken at every forensic autopsy. Photographs can be invaluable in documenting the appearance of an injury such as a gunshot wound, stab wound, or laceration. Because forensic autopsies are often performed to rule out injury, "negative photographs" of uninjured tissues and organs can be as valuable as photographs of injuries. Although one can often accurately describe abnormalities in tissues and organs, photographs provide a permanent visual record of the finding, and they may capture the appearance of a finding in detail or reflect characteristics of a finding that escaped its original description.
>
> Dolinak, David, Evan Matshes, and Emma O. Lew. *Forensic pathology: principles and practice*. Elsevier, 2005.

b. According to the standards, the injuries are first documented by overall photos taken perpendicularly from the distance, first without numbered labels, then repeated with numbered labels next to each injury. Then close-up photos are taken perpendicularly of each injury with the respective, numbered label next to each injury. Finally, the latter is repeated, but with a right-angle ruler next to each injury. In addition, if any of the injuries are gaping due to the tension lines in the skin, the latter step is repeated, but with the wound reapproximated by pulling the ends of the wound apart.

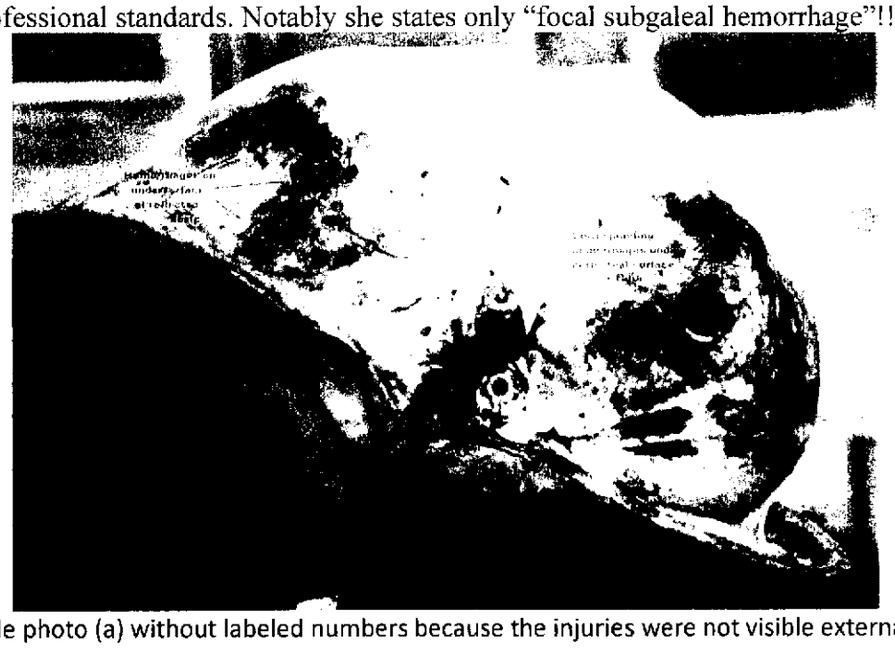
> " ***The photographs should be taken from several different angles, but especially from a directly perpendicular viewpoint, with the plane of the film at right angles to that of the lesion...tangential shots foreshorten the true shape. An accurate scale should always be adjacent to the lesion, as close as possible, but not impinging upon it or obscuring any detail. Specific rulers, such as those of the American Board of Forensic Odontology (ABFO), include two scales at right angles and a perfect circle at their intersection: this can help in correcting any distortion."***
>
> Saukko, Pekka; Knight, Bernard. Knight's Forensic Pathology (p. 556-557). CRC Press.

c. There are only two photos depicting the scalp lacerations. Both are overall photos without labels and without rulers, and many of the injuries are seen tangentially. Those two photos are #3306 and #3307. The absence of the required photographic documentation of the injuries is a serious departure from the required standards!

d. To make things worse, the diagrams provided no assistance because the diagrams do not agree with the photos, especially as they relate to the injuries on the back of the top of the head. This raises the serious question as to whether one can relay more generally on Dr. Choi's descriptions and conclusions: Falsus in uno, falsus in omnibus.

3. As is shown in example photos (a) and (b) below, any and all contusions of the scalp, including those associated with lacerations, must be documented on the underside of the scalp when it is incised and reflected forward and back to expose the skull. This documentation is necessary because of the high vascularity there, resulting in very visible hemorrhages when the scalp is subjected to a blow (contusion), with or without laceration. Many of these contusions are not visible externally. In order to correlate hemorrhages on the undersurface with surface injuries, each hemorrhage on the underside of the scalp is photographed with the respective numbered labels, first without and then with the right-angle ruler in place.

Dr. Choi did not even describe, let alone photograph the undersurface -- this is a most serious departure from professional standards. Notably she states only "focal subgaleal hemorrhage"!!

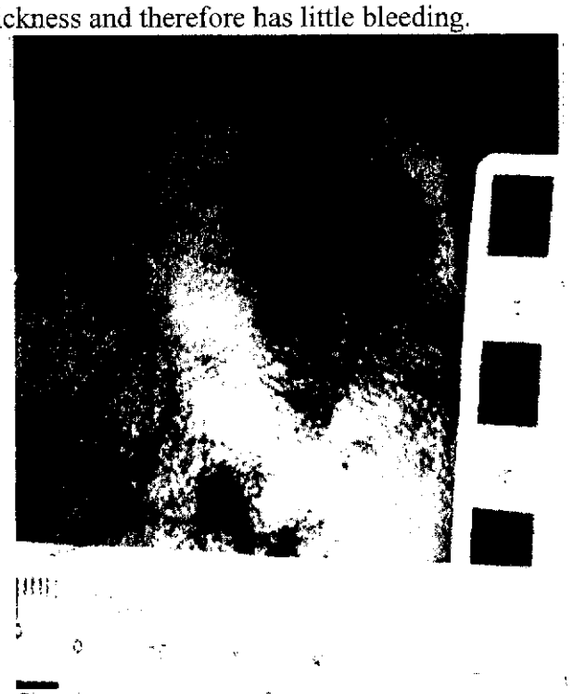


Example photo (a) without labeled numbers because the injuries were not visible externally.

Example photo (b) without labeled numbers because the injuries were not visible externally.

4. Given the available photos, the contused lacerations on Mr. Van Treese's scalp do not appear to be the result of a baseball bat strike, and may, in fact, be largely peri- or post-mortem.

a. The contused laceration caused by the impact of the smooth, cylindrical barrel of a baseball bat should have a uniform area of impact (contact) abrasion on either side of the laceration tapering more or less to a point at each end of the laceration due to the curved surface of the skull. In example photo (c) below one can see that uniform contact abrasion on either side of the laceration. The laceration is not full-thickness and therefore has little bleeding.



Example photo (c) Hamilton JR, Sunter JP, Cooper PN. Fatal hemorrhage from simple lacerations of the scalp. Forensic science, medicine, and pathology. 2005 Dec;1:267-71.

The lacerations in example photo (d) below were inflicted by a cylindrical tire iron – again one sees uniform, but much narrower contact abrasions. One also sees the blood clots welling up in the lacerations.

Example photo (d): Spitz WU, Diaz FJ. Spitz and Fisher's medicolegal investigation of death: guidelines for the application of pathology to crime investigation. Charles C Thomas Publisher; 2020 Jul 20.

b. Mr. Van Treese's contact abrasions, visible in photo #3307, are very disrupted, incomplete, and pebbly. As such, they do not carry with them the characteristics one typically sees from the smooth barrel of a baseball bat. The lacerations appear to have been inflicted by some other object of insufficient moment of inertia to cause skull fractures. And for the most part, the abrasions appear yellowish, dry and parchment-like suggesting that they were peri- or postmortem (also explaining the presence of "only focal subgaleal hemorrhage").

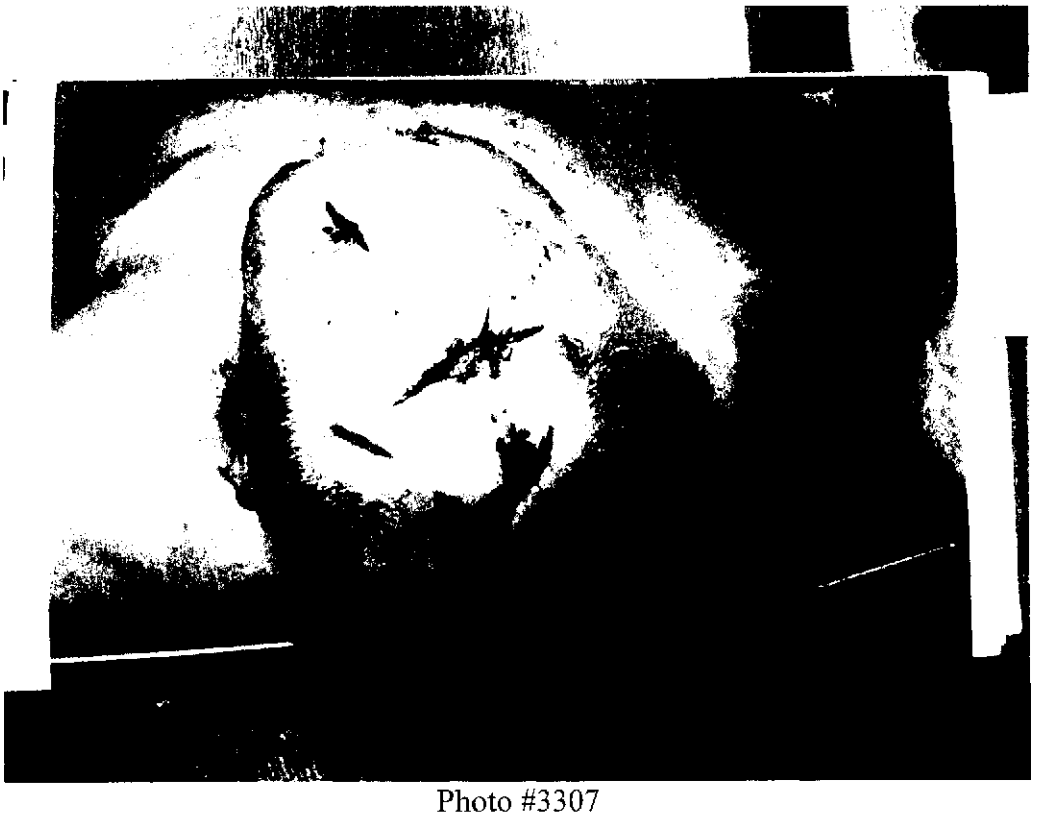


Photo #3307

c. This may explain why there were no skull fractures. When one considers the moment of inertia when the mass encumbered by the barrel of a baseball bat, held by the grip or handle end and is wielded by a healthy young adult male, a fracture of the skull, or at a minimum, significant bruising, should be expected. That has been reviewed by Gläser et al at: *Gläser, Nadine, et al. "Biomechanical examination of blunt trauma due to baseball bat blows to the head." Journal of Forensic Biomechanics 2 (2011).* The lack of skull fracture and bruising of the skull, with only "focal subgaleal hemorrhage," argues against these wounds having been caused by a baseball bat.

D. The likely cause of death

1. In Dr. Choi's report, the "red mark over the middle of the front" [of the neck] demands explanation. Dr. Choi ignored the "red mark" other than to mention it in passing. From the standpoint of a competent pathologist, this is unacceptable.

a. External evidence of pressure applied to the front of the neck may only be visible during the first hour or two; it may even be externally invisible right from the onset. This has been my experience, and it is also emphasized in the scientific literature. Here is an example from the scientific literature:

==========

Asphyxiation, Suffocation, and Neck Pressure Deaths (p. 355). CRC Press. Kindle Edition.

---

38 Survived Neck Compression

Stefan Pollak and Annette Thierauf-Emberger

"Local injuries on the neck range from vague reddening via different forms of abrasion to intra- and subcutaneous haematomas. Redness of the skin is mostly patch- or streaklike (Figure 38.1). It is often associated with superficial epidermal defects and intracutaneous bleeding. Mere reddening of the skin remains visible for about 2 days after the incident at the most [20]. Consequently, victims of assaults to the neck should be examined as soon as possible. The same applies to suspects, as strangling perpetrators may be injured themselves when they meet resistance. Scratches from fingernails are particularly..."

==========

b. Dr. Choi did not even bother to photograph the mark. In fact, the only photo taken of the front of the neck (#3306) does not even depict the front of the neck because the beard has not been shaven away, as is the accepted standard of practice, and calls into question the reliability of her conclusions.

c. Alternate light source often enhances these vague marks. It helps to recognize any possible pattern within the mark. Dr. Choi never utilized that.

2. The petechial hemorrhages in the conjunctivae and lid need explaining. They were mentioned in the report, but given no further explanation or attribution. Dr. Choi, when asked about them during testimony, gave the bizarre explanation that they were "a kind of bruise."

a. Scientifically speaking, petechial hemorrhages in the conjunctivae and lids are no longer considered as arising from hypoxia and therefore are not a sign of asphyxial hypoxia. Rather, the prevailing theory as to why they arise in the conjunctivae, lids and occasionally in the face, is that arterial blood is still reaching the face, but venous blood is variably blocked, causing increased

intravenous pressure, resulting in the pinpoint hemorrhages. Precisely this happens when pressure is applied around the front of the neck. But it may also happen in congestive heart failure or other analogous situations. The following is a quote from the defining article that is generally accepted:

> ***"We suggest that a clear, physiologically based understanding of the pathogenesis of petechiae of the head is critical for their appropriate interpretation. We present a review of the literature and the basis of our conclusion that conjunctival and facial petechiae are the product of purely mechanical vascular phenomena, unrelated to asphyxia or hypoxia."***
>
> Ely, S. F., & Hirsch, C. S. (2000). Asphyxial deaths and petechiae: a review. *Journal of Forensic Sciences*, *45*(6), 1274-1277.

3. When considering that brain injury and loss of blood are not compelling causes of death in this case (as set forth above) and one is then confronted with the mark on the front of the neck and the petechial hemorrhages, it is possible that the cause of death may be the result of pressure applied around the front of the neck, probably with associated smothering around the mouth and nose. The latter explains the injury to the tongue, to the inner surface of the lip pressed against the teeth and the injuries about the nose and elsewhere about the face. At the very least, this cause of death should have been examined seriously and ruled out.

4. The next step then by Dr. Choi should have been a state-of-the-art, layer-wise, dissection of the anterior neck in a bloodless field. To attain the latter, one removes the chest and abdominal organs and the brain before dissecting the neck. In my practice I went even further – I had the technician aim a slow stream of water on my dissection to wash away any stray blood evolving from small vessels during the layer-wise dissection. I doubt that the correct protocol was followed by Dr. Choi – otherwise she would have described the procedure and findings or lack thereof – negative findings in this setting are just as important as positive findings. What one is looking for are tiny hemorrhages in the dermis or strap muscles, including the back surfaces of the sternocleidomastoid muscles, and around the laryngeal structures in situ. In my casework I went even further – I would open the carotid arteries longitudinally and look for tiny endothelial tears with very focal hemorrhages in the surrounding adventitial connective tissue. Since Dr. Choi did not even photograph or carefully examine the mark and simply dismissed it, I am quite certain that these procedures were not followed. Here are some examples from the scientific literature:

> **The layered neck dissection**
>
> The neck dissection consists of several stages of careful tissue dissection performed to either document injury or the absence of injury. After careful inspection, documentation, and photographing of the neck and any injuries, the skin and subcutaneous tissues are reflected off the underlying skeletal muscles along a fascial plane (**Image 8.27**). Following exposure of the anterior cervical strap muscles, the muscles are then dissected off of each other in a layer-by-layer, stepwise fashion along fascial planes until the thyroid cartilage and trachea are exposed
>
> Dolinak, David, Evan Matshes, and Emma O. Lew. *Forensic pathology: principles and practice*. Elsevier, 2005.

==========

> ***"Dissection of the soft tissues, of the musculature and of the organs of the neck in a bloodless field is essential... Internally, the bruises...may be visible to a greater or lesser extent in the tissues of the neck. Often they are quite superficial and are confined to the dermis... When examination of the deep neck structures begins, careful removal of the overlying tissues layer by layer is required, seeking genuine haemorrhage as each set of muscles is exposed."***
>
> Saukko, Pekka; Knight, Bernard. Knight's Forensic Pathology (p. 645. 376-377). CRC Press.

5. The absence of petechial hemorrhages in the larynx and trachea is of no importance.

6. One more consideration needs addressing – are the other findings at autopsy compatible with a strangulation-smothering cause of death? The lungs may be of normal weight or congested depending on the timeframe and which prevailed – strangulation or smothering. They may also be of normal weight or light weight if they became overinflated in a desperate need to exhale while being smothered. The lungs were described as congested, but of normal weight. Froth exuded from the cut surfaces. This is caused by the mixing of air with congestion, consistent with smothering. The brain was very congested and that is entirely consistent with strangulation and/or smothering. And, as stated above, the kidneys were "slightly congested with unremarkable cortices, medullae," also consistent with strangulation or smothering.

E. Timeframe of the lacerations & focal subarachnoid hemorrhage.

1. When tissues, such as the scalp and the meninges (the thin linings surrounding the brain), are traumatically injured, in a normal, healthy person, a reaction can begin to be seen under the microscope on careful examination already after 20 to 30 minutes. What one sees at the edge of the injury, is a response by so-called white blood cells called polymorphonuclear granulocytes (also called neutrophils). They are beginning to migrate out of tiny vessels nearest to the edge of the injury. They will migrate into the area of injury to begin the so-called "inflammatory reaction," the first step in the cleaning up and repairing. The pathologist has learned to recognize these cells by their characteristic morphology and staining characteristics under the microscope. This phenomenon becomes quite recognizable after about an hour. Here are two authoritative scientific references:

"4. Open skin wounds

4.1. Blood cell reaction

A stabbing, cut or blow to the skin can lead to tissue destruction. tearing or rupture of blood vessels. and results in bleeding. Red blood cells that leave the blood vessels become partly or totally spherical and are located in an acidic environment in the perivascular tissue. The very early vital blood cell reaction will be the granulocyte emigration which will be seen in single cases within 10 min, in most cases, within 1 hr."

Oehmichen, M. "Vitality and time course of wounds." *Forensic science international* 144.2-3 (2004): 221-231.

Table 1 Appearance of histologically detectable parameters in human skin wounds dependent on the post infliction interval (n = 221)

Parameter	Earliest appearance	Regular appearance
Neutrophil granulocytes	20–30 min	> 15 hrs
Macrophages	3 hrs	> 3 d
Macrophages > granulocytes	20 hrs	> 11 d
Lipophages	3 d	(> 5 d)
Erythrophages	3 d	–
Siderophages/hemosiderin	3 d	(> 7 d)
Hematoidin	(8 d)	–
Lymphocytes	(8 d)	(> 19 d)
Fibroblastic cells	~ 1 d	> 5 d
Migrating keratinocytes	2 d	> 6 d
Complete reepithelialization (surgical wounds)	5 d	> 20 d

2. Dr. Choi states, regarding her microscopic examination of the lacerations, "There is no acute inflammation." That would imply that Mr. Van Treese did not survive more than 20 to 30 minutes after infliction of the lacerations. Regarding the focal subarachnoid hemorrhage – Dr. Choi does not address the issue at all.

Closing Comment:

This review has established an appalling lack of due diligence, an egregious lapse in duty to provide even the most basic professional services by Dr. Choi, which has made her findings in this homicide investigation unreliable to a reasonable degree of scientific reliability. It is still possible that further testing can be accomplished if tissue has been preserved and maintained, as federal professional standards require. If such testing is possible, and more information about the autopsy, especially including more photos, are uncovered, perhaps we can come closer to understanding what actually happened to Mr. Van Treese on January 7, 1997. Until then, we are left with more questions than answers on these critical issues. It is hoped that this Certification will help to seek justice.

Peter Speth, MD
March 19, 2023

Forensic consultations
501 Princeton Blvd
Wenonah, New Jersey, 08090

Mobile phone: 856 693-8878
Email: Spethmd@comcast.net

APPENDIX E

State of Oklahoma's Response in Support of Petitioner's Successive Application for Post-Conviction Relief, *Glossip v. State*, PCD-2023-267 (Apr. 6, 2023)

ORIGINAL

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 6 2023

JOHN D. HADDEN
CLERK

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,

GENTNER F. DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA

Gentner F. Drummond, OBA # 16645
313 N.E. 21st St.
Oklahoma City, OK 73105
Tel: (405) 521-3921

CERTIFICATE OF SERVICE

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

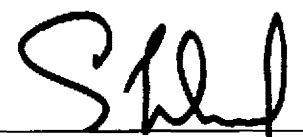
Warren Gotcher
323 E. Carl Albert Avenue
McAlester, Oklahoma 74501

Donald R. Knight
7852 S. Elati Street, Suite 201
Littleton, Colorado 80120

Amy P. Knight
3849 E. Broadway Blvd. #288
Tucson, Arizona 85716

Joseph J. Perkovich
P.O. Box 4544
New York, New York 10163

John R. Mills
1721 Broadway, Suite 201
Oakland, California 94612



Gentner F. Drummond

APPENDIX F

Opinion Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing, Motion for Discovery and Emergency Request for a Stay of Execution, *Glossip v. State*, No. PCD-2015-820 (Sept. 28, 2015)

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,

123 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 argued 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

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

Glossip had opportunity to raise this issue on direct appeal after his first trial. 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 justice 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 reversed based on insufficient evidence).

In his final proposition, Glossip claims that counsel was ineffective for failing 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 raised 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 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.

---

[4] Glossip did raise a similar issue in a motion for rehearing after this Court decided his first appeal 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.

ATTORNEYS FOR PETITIONER:

MARK HENRICKSEN
HENRICKSEN & HENRICKSEN
LAWYERS, INC.
600 NORTH WALKER AVE.
SUITE 201
OKLAHOMA CITY, OK 73102

KATHLEEN LORD
LORD LAW FIRM
1544 RACE STREET
DENVER, CO 80206

DONALD KNIGHT
DONALD R. KNIGHT
LAW FIRM
7852 S. ELATI ST.
SUITE 201
LITTLETON, CO 80120

MARK OLIVE
OFFICE OF MARK E. OLIVE, P.A.
320 W. JEFFERSON ST.
TALLAHASSEE, FL 32301

ATTORNEYS FOR RESPONDENT:

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. MILLER
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105

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. I 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.

APPENDIX G

Opinion, *Glossip v. State*, D-2005-310 (Apr. 13, 2007)

2007 OK CR 12
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Appellant,	)	FOR PUBLICATION
	)	
v.	)	No. D 2005-310
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LEWIS, JUDGE

¶1 Appellant, Richard Eugene Glossip, was charged with the First Degree (malice) Murder in violation of 21 O.S.Supp.1996, § 701.7(A), on January 14, 1997, in Oklahoma County District Court Case No. CF-97-244. The instant appeal arises from a trial occurring in May and June 2004, before the Honorable Twyla Mason Gray, District Judge.[1] The State filed a Bill of Particulars and alleged, during sentencing, the existence of two aggravating circumstances: (1) that the person 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 (2) the existence of the

[1] In his first trial, Glossip was convicted and the jury found the existence of two aggravating circumstances. The jury found (1) that the killing was especially heinous, atrocious, and cruel; (2) that the appellant would pose a "continuing threat" to society and recommended a penalty of death. On direct appeal, the convictions and sentences were reversed. *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. *See* 21 O.S.2001, § 701.12(3) and (7).

¶2 The jury found Glossip guilty of first degree (malice) murder, found the existence of the murder for remuneration aggravating circumstance, and set punishment at death. Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

I. FACTS

¶3 In January of 1997, Richard Glossip worked as the manager of the Best Budget Inn in Oklahoma City, and he lived on the premises with his girlfriend D-Anna Wood. Justin Sneed, who admitted killing Barry Van Treese, was hired by Glossip to do maintenance work at the motel.

¶4 Barry Van Treese, the murder victim, owned this Best Budget Inn and one in Tulsa. He periodically drove from his home in Lawton, Oklahoma to both motels. The Van Treese family had a series of tragedies during the last six months of 1996, so Mr. Van Treese was only able to make overnight visits to the motel four times in that time span. His usual habit was to visit the motel every two weeks to pickup the receipts, inspect the motel, and make payroll.

¶5 The State presented testimony about the physical condition, financial condition, and the day to day operations of the motel. At the beginning of 1997, Mr. Van Treese decided to do an audit of both motels after it was determined that there were shortfalls. Before Mr. Van Treese left for Oklahoma City, Donna Van Treese, Barry's wife, calculated Glossip's net pay at $429.33

for the period ending January 5th, 1997, because Glossip had $211.15 in draws.[2] On January 6, 1997, she and Mr. Van Treese reviewed the books and discovered $6,101.92 in shortages for the Oklahoma City motel in 1996. Mrs. Van Treese testified her husband intended to ask Glossip about the shortages.

¶6 Sometime in December, Mr. Van Treese told Billye Hooper, the day desk manager, that he knew things needed to be taken care of, and he would take care of them the first of January. Hooper believed Van Treese was referring to Glossip's management of the motel.

¶7 Justin Sneed, by all accounts, had placed himself in a position where he was totally dependent on Glossip. Sneed started living at the motel when he came to Oklahoma City with a roofing crew from Texas. Sneed quit the roofing crew and became a maintenance worker at the motel. He made no money for his services, but Glossip provided him with a room and food. Sneed admitted killing Mr. Van Treese because Glossip offered him money to do it. The events leading up to the killing began with Van Treese's arrival at the motel on January 6.

¶8 Van Treese arrived at the Best Budget Inn in Oklahoma City on January 6, 1997, around 5:30 p.m. Around 8:00 or 9:00 p.m., Van Treese left Oklahoma City to go to the Tulsa Best Budget Inn to make payroll and collect deposits and receipts. Hooper testified Van Treese was not upset with Glossip

[2] Glossip's salary was $1,500.00 per month, which was divided twice monthly. The net amount was after other usual deductions.

and did not say anything to her about shortages before he left for Tulsa. Van Treese did tell Hooper he planned to stay for a week to help remodel rooms.

¶9 William Bender, the manager of the Tulsa motel, testified that Mr. Van Treese was very upset. He had never seen him that angry. Van Treese inspected the daily report for the motel, and he checked to see if the daily report matched rooms actually occupied. He told Bender that there were missing registration cards, missing receipts and unregistered occupants at the Oklahoma City motel.

¶10 He told Bender that he told Glossip that he had until Van Treese arrived back at Oklahoma City to come up with the missing receipts. Then he was going to give Glossip another week to come up with the missing registration cards and to get the receipts in order. He also told Bender that if Glossip were fired Bender would manage the Oklahoma City motel. Van Treese left the Tulsa motel and arrived back at the Oklahoma City motel at about 2:00 a.m. on January 7.

¶11 Sneed, also known as Justin Taylor, testified that in exchange for maintenance work, Glossip let him stay in one of the motel rooms. Sneed said he only met Van Treese a few times, and he saw him at the motel with Glossip on the evening of January 6, 1997. Sneed testified that around 3:00 a.m. on January 7, 1997, Glossip came to his room. Glossip was nervous and jittery. Glossip wanted Sneed to kill Van Treese and he promised him $10,000.00 for killing Van Treese. Sneed testified that Glossip had asked him to kill Van

Treese several times in the past and the amount of money kept getting bigger and bigger.

¶12 Glossip suggested that Sneed take a baseball bat, go into Van Treese's room (room number 102), and beat him to death while he slept. Glossip said that if Van Treese inspected the rooms in the morning, as he intended to do, he would find that none of the work had been done. Glossip told Sneed that both of them would be out of a job.

¶13 Sneed went over to the Sinclair Station next door and bought a soda and possibly a snack. He then went back to his room and retrieved the baseball bat. Sneed said he went to Van Treese's room and entered using a master key that Glossip had given him. Van Treese woke up and Sneed hit him with the bat. Van Treese pushed Sneed, and Sneed fell into the chair and the bat hit and broke the window. When Van Treese tried to get away, Sneed threw him to the floor and hit him ten or fifteen times. Sneed also said that he pulled out a knife and tried to stab Van Treese a couple of times, but the knife would not penetrate Van Treese. Sneed received a black eye in the fight with Van Treese. He later told others that he fell in the shower and hit his eye.

¶14 A long time resident of the motel, John Beavers, was walking outside when heard strange noises coming from room 102. He then heard the glass breaking. Beavers believed there was a fight going on in room 102.

¶15 After Sneed killed Van Treese he went to the office and told Glossip he had killed Van Treese. He also told him about the broken window. Sneed

said that he and Glossip went to room 102 to make sure Van Treese was dead. Glossip took a $100 bill from Van Treese's wallet.

¶16 Glossip told Sneed to drive Van Treese's car to a nearby parking lot, and the money he was looking for would be in an envelope under the seat. Glossip also told him to pick up the glass that had fallen on the sidewalk.

¶17 Sneed retrieved the car keys from Van Treese's pants and drove Van Treese's car to the credit union parking lot. He found an envelope with about $4000.00 cash under the seat. He came back and swept up the glass. He put the broken glass in room 102, just inside the door. He said that Glossip took the envelope from him and divided the money with him. He also testified that Glossip helped him put a shower curtain over the window, and he helped him cover Van Treese's body. According to Sneed, Glossip told him, that if anyone asked, two drunks got into a fight, broke the glass, and we ran them off. Sneed testified that Glossip told him to go buy a piece of Plexiglas for the window, and some Muriatic acid, a hacksaw, and some trash bags in order to dispose of Van Treese's body.

¶18 D-Anna Wood testified that she and Glossip were awakened at around 4:00 a.m. by Sneed. She testified that Glossip got out of bed and went to the front door. When he returned, Glossip told her that it was Sneed reporting that two drunks got into a fight and broke a window. She testified that Glossip then returned to bed.

¶19 Glossip told police during a second interview, that Sneed told him that he killed Van Treese. He denied ever going into room 102, except for assisting with repairing the window. He said he never saw Van Treese's body in the room.

¶20 The next morning, Billye Hooper arrived at work and was surprised to see that Glossip was awake. She also noticed that Mr. Van Treese's car was gone. She asked Glossip about the car, and Glossip told her that Mr. Van Treese had left to get supplies for remodeling rooms. A housekeeper testified that Glossip told her to clean the upstairs rooms, and he and Sneed would take care of the downstairs, where room 102 was located.

¶21 Later that afternoon, employees found Mr. Van Treese's car in a credit union parking lot near the motel, and a search for Van Treese began. Glossip and D-Anna Wood were at Wal-Mart shopping. They returned to the motel, because Hooper paged them and told them to come back. The police were contacted sometime after Mr. Van Treese's car was found.

¶22 Cliff Everhart, who worked security for Mr. Van Treese in exchange for a 1% ownership, was already at the motel. He told Sneed to check all of the rooms. Sneed indicated that he did so. Everhart, Glossip and Wood drove around looking for Van Treese in nearby dumpsters and fields.

¶23 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. Sneed had already left the motel that afternoon, and he was not apprehended until a week later. Glossip was taken into custody that night, questioned and released. The next day, Glossip began selling his possessions. He told people he was leaving town. However, before he could leave town, he was taken into custody again for further questioning.

¶24 Subsequent searches revealed that Sneed possessed approximately $1,700.00 in cash, and that Glossip possessed approximately $1,200.00. Glossip claimed this money came from his paycheck and proceeds from the sale of vending machines and his furniture.

II: VOIR DIRE ISSUES

¶25 Glossip claims, in proposition nine, that the trial court committed errors during voir dire. Glossip is not claiming that he was forced to keep an unacceptable juror, but that the trial court abused its discretion in removing some jurors for cause. The first claim regards the method the trial court used in determining whether jurors had the ability to impose the death penalty.

¶26 Glossip attacks the trial court's use of the question whether jurors could give "heartfelt consideration to all three sentencing options." Glossip argues that this question is at odds with the uniform question "can you consider all three legal punishment options – death, imprisonment for life without parole or imprisonment for life – and impose the one warranted by the law and evidence?" *See* OUJI-CR 2d 1-5 (1996). Regardless of the language

used, Glossip must show that the alleged improper language affected his trial in a negative way.

¶27 Glossip claims his trial was unfair because this incorrect language caused two jurors, who had reservations about the death penalty, to be erroneously excused because they expressed an inability to consider all three punishment options equally. One of these jurors stated, "I would not be able to give the death penalty equal consideration as a sentencing option."

¶28 The trial court asked this juror, "So your reservations about the death penalty are such that regardless of the law or the facts or the evidence, you would not consider imposing a penalty of death." The juror, unequivocally answered, "That's correct." She was then removed for cause without objection.

¶29 The next juror Glossip mentions stated that she wanted to do her "civic duty," but was having "a problem with the death penalty." The trial court also asked this juror, "do you believe that your concerns about the death penalty are such that regardless of the law and the evidence, you would not be able to give equal consideration to all three sentencing options." This juror, stated, "I do." This juror was removed for cause without objection from trial counsel.

¶30 Glossip complains about the use of the language "equal consideration" used by the trial court, parroted by the first juror and repeated by the trial court to the second juror. Glossip claims that this Court has never

required "equal consideration" be given to all three sentencing options. *See Frederick v. State*, 2001 OK CR 34, ¶¶ 52-53, 37 P.3d 908, 926-27.

¶31 However, despite the holding in *Frederick*, this Court has held, in *Jones v. State*, 2006 OK CR 17, ¶ 14, 134 P.3d 150, 155, that "A major purpose of *voir dire* in a capital case is to reveal whether jurors will consider all three punishment options equally. A juror who cannot should be excused for cause." *See also Hanson v. State*, 2003 OK CR 12, 72 P.3d 40, 48 (cited in *Jones, supra*).

¶32 The proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment is whether their views would prevent, or substantially impair, the performance of their duties as jurors in accordance with the instructions and their oath. *See Ledbetter v. State*, 1997 OK CR 5, ¶ 4, 933 P.2d 880, 885; *also see Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985).

¶33 This standard does not require that a prospective juror's incompetence to serve be established on the record with "unmistakable clarity." *Wainwright*, 469 U.S. at 424-25, 105 S.Ct. at 852. We must give great deference to trial judges in matters regarding jury selection. *See Patton v. State*, 1998 OK CR 66, ¶ 16, 973 P.2d 270, 281-82; *Ledbetter*, 933 P.2d at 885.

¶34 In the present case, because there was no objection to the removal of these two jurors, any error must rise to the level of plain error. Here there is no such error. The first juror was unequivocal in her statement that she could

not impose the death penalty. The second juror expressed concerns about her ability to impose the death penalty at a very early stage in the voir dire process stating that she couldn't impose death. This juror asked for more time to consider whether she would consider the death penalty if the law and facts warranted such a penalty. She vacillated back and forth and finally stated that she could not consider the death penalty equally. We find that based on the entire voir dire, the trial court did not abuse its discretion in removing these two jurors.

¶35 In this proposition, Glossip also claims that a person serving a deferred sentence was improperly removed for cause. This juror raised her hand and later approached the bench when the trial court inquired whether anyone had "ever been charged with or accused of a crime." She was not completely honest with the trial court, until the trial court indicated that it knew about this juror's history of two different deferred sentences, one of which she was currently serving. The trial court expressed concern about the juror's ability to be fair and impartial in a criminal case when she, herself, had been prosecuted by the State. This juror agreed that it bothered her, and asked "what can I do about it?"

¶36 This juror agreed that she would be better suited for a non-criminal case. Before excusing her for cause, the trial court allowed defense counsel to object. The trial court stated that it had "a real problem with people who are on a deferred sentence sitting as jurors. They've got a lot at stake . . . ."

Although the trial court made a blanket statement about all persons currently serving a deferred sentence, the trial court believed this juror would be biased because she was currently serving a deferred sentence. The trial court, did not abuse its discretion in finding that this juror could not be fair and impartial and removing her for cause.

III: FIRST STAGE ISSUES

¶37 In proposition one, Glossip claims that the State presented insufficient evidence to convict him of first degree murder. Glossip claims that Justin Sneed's testimony was not sufficiently corroborated. Glossip also claims that the State's evidence regarding motive was flawed.

¶38 When the sufficiency of evidence is challenged on appeal, this Court will determine, whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *See Easlick v. State*, 2004 OK CR 21, ¶ 5, 90 P.3d 556, 559. This test is appropriate here where there was both direct evidence and circumstantial evidence supporting the conviction. *See Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203.

¶39 For Glossip to be convicted as a principal in Van Treese's murder, the State had to establish that he either committed each element of first degree malice murder or that he aided and abetted another in its commission. 21 O.S.2001, § 172. Aiding and abetting requires the State to show "the accused

procured the crime to be done, or aided, abetted, advised or encouraged the commission of the crime." *Spears v. State*, 1995 OK CR 36, ¶ 16, 900 P.2d 431, 438. Direct evidence supporting Glossip's commission of the crime came from admitted accomplice Justin Sneed.

¶40 There is no question that Justin Sneed was an accomplice to the murder of Barry Van Treese, and for Glosssip's conviction to stand Sneed's testimony must be corroborated by some other evidence tending to connect Glossip with the commission of the crime. *Spears*, 1995 OK CR 36, ¶ 27, 900 P.2d at 440; 22 O.S.2001, § 742.[3] Even entirely circumstantial evidence may be sufficient to corroborate an accomplice's testimony. *Pierce v. State*, 1982 OK CR 149, ¶ 6, 651 P.2d 707, 709; *see also Wackerly v. State*, 2000 OK CR 15, ¶ 23, 12 P.3d 1, 11.

¶41 To be adequate, the corroborative evidence must tend in some degree to connect the defendant to the commission of the offense charged without the aid of the accomplice's testimony. Even slight evidence is sufficient for corroboration, but it must do more than raise a suspicion of guilt. *Cullison v. State*, 1988 OK CR 279, ¶ 9, 765 P.2d 1229, 1231.

¶42 If the accomplice's testimony is corroborated as to one material fact by independent evidence tending to connect the accused to the commission of

---

[3] "A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof." 22 O.S.2001, § 742.

the crime, the jury may infer that the accomplice speaks the truth as to all. *Fleming v. State*, 1988 OK CR 163, ¶ 8, 760 P.2d 208, 210; *Pierce*, 1982 OK CR 149, ¶ 6, 651 P.2d at 709. However, corroborative evidence is not sufficient if it requires any of the accomplice's testimony to form the link between the defendant and the crime, or if it tends to connect the defendant with the perpetrators and not the crime. *Frye v. State*, 1980 OK CR 5, ¶ 31, 606 P.2d 599, 606-607.[4] The jury was properly instructed, according to the law in effect at the time of trial, on accomplice testimony and corroboration of the testimony.[5]

¶43 In this case, the State presented a compelling case which showed that Justin Sneed placed himself in a position where he was totally dependent on Glossip. Sneed testified that it was Glossip's idea that he kill Van Treese. Sneed testified that Glossip promised him large sums of cash if he would kill Barry Van Treese. Sneed testified that, on the evening before the murder, Glossip offered him $10,000 dollars if he would kill Van Treese when he returned from Tulsa. After the murder, Glossip told Sneed that the money he was looking for was under the seat of Van Treese's car. Sneed took an envelope containing about $4,000.00 from Van Treese's car. Glossip told

---

[4] *See also, Jones v. State*, 2006 OK CR 5, ¶ 33, 128 P.3d 521, 537-38; *Pink v. State*, 2004 OK CR 37, ¶ 16, 104 P.3d 584, 590-91.

[5] We note that the jury was given uniform jury instruction OUJI-CR (2d) 9-32 (2000 Supp.). After this trial occurred, this Court, in *Pink*, (*supra* footnote 4) amended OUJI-CR (2d) 9-32. *Pink*, 2004 OK CR 37, ¶ 23, 104 P.3d at 593. Glossip does not raise any issue regarding this instruction. We find that the giving of the pre-*Pink* instruction did not affect the outcome of this trial.

Sneed that he would split the money with him, and Sneed complied. Later, the police recovered about $1,200.00 from Glossip and about $1,700.00 from Sneed. The most compelling corroborative evidence, in a light most favorable to the State, is the discovery of the money in Glossip's possession. There was no evidence that Sneed had independent knowledge of the money under the seat of the car. Glossip's actions after the murder also shed light on his guilt.

¶44 The State points out four other aspects of Glossip's involvement, other than the money, which point to his guilt: motive, concealment of the crime, intended flight, and, as alluded to earlier, his control over Sneed.

¶45 Glossip claims that the State's evidence of motive was unsubstantiated and disputed. However, the State presented sufficient evidence to show that Glossip feared that he was going to be fired as manager, because the motel accounts had shortages during the end of 1996. Cliff Everhart told Mr. Van Treese that he thought that Glossip was "pocketing a couple hundred extra" every week during the quarter of 1996. Billye Hooper shared her concerns about the motel with Van Treese. Van Treese told her that he knew he had to take care of things. It was understood that Van Treese was referring to Glossip's management.

¶46 The condition of the motel, at the time of Van Treese's death, was deplorable. Only half of the rooms were habitable. The entire motel was absolutely filthy. Glossip was the person responsible for the day to day

operations of the motel. He knew he would be blamed for the motel's condition.

¶47 The State concedes that motive alone is not sufficient to corroborate an accomplice's testimony. *See Reed v. State*, 744 S.W.2d 112, 127 (Tex. Cr. App. 1988).[6] However, evidence of motive may be considered with other evidence to connect the accused with the crime. *Id.* Glossip's motive, along with evidence that he actively concealed Van Treese's body from discovery, as well as his plans to "move on," connect him with the commission of this crime. Evidence that a defendant attempted to conceal a crime and evidence of attempted flight supports an inference of consciousness of guilt, either of which can corroborate an accomplice's testimony. *See People v. Avila*, 133 P.3d 1076, 1127 (Cal. 2006); *also see Smith v. State*, 263 S.E.2d 910, 911-12 (Ga. 1980) (evidence that a party attempted to conceal his participation in a crime is sufficient to corroborate the testimony of an accomplice).

¶48 The State presented an enormous amount of evidence that Glossip concealed Van Treese's body from investigators all day long and he lied about the broken window. He admitted knowing that Sneed killed Van Treese in room 102. He knew about the broken glass. However, he never told anyone that he thought Sneed was involved in the murder, until after he was taken into custody that night, after Van Treese's body was found. Glossip

---

[6] *Also see Leal v. State*, 782 S.W.2d 844, 852 (Tex. Cr. App. 1989); *Ex Parte Woodall*, 730 So.2d 652, 660, fn. 2 (Ala. 1998); *Goodin v. Commonwealth*, 75 S.W.2d 567, 570 (Ky. App. 1934).

intentionally lied by telling people that Van Treese had left early that morning to get supplies. In fact, Van Treese was killed hours before Glossip claimed to have seen Van Treese that morning. Glossip's stories about when he last saw Van Treese were inconsistent. He first said that he last saw him at 7:00 a.m.; later he said he saw him at 4:30 a.m. Finally, he said he last saw him at 8:00 p.m. the night before Van Treese's death, and he denied making other statements regarding the time he last saw Van Treese.

¶49 Glossip also intentionally steered everyone away from room 102. He told Billye Hooper that Van Treese had left to get materials, and that Van Treese stayed in room 108 the night before. He told Jackie Williams, a housekeeper at the motel, not to clean any downstairs rooms (which included room 102). He said that he and Sneed would clean the downstairs rooms. He told a number of people that two drunken cowboys broke the window, and he tried to implicate a person who was observed at the nearby Sinclair station as one of the cowboys.

¶50 He told Everhart that he would search the rooms for Van Treese, and then he told Sneed to search the rooms for Van Treese. No other person searched the rooms until seventeen hours after the murder, when Van Treese's body was discovered.

¶51 The next day, Glossip began selling all of his belongings, before he admitted that he actively concealed Van Treese's body. He told Everhart that "he was going to be moving on." He failed to show up for an appointment with

investigators, so the police had to take him into custody for a second interview where he admitted that he actively concealed Van Treese's body. He said he lied about Sneed telling him about killing Van Treese, not to protect Sneed, but because he felt like he "was involved in it."

¶52 Glossip argues that all of this evidence merely proves, at best, that he was an accessory after the fact. Despite this claim, a defendant's actions after a crime can prove him guilty of the offense. Evidence showing a consciousness of guilt has been used many times.[7]

¶53 Here, all of the evidence taken together amounts to sufficient evidence to, first, corroborate Sneed's story about Glossip's involvement in the murder, and, second, the evidence sufficiently ties Glossip to the commission of the offense, so that the conviction is supported.

¶54 In proposition two, Glossip claims that the State presented irrelevant and highly prejudicial evidence during the first stage of trial. He claims that the State attempted to elicit sympathy for the victim and for Sneed. However, trial counsel failed to object to any of the testimony Glossip now claims was improper. Therefore, he has waived all but a review for plain error. *Coddington v. State*, 2006 OK CR 34, ¶ 52, 142 P.3d 437, 451-52. Plain error is that error which goes to the foundation of the case or takes away a right

---

[7] *See Dodd v. State*, 2004 OK CR 31, ¶¶ 33-34, 100 P.3d 1017, 1031 and cases cited therein (post crime suicide attempt, also mentioning attempting to bribe or intimidate a witness and flight or concealing oneself from authorities); *Anderson v. State*, 1999 OK CR 44, ¶ 11, 992 P.2d 409, 415 (attempting to influence a witness's testimony, mentioning altering, concealing or removing evidence from a crime scene citing *Camron v. State*, 1992 OK CR 17, ¶ 22, 829 P.2d 47, 53).

which is essential to a defendant's case. *Mitchell v. State*, 2005 OK CR 15, ¶ 47, 120 P.3d 1196, 1209.

¶55 Glossip first argues that the testimony of Donna Van Treese, the victim's spouse was irrelevant to the first stage of trial. He ties this testimony with the introduction of the "in-life" photograph, which was met with an objection.

¶56 Donna Van Treese, during first stage, described the victim as a fifty-four year old man, who had quit smoking six years prior, had gained weight, was balding, and had gray hair. He grew a full white beard and when he shaved it off; his daughter cried and begged him to grow it back. The "in-life" photograph shows Mr. Van Treese without the beard.

¶57 Mrs. Van Treese was allowed to testify that the months prior to his death, a series of tragedies had occurred which included the death of her mother. After this death the family took a long trip in a motor home to several States. During this trip Mr. Van Treese felt an urgent need to get home. When they arrived home, they learned that Mr. Van Treese's mother was scheduled for heart by-pass surgery that very morning. She did not survive the surgery.

¶58 The purpose of this testimony was to show why Mr. Van Treese was not involved in the day to day operations of the motel in the months preceding his death. It was meant to show how the motel could slip into physical and financial disrepair without his knowledge.

¶59 During the first stage, several witnesses described Mr. Van Treese as a loving, kind, and generous person who on many occasions allowed people to stay at the motel when they were down on their luck. This testimony was coupled with evidence that Mr. Van Treese had a temper and would explode with anger towards employees. Although this testimony may have been irrelevant to the first stage, it did not rise to the level of plain error. This evidence did not deprive Glossip of a fair trial.

¶60 Evidence that Mr. Van Treese was a ham radio operator was relevant to the identification of his vehicle, as the vehicle was found at the credit union parking lot with an amateur radio operators personalized license plate. The evidence about his diabetes was relevant to show why Mrs. Van Treese called people to initiate a search as soon as she heard about him being missing, and to explain why the discovery of his car was troublesome.

¶61 In this proposition, Glossip also claims that the State introduced irrelevant evidence he claims was intended to evoke sympathy for Justin Sneed. The defense theory was that Sneed killed Mr. Van Treese without any influence from Glossip. They presented this theory in opening statement by first describing Sneed as a remorseless, confessed killer, and then, throughout the opening, presented a story showing how Sneed acted alone.

¶62 The State portrayed Sneed as a person with low intellectual ability, and a child like demeanor. They presented testimony about his background, and his growing up in a single parent home, having a child early in life,

dropping out of school after the eighth grade, coming to Oklahoma City with a roofing crew, and quitting that to work at the motel in exchange for rent. This was all meant to show how he placed himself in a position to be dependent on Glossip. Although there was some lay opinion evidence regarding whether Sneed had the personality that would allow him to kill Mr. Van Treese on his own, this testimony comprised only a small portion of the State's case. This testimony did not rise to the level of plain error.

¶63 Next, in this proposition, Glossip claims that the State introduced irrelevant evidence regarding the remedial measures taken after Mr. Van Treese's death to show the condition of the motel. Glossip argues that this evidence was an indictment on the way Mr. Van Treese ran the motel, rather than relevant to show that Glossip had a reason to kill Mr. Van Treese.

¶64 The evidence included testimony that Mr. Van Treese's brother Kenneth Van Treese bought new towels and linens for the motel, replaced forty mattresses, and disposed of broken furniture. It was brought out during this testimony that Glossip never had the authority to buy new linens and towels. There was plenty of evidence that the motel was not in good repair when Mr. Van Treese died. Glossip could have believed that he would be fired because of the condition of the motel, whether he was responsible for the condition or not. The evidence was admissible and the jury could give it whatever weight they thought appropriate. There is no error here.

¶65 In proposition three, Glossip claims that the State used demonstrative aids to overly emphasize certain portions of witnesses' testimony. He claims that the posters (1) placed undue influence on selected testimony, (2) were the equivalent of continuous closing argument, and (3) violated the rule of sequestration. Glossip also claims that the trial court erred in refusing to include the posters as part of the trial record.

¶66 We will, first, address the trial court's exclusion of these demonstrative aids as part of the record. Defense counsel requested that these poster sized note sheets be preserved by the trial court for appellate review, but the trial court refused the request. Then defense counsel requested that they be allowed to photograph the exhibits for their own records, but again the trial court refused. The trial court insisted that everything that the prosecutor wrote on the pads was in the record; however, the analysis of the pages in the transcript where notations were made tells a different story. We are extremely troubled by the trial court's attitude toward defense counsel's attempt to preserve the demonstrative aides for appellate review.[8]

¶67 While it is incumbent on the moving party to make a sufficient record so that this Court can determine the content and extent of these documents, the trial court must allow counsel to make sufficient proffer so that the issues can be preserved. *See Ross v. State*, 1986 OK CR 49, ¶ 18, 717 P.2d

[8] Glossip has asked for an evidentiary hearing so that the record may be supplemented with these demonstrative exhibits, if they remain in existence; however, we find that the inclusion of the demonstrative exhibits would not affect our decision in this case.

117, 122. This Court will not assume error from a silent record.[9] However, this was not a case where evidence or testimony was not allowed to be introduced at trial.

¶68 This is a case where demonstrative aids were made by the prosecution, placed before the jury and utilized extensively during trial and closing argument. Even though these aids were utilized extensively during trial, the trial court rejected any attempt by defense counsel to preserve the "demonstrative exhibits" for future appellate review.

¶69 If a trial court is going to allow these types of demonstrative aids during trial, the trial court shall assume the responsibility of insuring that these aids are made a part of the record, as court's exhibits, when asked. The total recalcitrance of the trial court to allow a record to be made creates error in itself.

¶70 Here, the only way to determine what was on the posters, *in toto*, is to search the record and note where it appears that the prosecutor was writing on the note pad. According to the record cited, the prosecutor made notes of significant testimony on a large flip chart sized easel pad. This pad was left up

---

[9] *Welch v. State*, 1998 OK CR 54, ¶ 41, 968 P.2d 1231, 1245. *See also Hanson v. State*, 2003 OK CR 12, 72 P.3d 40, 56 (Lumpkin, concurs in results):

> If the trial court denies testimony of a witness or admission of an exhibit, it is the responsibility of the party offering the testimony or evidence to ensure a sufficient record is made to allow this Court to review the issue on appeal. This can be accomplished by requesting and conducting an *in camera* hearing to present the evidence for the record or through an offer of proof of sufficient specificity to provide this Court with what it needs in order to review the claim of error.

for the jury to view during trial over trial counsel's objection which was made after the second day of testimony.

¶71 The record is not clear whether these pads stayed up during the entire trial. Glossip asserts that they stayed on display from witness to witness from the first day of testimony to the last with no citation to the record. Glossip cannot say what was written on the poster sized pad sheets. (Trial counsel apparently informed appellate counsel that there were twelve of these poster sized note sheets plastered around the courtroom at the conclusion of the trial).

¶72 Glossip claims that the posters were "taped up to various places in the courtroom and remained in full view of the jury and all subsequent witnesses throughout the trial." Glossip's citations to the record do not support this specific factual claim.

¶73 Glossip admits that he has found no cases on point in Oklahoma, and only cites to a Kentucky case that he cites as saying,

> It is one thing to allow a party to make a chart or summary or other demonstrative aid for use while a witness is testifying. It is quite another 'to allow a particular segment of testimony to be advertised, bill-board fashion,' after that witness has completed his or her testimony.

Lanning v. Brown, 377 S.W.2d 590, 594 (Ky. 1964). The chart displayed in *Lanning* was a poster sized chart noting the list of special damages claimed by the party in a personal injury case. The Court held that the display of the

chart was harmless, because the damages were not in substantial dispute. The Kentucky court noted a dearth of precedent on this point.

¶74 In *Miller v. Mullin*, 354 F.3d 1288, 1295 (10th Cir. 2004), the Court noted a risk of using transparencies during closing argument. The court noted that "[a]n inherent risk in the use of pedagogical devices is that they may 'unfairly emphasize part of the proponent's proof or create the impression that disputed facts have been conclusively established or that inferences have been directly proved.'" *Id., citing United States v. Drougas*, 748 F.2d 8, 25 (1st Cir.1984).

¶75 In viewing the entire record, we cannot say that the posters affected the outcome of this trial. Both sides utilized the poster tactic during trial, although, the State seemed to utilize more posters than the defense. There is no argument that the posters did not contain factual information, and they were utilized to assist the jury in understanding the testimony, considering the trial court's instructions against note-taking. Any error in the utilization of these posters was harmless.

¶76 In proposition ten, Glossip claims that the statute allowing an "in-life" photograph of the homicide victim is unconstitutional on its face and the photograph was inadmissible because any relevance was substantially outweighed by the danger of harm.

¶77 Glossip's claim challenges the constitutionality of the amended 12 O.S.Supp.2003, § 2403, arguing the admission of an "in-life" photograph

without regard to relevance or the evidentiary balancing test violates due process. Glossip maintains that the blanket admissibility of such photographs unnecessarily risks exposing jurors to prejudicial information. This issue was thoroughly discussed in *Coddington v. State*, 2006 OK CR 34, ¶¶ 53-57, 142 P.3d at 452-53. In *Coddington* this Court upheld the first-stage admission of a single, pre-mortem photograph of the victim.

¶78 The legislature has seen fit to make the admission of a photograph of the victim while alive relevant in a homicide case "to show the general appearance and condition of the victim while alive." 21 O.S.Supp.2003, § 2403.

> We presume that a legislative act is constitutional; the party attacking the statute has the burden of proving that it is not. . . . We construe statutes, whenever reasonably possible, to uphold their constitutionality. . . . A statute is void only when it is so vague that men of ordinary intelligence must necessarily guess at its meaning. . . .

Hogan v. State, 2006 OK CR 19, ¶ 63, 139 P.3d 907, 930 [citations omitted] (discussing this same issue regarding admission of an "in life" photograph during second stage).

¶79 Contrary to Glossip's claim, § 2403 only allows the admission of one "appropriate" photograph. 12 O.S.Supp.2003, § 2403. We held, in *Hogan*, that photographs which violate the balancing test of § 2403 would be inadmissible. *Hogan*, 2006 OK CR 19, ¶ 64, 139 P.3d at 931; *see Coddington*, 2006 OK CR 34, ¶ 56, 142 P.3d at 152-53. Here, the State offered, in the first stage, an

innocuous portrait of Van Treese, taken during the September preceding his death. The photograph was offered "to show the general appearance and condition of the victim while alive" in accordance with the statute. Other than the fact that Barry Van Treese had a beard at the time of his death, the photograph depicted his appearance just before his death. The photograph met the guidelines of the statute, and its probative value was not substantially outweighed by the danger of unfair prejudice.

¶80 The admission of this evidence, as with all evidence, is reviewed under an abuse of discretion standard. The introduction of evidence is left to the sound discretion of the trial court; the decision will not be disturbed absent an abuse of that discretion. *Pickens v. State*, 2001 OK CR 3, ¶ 21, 19 P.3d 866, 876. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. The trial court did not abuse its discretion in admitting the photograph.

IV: PROSECUTORIAL MISCONDUCT

¶81 In proposition four, Glossip alleges several instances of what he calls prosecutorial misconduct. We first note that no trial will be reversed on the allegations of prosecutorial misconduct unless the cumulative effect was such to deprive the defendant of a fair trial. *Garrison*, 2004 OK CR 35, ¶ 128, 103 P.3d at 612. Much of the allegations here were not preserved at trial with contemporaneous objections, thus we review for plain error. We will not find

plain error unless the error is plain on the record and the error goes to the foundation of the case, or takes from a defendant a right essential to his defense. *Simpson*, 1994 OK CR 40, ¶ 23, 876 P.2d at 698.

¶82 Glossip's first series of claims attack the prosecution's argument as a misrepresentation of facts and misleading the jury. He first claims that the prosecutor committed misconduct when arguing that the absence of Glossip's fingerprints in room 102 amounted to evidence of guilt. There was no objection to these comments, thus we review for plain error only.

¶83 Here the prosecutor was merely arguing that, as manager of the motel and as a person who was responsible for repairs in every room, it was very suspicious that none of his fingerprints were found in the room. This was a fair inference from the evidence. The prosecutor was not arguing that Glossip selectively removed fingerprints after the crime, but was arguing that the absence of his fingerprints in the room, even ones that might have been left there under innocent circumstances was unusual. There is no plain error here.

¶84 Glossip next argues that the prosecution's argument that only Glossip, and not Sneed, had a motive to kill Mr. Van Treese amounted to misconduct. Again, defense counsel did not object. The State was merely arguing that Sneed had no reason to kill Mr. Van Treese other than the offer of money from Glossip. Again this is a fair inference from the evidence. There is no plain error here.

¶85 Next, Glossip argues that the prosecutor mislead the jury when arguing that the defense of "accessory after the fact" was baseless, because the State did not charge him with accessory after the fact to murder. In fact, the State did, initially charge Glossip with accessory to murder and Sneed with murder in separate Informations. The State then dismissed the accessory Information and added Glossip as a co-defendant with Sneed on the murder Information.

¶86 The State argued that it did not charge Glossip with accessory to murder, because he was guilty of the "big boy offense of Murder in the First Degree." Actually, the State did not pursue prosecution of Glossip for accessory, because they alleged he was guilty of first degree murder. The method of prosecution and the filing of charges is discretionary with the prosecution. Here the prosecutor is merely arguing that Glossip is guilty of murder, regardless of his defense that he only acted after the fact in attempting to cover up the crime. The argument, again, is properly based on the evidence adduced at trial.

¶87 The prosecutor argued that the lesser related offense instruction relating to accessory to murder was only given because defense counsel requested it. Glossip objected to this argument and the trial court admonished the prosecutor. Juries are to consider lesser related offenses, only if they have a reasonable doubt that a defendant has committed the greater offense. OUJI-CR 2d 10-27 (1996); *Graham v. State*, 2001 OK CR 18, ¶ 6, 27 P.3d 1026,

1027. The jury was properly instructed on the method of reviewing greater and lesser offenses. These instructions properly channeled the jury's decision making process and cured any error.

¶88 Glossip next argues that the prosecution attempted to elicit sympathy for the victim and his family during first stage of trial through evidence and argument. This argument relates to proposition two where Glossip argues that victim impact evidence was introduced through the testimony of first stage witnesses. Our resolution of proposition two also resolves this issue.

¶89 Next, Glossip argues that the prosecution introduced false or misleading testimony. This argument touches on the fact that the Tulsa motel was in just as much financial trouble as the Oklahoma City motel. Glossip argues that the prosecutor made an offer of proof that Van Treese was going to fire the Tulsa manager as well as Glossip, because of the shortages in Tulsa. Mrs. Van Treese testified that they were going to take care of the Oklahoma City motel first. However, the Tulsa manager, Bender, testified that Mr. Van Treese wanted to move him to the Oklahoma City motel. Glossip claims that both of these scenarios cannot be true, so the prosecution presented false evidence.

¶90 The fact that the Van Treeses discussed firing both managers was not in conflict with the fact that they were going to fire Glossip first, move

Bender to the Oklahoma City motel to take Glossip's place while managers were sought for both motels. This claim has no merit.

¶91 Next, Glossip claims that the prosecutor implied that additional evidence existed. During the re-direct examination of witness Kayla Pursley, Glossip claims that the prosecutor inferred that this jury would not hear everything she said to the police because she could not remember what she told police. The prosecutor did not allow Pursley to refresh her memory with the police report and tell the jury what she told police. No objection was made to this questioning at trial.

¶92 As indicated by the State, this questioning was to rebut the defense's cross-examination where counsel brought up the fact that she testified to things not in the police report because she remembered these things after talking to the police. The prosecutor was merely attempting to show that Pursley was testifying from her memory and not from the police report. The fact that the jury was deprived of this evidence due to a lack of memory was not indicative of more evidence damaging to Glossip. This claim does not rise to the level of plain error.

¶93 Glossip also claims misconduct occurred during the penalty phase of trial. He first claims that the prosecutor misstated the law regarding the appropriate punishment by arguing that death is appropriate because society, the Van Treese family, the Glossip family, and the justice system is "worse off" because of Richard Glossip. The State also argued that Glossip was a "cold-

blooded murderer" and "cold-blooded murders in the State of Oklahoma we punish with death." The prosecutor went on to argue that "He chose the option of murder in the face of other options and that makes death the appropriate option." There were no objections to these arguments.

¶94 Glossip also cites to the prosecutor's argument inferring that no one would be here, except for the actions of Richard Glossip, including the statement, "you [the jury] wouldn't be here making this tough decision." Again there was no objection.

¶95 Glossip claims that the prosecutor unfairly denigrated Glossip's mitigating evidence by pointing out that while he is awaiting trial he gets his niece to come visit him so he can bring her to trial so she can testify. The prosecutor also pointed out the fact that other mitigation evidence was from a 23-year-old detention officer. The prosecutor pointed out the fact that Sneed was about that age and he buddies up to this young kid so he can have a witness to say he is not violent. There was no objection to this argument.

¶96 Defense counsel did object during the next citation of alleged misconduct. The prosecutor used the victim's photographs as props, placed them on defense table, and said "I don't have a problem with taking this blood and putting it right over here. Because this is where it goes." Counsel's objection was aimed at the prosecutor "throwing things on our table." Defense counsel said the prosecutor should give them to the jury. The objection was overruled. The objection was not based on the argument but on where the

prosecutor was placing the photographs. Because he raises a different argument here, we can review for plain error only.

¶97 All of the alleged misconduct came during the State's second closing, after defense counsel stated that the State wants "Richard Glossip's blood to flow" (to which a State's objection was sustained). Defense counsel also told the jury that this was a decision that they would have to live with; the State would put this case away and forget about it. Defense counsel also argued that the State sees Richard Glossip as a person with no social redeeming value – ignoring the fact that he had a normal life, was a hard worker and supported his family.

¶98 It must be noted, that the State alleged two aggravating circumstances: continuing threat; and murder for remuneration. Most of the argument, from both sides, was in an attempt to show whether Glossip was a continuing threat to society. The continuing threat aggravating circumstance requires a jury to determine whether it is probable that a defendant will commit future criminal acts of violence that would constitute a continuing threat to society.

¶99 All of the prosecutor's arguments were proper comments on the evidence in order to show that, based on the circumstances of this crime, Glossip was a continuing threat to society. Obviously, the jury did not accept the prosecutor's argument, because they did not find that Glossip was a continuing threat.

V: INEFFECTIVE ASSISTANCE OF COUNSEL

¶100 In proposition five, Glossip claims that he was denied effective assistance of counsel during both stages of trial.[10] In order to show that counsel was ineffective, Glossip must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).[11] In *Strickland*, the Court went on to say that there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, i.e., an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

¶101 To establish prejudice, Glossip must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

¶102 In the context of a capital sentencing proceeding, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the

---

[10] Glossip has filed a motion for evidentiary hearing based on this claim so that he might be able to supplement the record with certain evidence. The evidence contained in the motion for new trial consists of the video taped interview of Justin Sneed, a transcript of the interview, the financial records of the Best Budget Inns (Tulsa and Oklahoma City), and accompanying affidavits. This evidence does not contain sufficient information to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize this evidence. See Rule 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006).

[11] The Strickland standard continues to be the correct test for examining claims of ineffective assistance of counsel where counsel fails to utilize mitigation evidence. *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

¶103 He first claims that counsel was ineffective for failing to utilize Justin Sneed's videotaped interview to impeach Sneed and Detective Bemo. Glossip points out that this Court, in our Opinion reversing Glossip's original conviction, stated that "[t]rial counsel's failure to utilize important impeachment evidence against Justin Sneed stands out as the most glaring deficiency in counsel's performance." *Glossip*, 29 P.3d at 601.

¶104 One would believe that if this Court stated an attorney was ineffective (to the point of requiring reversal) for failing to utilize one piece of evidence to impeach witnesses, the new attorneys on retrial would utilize the evidence. That is, unless counsel at the second trial is either banking on his ineffectiveness garnering his client another trial or he made a strategic decision not to introduce the tape and only question witnesses about the statements on the tape. The third possibility is that the failure to utilize this one piece of evidence is not the sole reason counsel was found to be ineffective during the first trial. This Court trusts that the first reason is invalid. Counsel's use of the contents of the tape to cross-examine witnesses, without introducing the tape, was a valid strategy. Furthermore, the failure to utilize the tape during the first trial was one of many reasons why this Court found there was

ineffective assistance of trial counsel during the first trial.[12] Even though these two trials encompass the same subject, similar strategic decisions occurring during both trials, might not result in the same conclusion by this Court.[13]

¶105 The videotaped interview was not introduced into evidence during this trial, thus it is not a part of the record. Glossip has filed a motion for an evidentiary hearing pursuant to Rule 3.11, *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006), in order to supplement the record.

¶106 Glossip admits that trial counsel cross-examined both Sneed and Bemo regarding the circumstances of the interview, statements made during the interview and discrepancies between current testimony and statements on the tape. Counsel was not ineffective for utilizing this strategy.

¶107 Glossip next argues that trial counsel failed to utilize readily available evidence (other than the video tape mentioned above) to cross-examine witnesses. Glossip clams that counsel was ineffective for failing to utilize financial records concerning the victim's Tulsa motel to show that the "over $6,000.00 shortage" at the Oklahoma City motel was not unusual. Counsel did attempt to introduce this evidence, but the trial court ruled it inadmissible. Counsel did not try to impeach witnesses with the documents.

---

[12] Trial counsel during the first trial was wholly unprepared for trial, had not formulated any reasonable defense theory, and failed to object to clearly inadmissible evidence. *See Glossip*, 2001 OK CR 21, ¶ 25, 29 P.3d at 603.

[13] During the first trial, trial counsel indicated he would use the tape to impeach Justin Sneed, but when the time came, "counsel failed to utilize the video tape at all." *Glossip*, 2001 OK CR 21, ¶¶ 16-17, 29 P.3d at 601. In this case, trial counsel questioned both Bemo and Sneed about inconsistencies between prior statements and current testimony.

¶108 Part of the State's theory was that Glossip wanted Van Treese killed so he could take over the management of both motels: Oklahoma City and Tulsa. The State also presented evidence that Glossip was going to be confronted about the $6,000.00 shortage. Furthermore, evidence was presented that Glossip did not want Van Treese to discover the condition of the motel.

¶109 The shortages at the Tulsa motel, while relevant to show that the $6000.00 shortage was not unusual, was not relevant to show that Glossip intended to have Van Treese killed because he feared termination. His fear was based on the condition of the motel, the missing registration cards, and missing money at the Oklahoma City motel.

¶110 Glossip next claims that counsel was ineffective, because counsel failed to object to improper character evidence introduced by the State. This evidence concerned testimony about the character of Justin Sneed as a follower who would not have killed the victim unless someone put him up to it. When counsel did object, an objection was overruled and the State elicited testimony that Sneed "would have probably done anything for Glossip. He was that dependent on him."

¶111 Several witnesses observed Sneed and Glossip interact with each other. They testified that Sneed had no outside income and he appeared to be dependent on Glossip. This evidence was not character evidence. This was

proper evidence presented so the jury could understand why Glossip was able to employ Sneed to commit the murders.

¶112 Next, Glossip claims that counsel was ineffective for failing to object to the evidence complained about in proposition two. We found above that this evidence did not rise to the level of plain error; we further find that the failure to object did not amount to ineffective assistance, as this evidence did not affect the outcome of the case.

¶113 Next, Glossip claims that counsel was ineffective to object to instances of prosecutorial misconduct set forth in proposition four. Any misconduct that might have occurred did not affect the outcome of this case, so there can be no ineffective assistance of counsel.

VI: SECOND STAGE ISSUES

¶114 In proposition six, Glossip claims there was insufficient evidence to support the sole aggravating circumstance of murder for remuneration. Murder for remuneration, in this case, requires only that Glossip employed Sneed to commit the murder for payment or the promise of payment. 21 O.S.2001, § 701.12.

¶115 Here, Glossip claims that Sneed's self-serving testimony was insufficient to support this aggravating circumstance. Glossip claims that the murder was only a method to steal the money from Van Treese's car.

¶116 The flaw in Glossip's argument is that no murder needed to occur for Sneed and Glossip to retrieve the money from Van Treese's car. Because

Glossip knew there would be money under the seat, a simple burglary of the automobile would have resulted in the fruits of their supposed desire. The fact is that Glossip was not after money, he wanted Van Treese dead and he was willing to pay Sneed to do the dirty work. He knew that Sneed would do it for the mere promise of a large payoff. There was no evidence that Sneed had any independent knowledge of this money.

¶117 There is sufficient evidence that Glossip promised to pay Sneed for killing Van Treese.

¶118 In proposition seven, Glossip claims that the jury instructions defining the jury's role in determining punishment were flawed. Glossip first argues that the jury should have been instructed, as requested by trial counsel, that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt. He claims, relying on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that the failure to give this instruction resulted in a death sentence that is unconstitutional and unreliable. This Court has consistently rejected this argument, and Glossip has presented no new argument which would cause this Court to reconsider our previous decisions. *See Mitchell v. State*, 2006 OK CR 20, ¶ 81, 136 P.3d 671, 704.

¶119 Glossip next argues that the trial court's instruction which defines mitigating evidence as factors which "in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame" impermissibly

narrows the characterization of mitigation. He claims this definition excludes evidence about a defendant that may warrant a sentence less than death, because the evidence may not lessen his moral culpability or blame. The trial court rejected trial counsel's requested instructions.

¶120 The trial court gave the uniform instructions on mitigating evidence, OUJI-CR 2d 4-78 and 4-79 (1996), as well as others, which included a list of mitigating evidence and additional instructions which allowed the jury to consider other mitigating circumstances if found to exist. This Court has previously analyzed these instructions and determined that they are appropriate. *Rojem v. State*, 2006 OK CR 7, ¶ 57, 130 P.3d 287, 299. This Court will not revisit the issue here.

¶121 In proposition eight, Glossip claims that the State was allowed to introduce improper victim impact evidence. Oklahoma's desire to allow victims of violent crimes some type of influence in the sentencing of criminal defendants has led to different statutes. 22 O.S.2001, §§ 984 and 984.1 allows the use of "victim impact statements" and 21 O.S.2001, §701.10(C) allows the use of "victim impact evidence."

¶122 Title 21 O.S.2001, §701.10(C) pertains only to capital sentencing proceedings. The State may present "victim impact evidence" about the victim and the impact of the murder on the family of the victim. The clear language of section 701.10(C) limits the type of victim impact evidence allowable in a

capital sentencing procedure. This section is not as encompassing as 22 O.S.2001, §§ 984 and 984.1. Section 984 reads in part:

> "Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence;

Section 984.1 states that,

> Each victim, or members of the immediate family of each victim or person designated by the victim or by family members of the victim, may present a written victim impact statement or appear personally at the sentencing proceeding and present the statements orally. Provided, however, if a victim or any member of the immediate family or person designated by the victim or by family members of a victim wishes to appear personally, such person shall have the absolute right to do so.

22 O.S.2001, § 984.1(A). "Members of the immediate family" means the spouse, a child by birth or adoption, a stepchild, a parent, or a sibling of each victim. 22 O.S.2001, § 984.

¶123 This Court has stated that both "victim impact statements" and "victim impact evidence" are admissible in a capital sentencing procedure. This includes a victim's rendition of the "circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence." See 22 O.S.2001, § 984; *Dodd*, 2004 OK CR 31, ¶ 95, 100 P.3d at 1044.

¶124 However, evidence may be introduced that "is so unduly prejudicial that it renders the trial fundamentally unfair" thus implicating the Due Process Clause of the Fourteenth Amendment. *Lott*, 2004 OK CR 27, ¶ 109, 98 P.3d at 346, *quoting Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991).

¶125 During the second stage the State presented two witnesses. These two witnesses, the victim's daughter and the victim's widow, met the definition of "immediate family members." These two witnesses read their own statements and statements of other immediate family members. Glossip now claims that this procedure violated our previous case law on victim impact evidence. Glossip argues that the State should have only been allowed to introduce testimony of immediate family members or present a representative to read all of the statements, not both. *See Lott v. State*, 2004 OK CR 27, ¶¶ 110-11, 98 P.3d 318, 347 (family members may testify or they may designate a family representative to testify in their behalf). Intermingled in this proposition are comments that Mrs. Van Treese's statement was more akin to a statement made by a family representative, rather than a personal statement addressing the impact of the death on her personally. Glossip argues that either her statement should have been admitted as a representative, or the State should have presented the personal testimony of immediate family members, not both.

¶126 The issue here is whether an immediate family member can both testify on their own behalf and represent other members of the immediate

family. In *Lott*, two members of the immediate family testified – the victim's son and daughter. Another witness also testified – the victim's granddaughter who was a "representative." She testified about the impact of the death on the entire family (even though she was not a member of the "immediate family"), her father and her aunts and uncles. (Her father and one of her aunts were the two witnesses who also presented victim impact evidence).

¶127 Glossip also cites *Grant v. State*, 2003 OK CR 2, ¶ 59, 58 P.3d 783, 797, *judgment vacated on different grounds in Grant v. Oklahoma*, 540 U.S. 801, 124 S.Ct. 162, 157 L.Ed.2d 12 (2003)[14] where this Court held that it is error for one person to read the statement of another. This Court, in Grant stated,

> In *Ledbetter v. State*, 1997 OK CR 5, ¶¶ 37, 933 P.2d 880, 893, we recognized the fact that "a person designated by the victim or by family members of the victim" may present victim impact statements. However, we held that the legislature intended that the "person chosen to present the victim impact statement" should use his "own thoughts or observations to express the impact of a death on survivors of the victim." *Ledbetter*, 1997 OK CR 5, ¶ 38, 933 P.2d at 893. In *Ledbetter*, our holding allowed the chosen person to observe family members and to use those observations in the statement; however, that person may not receive aid in the composition of the statement from outside sources. *Ledbetter*, 1997 OK CR 5, ¶ 39, 933 P.2d at 893.

¶128 Nevertheless, in *Grant* we held that the error did not rise to the level of plain error as the evidence was presented in a more sterile manner than

---

[14] Opinion on remand, *Grant v. State*, 2004 OK CR 24, 95 P.3d 178, *cert. denied* 543 U.S. 964, 125 S.Ct. 418, 160 L.Ed.2d 332 (2004).

if each of the writers of the statements had taken the stand and read their own statements.

¶129 The State cites *Hooks v. State*, 2001 OK CR 1, ¶ 37, 19 P.3d 294, 313. In *Hooks*, this Court held that a representative, who is not an immediate family member, may be the representative, and if they give testimony about the impact of the murder on themselves, the testimony can be harmless where the testimony makes up a small part of the victim impact evidence. This Court went on to say that a family member can give victim impact testimony on behalf of several immediate family members, as long as that testimony is otherwise admissible.

¶130 Trial counsel objected to victim impact evidence in a pre-trial motion and hearing. During the second stage, an in camera hearing was held and the parties went through the statements. Defense counsel made objections to some of the language in some of the statements and the trial court redacted the statements. However, counsel specifically stated that he had no objection to the two witnesses reading the statements of the remaining "immediate family members." Therefore, any claim regarding the method of victim impact evidence presentation is waived, except that error which is plain error.

¶131 We find that Glossip was not harmed by the State's utilization of two family members to read the statements of five others. This Court will not second guess trial counsel's sound trial strategy. There is no plain error here.

VII: MANDATORY SENTENCE REVIEW

¶132 We found above that there was sufficient evidence to support the finding of the statutory aggravating circumstance of murder for remuneration.

After reviewing the entire record in this case, we find that the sentence of death was not imposed because of any arbitrary factor, passion, or prejudice. Glossip presented mitigating evidence, which was summarized and listed in an instruction to the jury:

1. The defendant did not have any significant history of prior criminal activity;
2. The defendant is 41 years of age;
3. The defendant's emotional and family history;
4. The defendant, since his arrest on January 9, 1997, has been incarcerated and has not posed a threat to other inmates or detention staff;
5. The defendant is amenable to a prison setting and will pose little risk in such a structured setting;
6. The defendant has a family who love him and value his life;
7. Has limited education and did not graduate from high school. He has average intelligence or above. He has received his G.E.D.;
8. After leaving school, the defendant had continuous, gainful employment from age 16 to his arrest on January 9, 1997;
9. The defendant could contribute to prison society and be an assistance to others;
10. Prior to his arrest, the defendant had no history of aggression;
11. The defendant was not present when Barry Van Treese was killed.
12. The defendant has no significant drug or alcohol abuse history.

¶133 In addition, the trial court instructed, that the jury could decide that other mitigating circumstances exist and they could consider them as well.

¶134 We can honestly say that the jury's verdict was not born under the influence of passion, prejudice or any other arbitrary factor, and the evidence

supported the jury's findings of the aggravating circumstances. *See* 21 O.S.2001, § 701.13. Glossip's convictions and his sentences should be affirmed. We find no error warranting reversal of Glossip's conviction or sentence of death for first-degree murder, therefore, the Judgment and Sentence of the trial court is, hereby, **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY BEFORE THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

RICHARD EUGENE GLOSSIP, Appellant, was tried by jury for the crimes of Murder in the First Degree in Case No. CF-97-244 in the District Court of Oklahoma County before the Honorable Twyla Mason Gray, District Judge. Glossip was sentenced to death, and he perfected this appeal. Judgment and Sentence is **AFFIRMED**.

APPEARANCES AT TRIAL

SILAS R. LYMAN, II
WAYNE WOODYARD
CAPITAL TRIAL DIVISION
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEYS FOR DEFENDANT

CONNIE SMOTHERMON
GARY ACKLEY
ASSISTANT DISTRICT ATTORNEYS
OKLAHOMA COUNTY
505 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVE.
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

JANET CHESLEY
KATHLEEN M. SMITH
CAPITAL DIRECT APPEALS DIVISION
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEYS FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH B. BRANHAM
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: LEWIS, J.

LUMPKIN, P.J.: CONCURS IN RESULTS
C. JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: DISSENTS
A. JOHNSON, J.: DISSENTS

LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULT

¶1 I concur in the results reached by the Court and most of the analysis. However, I do disagree with the analysis on a couple of points.

¶2 First, the Court errs by citing as authority for the decision rendered cases from other states that are not valid precedent for this Court. The jurisprudence from this Court is more than sufficient to sustain the analysis and decision of the Court. Thus, that case law should be cited and not cases from irrelevant states.

¶3 Second, while I agree the trial court's failure to preserve the demonstrative aids for the record in this case was error, I cannot find error in the use of them in this case. These demonstrative aids, i.e. poster sheets with contemporaneous listing of accurate statements by witnesses, were nothing more than group note taking. And, this Court has pushed note taking with a missionary zeal. While individual note taking cannot be monitored for individual accuracy, this group note taking was monitored by the court and the accuracy ensured. The notes were not overly emphasized because as demonstrative aides, they were not allowed to be taken into the jury room.

CHAPEL, JUDGE, DISSENTING:

¶1 I dissent from today's decision because I disagree with the majority's treatment of Proposition III and the result reached on this claim. I also write to note that although I concur in the conclusion reached on Proposition I, I believe the majority overstates the strength of the accomplice corroboration evidence in this case, by confusing the narrow analysis of this question with Glossip's overall sufficiency of the evidence claim.

¶2 Regarding Proposition III, I find that the trial court's decision, over defense objection, to allow the State to post summaries of witness testimony throughout the courtroom and to leave these demonstrative exhibits visible to jurors and later witnesses, from the time they were first crafted until the conclusion of the first stage of Glossip's trial, was an abuse of discretion. I also find that the trial court's denial of defense counsel's clear and reasonable request to allow these exhibits to be either preserved intact or digitally photographed, for review by this Court, was likewise an abuse of discretion. The trial court's actions in this regard were totally unjustified and prejudiced Glossip's right to a fair trial and an informed consideration of his claims on appeal.

¶3 Two things occurred before the presentation of any evidence at Glossip's trial that seem noteworthy in light of his current claim. First, a jury panel venire member asked, during voir dire, if jurors would be allowed to take

notes.[1] The trial court responded with a lengthy explanation of the pitfalls of note-taking, particularly for those who did not do it regularly, and explained that witnesses would have to rely upon their "collective memories."[2] Hence juror note-taking was not permitted.[3]

¶4 The second noteworthy occurrence involved the rule of sequestration of witnesses. Glossip's counsel properly invoked "the rule" at the beginning of trial and also requested that Kenneth Van Treese, the brother of the victim, not be allowed to remain in the courtroom during the testimony of Donna Van Treese, the victim's wife. The trial court recognized that the rule had been invoked and even acceded to counsel's request regarding Kenneth Van Treese, over State

---

[1] This Court addressed the practice of jurors taking notes in *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211 (per curiam). We held that it was not error to allow jurors who took notes during a trial to take their notes into the jury room with them during deliberations. *Id.* at ¶ 5, 942 P.2d at 213. Although *Cohee* did not require trial judges to allow jurors to take notes, it recognized that note-taking has substantial potential benefits during a trial:

> Use of notes may aid the jury during their deliberations. We find that jurors may benefit from notes in several ways: (1) jurors may follow the proceedings more closely and pay more attention as they take notes for later use; (2) jurors' memories may be more easily and reliably refreshed during deliberations; (3) jurors may make fewer requests to have portions of a trial transcript read back during deliberations; and (4) the ability to use their notes may result in increased juror morale and satisfaction.

Id. at ¶ 4, 942 P.2d at 212. I would hope that trial courts considering whether to allow jurors to take notes would weigh these potential benefits against the potential risks from this practice.

[2] The court stated: "You know, note taking is a skill. If you're in a job or a student where you take notes every day, you get pretty proficient at it and you have a pretty good skill level at it. If it's been years since you've taken notes, you're pretty lousy at it." The court then explained that jurors would not be able to interrupt witnesses and ask them to repeat testimony, in order to ensure the accuracy of their notes, and described a scenario where a juror's written notes conflicted with that juror's memory of what was said: "And then you're confused[,] is what I wrote down right or is it the way I remember it right."

[3] The trial judge noted that she would provide jurors with a log of what happened each day, which "really helps" jurors remember what they heard. The record contains a court exhibit with a log of witnesses who testified, with a general description of who they were, such as "girlfriend of defendant," which was given to Glossip's jury. Yet this log contains no summary or other substantive information regarding the actual testimony of the witnesses.

objection, out of "an abundance of caution."[4] Unfortunately, the trial court's recognition that note-taking can sometimes be distracting and create problems during a trial, as well as the court's careful attention to respecting the rule of sequestration, did not remain consistent throughout Glossip's trial.

¶5 During the testimony of the State's first witness, Donna Van Treeese, the prosecutor got out an easel and started writing on a large paper pad placed upon it.[5] Although the record does not establish exactly what was written, the prosecutor's comments indicate that she recorded certain specific pieces of testimony on the pad, such as the time Glossip told Mrs. Van Treese that he had last seen her husband and when this statement was made. Defense counsel did not object.[6]

¶6 During Mrs. Van Treese's testimony the next day, the prosecutor again began writing on the pad, summarizing certain bits of testimony.[7] In particular,

---

[4] The trial court ruled that since there was going to be some overlap between the testimony of these two persons, both of whom were immediate family members of the victim, the victim's brother would be asked to leave the courtroom during the testimony of the victim's wife. (Although the record reveals that Mrs. Van Treese remarried and changed her name in 2003, she is referred to herein, as she was at trial, as Donna Van Treese.)

[5] As addressed further *infra*, the record in this case does not contain either the actual paper exhibits at issue or any photographs of them. The parties seem to agree, however, that the paper pad, which was used to create the various demonstrative exhibits at issue herein, was approximately 2 feet by 3 feet in size.

[6] The transcript in this trial sometimes reveals what was written down, because the prosecutor makes the statement "I have written . . ." and then (presumably) states exactly what was written. At other times the examining prosecutor indicates that he/she is recording certain testimony, but then fails to state what exactly he/she has recorded. And it is entirely possible that on some occasions statements were written down without the examining attorney mentioning it at all. Hence the transcript serves as a limited and fundamentally incomplete record of what was written on the large paper demonstrative exhibits at Glossip's trial. I strongly disagree with the majority opinion's suggestion that a careful review of the transcript is "the only way to determine what was on the posters, *in Toto* [sic]." The only way to determine the complete contents of the posters is to review the actual posters.

[7] For example, the prosecutor recorded that the hotel bookkeeping (during the second half of 2006) was "not up to par" and also apparently wrote "lifestyle decision not to fire Glossip during

she recorded Mrs. Van Treese's testimony about Glossip telling her that he had seen her husband on the morning of January 7, 1997.[8] Later that day, during the testimony of Glossip's live-in girlfriend, D-Anna Wood, the prosecutor likewise recorded what Glossip told her after Justin Sneed woke them up during the "early morning hours" of January 7, namely, that "two drunks broke a window" and that Glossip told Sneed "to clean it up."[9]

¶7 At the end of the day, after the jury had been dismissed, defense counsel objected to the State being allowed to post, in the courtroom, the large pieces of paper containing the State's notes summarizing particular witness testimony after the testifying witness had been excused, because it placed unfair emphasis on the selected testimony.[10] The State responded that it had a right to make demonstrative exhibits and suggested that it was Glossip's own fault that the exhibits were necessary.[11] The trial court agreed and overruled the

---

family turmoil" and "year-end totals and losses demand change." Although none of these remarks were actual quotes from the witness, these and similar statements that were apparently written down were reasonable summaries of witness testimony and were not challenged, in terms of content, either at trial or on appeal.

[8] The prosecutor apparently wrote, "Last time I saw Barry it was on the 7th in the morning between 7 and 7:30. He was leaving to go to the store and buy some supplies."

[9] The record suggests that at some point during the cross examination of Wood, defense counsel wrote on the paper pad as well, since he refers to "1-7," for January 7th, and explains to Wood that "BVT" stands for Barry Van Treese. Yet the transcript is totally unclear what else, if anything, defense counsel wrote down.

[10] Defense counsel stated:

> We want to make an objection for the record to the posting of demonstrative exhibits that are basically an accumulation of notes written by the prosecutors to remain throughout the course of the variety of witnesses.
>
> I understand the need sometimes for a demonstrative exhibit with a particular witness and then you bringing a demonstrative exhibit out with others, but basically all this does is emphasize the testimony of—it's only part of the testimony. And as a result of that we do object.

[11] The prosecutor asserted:

> Your Honor, we have a right to make a demonstrative exhibit. I have not and will not move to introduce those exhibits into evidence. This demonstrative

objection. The court did not specifically address defense counsel's objection to the posting of the exhibits or his "undue emphasis" complaint.[12]

¶8 During the testimony of Billye Hooper, who was the day clerk at the Oklahoma City Best Budget Inn, the prosecutor again began taking notes on the large pad of paper about numerous things Glossip said to her or in her presence: asking her to pay the hotel cable bill with her own money (so Van Treese would not find out it had been disconnected), that Van Treese got up early on the morning of January 7 and went to get breakfast and repair materials, that Barry Van Treese had rented Room 102 to a "couple of drunks," who had "busted out a window," and not to put that room on the housekeeping report, because Glossip and Sneed were going to clean it up themselves.[13] When this testimony began the prosecutor addressed the court saying, "Your Honor, this may take me a minute, but I'm going to try and write all this up here." As the witness testified, the prosecutor would repeatedly summarize and restate what had just been said, in order to get the witness's agreement to the accuracy of the prosecutor's written summary of this same testimony.[14]

---

exhibit is a running, continuing tally of the various spins that this Defendant has put on, you know, his version of the facts. It's his fault that there are so many of them, there are so many witnesses and people that he talked to.

[12] The State asserts on appeal that this Court should review Glossip's claim regarding the posting of the demonstrative exhibits only for "plain error," since Glossip's counsel did not re-raise his objection every time the prosecutor posted a new exhibit. Yet on-the-record comments made at the end of the first stage of Glossip's trial indicate that the issue of posting and also of preserving these exhibits may have been further addressed, off the record, at trial. Furthermore, the record indicates that the trial court was fully aware of Glossip's "undue emphasis" objection and had no intention of sustaining it. Hence I find that this claim was adequately preserved at trial.

[13] The prosecutor also attempted to record the approximate time at which each of these statements was made by Glossip.

[14] In the later part of Hooper's direct testimony, it becomes impossible to tell exactly what, if anything, is being written down, though the favorable nature of Hooper's testimony and the

¶9 During the testimony of the next witness, William Bender, who had managed the Tulsa Best Budget Inn, the prosecutor announced that she was going to start writing down things that Glossip had said to Bender on January 8, after the victim had been found and Glossip had been interviewed. As Bender testified the prosecutor summarized his testimony and got his assent to various quotations of things Glossip had said, as she wrote them down.[15] In the middle of this note-taking process, the court interrupted and called the attorneys to the bench—apparently after the prosecutor wrote down something about Glossip telling Bender that he didn't kill the victim, but that he knew who did—and suggested that the prosecutor add a particular piece of information to her notes, "in the interest of fairness."[16] The prosecutor then apparently recorded that Glossip said he did not tell the police who killed Van Treese because Glossip "was in fear for his life" and that Glossip warned Bender that he should probably leave even the Tulsa motel, because it was about to be "brought down."[17]

---

prosecutor's initial remark about wanting to write "all this up here" suggests that the prosecutor may have continued to summarize portions of Hooper's testimony on the paper pad.

[15] For example, she wrote down that Glossip described the victim, who had been found the previous evening, as "deader than a doornail," "cold as ice," and "beat to a bloody pulp." The prosecutor also apparently recorded some version of Glossip's remark to Bender that if the police hadn't told him to "stick around," he "would have already been gone."

[16] The exchange at the bench was as follows:

> THE COURT: There's one other matter that I think in fairness should be listed up there, which is that he [Glossip] told them [sic] [Bender] that he was in fear for his life.
>
> MS. SMOTHERMON: Okay. I will.
>
> THE COURT: And in the interest of fairness, I want to make sure that—if you'll just fix that, please.
>
> MS. SMOTHERMON: I will.

[17] Once again, however, the record does not reveal precisely what was written down.

¶10 This same prosecutor continued taking notes on the paper pad during the testimony of Jacquelyn Williams,[18] Kayla Pursley,[19] and Michael Pursley,[20] as she questioned each one of them. During Michael Pursley's testimony, as the prosecutor attempted to confirm the accuracy of her notes—by repeating the testimony and asking Pursley to affirm what she had written—defense counsel objected that the prosecutor was "repeating and rehashing testimony that's already before the jury." The court overruled the objection without comment.

¶11 Officer Timothy Brown, who assisted in the search for Barry Van Treese and who discovered his body in Room 102, was examined by the other prosecutor. It is not clear whether this prosecutor himself wrote any notes, but after questioning Brown for approximately twenty transcript pages, he asked the first prosecutor to come up and take notes for him. The transcript indicates that this first prosecutor then took notes, while the examining prosecutor continued

---

[18] Jacquelyn Williams was a housekeeper who lived in the Best Budget Inn rent-free, but who was not otherwise paid for her services. The transcript only clearly indicates one portion of her testimony that the prosecutor wrote down, namely, that Glossip told her to stay in her room when the owner came around. Yet the prosecutor's style of questioning, repeatedly clarifying particular pieces of information, suggests that she may have been taking notes on other testimony as well.

[19] Kayla Pursley worked the night shift at a gas station across from the Best Budget Inn. The transcript makes clear that the prosecutor wrote down that around 8:30 a.m., on January 7, Glossip told Pursley that "there was a fight between two drunks and they had thrown a footstool through the window," and that "one of the drunks was the strange guy that [Pursley] had seen earlier," and that Glossip and Sneed "threw the drunks out." The prosecutor later indicated that she was writing down other testimony "before I forget," which apparently included Glossip's statements to Pursley about the broken window in Room 102, *i.e.*, that he and Sneed "already cleaned that up" and that one of them "got cut." It is unclear whether the prosecutor wrote down other testimony from Kayla Pursely.

[20] Michael Pursley had been married to Kayla Pursley and was living with her and their children at the Best Budget Inn at the time. The transcript indicates that the prosecutor wrote down his testimony that around 8:30 a.m., on January 7, Glossip told him that he "knew the window [in Room 102] had been broken," that Glossip and Sneed had "been in the room," and that they knew "who had broken the window" and were "going to bill them for it."

to question Brown regarding numerous statements made by Glossip and Brown's investigation of Van Treese's disappearance. It is sometimes apparent in the record that the note-taking prosecutor is memorializing testimony—such as when the examining prosecutor asks, "Can we get that, Ms. Smothermon?"—but it is often impossible to tell how much or what exactly is being written down.[21]

¶12 Clifford Everhart, who did security work at the hotel and who participated in the search for Mr. Van Treese and was present when his body was discovered, was examined by the "note-taking prosecutor." The transcript indicates some specific occasions during this testimony that the prosecutor took notes summarizing what Glossip had said to Everhart and when it was said.[22] Once again, however, it remains entirely unclear, upon even a careful review of the transcript, whether this prosecutor wrote down other notes from Everhart's testimony, without verbally noting what she was doing.

¶13 After all the first-stage evidence had been presented and the jury had been excused, Glossip's counsel noted his earlier objections "to what has been labeled as demonstrative exhibits, which are basically the sheets of paper that have certain writings on them and have been taped to various places in the

---

[21] Sometimes the record is quite clear about what is being written, such as when the prosecutor quotes Glossip as saying to Brown, "Things keep getting turned around, I didn't say I saw Barry at 7:00 a.m." After getting confirmation of this quote from Brown, the examining prosecutor asks, "Now, did we get that, Ms. Smothermon?", and she responds, "Yes, sir." Yet on other occasions the examining prosecutor asks Brown to confirm "what Ms. Smothermon is writing" and that she "has it right," but fails to review what has been written.

[22] The transcript indicates that she wrote down Glossip's statements about Van Treese returning from Tulsa around 2:30 or 3:00 a.m. on the morning of January 7, that Glossip had last seen Van Treese around 7:00 a.m. that same morning, and that Glossip said he had rented Room 102 to "a couple of drunk cowboys," who had gotten into a fight and broken the window.

courtroom."[23] Defense counsel noted that he had earlier requested that these exhibits be included as part of the original record and that the trial court had asked for some authority on this issue. Counsel then cited *Anderson v. State*,[24] as being one of a number of cases establishing the defendant's duty to ensure that an adequate record is provided to the Court of Criminal Appeals, for the determination of claims on appeal. He added:

> If these don't go, then they will not really have an idea of what our concern was in the record. If it's too bulky to do that, we are willing to take some digital photographs of each—first of all, as these things appear in the courtroom and of each of these items to submit if that's an aid to the court reporter or to the Court or the Court of Criminal Appeals. But we do renew that request at this time.

¶14 The note-taking prosecutor responded that the record was already clear regarding "what these demonstrative aids entail," because she had "made sure that I put into the record what was being written." The prosecutor noted that "using the same size paper, the same marker, the Defense has made five demonstrative aids of their own of similar ilk, that had been displayed various lengths of time to the jury."[25] She also noted that defense counsel was free to use the demonstrative aids during closing arguments, but that they would not be

---

[23] The prosecutor did not challenge defense counsel's description of the paper demonstrative exhibits being "taped to various places in the courtroom." Glossip's appellate brief asserts that according to his trial counsel, "there were at least twelve of the State's posters plastered up across the front of the prosecutor's table, the trial bench, and any other available space in the courtroom." The current record, however, is inadequate to evaluate this specific claim.

[24] *See Anderson v. State*, 1985 OK CR 94, ¶ 4, 704 P.2d 499, 501 ("It is well established that counsel for a defendant has a duty to insure [sic] that a sufficient record is provided to this Court, so that we may determine the issues.") (citation omitted).

[25] In particular, the prosecutor described an exhibit recording a statement in which Sneed denied he had killed Van Treese, which was displayed during Sneed's testimony and that of others. Defense counsel did not dispute the prosecutor's assertion that he had created five demonstrative aids comparable to those made by the State.

sent to the jury or included with the record. The prosecutor concluded by again asserting that the record of what had been written down was already complete.[26]

¶15 The trial court noted that the actual demonstrative exhibits "would be somewhat bulky," indicated that the record was already "explicit as to what was being memorialized," and denied defense counsel's request. When defense counsel asked for "permission for our own purposes and for our own record to photograph" the challenged exhibits, in case they were later destroyed, the trial court got angry, and the following exchange occurred:

> THE COURT: You know what? What you're asking me to do is for permission to make your own record outside of the Court's record. Denied. The Court's record is what's going to stand. And if you want to look them up, you can do so. It's all in the transcript. There is nothing about this that has not been memorialized, and the transcript is the way that we make a record in Oklahoma courts.
>
> MR. WOODYARD: We think the better way to show actually how these things sit in the courtroom and exactly what's written would be to either have the documents or the digital photograph, so we're making that request and I understand the Court's denying our request.
>
> THE COURT: Your understanding is absolutely on target.

¶16 It seems to me that the preceding review of the transcript record in this case makes a few thing quite clear (though certainly not the contents of the challenged exhibits). The current record is *not* complete about what was written on the demonstrative exhibits; everything that was written down on these exhibits was *not* memorialized by being read into the record; and the transcripts alone are *not* adequate for a fair review of the current claim on appeal. Defense

---

[26] "I worked very hard to put everything that was written into the record and to make sure that all of their demonstrative aids were read into the record. And I believe the record to be complete."

counsel's request to digitally photograph the demonstrative exhibits, as they appeared in the courtroom, and to either preserve intact or digitally photograph the individual exhibits was entirely reasonable. I conclude the trial court abused its discretion in denying defense counsel's requests in this regard.

¶17 Defense counsel was more than diligent in attempting to provide this Court with an adequate record to review his Proposition III claim. Hence we certainly cannot fault Glossip for the inadequacy of the current record in this regard. In fact, the majority opinion acknowledges being "extremely troubled by the trial court's attitude toward defense counsel's attempt to preserve the demonstrative aides for appellate review." And I agree with the majority that "[t]he total recalcitrance of the trial court to allow a record to be made creates error in itself." Consequently, I cannot understand the majority's summary conclusion—made without attempting to review the actual exhibits at issue—that "[a]ny error in the utilization of these posters was harmless."

¶18 The State has represented to this Court that it still has the actual poster exhibits from Glossip's trial.[27] In his reply brief, Glossip requests that we order the State to supplement the record with these actual exhibits. In my view, if we are going to deny Glossip's claim, we should not do so without at least reviewing the actual demonstrative exhibits, if they are still available, particularly since Glossip's counsel diligently sought to have these exhibits included in the appellate record.

---

[27] Appellate counsel for Glossip, however, apparently does not possess the poster exhibits that were made by defense counsel at Glossip's trial.

¶19 The rub, of course, is that Glossip does not (and did not) challenge the accuracy of the notes taken by the prosecutor at trial, nor does he raise a prosecutorial misconduct claim in this regard. Glossip's claim in Proposition III is that the posted exhibits of the prosecutor's notes from selected witness testimony (1) placed undue emphasis on the chosen testimony, (2) violated the rule of sequestration of witnesses, and (3) amounted to a "continuous closing argument." Reviewing the actual paper exhibits could potentially help us resolve these claims, but such a review might not be decisive, particularly since this Court still would not know how the various exhibits were displayed in the courtroom. I take up Glossip's claims in turn, based upon the limited record currently before the Court.

¶20 First, I agree that the manner in which the State was allowed to record and post selected witness testimony, in the context of Glossip's capital trial, placed undue emphasis upon this testimony. While this Court has repeatedly approved the use of demonstrative exhibits, including summaries of witness testimony, to aid the jury in its consideration of evidence, we have also recognized that demonstrative exhibits can be misleading and can be misused in the trial setting.[28] In *Moore v. State*,[29] we addressed a claim that the State's use

---

[28] *See, e.g., Dunkle v. State*, 2006 OK CR 29, ¶ 64, 139 P.3d 228, 249 (finding that State's use of demonstrative exhibits, in the form of computer-generated animations or "reenactments," was "inappropriate and highly misleading"). This Court recognized in *Dunkle* that even though demonstrative exhibits "should not be made available for the jury during deliberations, as they have 'no independent evidentiary value,'" such demonstrative aids must nevertheless be authenticated and evaluated to determine whether they are relevant and whether their probative value is outweighed by the danger of unfair prejudice or by other trial considerations (confusion of the issues, undue delay, cumulative evidence, *etc.*). *Id.* at ¶¶ 53-54, 139 P.3d at 246-47 (citation

of a written summary of an expert witness's testimony placed "undue emphasis" on the summarized evidence. We rejected the claim, based upon the fact that the jurors only had access to the summary during the time that the expert witness was actually testifying.[30] We also noted that the summary assisted the trier of fact, since it helped explain "the extensive fiber evidence in the case at bar."[31] The current case is distinguishable on its facts.

¶21 Glossip's jury was able to review the State's hand-written summaries of witness testimony long after the testifying witnesses left the stand, throughout the first stage of his trial. Furthermore, despite the State's desire to catalog and display its favorite testimony, such recording can hardly be described as "necessary" for the jury's understanding in this case. Although the trial was long and many witnesses testified, the evidence summarized did not relate to complex expert testimony or to concepts that were not readily accessible to average citizens. And even if the actual demonstrative exhibits are uncontroversial—and Glossip has never challenged the State's right to create them—there was absolutely no justification for allowing them to remain in the courtroom throughout the taking of first-stage evidence in Glossip's trial.[32] I conclude that

---

omitted). Demonstrative exhibits that summarize witness testimony can be authenticated by demonstrating that the summary provided/created is consistent with the witness's testimony.

29 1990 OK CR 5, 788 P.2d 387.

30 *Id.* at ¶ 44, 788 P.2d at 398.

31 *Id.*

32 In *Lanning v. Brown*, 377 S.W.2d 590 (Ky. 1964), Kentucky's highest state court noted that although it was proper to display a chart summarizing an injured victim's testimony about her damages during that witness's testimony, "it is quite another thing to allow a particular segment of testimony to be advertised, bill-board fashion, after the living witness has vacated the stand," particularly if the exhibit "is not being used in connection with the subsequent testimony of other witnesses." *Id.* at 594. The *Lanning* court concluded that the trial court erred in allowing the

of the defendant, [and] admissions by the defendant."[41] This Court has never found that evidence that a defendant had a motive to commit a particular crime or that he helped conceal a crime committed by another is enough, standing alone, to link that defendant with the actual commission of the crime at issue. Yet this is the "corroboration" evidence focused upon in today's majority opinion.[42]

¶26 The Court's opinion initially notes that "[t]he State concedes that motive alone is not sufficient to corroborate an accomplice's testimony." Yet the opinion then attempts to demonstrate, by relying on cases from Texas, California, and Georgia, that evidence of a defendant's motive, as well as evidence about concealing the commission of a crime and attempted flight, can be adequate as corroborating evidence. These cases are entirely irrelevant to interpreting Oklahoma's very specific, accomplice corroboration statute.[43] And the majority opinion does not cite any Oklahoma authority for (or make a persuasive argument for) its assumption that non-accomplice evidence suggesting that a defendant had a motive to commit a crime, assisted the perpetrator in concealing a crime, or planned to leave the area afterward can

---

[41] *Id.* at ¶ 20, 104 P.3d at 592 (citing cases).

[42] The opinion initially refers to "four . . . aspects of Glossip's involvement, . . . which point to his guilt: motive, concealment of the crime, intended flight, and . . . his control over Sneed." Yet after reviewing the evidence on these four issues, the opinion concludes that this evidence, "taken together," is not merely indicative of guilt under a traditional sufficiency-of-the-evidence analysis, it is adequate to "corroborate Sneed's story about Glossip's involvement in the murder" and "sufficiently ties Glossip to the commission of the offense."

[43] The State notes in its brief, correctly, that "Defendant's challenge to the accomplice testimony in this case rests on pure state law grounds."

qualify as adequate corroborating evidence linking a defendant to the actual commission of the crime under 22 O.S.2001, § 742.[44]

¶27 In fact, this Court has specifically held that evidence implicating a defendant as an "accessory after the fact"—through his actions of helping dispose of the victim's body, lying to the police, and attempting to conceal a murder that he had directed others to commit—is *not* adequate to "independently connect him to the actual commission of [the] murder," under Oklahoma's accommodation requirement.[45] The facts of *Cummings* are quite similar to the current case. Cummings apparently directed both of his wives to kill his sister by shooting her, but was not present when the murder was committed by his second wife. When he returned home, he assisted in the disposal of his sister's body and lied to the police about it.[46] Despite the strong evidence of Cummings's guilt, including the testimony of both of his (accomplice) wives, this Court reversed his conviction for murdering his sister based upon the accomplice corroboration rule.[47]

---

[44] The opinion does not cite any authority for (or even fully develop) its contention that evidence of a defendant's "control" over the perpetrator can be adequate corroboration.

[45] *See Cummings v. State*, 1998 OK CR 45, ¶ 21, 968 P.2d 821, 830.

[46] *Id.* at ¶¶ 2-11, 968 P.2d at 827-28.

[47] *Id.* at ¶ 21, 968 P.2d at 830 ("As Appellant contends, outside of the testimony of Juanita and Sherry, the evidence only supports a finding that Appellant assisted his wives in lying to the police and in covering up the crime. It does not independently connect him to the actual commission of Judy Mayo's murder."). This Court upheld Cummings's conviction for the murder of his niece, however, because his second wife was not an accomplice to this separate murder; hence her testimony provided adequate independent evidence corroborating the testimony of Cummings's first wife (who was an accomplice) regarding the murder of their niece. *Id.* at ¶¶ 22-23, 968 P.2d at 830-31.

¶28 This Court's 2001 opinion in this case, in which we reversed Glossip's conviction based upon ineffective assistance of counsel,[48] emphasized the minimal nature of the corroborating evidence in this case. We stated: "The evidence at trial tending to corroborate Sneed's testimony was extremely weak."[49] We also characterized certain inadmissible double hearsay testimony as "arguably the only evidence presented at trial that tended to independently corroborate any portion of Justin Sneed's testimony implicating Appellant in the crime and establishing a motive."[50] We declined to reach the question of the adequacy of corroboration, however, choosing instead to reverse on Glossip's ineffective assistance claim.[51]

¶29 The current opinion, after recognizing the corroboration requirement, takes a very different tone: "In this case, the State presented a compelling case which showed that Justin Sneed place himself in a position where he was totally dependent on Glossip." Of course that has nothing to do with independent evidence linking Glossip to the actual commission of the murder of Barry Van Treese. The opinion then discusses Sneed's accomplice testimony and the State's case as a whole. I believe that we must first focus upon the very narrow question of whether the State presented separate evidence, independent of the

---

[48] *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

[49] *Id.* at ¶ 8, 29 P.3d at 599. We also noted that "the only 'direct evidence' connecting Appellant to the murder was Sneed's trial testimony," and that "[n]o forensic evidence linked Appellant to [the] murder and no compelling evidence corroborated Sneed's testimony that Appellant was the mastermind behind the murder." *Id.* at ¶ 7, 29 P.3d at 599.

[50] *Id.* at ¶ 21, 29 P.3d at 602.

[51] *Id.* at ¶ 8, 29 P.3d at 599.

testimony of Sneed, that connects Glossip to the actual murder and that materially corroborates some aspect of Sneed's accomplice testimony.

¶30 Although the question is very close, I agree with the majority that "the most compelling corroborative evidence . . . is the discovery of the money in Glossip's possession." Unfortunately, this single, conclusory sentence represents the entirety of the Court's analysis on this critical issue. I offer the following as an alternative, more narrow resolution of this issue.

¶31 According to the record in this case, when Glossip was questioned and then arrested on January 9, 1997, he was carrying $1,757 in cash, approximately $1,200 of which could not be accounted for by Glossip.[52] Such unaccounted-for cash, when not uniquely identified by serial number or some other marking, is not nearly as strongly corroborating as the presence of identifiable stolen goods that are found in the defendant's possession. Nevertheless, considering this case as a whole, including the State's evidence that Glossip was a person of very limited means, who was low on cash at the time, and the timing of his arrest, I agree that this evidence materially

---

[52] On the evening of January 6, 1997, Van Treese paid Glossip for his work in December of 1996 with a check for $429.33. According to Glossip's girlfriend, she and Glossip paid a 10% fee to cash the check on January 7, which would have left them with $386.40. They then went shopping and spent $172 for a pair of glasses, $107.73 for an engagement ring for her, and $45 more at Wal-Mart. These purchases would have left Glossip with only $61.67 from his paycheck. It can be reasonably inferred from the evidence that Glossip was very low on cash before being paid, because earlier in the day on January 6, he took a $20 advance from the hotel against the paycheck he was about to receive, to get through the day. In addition, Glossip's girlfriend told an investigator that they lived paycheck to paycheck and that she did not think Glossip was able to save any money.

Glossip later stated, during an interview in June of 1998, that just before he was arrested in this case, he sold his TV and futon for $190, sold his vending machines for $200, and sold an aquarium for $100, for a total of $490. If Glossip still had all of this cash, plus the money leftover from his paycheck at the time of his arrest, he would have had approximately $552 in cash.

corroborated Sneed's testimony.[53] The evidence regarding Glossip's paycheck, sales, and purchases, which could not explain where he obtained approximately $1200 of the cash in his possession at the time of his arrest, materially corroborated Sneed's testimony that Glossip offered him money to kill Van Treese and then paid Sneed for accomplishing the murder, using half of the cash stolen from Van Treese's car, and then kept the remaining stolen money for himself.[54] As noted in *Pink*, this Court has "not required that the *quantity* of the independent evidence connecting the defendant to the crime be great, though we have insisted that the evidence raise more than a mere suspicion."[55] I conclude that the amount of unaccounted-for cash found in Glossip's possession two days after the murder does tend to directly link him to this murder-for-hire killing and adequately corroborates the testimony of his accomplice, Justin Sneed.

¶32 Although the issue is close, I conclude that the facts of this case are distinguishable from *Pink*, wherein we reversed the defendant's conviction for robbery with a dangerous weapon because the State did not present adequate

---

[53] The finding of "stolen goods" in the defendant's possession is one of the examples of independent corroborating evidence noted in *Pink*. 2004 OK CR 37, ¶ 20, 104 P.3d at 592.

[54] The State presented evidence at trial that Barry Van Treese would have had $3500 to $4000 in cash in his possession, based on hotel receipts. Justin Sneed testified that the envelope he found under the front seat of Van Treese's car, where Glossip told him to look, contained approximately $4,000 in cash, which Glossip split evenly between Sneed and himself. When Sneed, who had no regular source of income, was apprehended one week later, he told investigators that he still had some of the money that he had been paid and where it could be found. When investigators searched the apartment to which Sneed directed them, they found a Crown Royal Bag containing $1,680 in cash in a drawer that Sneed was using while he stayed in the apartment.

[55] 2004 OK CR 37, ¶ 16, 104 P.3d at 590 (emphasis in original). We also noted in *Pink* that "circumstantial evidence can be adequate to corroborate an accomplice's testimony." *Id.* at ¶ 16, 104 P.3d at 590-91.

independent evidence connecting Pink to the armed robbery at issue.[56] I also find the *Pink* case distinguishable because the prosecutor in that case argued to the jury, contrary to well-established Oklahoma law, that the jury was *not* required to find the existence of evidence, separate from the testimony of any accomplices, that tended to connect the defendant with the commission of the offense.[57] This argument prompted us to revise the language of OUJI-CR(2d) 9-32, upon which the prosecutor in *Pink* had based her argument.[58] Although Glossip's trial was conducted using the pre-*Pink* version of this instruction, the prosecutor in his case specifically acknowledged, during closing argument, that Glossip's jury was required to find adequate corroborating evidence in order to convict him of murder. Hence Glossip's jury was not misled in this regard.

¶33 It is important to distinguish the adequate corroboration requirement found in 22 Okla. Stat.2001, § 742, which applies only to cases involving accomplice testimony, from the general sufficiency of the evidence standard, which can be applied to any conviction. After the independent corroboration standard has been met for any accomplice testimony, this Court can and will consider all the evidence presented at trial, including accomplice testimony, to determine whether sufficient evidence was presented to convict the defendant.[59]

---

[56] *See Pink*, 2004 OK CR 37, ¶¶ 17-20, 104 P.3d at 591-92.

[57] *Id.* at ¶ 22, 104 P.3d at 592.

[58] *Id.* at ¶ 23, 104 P.3d at 593.

[59] Hence although I reject the majority opinion's suggestion that Glossip's failure to immediately disclose his knowledge of Van Treese's murder and his misleading of the investigation can serve as adequate corroborating evidence under § 742, I agree that this evidence can be considered as going to consciousness of guilt within our overall sufficiency of the evidence analysis, after adequate corroboration is established.

In this regard, 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.

¶34 Nevertheless, I dissent from today's decision based upon my analysis of Glossip's Proposition III claim.

NSON, JUDGE, DISSENTING:

¶1 I dissent for the reasons well expressed in Judge Chapel's dissenting ion.

¶2 Providing visual aids for the jury is a common trial practice. Done ght, it focuses the jurors' attention, enhances their understanding, and sharpens their memory. Done right, it is an important part of a fair and well run trial.

¶3 Here, in the image of an American courtroom plastered with poster-size trial notes taken by the prosecutor, we see the practice gone badly wrong.

¶4 The process allowed the prosecution, in effect, a continuous closing argument, and may well have violated the rule of sequestration of witnesses. This Court cannot judge the effect of the process on this defendant's right to a fair trial with any assurance because the trial court refused the defendant's request to have the posters and their placement in the courtroom made part of the appellate record. Under those circumstances, we should not assume this error was harmless.

APPENDIX H

Opinion, *Glossip v. State*, D-1998-948 (July 17, 2001)

2001 OK CR 21

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	**FOR PUBLICATION**
Appellant,	)	
v.	)	Case No. D 98-948
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

JOHNSON, VICE-PRESIDING JUDGE:

¶1 Appellant, Richard Eugene Glossip, was convicted in Oklahoma County District Court, Case No. CF 97-244, of Murder in the First Degree, in violation of 21 O.S.1991, § 701.7(A).[1] Jury trial was held June 1st through 10th, 1998, before the Honorable Richard W. Freeman, District Judge. The jury found two aggravating circumstances - (1) that the murder was especially heinous, atrocious, or cruel and (2) that Appellant would pose a "continuing threat" to society - and recommended a penalty of death. Judgment and Sentence was imposed on July 31, 1998.

¶2 Appellant perfected his appeal by filing his Petition in Error on February 1, 1999. His initial brief was filed on April 17, 2000. The State's brief was filed on August 15, 2000, and Appellant's Reply brief was filed

[1] Appellant was charged cojointly with Justin Blayne Sneed. (O.R. 5). The State filed its bill of particulars on April 23, 1997, alleging the murder was especially heinous, atrocious or cruel and that Appellant constituted a continuing threat to society. (O.R. 31).

September 5, 2000. Appellant also filed on April 17, 2000, an Application for Evidentiary Hearing on Jury Misconduct Claims, an Application for Evidentiary Hearing on Sixth Amendment Claims, and Appellant's Notice of Extra-Record Evidence Supporting Prosecutorial Misconduct and Violations of Due Process Clauses of the Oklahoma and Federal Constitutions. We remanded the case to the district court for an evidentiary hearing. *See Order Remanding to the Presiding Judge of Oklahoma County for an Evidentiary Hearing on Claims of Jury Misconduct, Ineffective Assistance of Counsel, and Prosecutorial Misconduct, etc.*, D 1998-948 (Okl.Cr. December 7, 2000)(not for publication). The hearing was held March 5, 2001, before the Honorable Twyla Gray, District Judge, and the trial court's Findings of Fact and Conclusions of Law After Evidentiary Hearing were filed in this Court on March 16, 2001. Both parties filed Supplemental Briefs on March 23, 2001.

¶3 Appellant raised twelve propositions of error in his appeal. Two propositions required fact-finding outside the appeal record and were addressed at the March 5, 2001 evidentiary hearing. The claim of jury misconduct was also addressed at the evidentiary hearing. Having reviewed the entire record before us, we have determined that oral argument is not warranted or necessary as further argument on the claims and issues raised in this case would not be helpful or convincing to the Court.

¶4 Only a brief statement of facts is necessary, because Appellant's claim of ineffective assistance of counsel is compelling and requires relief. For

the reasons set forth below, we find Appellant's conviction for Murder in the First Degree should be and hereby is **REVERSED AND REMANDED FOR NEW TRIAL**.

¶5 On January 7, 1997, the body of Barry Van Treese was discovered in Room 102 of the Best Budget Inn in Oklahoma City. Van Treese had been severely beaten and died as a result of blood loss and blunt force trauma to his head. Following the discovery of the body, Oklahoma City police detectives interviewed Appellant, who was the manager of the Best Budget Inn. They also interviewed Justin Sneed, who was charged as a co-defendant in this case and who worked for Appellant as a maintenance man in exchange for a free room at the motel. At Appellant's trial, Sneed said he beat Van Treese to death by hitting him ten or fifteen times with a baseball bat. Sneed testified he killed Van Treese because Appellant asked him to do it. Sneed admitted he made an agreement with the State to testify against Appellant in exchange for a sentence of life without parole.

¶6 At all times prior to trial and during trial, Appellant denied involvement in the murder of Barry Van Treese. Although his statements to police officers changed somewhat between his first and second police interview, he consistently denied encouraging or telling Sneed to commit the murder. Appellant only admitted his involvement in the murder "after the fact." He admitted he was afraid to tell the police what he knew and admitted he assisted Sneed by helping conceal the murder scene.

¶7 On appeal and at trial, the State's theory of the case remained the same - Sneed was a poor, vulnerable young man and Appellant masterminded the murder by manipulating (asking or telling) Sneed to do it. The State concedes the only "direct evidence" connecting Appellant to the murder was Sneed's trial testimony. No forensic evidence linked Appellant to murder and no compelling evidence corroborated Sneed's testimony that Appellant was the mastermind behind the murder.

¶8 The evidence at trial tending to corroborate Sneed's testimony was extremely weak. We recognize a conviction cannot be had upon the testimony of an accomplice unless it is "corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof." 22 O.S.Supp.2000, § 742. However, we need not reach Appellant's claim going to the sufficiency of the evidence,[2] because trial counsel's conduct was so ineffective that we have no confidence that a reliable adversarial proceeding took place.

¶9 Appellant raised twelve propositions of error. Although several errors occurred at trial which alone might necessitate reversal, we only discuss those matters impacting our decision today and those which should be considered if Appellant is retried for this crime.

---

[2] Appellant raised sufficiency of the evidence in Proposition One of his Brief.

¶10 In Proposition Two, Appellant claims his trial counsel represented him "in a pervasively ineffective manner to the profound prejudice of Appellant, leading to a collapse of the adversarial process and a denial of Appellant's right to counsel guaranteed by the Sixth Amendment." We agree and preface our analysis of this claim by emphasizing the State's evidence was circumstantial except for the testimony of Justin Sneed.

¶11 Analysis of this claim begins with the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both a deficient performance and resulting prejudice. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Strickland* sets forth a two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. Unless the defendant makes both showings, "it cannot be said that the conviction . . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. 2064. Appellant must demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* at 688-89, 104 S.Ct. at 2065-66.

¶12 Appellant claims his trial counsel: (1) failed to engage in meaningful cross-examination or utilize potent impeachment evidence;[3] (2) failed to adequately prepare by familiarizing himself with discovery obtained from the State; (3) failed to conduct proper voir dire; (4) failed to object to improper double hearsay testimony; (5) failed to move the trial court to answer the jury's question regarding culpability for not rendering aid; and (6) failed to object to improper victim impact evidence. Appellant filed an Application for Evidentiary Hearing on Sixth Amendment Claims, pursuant to Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App.(2001). Although some of Appellant's ineffectiveness claims are obvious from simply reading the appeal record,[4] several, including trial counsel's failure to utilize available and potent impeachment evidence against Justin Sneed, are supported by matters outside the record.[5]

¶13 Reviewing the claims in the Application, in conjunction with the serious allegations made and the record before us, this Court determined

---

[3] This claim is the most egregious of the ineffectiveness claims. Specifically, this subclaim relates to trial counsel's failure to utilize the videotaped interview of Justin Sneed and his failure to utilize the record of Sneed's competency evaluation for impeachment purposes.

[4] The record aptly demonstrates trial counsel's failure to object to extremely prejudicial double hearsay, failure to object to prejudicial victim impact evidence, and failure to offer a proposed response to the jury's question concerning culpability for failure to render aid. The record also demonstrates counsel's failure to obtain and review discovery and other evidentiary materials, his failure to obtain the presence of witnesses, and his general lack of advocacy skills.

[5] The Exhibits attached to the Application for Evidentiary Hearing were not admitted at trial. They address trial counsel's failure to utilize available and important impeachment evidence against the State's star witness Justin Sneed (Exhibits 1, 2, 3, 4 and 7), his failure to adequately prepare for trial and present a relevant and sound theory of defense (Exhibit 6), and his failure to prepare proposed mitigation instructions or second stage closing argument (Exhibit 5).

Appellant had shown "by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001); *Order Remanding to the Presiding Judge of Oklahoma County for an Evidentiary Hearing on Claims of Jury Misconduct, Ineffective Assistance of Counsel, and Prosecutorial Misconduct, etc.*, D 1998-948 (Okl.Cr. December 7, 2000)(not for publication). We remanded for an evidentiary hearing.[6] We directed the trial court to enter appropriate findings of fact and conclusions of law and to determine: (1) the availability of the evidence or witness; (2) the effect of the evidence or witness on the trial court proceedings; (3) whether the failure to use a witness or item of evidence was trial strategy; and (4) if such evidence or witness was cumulative or would have impacted the verdict rendered. *See* Rule 3.11(B)(3)(b)(iii).

¶14 The evidentiary hearing was held March 5, 2001, and the trial court's Findings of Facts and Conclusions of Law were filed in this Court on March 13, 2001. Ultimately, the trial court found Appellant had shown by "clear and convincing evidence that he was prejudiced by the ineffectiveness of

[6] The matter was remanded for an evidentiary hearing on the Sixth Amendment claims asserted in Proposition Two and the Application, as well as to address other claims raised in the Application for Evidentiary Hearing on Jury Misconduct Claims and Appellant's Notice of Extra-Record Evidence Supporting Prosecutorial Misconduct and Violations of Due Process Clauses of the Oklahoma and Federal Constitutions.

counsel and that this Court cannot have confidence in the outcome of the trial."

¶15 As noted above, Appellant made six claims relating to ineffective counsel. Two claims - trial counsel's failure to engage in meaningful cross-examination or utilize potent impeachment evidence and his failure to adequately prepare for trial by familiarizing himself with discovery obtained from the State - required fact-finding outside the appeal record and were addressed at the evidentiary hearing. Prior to the hearing, Judge Gray[7] reviewed the entire trial transcript, including the testimony of Justin Sneed, and watched the videotaped interview of Justin Sneed conducted on January 14, 1997, by Oklahoma City police Detectives Bemo and Cook.[8]

¶16 Trial counsel's failure to utilize important impeachment evidence against Justin Sneed stands out as the most glaring deficiency in counsel's performance.[9] Evidence of counsel's failure to utilize the videotape of Justin Sneed is also apparent from the trial record. This interview was repeatedly referred to by trial counsel and by the State. During first stage deliberations,

---

[7] We take this opportunity to commend Judge Gray for her serious and studied handling of this matter on remand. The details of her Findings of Fact and Conclusions of Law are excellent. The Judge put in many hours to complete her task. She is complimented for making a hard decision and not taking the easy way out by condoning trial counsel's conduct.

[8] At trial, this videotape was identified as State's Exhibit 4 and was not admitted at trial; the videotape was attached to the Application for Evidentiary Hearing on Sixth Amendment Claims as Exhibit 1. A transcription of the videotape is attached to the Application as Exhibit 2.

[9] In this subclaim, Appellant contends counsel should have utilized the Sneed videotape and Dr. King's report on competency to impeach Sneed.

the jury requested to view the videotape of Justin Sneed even though it was not admitted into evidence. At trial, trial counsel attempted to impeach Detective Bemo with portions of the videotape, but was unable to lay an appropriate foundation. Judge Freeman talked trial counsel out of using the videotape to impeach Detective Bemo; trial counsel indicated he would use the tape to impeach Justin Sneed. However, when the time came to impeach Sneed, trial counsel failed to utilize the videotape at all.

¶17 At the evidentiary hearing, Judge Gray determined the videotape was available and could have been used as impeachment evidence against both Detective Bemo *and more importantly* against Justin Sneed, but trial counsel never laid a proper foundation for its use against Detective Bemo and did not even attempt to confront Sneed with the discrepancies and inconsistencies on the tape. Judge Gray noted the numerous inconsistencies between Sneed's trial testimony and his videotaped confession. She identified at least seven material inconsistencies and noted at least five things in Sneed's trial testimony that he had completely omitted from his videotaped statement. The most obvious and prejudicial of these omitted statements was Sneed's revelation that Appellant told him "to pick up some trash bags, a hack saw and I believe some ... muriatic acid ... He was wanting to pour the acid upon the body and then saw up the rest of the body and put it in trash bags to be able to move it out of the room." Trial counsel did not impeach Sneed by pointing out that he had never mentioned that obviously material fact on the videotape.

Judge Gray observed that trial counsel "missed multiple opportunities to test Sneed before the jury." Noting the State's star witness was Justin Sneed, the gist of Judge Gray's findings was that no reasonable trial strategy could have supported a decision not to utilize this impeachment evidence against him.

¶18 Judge Gray considered the testimony of Captain Charles Rexford on Appellant's claim that his counsel was obviously ill-prepared and had no cogent defense theory. After hearing Rexford's testimony, Judge Gray found trial counsel presented an ill-prepared, incomprehensible defense that other individuals committed the murder based upon a five-minute telephone conversation with Rexford about a murder that occurred in 1984. She noted trial counsel did not review the State's investigative reports on the 1984 murder, did not arrange to have the other "suspect" testify, and had clearly not reviewed the law applicable to the trial court's determination whether Rexford's testimony would even be admissible. Ultimately, Judge Gray determined that Rexford's testimony showed the theory of defense put forth by trial counsel was "ill-conceived and unsupportable (sic). Having a theory of defense is very important. It cannot be trial strategy to misstate the facts to the judge and jury." She found trial counsel had not adequately researched the law and his ill-preparedness impacted his performance at all stages of trial.[10]

---

[10] As to counsel's failure to utilize Dr. Edith King's report on Sneed's competency, Judge Gray found the report would not have been admissible at trial and it would have been improper to attempt to impeach Sneed with it. Judge Gray also found Pat Ehler's testimony on trial counsel's ill-preparedness for second stage was inadmissible and prohibited Ehler's from testifying at the evidentiary hearing under Rules 1.7, 1.9, 1.10 and 3.7, *Rules of Professional Conduct*, 5 O.S.Supp.2000, Ch.1, App. 3-A.

¶19 Judge Gray found trial counsel failed to adequately prepare for trial and the trial mistakes (addressed at the evidentiary hearing) were not part of any trial strategy. His failure to utilize available impeachment evidence against Justin Sneed, upon whose testimony the State's entire case relied, was deficient performance and was clearly prejudicial. She ultimately concluded Appellant met both prongs of *Strickland*.

¶20 This Court will give the trial court's findings strong deference if supported by the record, but we shall determine the ultimate issue of whether trial counsel was ineffective. Rule 3.11(B)(3)(b)(iv), *Rules of the Court of Criminal Appeals*, Title 22, Ch.18, App. (2001). After careful review and consideration of the record, we find the trial court's findings and conclusions are supported by the record and we shall address Appellant's remaining ineffective assistance of counsel claims in accordance therewith.

¶21 Although we find the claim that trial counsel did not conduct proper voir dire unpersuasive,[11] the remaining claims demonstrate trial counsel's ineffectiveness. There was no excuse for trial counsel's failure to object to inadmissible double hearsay - Detective Bemo's testimony that he talked to William Bender who said that Van Treese said he was going to move Glossip out of the motel. This testimony was inadmissible hearsay, was offered for no other reason than to prove the truth of the matter asserted, and was extremely prejudicial. It was arguably the only evidence presented at trial that tended to

[11] This claim was raised in Proposition Ten of Appellant's Brief.

independently corroborate any portion of Justin Sneed's testimony implicating Appellant in the crime and establishing a motive.[12]

¶22 Further, trial counsel's failure to object to Judge Freeman's handling of the jury's question regarding culpability for failing to render aid also was unreasonable and constituted deficient performance. The record demonstrates Appellant always maintained his innocence as a principal to the crime; he always admitted his involvement after the fact. Trial counsel totally missed this opportunity to reargue his request for an instruction on accessory after the fact at this juncture. This claim will be more fully discussed below.

¶23 Lastly, trial counsel's complete failure to object to the State's victim impact evidence was deficient under prevailing professional norms.[13] The State did not comply with *Cargle v. State*, 1995 OK CR 77, 909 P.2d 806, 828, *cert. denied*, 519 U.S. 831, 117 S.Ct. 100, 136 L.Ed.2d 54 (1996), and 22 O.S.Supp.1999, § 984. The victim impact statement admitted here went *far* beyond what was admissible under the guidelines previously set forth by this Court and was so inflammatory and prejudicial it very likely influenced the jury's decision to impose a death sentence. It was unreasonable for trial counsel to allow this inflammatory evidence to be admitted and heard without any objection.

---

[12] This claim was raised in Proposition Seven of Appellant's Brief.
[13] A claim relating to the prejudicial victim impact statement was raised in Proposition Five.

¶24 Trial counsel's lack of preparation is also apparent from his repeated statements prior to and during the trial referencing Appellant's ability to change his plea or Appellant's refusal to follow his advice to enter a blind plea to the murder charge. We also note other examples of unreadiness which are evident in the record: trial counsel's last minute requests for discovery which the State had already provided or had previously given counsel the opportunity to obtain; trial counsel's telling the jury "Howard Bender" was a fictitious person when his identity was known and obvious from discovery materials; trial counsel's failure to lay a proper foundation for the admission of evidence or testimony; trial counsel's objection to lack of notice withdrawn because trial counsel did have notice; trial counsel's failure to secure a witness whom counsel repeatedly referred to as a suspect in front of the jury: trial counsel's "calling" a witness (by yelling for him in the hallway during trial) to show the witness was not present; trial counsel's forgetting to demur to the evidence until prompted by the trial judge. Trial counsel also was not prepared for second stage. Although he prepared a list of mitigating factors for the jury's consideration, it was apparently one prepared in haste. Further, the only witness other than Appellant who testified during second stage was Appellant's mother, and counsel failed to ask her whether she wanted her son's life spared until prompted by the trial judge.

¶25 The record as a whole suggests that trial counsel was not prepared for trial, had not formulated any reasonable defense theory, fully expected

Appellant to enter a plea, and never expected to get to the second stage of the trial. For the reasons noted by the trial court after the evidentiary hearing, and for the reasons noted above, we find counsel's performance deficient and we find his failures could not have been part of any sound or reasonable trial strategy. Under the facts of this case and considering the weight of the evidence presented at trial, Appellant was prejudiced by his trial counsel's performance and we cannot say his trial produced a reliable result. *Strickland.* For these reasons, we find this claim warrants reversal and hereby remand this case for a new trial.

¶26 Several other issues warrant discussion to prevent the same mistakes from occurring on retrial. In Proposition Five, Appellant argued the admission of Donna Van Treese's victim impact statement during the second stage of trial violated the Evidence Code, 22 O.S.Supp.1999, § 984, and his state and federal constitutional rights. We agree. The trial court and the State failed to comply with the procedures set forth in *Cargle*, 1995 OK CR 77, ¶¶ 75-77; 909 P.2d at 828. The majority of the victim impact statement was outside the scope of permissible victim impact evidence, was unduly prejudicial and was not probative of "those unique characteristics which define the individual who has died, the contemporaneous and prospective circumstances surrounding that death, and how those circumstances have financially, emotionally, psychologically, and physically impacted on members of the victim's immediate family." *Id.*, 1995 OK CR 77, ¶ 75, 909 P.2d at 828; *see also*

Welch v. State, 2000 OK CR 8, ¶ 42, 2 P.3d 356, 373, *cert. denied*, -- U.S. -- , 121 S.Ct. 665, 148 L.Ed.2d 567 (2000)(testimony about son placing flowers at grave and brushing dirt away did not fall within statutory guidelines had little probative value and was more prejudicial than probative); *Washington v. State*, 1999 OK CR 22, ¶ 62, 989 P.2d 960, 978-979 (references to God and a higher power are improper in victim impact statement).

¶27 Proposition Eight also warrants some discussion. Under the very specific facts of this case, Appellant was entitled to a jury instruction on the crime of accessory after the fact.

¶28 The trial court has a duty to instruct on all lesser-included or lesser-related offenses which are supported by the evidence. *Childress v. State*, 2000 OK CR 10, ¶ 14, 1 P.3d 1006, 1011; *Shrum v. State*, 1999 OK CR 41, ¶¶ 5-6, 991 P.2d 1032, 1036. A defendant is also entitled to an instruction on his theory of defense if it is supported by the evidence and is tenable as a matter of law. *Kinsey v. State*, 1990 OK CR 64, ¶ 9, 798 P.2d 630, 632-633. The test this Court uses to determine whether evidence of a lesser included offense is sufficient to warrant a jury instruction is no different than the test used to determine when the evidence is sufficient to warrant a jury instruction on the defendant's theory of defense. *Bland v. State*, 2000 OK CR 11, ¶ 56, 4 P.3d 702, 719-720, *cert. denied*, -- U.S. -- , 121 S.Ct. 832, 148 L.Ed.2d 714 (2001). It is the judge's responsibility to determine whether *prima facie*

evidence of the lesser included offense (or evidence of the proposed defense) has been presented to warrant the instruction. *Id.* at ¶ 57.

¶29 Certainly where, as here, a defendant maintains his innocence to a charge of murder which rests upon a theory that he "counseled" another to commit the murder and the defendant *defends* the case on the theory that he only knew of the murder after the fact and did not disclose what he knew, the evidence is sufficient to establish a *prima facie* case warranting an instruction on accessory after the fact. Under the evidence presented, we believe accessory after the fact was a related offense, was Appellant's "theory" of defense, and the instruction should have been given.

¶30 The last claim we address was brought to our attention in Appellant's Application for Evidentiary Hearing on Jury Misconduct Claims. This Application was filed with Appellant's Brief and raises, in part, a claim alleging one or more jurors utilized extraneous materials, a Bible, during deliberations and possibly in arriving at their verdict(s). Affidavits of two jurors were attached to the Application noting the discussion of and reading of the Bible by one or more jurors during deliberations. Because of the seriousness of allegations involving the jury's receipt and consideration of extraneous materials, we remanded this issue for consideration at the evidentiary hearing. We instructed the trial court to make findings regarding whether extraneous material, specifically a Bible, was physically brought by one or more jurors into the jury deliberation room; and, whether the same was/were referred to and

utilized by jurors during their deliberations in the first or second stage of Appellant's jury trial.

¶31 Judge Gray considered evidence supporting this allegation at the evidentiary hearing held March 5, 2001. Nine of the twelve jurors from Appellant's trial testified at the hearing. Juror Casey Fine testified he brought his Bible into the deliberation room during both first and second stage deliberations. Fine said he opened and referred to it "when asked." He could not recall the name of the juror who asked him something about the Bible, but said it was not one of the jurors present to testify at the evidentiary hearing. Juror Jere Osburn saw the Bible in the deliberations room and testified it was physically opened or referred to or read from during deliberations. Juror James Hardy testified there was a Bible in the deliberation room, but said it was not opened or referred to during deliberations.

¶32 Jurors Rodden, Brooks, Chappell and Selensky each testified he or she did not "recall" or "remember" a Bible being physically present during deliberations. Juror McWilliams admitted one juror had a Bible with him everywhere and probably during both stages of deliberations, but McWilliams said it was not opened or referred to. Juror Armstrong said he was not exactly sure one way or the other.

¶33 After considering this testimony, Judge Gray found "credible evidence that a Bible was physically in the jury room during deliberations" and "credible evidence that the Bible was not actually utilized during deliberations."

We review those factual findings applying the deferential abuse of discretion standard. *Young v. State*, 2000 OK CR 17, ¶ 109, 12 P.3d 20, *cert. denied*, -- U.S. -- , 121 S.Ct. 2200, -- L.Ed.2d – (2001); *see e.g. Bear v. State*, 1988 OK CR 181, ¶ 8, 762 P.2d 950, 954 (resolution of questions of fact are entitled to special deference by a reviewing court); *Ellis v. State*, 1990 OK CR 43, ¶ 11, 795 P.2d 107, 110 (trial court's resolution of underlying factual questions subject to "clearly erroneous" standard of review).

¶34 Utilizing the above standard, we believe the trial court was presented with credible evidence to show that at least one Bible was, in fact, in the jury room during first and second stage and may well have been referred to in and during jury deliberations.

¶35 We were recently confronted with a similar claim in *Young*, *id.* There, we affirmed "there is no question that a jury's receipt of extraneous material not admitted at trial may have an improper influence upon the jury's verdict." Because the trial court in *Young* determined there was no extraneous material, i.e. a Bible, in deliberations, we did not reach the question whether physically utilizing a Bible and its verses during deliberations constituted receipt of extraneous material and an improper influence on the jury's deliberations. *Id.* at ¶ 113.

¶36 Again, because we reverse this case on Appellant's claim of ineffective assistance of counsel, we need not fully address this claim and its impact upon the jury's determination of guilt and sentence. However, we are

compelled to caution trial courts to remind jurors they are to utilize *only* the jury instructions and consider *only* the evidence presented at trial in arriving at their determinations of guilt and sentence. Any outside reference material, including but not limited to Bibles or other religious documents, dictionaries, or any other reference book, should not be taken into or utilized during jury deliberations. Such documents and texts may be left in custody of the bailiff and returned to the jurors at the conclusion of deliberations. Enforcement of such a procedure will foreclose future claims similar to the one raised in this case and the one previously addressed in *Young*.

Conclusion

¶37 Glossip's conviction for First Degree Malice Aforethought Murder is **REVERSED AND REMANDED FOR A NEW TRIAL.**

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RICHARD W. FREEMAN, DISTRICT JUDGE

Appellant, Richard Eugene Glossip, was tried by a jury in the District Court of Oklahoma County, Case No. CF-97-244, before the Honorable Richard W. Freeman. Glossip was convicted of First Degree Malice Aforethought Murder. After finding the existence of two aggravating circumstances, the jury assessed punishment at death and the trial court sentenced accordingly. Glossip's conviction for First Degree Malice Aforethought Murder is **REVERSED AND REMANDED FOR A NEW TRIAL.**

LWW 20943

APPEARANCES AT TRIAL

WAYNE M. FOURNERAT
ATTORNEY AT LAW
2525 NW EXPRESSWAY, SUITE 300
OKLAHOMA CITY, OK 73112
ATTORNEY FOR DEFENDANT

FERN SMITH
JACK DURRETT
ASST. DISTRICT ATTORNEYS
OKLAHOMA COUNTY COURTHOUSE
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

G. LYNN BURCH, III.
MATTHEW D. HAIRE
APPELLATE DEFENSE COUNSEL
OKLAHOMA INDIGENT DEFENSE SYSTEM; CAPITAL DIVISION
1660 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEYS FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH BRANAM
ASSISTANT ATTORNEY GENERAL
2300 N. LINCOLN BLVD., STE. 112
OKLAHOMA CITY, OK 73104-4894
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, V.P.J.
LUMPKIN, P.J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS IN RESULT

RC

LWW 20944

LILE, JUDGE: CONCURS IN RESULTS

¶1 Judge Gray's *Findings of Fact and Conclusions of Law After Evidentiary Hearing* was comprehensive and compelling. I concur in her conclusion that trial counsel representation was inadequate. This was not a fair trial. I agree that this case must be reversed and remanded for new trial for this reason alone.

¶2 I have full confidence that the retrial will be conducted according to law.

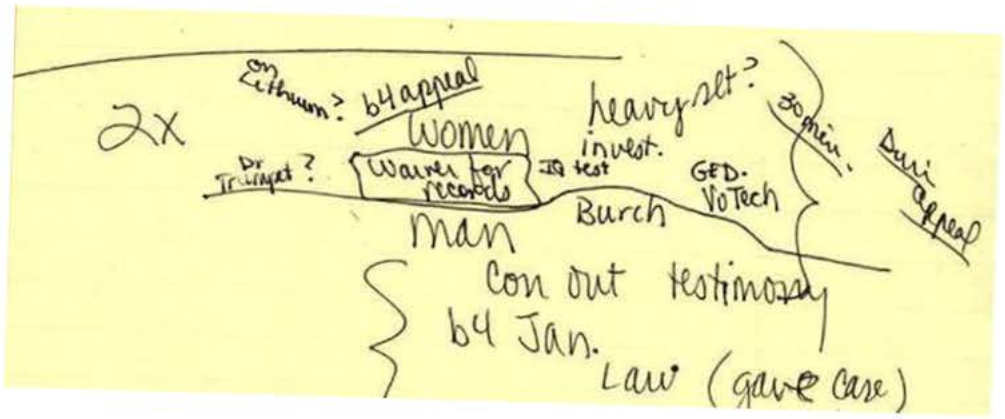
APPENDIX I

Tr. Vol. 12, 64, *State v. Glossip*, No. CF-97-244

any type of prescription medication?
A. No, ma'am.
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.
Q. Did it make you feel better?
A. It made me drowsy, you know. I really didn't try to take it a whole lot because I never did -- you know, most of the time when they gave it to me I'd just flush it or something like that.
Q. So you voluntarily stopped taking the medication they prescribed for you?
A. Yes.
Q. All right. Prior to your arrest on January 14th of 1997, you told us that you, once you came to Oklahoma City that you had began using some drugs. I believe you said marijuana and crank; is that correct?
A. Yes, ma'am.
Q. All right. Marijuana you smoke; is that right?
A. Yes, ma'am.

APPENDIX J

Color Copy of Attachment to Successive Application for Post-Conviction Relief, *Glossip v. State*, No. PCD-2023-267 (Mar. 27, 2023)


2x
Women
Waiver for records
IQ test
invest.
GED.
VoTech
Burch
Man
Con out testimony
b4 Jan.
Law (gave case)
heavy set?
30 min.
Dui appeal

APPENDIX K

Excerpts from the Attachments to the Application for Post-Conviction Relief, *Glossip v. State*, No. PCD-2022-589

ATTACHMENT 7

COPY

TRANSCRIPT OF INTERVIEW

OF

JUSTIN SNEED

FROM VIDEOTAPE

ON

JANUARY 14, 1997

BY MR. COOK: Justin, this is my partner Detective Bemo.

BY MR. BEMO: How are you doing?

BY MR. SNEED: Good. How are you doing?

BY MR. BEMO: All right.

BY MR. COOK: What time have you got, Bob?

BY MR. BEMO: I have 7:50 to be exact.

BY MR. COOK: Justin, you're how old?

BY MR. SNEED: 19, sir.

BY MR. COOK: And your date of birth is what?

BY MR. SNEED: 9-22-77.

BY MR. COOK: And your Social Security number?

BY MR. SNEED: 453-83-1415.

BY MR. COOK: Are you about 6 foot, 140 still, brown hair and hazle eyes?

BY MR. SNEED: No. I've got like a red tint in my hair.

BY MR. COOK: Can I see?

BY MR. BEMO: Well, that's just a

small red tint.

BY MR. COOK: Did you do that on purpose?

BY MR. SNEED: No. My mom has got really red hair.

BY MR. COOK: Really?

BY MR. BEMO: Oh, it's natural then?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Justin, what we want to do is talk with you about this thing. I'm sure these officers told you what you were being brought down here.

BY MR. SNEED: Yes, sir.

BY MR. COOK: What did they tell you?

BY MR. SNEED: They said I was being arrested for murder one, I think.

BY MR. COOK: Uh-huh. And so you're technically under arrest right now. And we want to talk to you about this deal, okay? But before we do, my partner, he's -- he's going to advise you of what we call the Miranda warning. He's got a card. He's going to read your rights to you to make sure you understand

those, okay?

BY MR. BEMO: And before you make up your mind on anything, I want you to hear some of the things that we've got to say to you and before we talk. But at any rate let me read your rights to you.

You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have him present with you while you are being questioned.

If you cannot afford to hire an attorney one will be appointed to represent you before any questioning if you wish one. If you do decide to make a statement, you may stop at any time.

Now do you understand these rights I have read to you?

BY MR. SNEED: Yes, sir.

BY MR. BEMO: Okay. Do you want to discuss this incident with us?

BY MR. SNEED: I believe so.

BY MR. BEMO: I'm sorry?

BY MR. SNEED: Yes, sir.

BY MR. BEMO: Okay. The thing about it is, Justin, we think -- we know that this involves more than just you, okay? We've got witnesses and we've got other people and we most likely have physical evidence. You know what I am saying, on this thing.

And right now the best thing you can do is to just be straightforward with us about this thing and talk to us about it and tell us what happened and who all was involved, because I personally don't think you're the only one.

Everybody that we talked to they're putting it on you, okay? They're putting the whole thing on you and they're going to leave you holding the bag.

In other words, if you just said you don't want to talk to us and you want to talk to an attorney we would march you down to the jail and we would book you in for this charge and you would be facing this thing on your own. And I don't think it's just you.

I think there are more people involved and you can straighten out a lot of things. And I just don't think you should take

the whole thing.

BY MR. COOK: Now that gentleman that we talked with, I say we, the cops, when we were out there, is his last name Brassfield?

BY MR. SNEED: Yeah, Brassfield.

BY MR. COOK: Yes. Well, Mr. Brassfield, of course, doesn't know what we know about this, Justin, and he likes you. All righty? And it's my understanding that you worked for him when you came up from Texas here, how long ago was that?

BY MR. SNEED: It was like July 3rd when we come up here during the summer. That was the day before --

BY MR. COOK: Okay. Fourth of July?

BY MR. BEMO: Who came up here with you? One of your brothers?

BY MR. SNEED: Yes. My brother, Wes Taylor.

BY MR. BEMO: Wes Taylor came?

BY MR. SNEED: He's got a different last name than I do. He's my stepbrother.

BY MR. BEMO: Half brother?

BY MR. SNEED: Well, my mom married his dad.

BY MR. BEMO: Oh, I see. Okay. So he's not even a half brother. He's just a stepbrother?

BY MR. SNEED: Yes.

BY MR. BEMO: Okay. So why did you leave the construction crew?

BY MR. SNEED: Because me and my brother were working for this construction crew down there, and we were going to try to -- try to make it here in Oklahoma City, you know, to build up a life here and everything and so we got to talking to the manager at the motel there.

BY MR. BEMO: Who is?

BY MR. SNEED: Rich. I don't really know his last name.

BY MR. COOK: Okay. Would you know it if you heard it?

BY MR SNEED: I think it starts with a G.

BY MR. COOK: Glossip?

BY MR. SNEED: Yeas, I think. That kind of sounds right. I knew it was some

weird name.

And anyway, we got to talking to him about working with him for like the room, just doing maintenance and doing the housekeeping and everything, just strictly for the room.

And so we started doing that for a little while and then my brother was like wanted out of Tarrant County, or he was up here on probation from Tarrant County, and his dad tracked him down to that motel and talked him into going in and turning himself in, so I stayed there for a while.

And then one of the bosses because there was like two bosses and this Rob Brassfield, which is like the main boss that gives us our payroll and everything like that and then his brother, Mark Brassfield.

Anyway, Mark came by the motel one time like a couple of weeks before Christmas and told me that as long as I was in Oklahoma City or as long as they were in Oklahoma City or I could find them that if they were doing work that I was more than welcome to come back to work and then -- but he told me he was going

to California for a couple of weeks.

BY MR. COOK: How did he know you were at the motel?

BY MR. SNEED: Because he knew I was -- or he knew that me and Wes were -- had quit them to work for this motel because we still had one roommate named Jesse. I can't even think of his last name. He was a Mexican guy that was living with us when we quit him. And he was still working for these guys, and he knew that we was working for the motel.

And so he just came by cruising by one day and I happened to be outside and he stopped and I talked to him and everything.

BY MR. BEMO: What kind of work does he do? I mean, what kind of work do you do for him?

BY MR. SNEED: For the Brassfields?

BY MR. BEMO: Yeah.

BY MR. SNEED: Roofing.

BY MR. BEMO: Roofing? Are they just --

BY MR. SNEED: They contract from like All American -- or out of Oklahoma City.

BY MR. BEMO: Do they have a lot of work here in Oklahoma City?

BY MR. SNEED: Yes. They have been pretty busy since July 4th.

BY MR. BEMO: So they just never had gone back to -- where did you come from out of Texas up to here?

BY MR. SNEED: From Eastland County.

BY MR. BEMO: Cisco?

BY MR. SNEED: Yeah, Cisco.

BY MR. BEMO: Okay. Is that where the main company is?

BY MR. SNEED: That's where they're from. That's where they usually roof from. And then they're kind of like I guess you could call us stormtroopers, wherever there is a heavy storm at they know, you know, quite a few people or quite a few companies that they can go contract from whenever there's a good storm at.

BY MR. COOK: I see. Well, this is kind of a bad time of the year, isn't it? I mean, as cold as it's been?

BY MR. SNEED: Yeah. Well, they

still got quite a bit of business doing like, when this cold spell hit. They have been just working like four or five hours a day, you know, putting on about 10 square a day and then quitting for the day instead of having everybody out in the cold all day long.

BY MR. COOK: Man, I bet that's rough.

BY MR. SNEED: Yeah, it is. We have been off. We took off the last two or three days except for today. We went and put a 15 squares (inaudible) on.

BY MR. BEMO: It's hard work, isn't it?

BY MR. SNEED: No kidding.

BY MR. BEMO: Well, how did you get -- how did you get fixed up at the motel as far as, you know, your job there?

BY MR. SNEED: Well, I really just kind of popped into it. It was more my brother and the manager taking about working for the room, but my brother was saying me and him would work for the room, but I know that they conversed it, and I just started working for the motel and doing the maid service and

everything.

BY MR. COOK: You got your room?

BY MR. SNEED: Yeah. And then he would buy me supper like every other night or so, you know, just whenever that is, he had a little spare money to buy me supper with.

BY MR. BEMO: Is this the manager?

BY MR. SNEED: Yes.

BY MR. BEMO: Rich?

BY MR. SNEED: Yes.

BY MR. COOK: I'm sorry, you said every other night or so he would buy your supper or every night?

BY MR. SNEED: Well, there was a couple of nights that, you know, I didn't -- he didn't buy me nothing to eat or nothing.

BY MR. COOK: That's kind of rough, isn't it?

BY MR. SNEED: Yes. It was pretty rough. That's why I went ahead and decided to go back to work for the roofing company.

BY MR. BEMO: Does it pay pretty good?

BY MR. SNEED: They pay me $5 an hour but we -- during the summertime we can get

like 15-16 hours a day because we get started a little bit before sunrise because we can do a lot tearing off without, you know, any sunlight and then during the summertime it don't get dark until like 9:30, so, you know.

BY MR. BEMO: (Inaudible)

BY MR. SNEED: Yeah. Pretty much we work all day, every day, and that's how we were working when I first come up here. It was all day every day. But any day they didn't get a chance to work without it being really, really cold then they'll work, even Sundays.

BY MR. BEMO: So you've been in town since July the 3rd?

BY MR. SNEED: Yeah.

BY MR. BEMO: Have you gone back home for any reason since then?

BY MR. SNEED: No, sir.

BY MR. BEMO: Are you from Cisco, Texas?

BY MR. SNEED: No. I'm from -- I was born in Artesia but I have lived in Cisco since I was four years old.

BY MR. BEMO: Oh, have you?

BY MR. SNEED: So you can

basically say that I was from Cisco, I guess.

BY MR. BEMO: Is that where your parents are?

BY MR. SNEED: My mother lived in Cisco, but I think she's recently moved to Breckenridge since I've been up here, which is just like 35 miles away from Cisco. It's like Stevens County.

BY MR. COOK: Okay. Are your mom and mother together? I mean, your dad and mom together or are they --

BY MR. SNEED: No. My dad still lives in New Mexico, that I know of. I haven't talked to him in several years. And my mom was dating a guy name Jose Reyes that worked at Crestridge which is a mobile home factory in Breckenridge.

BY MR. BEMO: Okay. So that's where she's at now?

BY MR. SNEED: Yes.

BY MR. BEMO: Do you maintain pretty close ties to your mom?

BY MR. SNEED: I haven't called her in a while.

BY MR. BEMO: I see. Now, do you

have another brother besides Wes?

BY MR. SNEED: Yes. His name is Jeremy.

BY MR. BEMO: Jeremy?

BY MR. SNEED: He's my real brother. He's like a year old other than I am.

BY MR. BEMO: He's a year older than you are?

BY MR. SNEED: Yeah.

BY MR. BEMO: Is he in Breckenridge or where's he at?

BY MR. SNEED: Yes. He works at that mobile home factory.

BY MR. BEMO: Oh, he does?

BY MR. SNEED: Or the last I knew of he did. I don't know if he still does, but he did when I come up here.

BY MR. BEMO: Okay. Have you maintained any contact with him?

BY MR. SNEED: No. I haven't talked to him in a while either.

BY MR. BEMO: Okay. So who were some of your friends up here?

BY MR. SNEED: The only people I really knew was like -- when the people that

popped in and out of the motel I just talked to them for a little while if they were in that motel and then when they moved out I didn't really didn't never hear from them.

BY MR. BEMO: I see. So you --

BY MR. SNEED: So I didn't really -- the only person I mainly associated with was the manager.

BY MR. BEMO: Okay. I understand you all were pretty good friends.

BY MR. SNEED: Oh, we got along. We got along pretty good. I had no problems with him or nothing.

BY MR. BEMO: Well, do you want to -- let's get down to -- to business here.

Do you want to tell us what happened out there, how this all got started and run it down to us?

BY MR. SNEED: Huh-uh.

BY MR. BEMO: You don't want to tell us about it?

BY MR. SNEED: I don't really know what to say about it.

BY MR. BEMO: Well, let me tell you, there's -- there's a lot of people, you

know, when something like this happens everybody tried to save themselves.

BY MR. SNEED: Uh-huh.

BY MR. BEMO: And everybody wants to make themselves look as good as they can, you know, to the -- to the police. Because then all of a sudden, you know, the cat's out of the bag and everybody knows what's going on.

Well, they've made you the scapegoat in this. You know, everybody is saying you're the one that did this and you did it by yourself and I don't believe that.

You know Rich is under arrest, don't you?

BY MR. SNEED: No. I didn't know that.

BY MR. BEMO: Yeah. He's under arrest, too.

BY MR. SNEED: Okay.

BY MR. BEMO: So he's the one -- he's putting it on you the worst.

Now, I think that there's more to this than just you being by yourself and I would like for you to tell me what -- how this got started and what happened and --

BY MR. SNEED: Well, I think one time when my brother went and turned himself in he had said something, you know, about setting it up some way to where the place looked like it got robbed or something like that.

And then -- then he went and, you know, went and turned himself back into Tarrant County for violating his probation and that's all that, you know, I pretty much knew about that.

BY MR. BEMO: Well, now I'm not talking about -- now you're talking about maybe setting up a robbery at the motel and then having Rich give a bad description and split the money?

BY MR. SNEED: Yeah, I guess, something like that. I really don't know what they --

BY MR. BEMO: Well, Rich told us you came to him with that idea.

BY MR. SNEED: No. You see, like my brother came to him with like that idea. And then, after my brother went and turned himself in, Rich had told me that Wes had said something like that to him.

BY MR. BEMO: Was he trying to proposition you with that idea?

BY MR. SNEED: I guess.

BY MR. COOK: Well, basically what he's saying, Justin, is that Rich told us that you're the one that came to him with that idea.

BY MR. BEMO: He's putting it off on you, Justin. That's what he told us.

BY MR. SNEED: No. I don't understand that.

BY MR. BEMO: And now Rich is trying to save himself by saying that you're in this by yourself, that it was all your doing and you're the one that -- that did the homicide, it was you, that you came to him and told him about it; is that true?

BY MR. SNEED: (Shakes head)

BY MR. COOK: Okay. Why don't you straighten this out then.

BY MR. BEMO: Tell us what happened.

BY MR. SNEED: All I know is that, like I said, that he told me that my brother had told him that, you know, came up to him and tried to proposition and things like that which

I didn't know -- I didn't even know that my brother was going to go, you know, because my brother didn't even say nothing to me about it. And then, you know, after he turned himself in Rich had said something to me that Wes had said something like that to him, but it didn't really go no further than that.

BY MR. BEMO: Okay. Fine. How about the man, the owner of the motel, that's what I want you to tell me about.

BY MR. SNEED: I met him a couple of times, but I never knew when he was at the motel or nothing, but I met him a couple of times when we were trying to fix the TVs, we'd say we had like some problem with the amplifier or something like that that would reduce the power to the lines and that's why -- I mean, and I think we only messed with it like twice and then went and bought a whole brand new system and put it in. And that was the only time I really ran in to him was when we were trying to fix the TVs.

BY MR. BEMO: Okay. Are you saying that you didn't kill him?

BY MR. SNEED: Yes, sir.

BY MR. BEMO: Well, that ain't going to a get it. They're putting it all off on you. That's what I'm trying to tell you.

BY MR. COOK: You know, Justin, I suppose I'm not so sure if I wasn't in your shoes I wouldn't say the same thing you're saying.

But we've gone through a lot of trouble, we've gone to a lot of work, investigation. And what you're saying there doesn't add up with everything else that we have discovered, not only with our technical investigation but also you told some folks some things. Okay?

BY MR. SNEED: What do you mean?

BY MR. COOK: Well, what I mean is according to Rich, you told him...

BY MR. BEMO: That you killed the man, the owner of the hotel.

BY MR. COOK: And what we want you to do is try to do the manly thing here and get this thing straightened out. We want to hear your side of it.

If it's just -- if it went bad or you didn't mean to do it you need to tell us

that and that's what we'll tell the District Attorney's office. But you need to get straight with us and tell us what's going on here.

And this stuff about gee, you know, I replaced a speaker system in a TV and that's the only time I've ever run into him. That ain't going to cut it, man. It's gone too far for that.

BY MR. BEMO: It's gone way too far. There's too many other witnesses that have come forward that will testify against you.

BY MR. COOK: Okay.

BY MR. BEMO: And if you don't -- if you don't try to get it straightened out with us when you go into court like that --

BY MR. COOK: Okay. Now we're not -- we're not bad people. We're not trying to bully you or pressure you, but we're telling you, this is not going to get it.

You're going to have to get straight with us, you're going to have to get straight with yourself, and mainly you have to get it straight with the Almighty. But you

need to do that now. All right?

BY MR. BEMO: You need to tell us how this all started.

BY MR. COOK: I mean, buddy, let me tell you, I can certainly understand your predicament. I don't know how in the world you managed to work just for your room. I do not understand that.

BY MR. SNEED: All I basically did was, I was comped out, according to what I was told by Rich I was -- I was being comped out on my room.

BY MR. COOK: Well, I'm amazed. I'm impressed that you were able to do that, but my gosh, you were probably starving to death.

BY MR. SNEED: Well, like I told you that every now and then he would buy me some food.

BY MR. COOK: But still, I mean, I would hate to have to live on that. I'm feeling sorry for you is what I'm saying here.

BY MR. SNEED: Yeah.

BY MR. COOK: I can appreciate the bad situation you're in even to the point of

where you're feeling desperate. I think maybe I would feel desperate in that situation, but I need you to get straight with us now and tell us what's going on, because we've been doing this for a lot of years.

And on this particular situation we have worked on it ever since it's happened and I think we know what has happened. Some stuff I know we know, some stuff we think we know, and we would like for you to straighten us out for sure.

And anything you tell us we're going to go tell the District Attorney. I mean, if it's a situation where you didn't mean to do this, got carried away, and you're sincere and you're telling the truth, we'll go tell the man that.

BY MR. BEMO: But we want to know whose -- whose idea it was.

BY MR. COOK: Is it all your idea, the whole thing?

BY MR. SNEED: No, sir.

BY MR. COOK: Well, okay, tell me.

BY MR. BEMO: You need to tell us about it.

BY MR. SNEED: Okay. Rich told me that he would split what money we could get out of Barry. I think that's -- his name was Barry.

BY MR. COOK: Right.

BY MR. SNEED: That's what I was told his name was anyway. And we come and woke me up like at three o'clock in the morning and told me that Barry had just got there. And that -- he told me that he knew where the money was and that he was sitting on like $7,000. And so we went into the room.

BY MR. BEMO: Did you use a key to get in?

BY MR. SNEED: Yes, sir.

BY MR. BEMO: Okay.

BY MR. COOK: Was it a situation where you both go into the room or is it just you going into the room?

BY MR. SNEED: I just went in (inaudible) with a set of keys.

BY MR. BEMO: How you were going in --

BY MR. SNEED: Barry had a set of keys.

BY MR. BEMO: With a set of keys?

BY MR. SNEED: Yeah.

BY MR. BEMO: Okay. Did Rich give you the key to the room?

BY MR. SNEED: No. I had a set of master keys that I walked around with because if I did like open the laundry and I had a master key to most of the rooms in the motel except back there was eight or nine odd ball doorknobs which I would have to go to the office and get a key for if I was to get in those rooms.

BY MR. BEMO: Okay. Continue. Go ahead.

BY MR. SNEED: Anyway, Barry was like there that night and he called me and told me that Barry was here, you know, and that to be in my room if anybody called for complaints like for extra towels or if their heater didn't work or if they needed their TV adjusted or something like that because he calls me when he's not usually there telling me to be in the room and he was going to call me and use the phone and I came in there so if he needs to find me right there, so...

BY MR. BEMO: Especially if the owner is there, sure.

BY MR. SNEED: Yeah. So I came to take care of it right quick and everything and...

BY MR. COOK: About what time was this when he told you that?

BY MR. SNEED: It was kind of -- about four or five o'clock in the afternoon.

BY MR. COOK: Okay. So it's still -- still early evening, okay?

BY MR. SNEED: And then he called me back and told me that Barry was going like to Tulsa which, you know, like another motel in Tulsa or something like that. And then he come and woke me up at three o'clock in the morning and said that he had just seen his car pull in.

And he said he was going back up to the front desk and for me to go in and get his car keys because he said he would know where the money was and everything.

BY MR. COOK: Now, I'm sorry, tell me that part again. He wanted you to go in and get his car keys because -- because what?

BY MR. SNEED: Because I guess the

money was --

BY MR. COOK: Was in the car?

BY MR. SNEED: Right. Yeah.

BY MR. COOK: Where did Berry keep his car?

BY MR. SNEED: Right there in front of the door.

BY MR. COOK: Right there under the awning, right by the office door?

BY MR. SNEED: And after everything kind of got out of control we transported the car over to the back parking lot.

BY MR. BEMO: Well, now wait a minute. I want you to go ahead and detail about after you -- you go in, you go into the room. Go back to that and tell us what happens.

BY MR. SNEED: After he woke up?

BY MR. COOK: Go ahead. He was in bed asleep?

BY MR. SNEED: Yeah.

BY MR. COOK: Okay.

BY MR. SNEED: And then I just really meant just to knock him out, you know.

BY MR. BEMO: What did he say to you?

BY MR. SNEED: He just kind of jumped out of his bed, you know. He really didn't never -- never say anything.

BY MR. COOK: Was there a light on inside or was it dark?

BY MR. SNEED: No, no. It was dark.

BY MR. COOK: Could you see well enough?

BY MR. SNEED: Yeah, from like the outside light that was shining through the blinds.

BY MR. COOK: So the blinds were open and there was some -- some outside light coming through?

BY MR. SNEED: The blinds in that room are kind of like warped. I don't know how they got warped but they were kind of -- a few of them were bent out of shape.

BY MR. BEMO: Sure. The light could get through there?

BY MR. COOK: So there was enough light coming through where you could see what

was going on and he was in bed when you went in?

BY MR. SNEED: (Nods head)

BY MR. COOK: Okay.

BY MR. BEMO: So he jumps up and then what happens?

BY MR. COOK: You said you meant to knock him out. Did you hit him with something?

BY MR. SNEED: Yes.

BY MR. COOK: What?

BY MR. SNEED: A baseball bat.

BY MR. COOK: Really. And where did you get this bat?

BY MR. SNEED: I found it in a room when I was cleaning some rooms. It was like we had this big fat black dude working for us at one time when I first started working there. He was already working there and when he quit and moved out when I cleaned his room and everything I found it.

BY MR. COOK: Where is this bat now, man?

BY MR. SNEED: I put it in the dumpster.

BY MR. COOK: In the dumpster?

BY MR. SNEED: Yeah.

BY MR. COOK: Okay. And so anyway how many times would you estimate, you know, now correct me if I'm wrong here, is Barry kind of stout? I mean, he's -- he's an older man but he's kind of stout; is he not?

BY MR. SNEED: I would -- I would say he's pretty stout.

BY MR. COOK: When -- when you tried to knock him out did that take some of the stoutness out of him? Do you understand what I'm saying?

BY MR. SNEED: I just only like hit him two or three times. I figured I would just knock him out.

BY MR. COOK: Sure. Did it work?

BY MR. SNEED: Yes.

BY MR. BEMO: Did he hit you in the eye?

BY MR. SNEED: Something collisioned me in the eye. I don't know what it was but...

BY MR. COOK: So...

BY MR. SNEED: I don't know what

it was, if it was like his elbow or --

BY MR. BEMO: Well, there must have been some kind of struggle because the window got broke out.

BY MR. SNEED: Oh, that's because I hit it with the baseball bat. The baseball bat tagged it.

BY MR. BEMO: Well, there's blood on the window, though.

BY MR. SNEED: I don't know where that came from.

BY MR. BEMO: How did you cut your ear?

BY MR. SNEED: I don't know how that little scratch got there. I really don't.

BY MR. COOK: Don't you think it came from this encounter that you had?

BY MR. SNEED: Yes, possibly.

BY MR. COOK: Well, did Barry put up a fight, Justin?

BY MR. SNEED: Yeah. He danced around a little bit and then I kind of knocked him to where he was down on the floor and then I tapped him a couple more times and when he quit moving I kind of left him alone because I

figured he was knocked out.

BY MR. COOK: Then what, did you get the keys?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Where were they?

BY MR. SNEED: They were in his pants pockets.

BY MR. COOK: Now when you say keys are we talking just a key, several keys?

BY MR. SNEED: It was like a set of keys. I couldn't tell you how many keys. It was probably 25 keys on there.

BY MR. BEMO: Were they on -- were they on just like a key ring?

BY MR. SNEED: I think it was -- some of them were on a bigger key ring and then there was two or three of them on a smaller key ring.

BY MR. BEMO: Was there something holding them together?

BY MR. SNEED: The were locked, the key rings were like interlocked, interlocked.

BY MR. COOK: Oh, like -- like

this?

BY MR. SNEED: Yes.

BY MR. BEMO: Oh, okay. What about his car keys?

BY MR. SNEED: They were on there.

BY MR. COOK: I see. Anything unusual about the car keys? Were they on one of the rings or were they on --

BY MR. SNEED: Yes. They were on one of the rings.

BY MR. BEMO: What was the idea of taking the car where you took it?

BY MR. SNEED: That's after we found out that he wasn't going to get back up.

BY MR. BEMO: That what?

BY MR. SNEED: That was after we found out that he wasn't going to get back up.

BY MR. BEMO: Okay. Well, tell us about all that. You knock -- you think you've knocked him out, right?

BY MR. SNEED: Yeah.

BY MR. BEMO: Okay.

BY MR. SNEED: Then we got the money out of the car and we went back --

BY MR. COOK: Well, wait, wait,

wait. Let's back up just a little bit. I'm sorry to stop you, but I want to make sure I understand.

Let's go back to the point where he's laying there on the floor, you said you tapped him two or three more times, you get the keys, where were they? Were they in his pants pocket? Were they laying there?

BY MR. SNEED: They were like on the -- on the little couch deal that was in the room.

BY MR. COOK: Just laying there on the couch deal?

BY MR. SNEED: Yes, his pants were. And then I just kind of felt in his pants and felt the keys, then --

BY MR. COOK: I see. You get the keys out, then what?

BY MR. SNEED: And then Rich told me after I got the keys to come back up to the office, so I went back up to the office.

BY MR. COOK: Did you shut the door to the motel room?

BY MR. SNEED: Yes.

BY MR. COOK: And what room is

this?

BY MR. SNEED: I think it was 102.

BY MR. COOK: Okay. So you shut the door behind you?

BY MR. SNEED: Yes.

BY MR. COOK: You go back to the office?

BY MR. SNEED: Yes.

BY MR. COOK: Do you have any idea what time it was now, man?

BY MR. SNEED: I don't know. It was like three o'clock when Rich woke me up and told me that he was back.

BY MR. COOK: So it's after three?

BY MR. SNEED: Yes.

BY MR. COOK: If you were guessing you would say?

BY MR. SNEED: It would probably be like 4:30 or 5 o'clock at the most.

BY MR. COOK: Okay. So at 4:30 or 5:00 you go back to the office and Rich is still -- is it office unlocked?

BY MR. SNEED: Well, no. He made me lock it and I just rang the buzzer and he come up there. And then we went and got the

money out of the car and went and took it back to my room so that I guess like his girlfriend wouldn't know nothing or nothing like that and we split the money.

BY MR. BEMO: How much money did you get?

BY MR. SNEED: Like about $1900. I mean, he told me that the guy was sitting on like 7,000 but it only come up to being a little less than five, I think.

BY MR. BEMO: 5,000?

BY MR. SNEED: No. A little less than four, right at four.

BY MR. BEMO: Right at 4,000. So did you count the money there to see how much was in the -- that he had there and then split it up equally?

BY MR. SNEED: No. We just kind of tossed like -- like a -- like a grand here and then we tossed a grand there and then we just kind of divided it like into two piles and never really counted it.

BY MR. BEMO: So you got close to 2,000 a piece?

BY MR. SNEED: Yes.

BY MR. BEMO: How much money of that -- how much of that money do you have left?

BY MR. SNEED: Like 1700.

BY MR. BEMO: Where is it at?

BY MR. SNEED: It's at the apartment that I was at.

BY MR. BEMO: Is it back still up in the apartment?

BY MR. SNEED: No. It's at the apartment I was recently at.

BY MR. BEMO: Oh, just recently at?

BY MR. COOK: You mean you felt safe to leave it there?

BY MR. SNEED: No. I just left it there when my boss showed up and told me to come up here.

BY MR. BEMO: Oh. Okay, now --

BY MR. COOK: Excuse me just a minute before you ask anything else. This money, is it with somebody or --

BY MR. SNEED: No.

BY MR. BEMO: That's what I was going to ask.

BY MR. SNEED: No. It's in a drawer that -- that has some -- like a couple of old pairs of my socks and a couple --

BY MR. COOK: Which apartments are you staying at?

BY MR. SNEED: Oh, it's like, I don't know the name of the complex but like Buffalo is right here and then you got 23rd and then Council is right here and there's like a Quick Shop right here and like a mini-mart over here and mini-mart right there and then there's a little road that goes back and there's a complex right there..

BY MR. COOK: Okay.

BY MR. SNEED: And it's like around back. And when you come to the back -- the end of the driveway you like hit the stoppers.

BY MR. COOK: Is this an apartment?

BY MR. SNEED: Yes. It's a whole apartment complex.

BY MR. COOK: What's the name of it?

BY MR. SNEED: I don't know the

name of the complex.

BY MR. COOK: How in the world did you find it? Is there somebody sharing that apartment with you?

BY MR. SNEED: Yes. Some of the other roofing crew is staying there.

BY MR. COOK: But you feel pretty -- pretty sure that your money is safe there?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Do you have -- you say it's -- did I understand you to say is there a sock or in some socks there?

BY MR. SNEED: Well, it's in like one of those round Crown Royal bags.

BY MR. COOK: Yeah.

BY MR. SNEED: But I have like some socks and some underwear.

BY MR. COOK: Kind of on top of it to cover it?

BY MR. SNEED: Yeah. It's like in a drawer.

BY MR. COOK: Do you have -- is that drawer yours?

BY MR. SNEED: Yes. They told me that I could use those drawers for my clothes

and everything.

BY MR. COOK: Cool. Cool.

BY MR. SNEED: And I kind of didn't grab all of my socks and underwear. They told me to bring some of my clothes up here.

BY MR. COOK: Okay. Now let me ask you, let me go back just a little bit here. Okay?

Now you mentioned that you went up to the office and you took the keys up there. Now then, when you got to the office you rang the bell and you rang the bell as opposed to knocking on the door?

BY MR. SNEED: Yes. There's a little door bell there.

BY MR. COOK: And where is this doorbell? Is it over on the -- on the east side, west side? Is it on the side over by where Council Road is or on the other end?

BY MR. SNEED: Well, the office door faces the -- the Council Road.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And the doors are back here. And then like on the side of the

brick and everything there's a little buzzer.

BY MR. COOK: So you just hit the buzzer?

BY MR. SNEED: And then he come and answered the door. He presumed it was me seeing how he woke me up just a few minutes or...

BY MR. COOK: So he's kind of waiting on you?

BY MR. SNEED: Yeah.

BY MR. COOK: And so did he let you in or did he come outside?

BY MR. SNEED: No. He came and unlocked the door and then told me that he would meet me over there at my motel room and then I went up to my -- my room and then --

BY MR. COOK: Which is room number what?

BY MR. SNEED: 117.

BY MR. COOK: Okay. So you went around there to your room?

BY MR. SNEED: Yeah.

BY MR. COOK: And then he met you there?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. And --

BY MR. SNEED: Then we got the money and split it.

BY MR. COOK: Wait. You're going a little fast for me. You haven't looked in the car yet, right?

BY MR. SNEED: Right.

BY MR. COOK: Okay. So you're up in your room with him? You two guys then decide to go down and look through his car?

BY MR. SNEED: No. He knew where the money was.

BY MR. COOK: Okay. So did you just give him the key?

BY MR. SNEED: No. I went and got the money.

BY MR. COOK: Oh, you went and got the money?

BY MR. SNEED: Yes.

BY MR. COOK: Where was it exactly?

BY MR. SNEED: It was under the car seat.

BY MR. COOK: Under the car seat? And it was in what?

BY MR. SNEED: Like a brown envelope, just a regular envelope but it was brown.

BY MR. COOK: I see. Just one envelope?

BY MR. SNEED: Yes.

BY MR. COOK: And all that money was in just one envelope?

BY MR. SNEED: Yes.

BY MR. COOK: You got the money?

BY MR. SNEED: Yes.

BY MR. COOK: Did you take -- and where was he when you got the money?

BY MR. SNEED: Well, he walked around there with me but I unlocked the door and everything and Rich's in there.

BY MR. COOK: I see. And then what? Did you guys go back up to the motel room?

BY MR. SNEED: We went back to my room and then we went and checked on Barry and then I transported the car.

BY MR. COOK: Okay. Now wait, wait. After you get the money you go back up to 117, correct? You split the money up when

you're up in 117 right then?

BY MR. SNEED: (Nods head)

BY MR. COOK: Okay. And then the two of you go back downstairs and you say to check on Barry?

BY MR. SNEED: Yeah. We went and peeked the door open to see if he got up or anything.

BY MR. COOK: Did both of you or just you or just him or were you both together?

BY MR. SNEED: Yes.

BY MR. COOK: What about the broken glass from the window? I'm sure there was some laying out on the sidewalk, wasn't there?

BY MR. SNEED: Yeah. I picked it up real quick.

BY MR. COOK: And what did you do with it?

BY MR. SNEED: That's when we pretty much found out that he wasn't going to move again. I just kind of chunked it inside the doorway and then we had me go pick up a piece of -- piece of Plexiglas to put over the window there.

BY MR. COOK: What about Barry?

BY MR. SNEED: We just kind of let him alone.

BY MR. COOK: Well, did you do anything to Barry?

BY MR. SNEED: Actually, Rich asked me to kill Barry and that's what he'd done, yes.

BY MR. COOK: Rich asked you to kill Barry?

BY MR. SNEED: Yes. So that he could run the motel without him being the boss.

BY MR. COOK: And in exchange for doing this?

BY MR. SNEED: I would get seven grand and (inaudible).

BY MR. COOK: You get all of it or you just split it?

BY MR. SNEED: Well, he told me that he would give me all of it, but after it happened he decided he wanted to split it. And then from then on out he said he was going to rent rooms off the books and keep money back and everything and slide me some on the side.

BY MR. COOK: So in addition

you're going to get -- feather your nest, so to speak?

BY MR. SNEED: Yeah.

BY MR. COOK: I see. Okay. So when you leave your room from splitting up the money you go down and you check on Barry; is that correct?

BY MR. SNEED: (Nods head)

BY MR. COOK: Now you both check on Barry?

BY MR. SNEED: (Nods head)

BY MR. COOK: You need to answer me.

BY MR. SNEED: Yes. We both went in the room and found out that he was completely dead.

BY MR. COOK: And what about the bed clothes, the sheets, the blankets?

BY MR. SNEED: Well, I kind of pulled those off of there and I kind of pulled those off of there and tried to put them over him.

BY MR. COOK: That's what I'm getting at.

BY MR. SNEED: Yeah. We put them

over --

BY MR. COOK: We did, both of you did or is it just you -- or not that it makes any difference.

BY MR. SNEED: I know I grabbed them and kind of tossed them over his body a little bit.

BY MR. COOK: Why did you do that? What was the idea?

BY MR. SNEED: Just to cover him up a little bit.

BY MR. COOK: Okay. Is that -- is that right after you picked up the broken glass and put it in there?

BY MR. SNEED: I can't recall if it was after or before or during.

BY MR. COOK: But was it during that same visit that you covered him up and put the glass in there?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Was there anything else you did?

BY MR. SNEED: Moved the car to the back parking lot.

BY MR. COOK: Okay. Now then --

BY MR. SNEED: He asked me to move it to the back parking lot. He told me after that day he was going to go get rid of it and everything and have me follow him in his car and pick him up wherever he dropped it off at.

BY MR. COOK: I see. So the back parking lot is just a temporary drop-off, supposedly. He's going to go get rid of it later?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. So what happened then as far as -- does he wait in the office while you get rid of the car?

BY MR. SNEED: Yes. He made frequent trips to the office and then he said he was trying to make it look like to where his girlfriend or wife or whoever she is, I don't know if they were married or not married, but wouldn't think nothing because she's the one that told him that she had just seen Barry's car pull back in when they were still in the office at 3:00 that morning or 2:30 or whatever it was. I don't know exactly when it was.

BY MR. COOK: Deanna --

BY MR. SNEED: Yeah.

BY MR. COOK: -- told Rich that she saw Barry's car pull back in at 3:00 or 3:30, whenever it was?

BY MR. SNEED: Yes. 2:30 or 3:00.

BY MR. COOK: How do you know that?

BY MR. SNEED: Because he told me that. Because they were sitting up at the office, the room in the office because the office doors like -- he keeps them open until he's about ready to go to bed.

And then I guess she was up like at the front desk, you know, just standing up there taking care of a customer or whatever.

And then she said she -- she went and told Rich that she just saw Barry pull back in and that's when Rich jumped up and come running down and woke me up and told me he was back.

BY MR. COOK: Do you know or not if Barry had already checked into 102?

BY MR. SNEED: From what I understand he took the key with him before he went to Tulsa so Rich wouldn't rent that room so he would have that room for the night.

BY MR. COOK: Okay. Now then tell me about this piece of Plexiglas.

BY MR. SNEED: He asked me to go down to Payless and get a piece of Plexiglas so we could cover that hole that was broke so like none of the little kids that run around there would go digging their hands in it and everything and maybe get cut or something like that.

BY MR. COOK: So that morning did you go to Payless and get some Plexiglas?

BY MR. SNEED: Yes.

BY MR. COOK: And what time did you go? It must have been awful early?

BY MR. SNEED: It was like right when they opened.

BY MR. COOK: Okay. Do you have any idea when that is?

BY MR. SNEED: About 8:30 or nine o'clock.

BY MR. COOK: Did you pay cash for the Plexiglas or what?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. So you brought the Plexiglas back and what did you do?

BY MR. SNEED: And we siliconed it around the -- the other window.

BY MR. COOK: You say we, you and Rich both did?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. What else did you do?

BY MR. SNEED: Before we even did that we taped a shower curtain up over the inside of the window while we was there, yeah.

BY MR. COOK: Both of you or just you, just him?

BY MR. SNEED: Yes. We both taped it up there.

BY MR. COOK: Let me ask you, how were you dressed that particular night or early that morning?

BY MR. SNEED: Just a pair of jeans and a shirt.

BY MR. COOK: Where -- where is that shirt and that pair of jeans?

BY MR. SNEED: In the laundry room on the top shelf because I didn't -- I still had them in my room when the cops found Barry's car sitting in the back parking lot.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And I walked them to the laundry room and stuck them up on the top shelf underneath like some old curtains and stuff so that they think it's all curtains that are up there.

BY MR. COOK: Help me out just a little bit here. This is the laundry room. Here I think is the door. Don't you come in like right here? Over here is maybe the washer and dryer?

BY MR. SNEED: Okay. Here's the double doors and you come in and right there are two like home washers sitting right here.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And then there is like a third cycle washer there and this is the front door.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And there's just another little doorway, you got two dryers sitting here with a table in the front.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And there's this other little doorway which opens up to a room

that has just get a shelf in here and a shelf in here and a shelf in here. That's got like 1, 2, 3, 4 -- like 4 or 5 shelves, but anyway...

BY MR. COOK: Where are the shelves? On this wall?

BY MR. SNEED: Yes. There are shelves on all the walls. They're just all built around.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And as you walk in the door on the left side there's a bunch of curtains on the top shelf and I kind of had --

BY MR. COOK: The top shelf on this wall?

BY MR. SNEED: Yeah. I kind of had them in like a canister that had a bunch of popcorn and had like a spacer like popcorn and like different flavored popcorn. It's like all different flavored popcorn. They had caramel corn and some other type of popcorn. I don't remember.

BY MR. COOK: You mean they are just empty canisters?

BY MR. SNEED: Yes.

BY MR. COOK: And that's what you put your clothes down in?

BY MR. SNEED: Yes. A big empty canister like a (inaudible) canister and I had all the things down here and I threw them and a pair of shoes that I had underneath all those curtains.

BY MR. COOK: So they're all still there?

BY MR. SNEED: Yes. They all should be still there.

BY MR. COOK: Okay.

BY MR. SNEED: That's where I put them and I left them on top.

BY MR. COOK: Were you wearing a hat?

BY MR. SNEED: No.

BY MR. COOK: What about your coat?

BY MR. SNEED: I wasn't wearing a coat.

BY MR. COOK: What kind of a shirt was it?

BY MR. SNEED: I think I had two shirts on. I think I had a long-sleeved shirt

which was black and then I think I had a -- well, it was a black T-shirt until I bleached it and it was kind of like a tanish beige. I bleached it.

BY MR. COOK: And then your jeans and your shoes? And they are all in those empty canisters?

BY MR. SNEED: It should all be in that one canister. It's like a gallon canister, a five gallon or something like that, two and a half gallon.

BY MR. COOK: And you put them there when the cops discovered Barry's car over at the credit union?

BY MR. SNEED: Yeah. I put them there while they were all over there. I walked and threw them in the laundry room -- under the laundry room and I shoved them up in there and left the motel.

BY MR. COOK: I see. You know, you had two or three people hit you up, ask you if you had been in a fight or what you done to your eye.

BY MR. SNEED: Yeah. I told them I hit my soap dish while I was talking a

shower.

BY MR. COOK: Who all -- who all hit you up?

BY MR. SNEED: I know Deanna did. Billye, I don't -- I don't think she ever asked me about it. And I know the two maids that -- the black couple that was working for their room also, which I don't think Barry knew that they were working there also.

BY MR. COOK: What about Kayla, do you remember her asking you?

BY MR. SNEED: She might have asked me. I know who you're talking about.

BY MR. COOK: Okay.

BY MR. SNEED: But that's the story me and Rich conjured up to tell them about my black eye.

BY MR. COOK: So when is it you cut out then?

BY MR. SNEED: When I left the motel?

BY MR. COOK: Yes.

BY MR. SNEED: When the cops were over there messing with the car I guess 2:00 or 3:00 that afternoon, that next day.

BY MR. COOK: Is that when you left?

BY MR. SNEED: Yes.

BY MR. COOK: What did you do? Did you just take out on foot?

BY MR. SNEED: Yes. And then I went right down Reno. Between Reno and Rockwell there's a stop sign that turns into that company where the bridge is at, there's like a bridge there. I kind of stashed under that bridge until dark.

And then I didn't really expect them roofers to still be in town when I was crossing -- I was in there using the pay phone. And when I got to Rockwell I seen that somebody was on that pay phone, so when I was crossing over that bridge I saw some of the workers that I used to work with that was like the boss' son-in-law. And I seen them cross over the bridge so I went ahead and walked down to that trailer park and I asked them if they still were looking for a hand because that one boss had been by like a couple of weeks before Christmas telling me they might be back, that he was going to go to California and everything

and get some work built up, but if they had enough work to stay in Oklahoma City that they would still be working there. And I didn't really figure that they would be there and so I went back to work with them.

BY MR. COOK: One other thing I need to ask you that I didn't.

Now you were wearing those two shirts, a long-sleeved one and a bleached out black one that was kind of beige looking and your blue jeans. Were you wearing a belt?

BY MR. SNEED: Yes.

BY MR. COOK: When you were in that scuffle did it get broken?

BY MR. SNEED: Yeah. I think the little clasp came off of it.

BY MR. COOK: The little metal clasp?

BY MR. SNEED: It wasn't on there real good.

BY MR. COOK: Is that belt, is it with your clothes?

BY MR. SNEED: No. I think I chunked it in the trash with the baseball bat.

BY MR. COOK: How come you chunked

it? How come you didn't just chunk all of the clothes?

BY MR. SNEED: Well, I had planned on doing that, but I don't know why I didn't.

BY MR. COOK: But the belt you threw away along with the baseball bat?

BY MR. SNEED: Yes.

BY MR. COOK: Well, let me ask you this. I found kind of a pocketknife in that room. Is that yours?

BY MR. SNEED: Yeah. I found it in a -- in a room, one room that I had been cleaning before. And I usually carried it around because he didn't have the -- he lost his master key to like 107 and I would use it to pop the lock on 107.

We'd have to get in and clean it because we only had like one key and usually the people he rented that room to would like leave the key in the room and I had to have some way of getting into that room. So I would just kind of stick it in there and the door didn't really shut good on 107 so it was really easy to pop.

BY MR. COOK: Well --

BY MR. SNEED: He told me to do that until he could get another -- another lock for it.

BY MR. COOK: When you -- when you and Barry were struggling, okay, I was in that room for quite a while. Okay? They teach me to be able to look at certain things like maybe a little bit of blood on the wall and it kind of tells me a story of what happened in that room.

And I spent so much time in there that quite frankly, Justin, there was a hell of a fight in there. That's the way I look at it. I mean, that's what I'm thinking.

Is that what you -- would you agree with that?

BY MR. SNEED: Well, we struggled for a little bit but there wasn't that much of a fight.

BY MR. COOK: Did you end up stabbing him once with that knife?

BY MR. SNEED: Huh-uh.

BY MR. COOK: Do you remember losing the knife? Did you have it out?

BY MR. SNEED: I recall dropping

it after I left the room because I knew I didn't have it on me no more.

BY MR. COOK: Okay. Was -- was he moving around or making any kind of noise at all when you left?

BY MR. SNEED: Huh-uh.

BY MR. COOK: And you don't remember how you cut your eye?

BY MR. SNEED: No.

BY MR. COOK: Or blacked it?

BY MR. SNEED: I don't remember how that happened.

BY MR. COOK: Take off your hat. It kind of shades you, let me see it. That's okay. You don't need to bend over. Just -- you've got a few little nicks and cuts on your face here, too, don't you?

BY MR. SNEED: Yeah.

BY MR. COOK: And you got a little nick on your ear. Let me see the other side.

BY MR. SNEED: (Complies)

BY MR. COOK: Well, you were in a little bit of a fight there, weren't you?

BY MR. SNEED: Yes, a little bit of a struggle.

BY MR. COOK: But you have thrown the ball bat away?

BY MR. SNEED: Yes.

BY MR. COOK: You're absolutely sure you threw it away?

BY MR. SNEED: Yes. I put it in the dumpster.

BY MR. COOK: Which dumpster?

BY MR. SNEED: That dumpster, the dumpster right there the next day or that following Wednesday. I think it was Tuesday morning, I guess.

BY MR. BEMO: When all this happened?

BY MR. SNEED: It was like three o'clock in the morning when he woke me up, so it would be Tuesday morning. Then that Tuesday I put it in the dumpster and it would have left out that Wednesday morning like nine o'clock.

BY MR. COOK: Was the dumpster right there at the motel?

BY MR. SNEED: Yes. It was right there at the motel.

BY MR. COOK: The motel dumpster?

BY MR. SNEED: Yeah.

BY MR. COOK: Do you have any -- do you mind signing a search waiver so that we can go get -- get that money?

BY MR. SNEED: No. I don't know how they would look at it, but yeah.

BY MR. COOK: How who would look at it?

BY MR. SNEED: The people who live there.

BY MR. COOK: Well, we'll talk to them and explain the situation. Okay?

What about -- what about your motel room, would you sign a search waiver to let us look in there?

BY MR. SNEED: Yeah. There ain't nothing in there, but yeah.

BY MR. COOK: Okay. Is there anything else --

BY MR. SNEED: No belongings in there.

BY MR. COOK: Is there anything else about this deal that you need to tell me about? Have you been -- have you been truthful with me about it?

BY MR. SNEED: Yeah, pretty much.

BY MR. COOK: Pretty much?

BY MR. SNEED: Well, all that I can think of.

BY MR. COOK: Was Rick Page involved in this in any way?

BY MR. SNEED: Is he the guy that drove the motorcycle?

BY MR. COOK: Uh-huh.

BY MR. SNEED: No.

BY MR. COOK: The one who kept his dog?

BY MR. SNEED: Yeah. There wasn't nobody else involved.

BY MR. COOK: Nobody else involved?

BY MR. SNEED: He just stayed there -- he stayed there for like two or three weeks in the motel and then they checked out, him and his wife, and they just like his two kids.

And one day he showed back up there at the motel and he conned Rich into giving him a room for free that night. And before he left he kind of conned me into watching his dog.

But he told me he was going to be for like maybe two days because all he had was his motorcycle and he said he would be back in his vehicle to get his dog. And it took me like a week to finally get him to come get his dog.

Because he called me and told me that this was the number that he was at and that he'd be by in a day or so to get his dog. And I waited for like a week and then called him back and he came by like twice while I had his dog.

And after he brought some dog food over and all that I kind of figured he was trying to just pawn his dog off to me so I called him and told him to come and get it or I was going to turn it loose.

BY MR. COOK: Okay. I will be back in just a minute. Okay?

(Bemo and Cook leave the room and then return)

BY MR. COOK: Justin, would you like a cup of coffee?

BY MR. SNEED: Yes, sir. Thank you.

BY MR. COOK: Do you drink it black?

BY MR. SNEED: Yeah. That would be fine.

BY MR. COOK: Okay. I'm going to go get you one. Okay?

BY MR. SNEED: Okay.

BY MR. BEMO: Let me get you to stand up here. Let me get you to take your ball cap off and your coat. Kind of look, yeah, just like that.

(Bemo is taking Polaroid photographs of Sneed)

BY MR. BEMO: Let's see your hands.

BY MR. SNEED: Like this?

BY MR. BEMO: Yes.

BY MR. SNEED: Those are like just roofing marks.

BY MR. BEMO: Yes. Can you turn that just a little there. No, that one. This one, yeah, there you go.

(Bemo is taking Polaroid photographs of Sneed)

BY MR. BEMO: Do you have any

marks on your arms?

BY MR. SNEED: No.

BY MR. BEMO: How about on your body?

BY MR. SNEED: Well, I got some tattoos, but I ain't got no marks, (inaudible).

BY MR. BEMO: Turn around and let me see your back there.

BY MR. SNEED: (Inaudible)

(Bemo is taking Polaroid photographs of Sneed)

BY MR. BEMO: I don't need a picture of that.

BY MR. SNEED: (Inaudible). The other two I got are two crosses like that.

BY MR. BEMO: Okay. Tell me something I'm just curious about, how come you would hide your clothes up there in the laundry room and then throw the bat away with the belt? Why would you do that?

BY MR. SNEED: Because I took off the belt after I figured out that it broke. And I had the bat with it and I went to the dumpster and threw that in the dumpster and I just kind a chunked the belt while I had it in

there.

And then I went to my room and take off my clothes real quick and jumped in the shower and rinsed off and everything. And I then put on some fresh clothes and I put them all in the canister and I still had them in my room for some reason. I don't know. I was going to put them in the dumpster but Rich said no, let's burn them. And I knew the trash was leaving the next day.

And then they found the car I still had them and I didn't want them to see me carrying them to the dumpster, so I went and put them in the laundry room real quick.

BY MR. COOK: I see. Okay. What we -- what we would like to do at this point is we have a piece of paper, we call it a waiver, a search waiver. And we'd like for you to sign the search waiver.

What it is we want to look inside not only room 117, your room there at the motel, but we would like to go to the apartment where the money is and look in there, also.

BY MR. SNEED: Well, I can give you the right to go directly in and get the

money but I can't give you the right to search the whole apartment.

BY MR. BEMO: That's okay. We'll -- we'll speak with the other gentlemen.

BY MR. COOK: Are the other guys there at the apartment now?

BY MR. SNEED: Oh, they should be.

BY MR. BEMO: How many guys do you share that apartment with?

BY MR. SNEED: There's two guys and then there's a women, one of them is married and the other one just has a girlfriend.

BY MR. COOK: Oh, is the women stay there with them?

BY MR. SNEED: Yeah.

BY MR. COOK: What are their names?

BY MR. SNEED: David Jackson, I think. I think that's his last name is David Jackson. And Kim, which is Rob Brassfield's daughter-in-law, I guess. It's like his wife's daughter and they are married and they got a little baby.

BY MR. COOK: Okay. Who's

apartment actually --

BY MR. SNEED: It's under their name. I don't know.

BY MR. COOK: Under David Jackson's?

BY MR. SNEED: Yeah. I supposed it would be under his name.

BY MR. BEMO: What motel is this at?

BY MR. SNEED: I don't know the name of the complex.

BY MR. BEMO: It's an apartment complex?

BY MR. SNEED: Yes. I know I can kind of -- kind of graph it out for you.

BY MR. BEMO: Well, we're going to take you out there and you can show us where it's at.

BY MR. SNEED: Oh, all right.

BY MR. COOK: Is that okay?

BY MR. SNEED: Yeah. That's fine. I'll go out and help you and everything.

BY MR. COOK: Did you copy that?

BY MR. BEMO: Yes. He's copying that for me now.

BY MR. COOK: Oh, okay. I'll get it for you.

BY MR. BEMO: You said -- oh, you got some coffee there?

BY MR. SNEED: So is this going to help me out any at all by telling you all this?

BY MR. COOK: Well, we'll just have to wait and see. This is definitely going to be better for you this way then it would be if you didn't say anything.

BY MR. SNEED: Well, what's the maximum sentence for murder one?

BY MR. COOK: Murder one? Well, the maximum is death.

BY MR. SNEED: I guess I should have suspected that.

BY MR. BEMO: But there's also two other charges. It could be life without parole or life.

BY MR. COOK: Are you guys ready? We'll go down here.

BY MR. BEMO: Why don't you just bring them in here and let's sign them in here. We went to the jail and he'll bring them back -- he's going to bring them back here.

BY MR. COOK: All right.

BY MR. SNEED: Suppose it's life, do you get parole?

BY MR. BEMO: Yeah. Well, it seems like you can after about a third of your sentence. They will figure it's -- 45 years is a life term. There's all kind of things that can happen in this and it's really kind of premature for --

BY MR. SNEED: Well, I should look forward to the next 40 years of sitting in a cell?

BY MR. BEMO: Oh, well, I don't know. But I'm going to tell you this, your old bud, Rich, was planning on letting you hang by yourself for this.

BY MR. SNEED: Well, I ain't going to hang by myself. I'm telling you all the truth.

So you all are going to search this whole apartment?

BY MR. BEMO: No. We just want -- we just want you to sign a waiver so that we can go in -- you said you had just a couple of drawers in the apartment that are yours?

BY MR. SNEED: Yes.

BY MR. BEMO: Or one or whatever it is, I don't know. All we want is to go in there and -- and look in your drawer and get that money out. That's all we want. We don't want to search the whole apartment. And we're not interested in what they're doing or what they have or anything like that.

Okay. Now, this is a consent to search waiver form, okay. Let me read it to you. Look at this here. While I'm reading it you read along with me. It has a blank spot up there that I will have you print your name in.

And it says after having been advised of my right not to have a search made of my premises hereinafter mentioned without a search warrant that my right to refuse to consent to such a certain hereby authorizing Inspector Bemo and Inspector Cook, officers of the Oklahoma City Police Department to conduct a complete search of my premises located and we'll get the address of that apartment complex out there, in Oklahoma City, Oklahoma.

These office are authorized by me to take from my premises any letters, papers,

materials or property which they may desire. This written permission is being given by me to the above-named officers voluntarily and without any threats or promises of any kind. Okay?

Now want I want you to do is I want you to print your name up here.

BY MR. SNEED: Full name?

BY MR. BEMO: Yes.

BY MR. SNEED: (Complies)

BY MR. BEMO: Okay. Now I want you to sign your signature there.

BY MR. SNEED: (Complies). Okay.

BY MR. BEMO: I'll have them sign it out there.

BY MR. COOK: Okay. And we'll need one for 117.

BY MR. BEMO: 117?

BY MR. COOK: Yes, sir.

BY MR. BEMO: Okay. That's -- okay. This same thing applies to your room out there on Council at the Best Budget.

Did you not see the news tonight or anything?

BY MR. SNEED: Yeah. I was

sitting there watching it while I was waiting for the officers to come pick me up.

BY MR. COOK: Okay. You knew they were coming?

BY MR. SNEED: Yes. They showed up at my boss' house. My boss said that he would go get me and bring me back to his trailer and then they didn't pick me up there and then they came along. You come out without any trouble.

BY MR. COOK: Ready?

BY MR. BEMO: Okay. Grab your smokes there and come with us.

(End of interview)

C E R T I F I C A T E

STATE OF OKLAHOMA)
) SS:
COUNTY OF CLEVELAND)

I, LARRY L. SHALBERG, a Certified and Registered Court Reporter in and for the State of Oklahoma, do hereby certify that the foregoing videotaped interview was taken by means of a computer-aided stenograph machine and that such proceedings have been correctly transcribed and reduced to writing under my supervision and is fully and accurately set forth in the preceding pages.

I FURTHER CERTIFY that said proceedings as above set forth constitutes a true record of the proceedings.

LARRY L. SHALBERG, CSR-RPR
CERTIFIED & REGISTERED COURT REPORTER
CSR No. 00366

Larry Shalberg
Oklahoma Certified Shorthand Reporter
Certificate No. 00366
Exp. Date: December 31, 2000

ATTACHMENT 33

Reported Date: 01/07/97 Time: 15:10 Case: 97-002261 Page: 1
Code: 21-701.7 SS Crime: MURDER 1 Class:
Occurrence Date: 01/07/97- Day: TUESDAY - Time: 08:00-
Status: AS ASSIGNED Closing Officer:
Location: 301 S. COUNCIL RD., OK RD: 52

INVOLVED PERSONS

WITNESS: PRITTIE JOHN MYRON DOB: 10/31/62 Race: W Sex: M
CHARLOTTESVILLE - NEWPORT NEWS, VA.
Apt: State: VA Zip: Phone: Adu/Juv:
POB: NEW HAMPSHIR Hair: BRO Eye: BRO Hgt: 508 Wgt: 150 Bld: SMA
Business Name:
Phone:

NARRATIVE

BODY OF REPORT

John Prittie is one of the guest of the Best Budget Inn that was staying in room #103. Room #103 is located next to the same room that Barry Alan Van Treese was found murdered in, room #102! Mr. Prittie was still awake at the time of this investigator wanted to do a interview.

INTERVIEW WITH JOHN MYRON PRITTIE

After concluding my interview with Mr. Webb, I proceeded to room #103 to talk with the occupant. After knocking on the door a white male subject answered the door. I identified myself to the occupant and asked if I could come into his room and talk with him. The occupant said could and identified himself to me as John Myron Prittie. Prittie seemed very nervous about talking to me. My interview with Mr. Prittie begin at 12:10am inside his room (103). The date at that time was 1/07/97. Prittie was photographed in his room prior to the interview. Prittie provided me with his stats, but they are somewhat incomplete with reference to his address.

Prittie said he was just passing through and had left Phoenix, AR. after quitting his job out there. Prittie advised that his wife was now in Newport News, Virginia attempting to find a job. If she gets one that would be where to find him. If Prittie's wife didn't get the job, Prittie said they would probably moved to Charlottesville, Va. Prittie said his parents reside in Conway, New Hampshire in the Saco Woods Condominium complex, telephone 1/603/356-5427, and if he can't be located in either of the two locations mentioned above, the police could contact his parents and they would know how to reach him.

Prittie said he checked into the Best Budget Inn on Monday, 1/6/97 sometime between 3:00pm to 4:00pm. Prittie said the only reason he was still in Oklahoma was due to his vehicle breaking down on him. Prittie said he hasn't been able to get it fixed. Again Prittie said he was just

LWW 9529

Standard Trailer - First Page

Reporting Officer: BEMO ROBERT Number: 000179 Date: 01/15/97 Time: 14:10
Typed by: BEMO Number: 179 Date: 01/15/97 Time: 14:09
Approving Officer: PACHECO, STEP Number: 000115 Date: 05/16/97 Time: 15:44

passing through Oklahoma. I asked Mr. Prittie to tell me what he did Monday evening on 1/6/97. Mr. Prittie said he ordered a pizza and watched T.V. Monday evening. Prittie said he layed down sometime around 12:00 midnight.

Prittie said he was awakened sometime around 1:00am to 2:00am at the latest by a loud disturbance occurring in the next room. This room was 102. Prittie couldn't be sure about the time, because he was awaken out of a sound sleep. Prittie said he over heard arguing between two people coming from room 102. Prittie believes one of the voices he heard arguing was a male voice and the other voice he couldn't tell if it was male or female. The voices were mostly muffled and it was hard to understand what the argument was about. Prittie said after the disturbance was over he heard moaning coming from inside the next room (102) and it stopped about 15 minutes later.

Prittie said the argument turned into a fight and then he heard glass breaking. Prittie said he heard something hitting the ground that sounded like Aluminum hitting the ground. Prittie said he started to get up and tell the occupants next door to knock off, but he didn't. Prittie thought it was some couple into a domestic. Prittie said he got out of bed and walked over to the window facing south (only window) when the argument turned into a fight. He wanted to look outside to see if his vehicles were okay. And they were. The next morning Prittie said he got up about 9:00am. He kind of lounged around his room for about two hours. Then Prittie walked over to the front office about 11:00am. Prittie said as he walked by room 102 he observed two young boys fixing the window. He said they caulking the window. Prittie asked what happened to the window? And either both or one of the young boys replied, a couple drunks got into it last night.

I asked Mr. Prittie if he could identify the two subjects repairing the window if he saw them again. Prittie didn't think he could. Prittie said he was just walking by the room and really didn't pay that good of attention to either of the two subjects to recognize them again. I asked Mr. Prittie to stop and think real hard and try to remember the two boys physical description to the best of his ability. The following is a physical description provided by Mr. Prittie. Mr. Prittie emphasized that these descriptions were not to be considered acurate.

1 - WM/20's, SCRUFFY LOOKING, JEANS PLAID,
HTD: 5'8", LIGHT BROWN HAIR (SHOULDER LGT.)
160 LBS., MUSTACHE & GOATEE.

2 - WM/20'S, HT: 5'8", WT: 130-35 LBS.,
DISCOLORATION ON ONE EYE, LIKE SOMEONE
HIT HIM, BROWN HAIR STRAIGHT (LONGER
THAN SHOULDER LGT.) BLUE JEANS.

LWW 9527

This concluded my interview with Mr. Prittie.

Standard Trailer - Continuation

Reporting Officer:	BEMO ROBERT	Number: 000179	Date: 01/15/97	Time: 14:10
Typed by:	BEMO	Number: 179	Date: 01/15/97	Time: 14:09
Approving Officer:	PACHECO, STEP	Number: 000115	Date: 05/16/97	Time: 15:44

Reported Date: 01/07/97 Time: 15:10 Case: 97-002261 Page: 3
Code: 21-701.7 SS Crime: MURDER 1 Class:

end of report
Insp. Bob Bemo

LWW 9528

Standard Trailer - Continuation

Reporting Officer: BEMO ROBERT Number: 000179 Date: 01/15/97 Time: 14:10
Typed by: BEMO Number: 179 Date: 01/15/97 Time: 14:09
Approving Officer: PACHECO, STEP Number: 000115 Date: 05/16/97 Time: 15:44

APPENDIX L

Successive Application for Post-Conviction Relief, *Glossip v. State*, No. PCD-2022-819 (Sept. 22, 2022)

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

RICHARD GLOSSIP, *Petitioner*, v. STATE OF OKLAHOMA, *Respondent.*	Oklahoma County Case No. CF-97-256 Court of Criminal Appeals Direct Appeal Case No. D-2005-310 Post-conviction Case No. PCD-2004-978 Post-conviction Case No. PCD-2015-820 Post-conviction Case No. PCD-2022-589 No. _____

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

DEATH PENALTY – EXECUTION SCHEDULED DECEMBER 8, 2022

Warren Gotcher, OBA # 3495
Gotcher & Beaver
323 E Carl Albert Avenue
McAlester, OK 74501
918-423-0412
warren@gotcher-beaver.com

Donald R. Knight*
Attorney at Law
7852 S. Elati Street, Suite 205
Littleton, CO 80120
303-797-1645
don@dknightlaw.com

Amy P. Knight*
Knight Law Firm, PC
3849 E Broadway Blvd #288
Tucson, AZ 85716
520-878-8849
amy@amyknightlaw.com

Joseph J. Perkovich*
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
212-400-1660
j.perkovich@phillipsblack.org

John R. Mills*
Phillips Black, Inc.
1721 Broadway, Suite 201
Oakland, CA 94612
888-532-0897
j.mills@phillipsblack.org

*Temporarily Admitted

COURT OF CRIMINAL APPEALS FORM 13.11A

SUCCESSIVE APPLICATION FOR POST–CONVICTION RELIEF
- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, Richard E. Glossip, through undersigned counsel, submits this Successive Application for Post-Conviction relief under Section 1089 of Title 22. This is the fourth application for post-conviction relief filed in Mr. Glossip's case. Rule 9.7A (3)(d) requires copies of the Original Application for Post-Conviction Relief and the prior Successive Applications for Postconviction Relief to be attached. Given that the most recent prior successive application remains pending with this court (No. PCD 2022-589), and attached the prior two applications, Mr. Glossip has not re-attached them here, to avoid duplication and confusion. Should the court need additional copies of those applications, Mr. Glossip will provide them immediately on request.

The sentence from which relief is sought: Death.

1. **Court in which sentence was rendered:**

   (a) Oklahoma County District Court

   (b) Case Number: CF-1997-256

2. **Date of sentence:** August 27, 2004

3. **Terms of sentence:** Death

4. **Name of Presiding Judge:** Hon. Twyla Mason Gray

5. **Is Petitioner currently in custody?** Yes

   Where? H-Unit, Oklahoma State Penitentiary, McAlester, Oklahoma

   Does Petitioner have criminal matters pending in other courts? No

Does Petitioner have sentences (capital or non-capital) to be served in otherstates or jurisdictions? No

I. CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of deathwas imposed:** First Degree Murder, in violation of Okla. Stat. tit. 21, § 701.7(A).

Aggravating factors alleged:

1. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
2. The murder was especially heinous, atrocious, or cruel [dismissed by Court prior to trial];
3. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society [rejected by jury].

Aggravating factors found:

1. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration.

Mitigating factors listed in jury instructions:

1. The defendant did not have any significant history of prior criminal activity;
2. The defendant is 41 years of age;
3. The defendant's emotional and family history;
4. The defendant, since his arrest on January 9, 1997, has been incarcerated andhas not posed a threat to other inmates or detention staff;
5. The defendant is amenable to a prison setting and will pose little risk in such structured setting;
6. The defendant has family who love him and value his life;
7. Has limited education and did not graduate from high school. He has average intelligence or above. He has received his G.E.D.;
8. After leaving school, the defendant had continuous, gainful employmentfrom age 16 to his arrest on January 9, 1997;
9. The defendant could contribute to prison society and be an assistance to others;
10. Prior to his arrest, the defendant, had no history of aggression;
11. The defendant was not present when Barry Van Treese was killed; and

12. The defendant has no significant drug or alcohol abuse history.

Was Victim Impact Evidence introduced at trial? Yes

7. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X).

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ( )

9. Was the sentence determined by:

A jury (X), or ( ) the trial judge?

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).

Petitioner was not convicted of any offense other than the single capital offense.

11. n/a
12. n/a

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

Silas Lyman
1800 E. Memorial Rd.#106
Oklahoma City, OK 73131
(405) 323-2262

Names and addresses of all co-counsel in the trial court:

Wayne Woodyard
Oklahoma Indigent Defense System

610 South Hiawatha
Sapulpa, OK 74066
(405) 801-2727

14. Was lead counsel appointed by the court? Yes

15. Was the conviction appealed? Yes

To what court or courts? Oklahoma Court of Criminal Appeals

Date Brief In Chief filed: December 15, 2005

Date Response filed: April 14, 2006

Date Reply Brief filed: May 4, 2006

Date of Oral Argument: October 31, 2006

Date of Petition for Rehearing (if appeal has been decided): May 3, 2007

Has this case been remanded to the District Court for an evidentiary hearing ondirect appeal? No

If so, what were the grounds for remand? n/a

Is this petition filed subsequent to supplemental briefing after remand? No

16. Name and address of lawyers for appeal

Janet Chesley Kathleen Smith
Capital Direct Appeals
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
(405) 801 2666

17. Was an opinion written by the appellate court? Yes, for D-2005-310
Yes, for D 1998-948[1]

If "yes," give citations if published:
Glossip v. State, 2007 OK CR 12, 157 P.3d 143 (2007)
Glossip v. State, 2001 OK CR 21, 29 P.3d 597 (2001)

[1] [1] This Court reversed Mr. Glossip's conviction and death sentence in his first appeal.

18. Was further review sought? Yes

a. After this Court affirmed Mr. Glossip's death sentence in D-2005-310, he sought certiorari in the U.S. Supreme Court, which was denied on January 22, 2008 in Glossip v. Oklahoma, 552 U.S. 167 (2008).

b. An Original Application for Post-Conviction Relief was filed in this Court, Case No. PCD- 2004-978, on October 6, 2006. The court denied Mr. Glossip's original application in an unpublished opinion on December 6, 2007. The following grounds for relief were raised in the original application:

PROPOSITION I

PROSECUTORIAL MISCONDUCT DEPRIVED MR. GLOSSIP OF A FAIR TRIAL- AND RELIABLE SENTENCING PROCEEDING.

PROPOSITION II

TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OKLAHOMA CONSTITUTION.

PROPOSITION III

TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE THAT JUDICIAL BIAS SO INFECTED THE PROCEEDINGS THAT MR. GLOSSIP WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTIONS 6, 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION IV

MR. GLOSSIP WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO KEEP THE JURY SEQUESTERED DURING DELIBERATIONS.

PROPOSITION V

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT

APPEAL AND POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW.

c. On November 3, 2008, Mr. Glossip filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma. *Glossip v. Trammell*, Case No. 08-CV-00326-HE. The federal district court denied the petition on September 28, 2010. The following grounds for relief were raised in Mr. Glossip's habeas petition:

GROUND ONE

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND SENTENCE OF DEATH UNDER THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

GROUND TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE INTO THE RECORD IN VIOLATION OF MR. GLOSSIP'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND THREE

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO DISPLAY SELECTIVE PORTIONS OF CERTAIN WITNESSES TESTIMONY THROUGHOUT THE TRIAL BECAUSE IT OVEREMPHASIZED THAT TESTIMONY, CONSTITUTED A CONTINUOUS CLOSING ARGUMENT, AND VIOLATED THE RULEOF SEQUESTRATION OF WITNESSES.

GROUND FOUR

MR. GLOSSIP WAS DEPRIVED OF A FAIR TRIAL AND A FAIR SENTENCING HEARING BY THE IMPROPER TACTICS, REMARKS, AND ARGUMENTS OF THE PROSECUTORS DURING BOTH STAGES OF TRIAL.

GROUND FIVE

MR. GLOSSIP WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITEDSTATES CONSTITUTION.

GROUND SIX

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE AGGRAVATING CIRCUMSTANCE OF MURDER FORREMUNERATION.

GROUND SEVEN

ERRORS IN JURY INSTRUCTIONS GIVEN IN THE SECOND STAGE OF TRIAL DENIED MR. GLOSSIP'S RIGHTS UNDER THE EIGHTH ANDFOURTEENTH AMENDMENTS TO DUE PROCESS AND A RELIABLE SENTENCING PROCEEDING.

GROUND EIGHT

THE TRIAL COURT ERRED IN ALLOWING IMPROPER VICTIM IMPACT TESTIMONY DURING THE SENTENCING STAGE, VIOLATING MR. GLOSSIP'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND NINE

THE TRIAL COURT'S VOIR DIRE PROCESS VIOLATED MR. GLOSSIP'S RIGHTS PROTECTED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE OKLAHOMA CONSTITUTION.

GROUND TEN

THE ADMISSION OF A PRE-MORTEM PHOTOGRAPH OF THE VICTIM INJECTED PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS INTO THE SECOND STAGE PROCEEDINGS.

GROUND ELEVEN

TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OKLAHOMA CONSTITUTION.

GROUND TWELVE

TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE THAT JUDICIAL BIAS SO INFECTED THE PROCEEDINGS THAT MR. GLOSSIP WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND THIRTEEN

THE ACCUMULATION OF ERRORS SO INFECTED THE TRIAL AND SENTENCING PROCEEDINGS WITH UNFAIRNESS THAT MR. GLOSSIP WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS AND A RELIABLE SENTENCING PROCEEDING IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Tenth Circuit affirmed the denial of habeas relief in Case No. 10-6244 on July 25, 2013. See Glossip v. Trammell, 530 Fed.Appx. 708 (2013). A petition for rehearing was filed on September 9, 2013 and was denied on September 23, 2013. A petition for writ of certiorari was filed in the Supreme Court and was denied on May 5,2014. See Glossip v. Trammell, 134 S.Ct. 2142, 188 L.Ed.2d 1131 (2014).

d. A Subsequent Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2015-820, on September 15, 2015. The court denied Mr. Glossip's subsequent application in an unpublished opinion on September 28, 2015. The following grounds for relief were raised in the subsequent application:

PROPOSITION ONE

IT WOULD VIOLATE THE EIGHTH AMENDMENT FOR THE STATE TO EXECUTE MR. GLOSSIP ON THE WORD OF JUSTIN SNEED.

PROPOSITION TWO

COUNSEL WERE INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT.

PROPOSITION THREE

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.

PROPOSITION FOUR

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 RELIABILTY OF THE VERDICT AND DEATH SENTENCE.

The Court of Criminal Appeals denied a petition for rehearing on September 29, 2015. Mr. Glossip filed a petition for a writ of certiorari in the U.S. Supreme Court the same day, and it was denied September 30, 2015.

e. An additional subsequent Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2022-589, on July 1, 2022. That Application remains pending. The following grounds for relief were raised in the subsequent application:

PROPOSITION ONE

RICHARD GLOSSIP IS FACTUALLY INNOCENT OF THE MURDER OF BARRY VAN TREESE.

PROPOSTION TWO

THE STATE'S BAD FAITH DESTRUCTION OF VITAL EVIDENCE DURING THE PENDENCY OF MR. GLOSSIP'S FIRST DIRECT APPEAL VIOLATES HIS RIGHT TO DUE PROCESS.

PROPOSITION THREE

MR. GLOSSIP'S TRIAL COUNCEL WERE CONSTITUTIONALLY INEFFECTIVE FOR FAILING, ON BEHALF OF THEIR INNOCENT CLIENT FACING THE DEATH PENALTY, TO CONDUCT ANY INDEPENDENT INVESTIGATION OF THE CRIME, INVESTIGATE MR. GLOSSIP'S MENTAL IMPAIRMENTS AND DEFICITS, INTERVIEW MANY OF THE STATE'S WITNESSES, OR INVESTIGATE AND PURSUE THE STATE'S DESTRUCTION OF EVIDENCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ART. II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION FOUR

THE INVESTIGATION, TRIAL, AND APPEAL IN MR. GLOSSIP'S CASE FAILED TO MEET THE DEMANDS OF DUE PROCESS OF LAW.

PROPOSITION FIVE

MR. GLOSSIP IS INTELLECTUALLY DISABLED AND INELIGIBLE FOR THE

DEATH PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ART. 2, § 9 OF THE OKLAHOMA CONSTITUTION.

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes

21. Have other motions been filed with this application or prior to the filing of this application? No

22. List propositions raised (list all sub-propositions).

PROPOSITION ONE: THE STATE WITHHELD MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE OF JUSTIN SNEED'S PLAN TO RECANT HIS TESTIMONY OR RENEGOTIATE HIS PLEA DEAL.

PROPOSITION TWO: THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN SHE VIOLATED THE RULE OF WITNESS SEQUESTRATION TO ORCHESTRATE SNEED'S TESTIMONY, INTENDING TO COVER A MAJOR FLAW IN THE STATE'S CASE.

PROPOSITION THREE: THE STATE PRESENTED FALSE TESTIMONY FROM SNEED ABOUT ATTEMPTING TO THRUST THE KNIFE INTO VAN TREESE'S HEART.

PROPOSITION FOUR: THE STATE SUPPRESSED IMPEACHMENT EVIDENCE OF SNEED'S KNIFE TESTIMONY.

PROPOSITION FIVE: THE CUMULATIVE EFFECT OF THE STATE'S SUPPRESSION OF EXCULPATORY AND IMPEACHMENT EVIDENCE REQUIRES REVERSAL OF THE CONVICTION AND SENTENCE.

PART C: FACTS

INTRODUCTION

This petition is based on information that has only been discovered in the past 22 days, after the filing of the petition that is currently pending in this Court (No. PCD-2022-589). The information contained herein was discovered (1) through the efforts of the ongoing independent investigation conducted by Reed Smith and (2) during Mr. Glossip's inspection of files held by the State on September 1, 2022. The information contained herein was not, and could not have been despite diligent efforts, discovered at any time prior.

The State's case against Richard Glossip was heavily dependent on the testimony of one witness: the actual killer, Justin Sneed. Sneed's credibility has always been suspect—because he was the known killer, because his testimony was provided in exchange for avoiding the death penalty, because the recorded interrogation by police was highly suggestive and coercive, and because his accounts have been inconsistent, both internally and across occasions (to police; in the first trial; in the second trial; during post-conviction). In 2014, a letter attributed to Sneed's daughter surfaced, reporting that "[f]or a couple of years," Sneed had "been talking to [her] about recanting his original testimony," Attachment 1, but Sneed denied discussing recantation with her, and the letter's authenticity could never be established. In 2015 and after, another source of information began to cast further doubts on Sneed's credibility: no fewer than four men who spent time with him in the Oklahoma County Jail and two in the Joseph Harp prison came forward reporting that Sneed told them something entirely different from what he said in court, and that he had set Richard Glossip up so he could avoid the death penalty. Those allegations are the subject of a still-pending Successive Application for Post-Conviction Relief filed July 1, 2022 (No. PCD 2022-589).

In the last 60 days, explosive new information has come to light: not only did Sneed initially provide his testimony as a quid pro quo; when called to testify at the second trial, he repeatedly expressed a desire to "recant" (his word) and sought to take it all back unless the State would give him a better deal than he already had. Confronted with this evidence, he has also now confirmed that although he was unwilling to admit it previously, he *did* tell his daughter in 2015 that he was thinking about recanting. Attachment 2.

Newly available evidence also shows that during the second trial, when the medical examiner gave testimony about knife wounds on the victim's body that was inconsistent with all existing accounts of the beating, the prosecutor wrote that she "needed to discuss with Justin" that testimony, and she needed to "get to him" that afternoon, before he took the stand the next day. After this intervention by the prosecutor, he subsequently gave testimony about using a knife that was flatly inconsistent with his prior statements, and consistent with the State's theory.

Reed Smith, a law firm conducting an independent investigation of the case at the request of an ad hoc committee of legislators, uncovered information establishing this fact, including correspondence between Sneed and his attorney and confirmation from Sneed of key information, contained in a third supplemental report issued September 18, 2022. Attachment 2. This new supplement includes that "Sneed Admits to Discussing 'Recanting' With His Daughter and Mother in 2014 Establishing a Pattern of Him Talking About Recanting Over an 11-Year Period," that new information "Shows Multiple ADA Meetings with Sneed and That ADA Had Knowledge Sneed Wanted to Break His Deal and Not Testify," and that "Sneed Confirmed that ADA Smothermon Was Aware He Did Not Want to Testify and Wanted to Break His Plea Agreement," and finally, "ADA Pope's Apparent Violation of the Rule of

Sequestration Shows Continuing Concern over Sneed's Testimony." Evidence of these facts was, until recently, kept from Mr. Glossip and located in the District Attorney's file. Despite years of requests, Mr. Glossip was only provided partial access to this file on August 31, 2022.[2] In light of this new evidence, the series of events leading up to the second trial demonstrates not only that Sneed was not planning to testify as he had at the first trial, but also that the prosecutors knew it. Nobody told Mr. Glossip. å

CHARGES AND NEGOTIATION

Before dawn on January 7, 1997, 19-year-old methamphetamine addict Justin Sneed brutally murdered motel owner Barry Van Treese at his Best Budget Inn property in Oklahoma City. These facts are not, and have never been, in dispute. When Sneed was arrested a week after the murder, detectives told him they knew he had killed Van Treese, that he had not acted alone and should not take all the blame, that they could help him, and that they had already arrested the motel's manager, Richard Glossip, who was blaming Sneed for the murder. Only then did they ask him what happened. Sneed predictably responded that Mr. Glossip had told him they could split whatever money they could get out of Van Treese. Later in the interview, he changed his statement to say that Glossip had asked him to *kill* Van Treese "so he could run the motel without him being boss." Police told Sneed his crime carried the death penalty, and the State charged Sneed with first-degree murder.

Mr. Glossip had already been charged with accessory after the fact, as police seemed to believe he had helped to cover up the murder, based on his actions during the day on January 7th, before Van Treese's body was discovered in Room 102 of the motel. Several days after Sneed's

[2] August 31 was the earliest date the Attorney General's Office agreed to allow review. Due to flight cancellations, Mr. Glossip's attorneys reviewed the files the next day, on September 1.

arrest, the State withdrew the accessory charge and added Mr. Glossip as a co-defendant in Sneed's murder case, seeking the death penalty against both.

Before the case against Sneed proceeded, however, his lawyers sought a competency determination, and the Court had him evaluated by psychologist Dr. Edith King on July 1, 1997. Dr. King wrote of Sneed: "[H]e said his only hope to get out of the death penalty is to plead guilty. He also said that if his only possibility is either life without parole or death he would not plead guilty, since he does not want to spend the rest of his life in prison." Attachment 3. On July 31, 1997, Sneed, represented by Gina Walker and Tim Wilson from the Oklahoma County Public Defender's Office, was declared competent, and the State filed a bill of particulars seeking the death penalty against him.

About five weeks later, on September 10, the State made a formal offer to Mr. Glossip: in exchange for testimony against Sneed at a preliminary hearing and trial, the State would agree to a sentence of life without the possibility of parole. Attachment 4. Mr. Glossip was not interested; he maintained his innocence and insisted on a trial. The following week, on September 16, 1997, Prosecutor Fern Smith filed a summary of witness statements for the case against Mr. Glossip; regarding Sneed, she wrote:

> Justin Sneed – will testify consistent with his video taped interview with police and police reports. Defendant Sneed will testify he was given a sentence of Life Without Parole to testify truthfully against defendant Glossip. The Bill of Particulars was dismissed in exchange for his plea of Life Without Parole. Plea agreement was made September, 1997. Copy of agreement furnished to defense counsel.

OR 86. At that time, however, no agreement with Sneed had been reached, and it is unclear why Fern Smith represented to the Court and defense counsel that it was. Indeed, in February of 1998, Sneed was still expressing unequivocal unwillingness to enter into a deal that did not include parole eligibility. Attachment 5.

Throughout this period prior to the start of trial, as previously reported in Mr. Glossip's July 1, 2022 Application, Sneed discussed his case with men he met inside the jail. Roger Ramsey, who was already there when Sneed arrived, recalled Sneed saying he'd "pointed the finger" at someone named Richard, "that he was mad at Richard so he was blaming him." Attachment 6. He understood from Sneed that rather than being hired to kill Van Treese, he and an accomplice, possibly a woman, "wanted to ambush and rob him, that the robbery went bad, and then that Sneed killed him." *Id.* at 3.

Terry Cooper arrived around the same time as Sneed in early 1997, and was housed in a pod with Sneed shortly after his arrest. Sneed told Cooper he "was afraid the state was going to give him the death penalty and that he needed [Cooper's] help to 'lay it all off on Rich.'" Attachment 7, ¶ 7. Specifically, Sneed wanted Cooper to lie to police and tell them he'd heard Sneed and Glossip discussing the murder at the Best Budget Inn before it occurred. *Id.* ¶ 5. Paul Melton, who arrived in March of 1997, approximately two months after Sneed, recalled:

> I remember Justin Sneed was young and very scared because he was facing the death penalty. I was older than he was and he asked me several times what he should do to get out of the death penalty. Sneed wanted to know what I would do if I was in his position. I had no idea what to tell him, because I could not even imagine killing someone and facing the death penalty. Sneed was prescribed psychiatric medication at that time. I think it was lithium. Sneed asked me if he should say the murder was an accident or if he should plead insanity. Because Sneed was prescribed the psychiatric medication I remember telling him that it sounded like a good idea to me to plead insanity. All I know is that he was very afraid of the death penalty.

Attachment 8, ¶ 13. When Sneed talked about his crime to Melton, "Sneed's story was always the same; that he and his girlfriend planned a robbery that got very messy and ended with him killing the victim," and he never said anything about being hired, or about Richard Glossip. *Id.* 15. Joseph Tapley, who arrived that summer and shared a cell with Sneed, also remembered he

"was very concerned about getting the death penalty." Attachment 9, ¶ 11.

TRIAL AND CONVICTION

Sneed did not sign any deal until May 1998, eight months after Smith claimed he had, when he finally signed an agreement stating, as relevant here:

> Justin Blayne Sneed further agrees to testify fully and truthfully at all court proceedings relating to the crimes which are the subject of this agreement when and if he is called upon to do so. In exchange for the above enumerated cooperation, the Oklahoma County District Attorney's Office agrees as follows: Dismiss the Bill of Particulars and allow Justin Blayne Sneed to enter a plea of guilty to Murder in the First Degree and serve a sentence of Life without the Possibility of Parole.

Attachment 10. This agreement was signed May 26, 1998—less than a week before the State took Mr. Glossip to trial.

Mr. Glossip's trial began on June 1, 1998. The State's case against Mr. Glossip for murder—and for the death penalty—depended heavily on this bargained-for testimony from Sneed. Sneed testified that Glossip had offered him money to kill Van Treese, and the State portrayed Sneed as helpless and easily manipulated, and thus vulnerable to exploitation by Mr. Glossip. His testimony was crucial to the State's case; without it, they had nothing tying Mr. Glossip to the murder itself, as there were no other witnesses to any plan or agreement between Sneed and Glossip, and no physical evidence connecting Mr. Glossip to the crime. On June 10, 1998, Mr. Glossip was convicted and sentenced to death.

On June 18, 1998, pursuant to his agreement, Sneed formally entered his guilty plea. On November 17, 1999, Sneed was transferred to Joseph Harp Correctional Center, a medium-security facility where he has been held ever since.

APPEAL

In April, 2000, attorneys G. Lynn Burch and Matthew Haire filed Mr. Glossip's direct

appeal. The central (and ultimately successful) claim was that Mr. Glossip's trial attorney had failed to defend him in even the most minimally competent way—including a failure to impeach Sneed's testimony with readily available evidence, among it the video of the police interrogation where detectives repeatedly propose the idea that Mr. Glossip was his accomplice. It also included a claim that the prosecutor, Fern Smith, had committed misconduct because she knowingly presented false or misleading testimony from Sneed by claiming his testimony was the same as what he'd told police, when there were a range of material inconsistencies. On December 7, 2000, this Court remanded for a hearing on both of these issues, as well as a jury misconduct claim. O.R. 453-58.

The hearing was held on March 5, 2001. The District Court entered findings four days later, including that Smith had not knowingly misled the jury, and that Mr. Glossip had received constitutionally ineffective counsel. O.R. 593-615. About four months later (July 17, 2001), this Court unanimously reversed the conviction and sentence based on the defense attorney's abysmal performance, noting he should have sought a lesser-included-offense instruction on accessory after the fact and used the video to cross-examine Sneed, and remanded for a new trial. It declined to reach a challenge to sufficiency of the evidence against Mr. Glossip.

While this Court was working on that opinion post-remand, an OIDS lawyer who had been assigned to prepare a postconviction relief application for Mr. Glossip should he not prevail on his appeal, Wyndi Hobbs, also visited Mr. Sneed at Joe Harp. Attachment 11. Hobbs explained that given the findings on remand, "it did look like Mr. Glossip would get a new trial and that there were pretty good odds that he would be called to testify again. [Sneed] said he was not real excited about this, as he has had some problems (he was able to smooth them over) in prison over his testifying." *Id.* ¶ 8. Hobbs believed Sneed regretted what he'd testified to and

would provide helpful information that would exonerate Mr. Glossip, but before she could follow up, Gina Walker, still acting as Sneed's attorney, contacted her and forbade her to contact him because if he cooperated with the defense, "the District Attorney's Office would rip up the deal, and Sneed would risk facing the death penalty." *Id.* ¶ 13.

POST-REVERSAL

Retrial was scheduled for the following September (2002), then postponed, due to the Court's schedule, until January 2003. Fern Smith and Glossip's defense lawyers, Lynn Burch, Silas Lyman, and Wayne Woodyard, began preparing the case for retrial. Burch made a second visit to Sneed at Joe Harp on October 23, 2002, and though he tried to take his co-counsel with him, they were not admitted, and Burch and Sneed spoke alone. Burch provided Sneed with information about the law regarding plea agreements and re-trials. Tr. 1/16/03 at 19-20; 11/4/03 at 9-12.

A few days later, Sneed wrote to Walker about the visit, explaining Burch had told him he was on the State's witness list but he did not have to testify, and "I haven't been enthused at all, since day one of Richard getting his case overturned of doing the same thing. . . . My opinion is they cannot make me do the same thing." Attachment 12.

On January 10, 2003, the Court held a motion hearing in anticipation of a January 27 trial. The motions, which had been filed the previous June in preparation for an earlier trial date, included:

- A motion specifically requesting production of all Sneed's statements, specifically any written or recorded statements and information about who obtained them, when, where, and how, including any law enforcement agents who participated, and specifically "any and all statements made by Justin Blayne Sneed to law enforcement and/or the Oklahoma County District Attorney's office." O.R. 707-08. The State responded it planned to use his trial 1 testimony and all previously disclosed statements, including the interrogation video, and that it had complied with the discovery code's requirement

to disclose "any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant," so the motion was moot. O.R. 774. At the hearing, Burch clarified that he was seeking any communications that had occurred since the case was remanded. Tr. 1/10/03 at 32. Without requiring the prosecutor to say anything, the Court said "the State's absolutely going to comply with the law and I have every confidence about that." *Id.* at 33.

- A motion in limine to preclude the proffered testimony of Justin Sneed, because his first trial testimony made clear he would *not* testify consistent with his videotaped police interview as the State represented, and while Smith could claim not to have realized that in the first trial, she certainly had to realize it now. O.R. 731-741. The State responded that while some of his testimony was inconsistent, it was not false, and the State would not object to the defense using the video at trial. O.R. 859-61. At the hearing, Burch clarified he did not know which version of events Sneed planned to testify to. Tr. 1/10/03 at 48-49. In response, Smith stated, "to the best of my knowledge, Justin Sneed will be on the witness stand to testify . . . If he decides between now and the trial that he refuses to testify, then we'll have to go another route, but I believe that we can take that up at that time because I don't anticipate that that's going to be the situation." Tr. 1/10/03 at 52.

  Burch then asked for further confirmation that Sneed would be testifying, *id.* at 54, explaining, "the reason I'm inquiring about it is that in preparation for this several months ago, I spoke with this young man and interviewed him and he indicated to me at that time that he did not want to testify." *Id.* at 55.

  The Court then asked Smith if she had had "any kind of communication" with Sneed since then, and she said she had not, and that she assumed any conversations with him would go through Gina Walker, and that she assumed "that Gina Walker would talk to him before he makes any kind of a decision not to testify, because in his agreement there are some consequences if he decides not to do so and Ms. Walker is the one who needs to talk with him about those, not Mr. Burch." *Id.* at 56. She overruled the motion, but ordered "that if anyone is made aware that Mr. Sneed is refusing to keep the agreement that he made with the State of Oklahoma, everyone else has to be notified of that immediately." *Id.* at 57.

  Smith then stated she had writted Sneed down to the county jail and he would be there by Monday (i.e., January 13), and she would "talk with Ms. Walker and ask her to let us know what his feelings are at that time. I'll inform the Court as soon as I know." *Id.*

In fact, records reflect Sneed was transported from Joe Harp to Oklahoma County Jail on January 9, 2003 (the day before this hearing), where he stayed until January 23. O.R. 950.

Three days after the motion hearing and ten days before the scheduled start of trial, the defense attorneys, for the first time, went to the District Attorney's office to inspect the evidence

in the case. During their review, they detected apparent blood stains on some of the money taken from the room Sneed was staying in at the time of his arrest, which had never been noted in any police report,[3] and filed an emergency motion for a continuance to allow them to have the evidence tested. O.R. 924-928. The Court quickly convened a hearing on January 16, 2003, where everyone agreed the case needed to be continued to allow for testing. Tr .1/16/03 at 15. The trial was ultimately reset for August 25. Smith also stated that, as she had indicated she planned to do at the previous hearing, she had "talked with Ms. Walker this morning concerning this case and gave her some police reports and things and she has informed me that Mr. Burch has been to the penitentiary and her words were, 'pressured Mr. Sneed' concerning his testimony in this, not once but several times." *Id.* at 18. She wanted Burch admonished not to talk to Sneed without Walker present, because he was "still under an agreement to testify and if he doesn't testify pursuant to his agreement, then he comes back and we try him for the death penalty." *Id.* at 19. Burch clarified that he had interviewed Sneed but not pressured him, but agreed not to talk to Sneed again without informing Walker. *Id.* at 20.[4]

The following week, on January 22, 2003, Sneed's other attorney, Tim Wilson, wrote to Burch asking him to "refrain from any future contact with our client." Attachment 13. The following day, Sneed was returned to Joe Harp, O.R. 950, and Burch then responded to Wilson explaining that "when Mr. Sneed was brought back to the Oklahoma County Jail via the State's writ several days ago, he called me on the telephone and asked if I would let Gina Walker know

[3] These stains were significant in part because there was no sign of any blood on the bills taken from Glossip, which might be expected if all of the money was taken from the same place at the same time as the State alleged.
[4] At the same hearing, Smith informed the Court that during the January 13 evidence inspection, the defense had asked about some items that did not seem to be there, and that there had been a report lying on top of the evidence the defense had not seen documenting the destruction in late 1999 of ten items of evidence by the Oklahoma City Police Department. Tr. 1/16/03 at 23. This event is discussed in detail in Mr. Glossip's July 1, 2022 application.

that he was back in Oklahoma County, which I did immediately." Attachment 14.

As the parties worked to obtain the necessary forensic testing over the ensuing months, Sneed was clearly concerned about the prospect of testifying again, and considering taking back what he had said at the first trial. After arriving back at Joseph Harp, he wrote to Walker again, asking when his DNA sample would be collected for the analysis of the money and stating, "I still question on what I should do, on when the time comes." Attachment 15. A few days later, he wrote, about the "ever haunting court issues," that depending "on what happens, depends on what I'll do." Attachment 16. The next month, he wrote to her, "As of now do not expect to [sic] much." Attachment 17.

His concerns escalated when he wrote to Walker on May 15, 2003:

> Curious on if your [sic] still thinking about coming here to try to visit me before his trial [currently scheduled for August 25]. And parts of me are curious that if I chose to do this again, **do I have the choice of recanting my testimony at any time during my life,** or anything like that. For now I guess that's pretty much it. **If there is anything you know, on his court date and about re-canting.** The most thing I just hate the waiting game, and not seeing what is going to come next.

Attachment 18 (emphasis added). Walker responded on May 21 she would "write you and let you know the date I will come see you" after she finished with a trial she was involved in, and "The remainder of the things you mention in your letter I will talk to you about in person." Attachment 19.

SECOND TRIAL AND INVOLVEMENT OF CONNIE POPE

During the summer of 2003, Fern Smith left the case.[5] On June 12, 2003, there was a meeting in chambers with the Court and counsel where it was agreed to move the trial date from

[5] She indicated that she planned to retire, but she continued to appear in other Oklahoma County capital cases long after leaving the Glossip case.

August 23 to November 3, 2003; Burch wanted the new prosecutor to have a chance to do a thorough review of the case in hopes of securing lesser charges. O.R. 996. The prosecutor the State assigned to the case was Connie Pope.[6] On August 15, 2003, Pope and an investigator by the name of Larry Andrews met with Burch, who asked her to take a fresh look at the case; Pope agreed. Tr. 10/27/03 at 6-7.

On September 13, Sneed wrote to Walker, noting she had recently visited him, and that he was "Still not sure on what even to do." Attachment 20. There was apparently some communication between Sneed, Walker, and prosecutors on September 23, because Sneed also wrote to Walker on October 1, "I've learned, as you & the DA's said on the 23rd there's a lot in words & details that can tell people a lot." Attachment 21. There is no other known record of a visit or meeting between Sneed and Walker or prosecutors on that date, and it is not known whether it was a visit, phone call, or other correspondence, but it did involve "the D.A.'s." *See also* Attachment 2 at 10.

In any event, it is clear that there was *some* type of communication around then that included a discussion of re-negotiating Sneed's deal. On September 25—two days after—Pope met with the Van Treese family, and Kenneth Van Treese, Barry's brother, sent her a follow-up email. Attachment 22. He outlined a series of concerns they had reportedly discussed at the meeting, including "that Sneed may attempt to renegotiate the terms of his plea agreement in exchange for testifying to the same facts he provided in the first trial." *Id.* He wrote that Pope had "assured [him] that Sneed is on board for the new trial and there will be no modification to the agreement for Sneed to be in prison for the rest of his life." *Id.* But the fact that they were

[6] Pope married during these proceedings and was then known as Connie Smothermon. For simplicity, this pleading refers to her as Pope throughout, although in some transcripts and correspondence, she appears with her married name.

even discussing this shows the State had information about Sneed's stated intentions. Indeed, the email also reflects a discussion about the family's feelings about a plea offer for Mr. Glossip, which would be consistent with the State having concerns about taking its case to trial. The day after this meeting, the State served Walker—Sneed's attorney—with a subpoena to testify at the scheduled November 3 trial, again reflecting concern about Sneed's testimony. O.R. 978.

On Friday, October 10, Pope called one of Mr. Glossip's lawyers about "offers," Attachment 23, which their subsequent correspondence confirms refers to an attempt to settle the case. The following week, Gina Walker made requests for two visits with Sneed—one on October 20, for which she requested video equipment, and one on October 22, at which she would be accompanied by prosecutors Pope and Gary Ackley.

On October 20 (two weeks ahead of the scheduled November 3 trial date), Pope filed several documents. One was a formal addition to her witness list: Gina Walker. O.R. 1052. Concurrently, she filed an additional summary of witness testimony; for Walker, she wrote, "Will testify to gaining information that Mr. Sneed was visited by the defendant's attorneys in an attempt to prevent him from testifying." O.R. 1057. It is unclear how that would be relevant if she expected that Sneed was going to testify as he had at the first trial, the visit from Burch notwithstanding. Rather, such testimony would only be needed if Sneed did, in fact, refuse to testify to the things he had before. She also filed an Amended Bill of Particulars, adding a new aggravating circumstance never alleged by the State previously: murder for remuneration, O.R. 1044, along with a more definite statement specifying the evidence she would present for the new aggravator, including information from Sneed:

> Justin Sneed will testify that the defendant came to this motel room in the early morning hours of January 7, 1997 and offered Mr. Sneed $7,000.00 to kill the victim. Mr. Sneed killed the victim at the defendant's instructions.

> The defendant instructed Mr. Sneed to wait until the evening of January 7th to move the body. The defendant had offered to pay Mr. Sneed on numerous occasions to kill the victim. The defendant told Mr. Sneed that if the victim was not killed that Mr. Sneed and the defendant would get kicked out of the motel. The defendant told Mr. Sneed that the defendant might be able to con the victim's wife into letting the defendant run two motels after the murder.

O.R. 1048. All of this was contained in Sneed's prior statements and testimony.

Two days later, Pope made her first documented visit to Justin Sneed, accompanied by Walker and Ackely. RT Vol. 12 at 60-61. That same day, she filed a document adding to both the more definite statement and the summary of testimony, containing additional planned testimony by only one witness, Sneed:

> [T]estimony from Justin Sneed that the defendant was always acting like the victim was going to fire him. It was important to the defendant not to get fired. Mr. Sneed saw the defendant mad and afraid of being fired. One time around the end of November, first part of December, 1996, the defendant came to Mr. Sneed's room and woke him up in the middle of the night. The defendant and Mr. Sneed conducted an inspection of all the unoccupied rooms because the defendant said the victim was coming to do an inspection and the defendant was nervous about the outcome.
>
> Further, Mr. Sneed will testify that starting approximately two months prior to the murder, the defendant began talking about killing the victim. The defendant offered Mr. Sneed money in increasing increments to kill the victim. On one occasion, the defendant, Mr. Sneed and the victim were working on a television feed line. The defendant was putting a lot of pressure on Mr. Sneed to get something and hit the victim over the head with it. The defendant was wearing gloves and cautioned Mr. Sneed to get a pair of gloves for himself. After the defendant offered to pay Mr. Sneed to kill the victim on more than one occasion, Mr. Sneed realized the defendant was serious in his request. Mr. Sneed will testify that the defendant told him he could talk the victim's wife into letting him manage both motels after the victim was dead.

O.R. 1067-68. Much of this information was new; it had not been included in Sneed's prior police interview or testimony, nor in any prior summary of testimony filed by the State.

A pretrial motions hearing was held the following Monday, October 27, and the parties

continued to discuss possible plea resolution, but could not reach any agreement. Pope did not, at that hearing, raise any concerns about the need for testimony from Walker and/or Burch about Burch's visit to Sneed the year before.

Sneed was brought to the Oklahoma County Jail on Thursday, October 30, 2003. O.R. 1152. Although the writ of habeas corpus ad testificandum for Sneed, which the State had sought on October 9 (O.R. 1150) said the transport was for the November 3 trial, the prison's file contains a memo noting that Sneed would be picked up and would be "out overnite" Attachment 24, and the Sheriff's return indicates he was indeed transported back to Joseph Harp the next day, October 31. The jail's paperwork reflects that upon arrival in the county jail, Sneed was placed in protective custody at the jail at the DA's office's request (via Jayne Adkisson, who was assisting Pope), and explains that he was a "key witness in a murder trial." Attachment 25. These machinations confirm that the prosecutors were directly involved in handling Sneed. When Sneed was sent back to Joseph Harp the next day, Pope sought a writ to have him brought back again on November 9. O.R. 1143. While there is no record of what occurred during this overnight visit, it is clear that it was coordinated by the District Attorney's Office, and it is clear that although the transport was purportedly for trial testimony, that was not the plan, as the prison was aware in advance that Sneed was to be gone only overnight, and would be back at Joe Harp before the trial started.

On the first day scheduled for trial, November 3, 2003, rather than beginning with jury selection, there were continued plea negotiations; indeed, the Court noted on the record that the State had offered Mr. Glossip an agreed sentence of life *with* the possibility of parole if he would plead guilty, thus averting a trial. Attachment 26. The State had never before agreed to an offer that would allow for parole, yet now, with trial beginning imminently and witnesses already

subpoenaed and brought to court,[7] they decided to sweeten their offer. The Court gave Mr. Glossip until the next morning to consider the offer, but he refused. Tr. 11/4/04 at 6.

Before proceeding with the trial, the Court stated the need to resolve, at ***Pope's*** request, "a potential problem in regard to hearsay." *Id.* Pope does not indicate why she did not raise this issue previously—for instance, at the motions hearing held the week before. The Court then inquired about Burch's October 23, 2002 (i.e., over a year prior) visit to Sneed, confirming Burch had visited Sneed without Walker, and Sneed's lawyers had taken exception. The Court then asked Pope how that meant Gina Walker might become a witness, and Pope responded:

> [W]e would not anticipate that she would be called as a case in chief witness in order to substantively prove the guilt of Richard Glossip. However, Justin Sneed is going to be called as a witness. Depending on how the cross-examination goes and/or the tenure [sic] and the questions that are asked or the impressions that are left, there may need to be some rehabilitation of some issues. I believe that's how Ms. Walker would come to be a witness. I believe that there will be, could potentially be, again, I don't know how cross-examination is going to go, but I think there potentially could be an express or implied claim of fabrication, recent fabrication. I believe that she could be called under the law in order to rebut that.

Tr. 11/4/03 at 8. In other words, Pope was concerned Sneed was going to say something different on the stand that would require "rehabilitation" or invite a claim of "recent fabrication"—presumably of some version or testimony that did not accomplish what Pope needed.

Pope went on to say she thought Walker could be a witness to the original agreement to testify truthfully (although how that could become necessary when they had the agreement itself, and anything underlying it would be privileged, is unclear) or to the fact that her office told Burch to leave Sneed alone after his visit, *id.* at 8-9 (she obviously could not be a witness about the visit itself, because she was not there, and anything Sneed had told her about it would be

[7] The State served subpoenas for the new May 2004 trial date on D-Anna Wood and William Bender (both out-of-state witnesses) *in person* on November 4, 2003. O.R. 1148, 1153.

privileged). Apparently, Pope was still concerned Sneed was not going to give the testimony she needed, and she would thus need to bring up with Sneed the fact that Burch had made a visit at which he allegedly tried to persuade Sneed not to testify. *Id.* at 9. How Walker's office's subsequent instruction to Burch would be relevant, Pope did not say, but this conversation led the Court to ask Burch if *he* might now be a witness—to rebut any claim by Sneed that Burch had pressured him—and Burch swiftly agreed he would and promptly moved to withdraw, causing the trial to be postponed for six more months, to May 11, 2004, and left in the hands of two other lawyers, Lyman and Woodyard, who were not prepared. *Id.* at 12-13. The same day, Ackley recalled the writ they had obtained to bring Sneed to testify on November 9. O.R. 1157.

Oddly, the next day, Kenneth Van Treese emailed Pope a "memo for record" detailing his version of the events of the previous two days, prefaced by "PLEASE CHECK FOR ACCURACY. YOUR MOMMA SHOULD BE PROUD!" Attachment 27. Although Van Treese does not say why he was so pleased with Pope when the long-awaited trial for his brother's murder had just been cancelled, in context, it appears the State did not want to proceed with the trial at that time (first the sweetened offer and agreement to postpone trial by a day to try to negotiate it, then raising at the last minute the issue that would require disqualification that could have been addressed the week before, or at any time in the preceding year). That would certainly be in the State's favor if Sneed were not willing to testify; once the trial began and jeopardy attached, they would be unable to stop it, whether they had their star witness on board or not.

The next week, Kenneth Van Treese again emailed Pope, apparently in response to her query, information about new witnesses that had not, thus far, been contacted by the State—an odd thing for them to be doing if they had been prepared to start the trial and unexpectedly had to wait for new defense counsel to get up to speed.

When the May trial date grew near, Gina Walker requested an attorney visit with Sneed on May 5, for two hours by herself and then for Pope and Ackley[8] to join her on the same day, and to have video equipment available. Attachment 28. That visit occurred as scheduled. RT Vol. 12 at 61-62.

Testimony in the second trial began on Friday, May 14, 2004, with the testimony of Donna Van Treese. Pope elicited from Donna something she had never previously said: that she recognized the knife found under Barry's body as a pocketknife he owned and would carry. RT Vol. 4 at 86. Thus, it appeared Pope was concerned about the presence of the knife in the room. Testimony continued all the following week, and into the next week when, on Monday, May 24, John Fiely, the technical investigator who initially processed the crime scene, testified. Fiely testified on cross that in fact, two still-folded pocket knives were found in Barry's pants pockets, RT Vol. 10 at 124-25, making it unlikely that the open knife found with the body was a knife he had been carrying with him. After all, Donna Van Treese did not testify he was known to carry three knives at a time. Also that day, May 24, Justin Sneed was brought back to the Oklahoma County jail in anticipation of his testimony.

The following day, the medical examiner, Dr. Chai Choi, took the stand. On direct, Ackley took her through the wounds she had observed on the victim's body during the autopsy, establishing that the fatal wounds on his head were made by a blunt object such as a baseball bat. There were also several smaller wounds on his chest and one on his buttocks, in addition to two actual cuts (one on a finger and one on an elbow) made by something sharp, but she was not asked about the source of these wounds. On cross, Lyman showed her the knife that had been

[8] It appears Ackley did not actually attend.

found under Van Treese's body—she had not previously been aware a knife had been found—and asked if the smaller wounds on the chest and buttocks could have been made by that knife. The knife was distinctive because its tip was broken off, meaning it still had sharp edges but did not have a point, but rather a blunt, dull edge. Dr. Choi thought it was a good match for the wounds, that it seemed as though perhaps someone had been trying to stab Van Treese in the heart, but the object used was dull, resulting in patterned marks that did not pierce the skin. RT Vol. 11 at 82-83. She testified the knife could also have made the two cuts observed on Van Treese's elbow and finger. *Id.* at 83. This testimony was especially significant to the defense because Justin Sneed, in the only statement he ever made about the knife, had told police the knife was his, but *he did not stab Van Treese*. Attachment 29. Strong evidence that someone had attempted to stab Van Treese was thus inconsistent with the State's case; it meant that either Sneed was lying about his own actions, or there was a second assailant in the room.

In an undated memo that appears to have been written later that day, after Choi's testimony but before Sneed would testify the following day,[9] Pope wrote to Gina Walker: "Here are a few items that have been testified to that I needed to discuss with Justin." Attachment 30. She then lists six areas, drawn from witness testimony that had occurred so far in the trial, and concluded with "Thanks – we should get to him this afternoon. Tina wasn't here on Monday so Justin may not get to the old jail until noon." *Id.* These areas of testimony were thus being presented to Walker—herself on the witness list and under subpoena—for the purpose of discussion with Sneed, the star witness, *prior* to his taking the stand.

The most crucial item was #3 on the list:

[9] The timing of this memo is further confirmed by the fact that it discusses the testimony of Kayla Pursley, who did not testify in the first trial. Reed Smith details at length the support it found for the conclusion that this memo was written during the second trial. Attachment 2 at 16-19]

> Our biggest problem is still the knife. Justin tells the police that the knife fell out of his pocket and that he didn't stab the victim with it. There are no stab wounds, however the pocket knife blade is open and the knife is found under the victim's head. The victim and Justin both have 'lacerations' which could be caused from fighting/falling on furniture with edges or from a knife blade. It doesn't make much sense to me that Justin could have control of the bat and a knife, but I don't understand how/when the blade was opened and how/when they might have been cut. Also, the blade tip is broken off. Was the knife like that before or did that happen during?

In noting the problem was "still" the knife, Pope conveyed that they had previously discussed the knife being a "problem" for the State. It is unclear why the prosecutor and the lawyer for a witness who has always denied using a knife would have had such a conversation, but it does establish that Pope and Walker had already discussed perceived problems with Sneed's testimony. In addition, the paragraph clearly reflects content from Dr. Choi's testimony, specifically about the lacerations and the possibility of falling on furniture, which was not in the testimony from the first trial. It also conveys Pope's concern that Sneed's version of events "doesn't make much sense." In other words, Pope recognized that Sneed's statement to police about the knife was inconsistent with the evidence now on the record, and that the State's theory of the case depended on Sneed's account matching that record.

This document was discovered by Mr. Glossip's present counsel in the September 1, 2022 inspection of the District Attorney's file. The handwritten notes, which reflect answers to the questions, are unidentified, but appear to have been made by Pope, in talking either directly with Sneed, as the memo proposed, or with Walker, who had taken those questions to Sneed on Pope's behalf. Thus, it seems that after the memo was written, she did indeed "get to" Sneed.

The following morning, Sneed took the stand. As detailed below, Sneed has also described speaking with Pope and Walker in a conference room at the courthouse immediately prior to his testimony. *See* Attachment 2 at 13. He then testified he and Pope had met only twice,

once with Ackley and once without, and that he had never spoken to anyone else from the District Attorney's Office. RT Vol. 12 at 59. He described the October and April visits Pope made to Joe Harp, but said nothing about communications on September 23, nor his overnight trip to Oklahoma City on October 30. When asked by Pope to describe his actions inside Room 102, he said:

> I grabbed the baseball bat and my keys and walked over to room 102 and entered the room. And then when I opened the door, Mr. Van Treese got up out of the bed he was sleeping in and came around towards me. At that point I took one swing with the baseball bat. He pushed me back into a chair and when I tripped and fell in the chair the end of the baseball bat hit the window shattering the outside window, and he tried to make it to the door and I got up out of the chair and grabbed him by the back of his shirt, because I think he was sleeping in a nightshirt and pulled him sideways so he tripped over my feet and his own feet and put him on the ground.
>
> **And then at one point -- at that point I tried to – I took my knife out of my pocket and tried to force it through his chest but it didn't go,** and then that caused him to roll over onto his stomach to where his back was facing the ceiling and then I hit him quite a few more times with the baseball bat.

RT Vol. 12 at 101-02 (emphasis added).[10]

Shortly after this testimony, they broke for lunch, and Lyman moved for a mistrial, explaining the defense had "never received information concerning Mr. Sneed testifying that he either forced or tried to force the knife into Mr. Van Treese's chest, ever, at any point." *Id.* at 105. Pope avowed:

> I asked Mr. Sneed about this knife one time and that was last year. **He told me that he had the knife open during the attack, that he did not stab Mr. Van Treese with it.** I

[10] In his testimony at the first trial, Sneed described his actions this way:

> I went in with my baseball bat, and basically when I opened the door, Mr. Van Treese woke up, and then I just hit him with the bat. And then he pushed me and I fell back into the chair, and that's how the window ended up getting broke because the bat hit the window. And then I just – Mr. Van Treese was trying to get out of the room, and I just grabbed the back of his shirt and slung him in the floor and then hit him a couple more times.

Tr. 6/8/98 at 92. There was no discussion of the knife, but it was the deficient cross-examination of Sneed in this trial that largely led this Court to overturn Mr. Glossip's conviction.

knew all the wounds to be blunt force trauma and so I didn't pursue it any further.

Yesterday after I heard the ME's questions, I called Ms. Walker. She had a conversation with Mr. Sneed and conveyed to me that -- **the same thing that I knew, that he had the knife open during the attack but that he did not stab him with it**. The chest thing we're all hearing at the same time. . . . In fact, I had given these pictures to Gina. She, I think showed the pictures to me . . . Because the pictures seemed to indicate that it happened more than once and **I thought that he had told me last year that he has just, you know, tried once to attack him with it.** That's what he told Ms. Walker.

RT Vol. 12 at 105. Despite the internal inconsistencies in these statements—did Sneed tell Pope the year before that he did not stab Van Treese, or that he had *tried* once?— and the obvious conflict between Sneed's statement to police and his testimony (what prosecutor Gary Ackley would later call a "night-and-day" difference Attachment 2 at 19], the Court ruled there had been no discovery violation, and denied the motion for mistrial. *Id.* at 109.

In addition to the testimony about the knife, Sneed also stated something that appears to have caught Pope by surprise: that when, on the morning after the murder, he had purchased plexiglass, trash bags, and a hacksaw, he had brought those items into Room 102 at the motel, on Mr. Glossip's orders. RT Vol. 12 at 147. Lyman then crossed him about the fact that he had not mentioned the hacksaw to the police. RT Vol. 13 at 49. The following day, when Lyman cross-examined Det. Bemo, he confirmed Bemo had not found any hacksaw, and did not recall Sneed mentioning one. RT Vol. 14 at 76. This prompted Pope to do something extraordinary: she recalled Kenneth Van Treese, who had testified before Sneed and who, as a family member of the victim, had received an exemption from the general rule of sequestering witnesses. He had already testified about his inspection of the property and what he had found; he made no mention of locating a hacksaw. When she recalled him as a witness—having already witnessed the testimony of Sneed and Bemo— she asked him:

Q. All right. Now, you have been sitting in here and watching and listening to the

testimony; is that correct?
A. Yes, ma'am.
Q. Including when we ended Friday with Detective Bemo. Were you in here then?
A. Yes, ma'am.
Q. And you heard the cross-examination where, I believe, accusations were being made that Justin Sneed had never mentioned the hacksaw or the plexiglass or what happened to that when they first interviewed him. Do you remember that?
A. I recall that, yes.
Q. And you recall Justin Sneed's testimony that he put those items in room 112?
A. Yes, ma'am.
Q. Okay. Now, you've testified before, right?
A. Yes, ma'am.
Q. And we had you on the stand for a while?
A. Yes, ma'am.
Q. We didn't talk about the plexiglass or the hacksaw or the trash bags, did we?
A. No, ma'am.
Q. Why didn't you mention those things when you testified before?
A. Because nobody asked me.
Q. Well, I'm going to ask you now. Okay? During your inventory of the motel, did you ever come across any plexiglass, trash bags, or hacksaw?
A.Yes, ma'am.
Q. And where did you come across that?
A. In room 112.

Tr. Vol. 15 at 19-20. This type of direct explicit confirming of what a prior witness said is of course a core reason the rule of sequestering witnesses exists, and when an exception is made for victims, it is not to permit them to listen to all the testimony and then fill in the holes; it is so they will not be excluded from an important emotional experience concerning the harm done to their loved one.

Following this testimony, without any witnesses called for the defense, Mr. Glossip was convicted on June 1; he was then sentenced to death on June 3.

THE WALKER-POPE CONNECTION

While there is documentation of meetings where Sneed and Pope spoke directly, it is also apparent from the record that Walker passed information between Sneed and the prosecutors. It began with Pope's predecessor, Fern Smith, who explained at the hearing that occurred shortly

after the defense had discovered blood on the cash taken from Sneed, Smith said she "talked with Ms. Walker this morning concerning this case and gave her some police reports and things and she has informed me that Mr. Burch has been to the penitentiary and her words were 'pressured Mr. Sneed' concerning his testimony in this, not once but several times." Tr. 1/16/03 at 18. In other words, Smith and Walker were discussing the facts of the case (hence the police reports), and Walker was giving Smith information from Sneed.

Pope then explained during Sneed's testimony that after the medical examiner testified in the second trial, she, too, had "called Ms. Walker. She had a conversation with Mr. Sneed and conveyed to me that—the same thing that I knew, that he had the knife open during the attack but that he did not stab him with it." RT Vol. 12 at 108. She went on to say she "had given these pictures to Gina. She, I think showed the pictures to me. . . [b]ecause the pictures seemed to indicate that it happened more than once." *Id.* In other words, Pope was getting information from Sneed even when not meeting with him in person. Pope's note to Walker that the knife was "still" their biggest problem also suggests prior conversation about this.

Kenneth Van Treese's communications with Pope also strongly suggest she was receiving information about Sneed's intentions, as in the September 28, 2003 email (prior to any documented or admitted meeting between Pope and Sneed), he reported having discussed in a meeting three days before a concern "that Sneed may attempt to renegotiate the terms of his plea agreement." Attachment 22. Given Sneed's later reference to Walker "and the DAs" saying something to him on September 23, Walker, if not Sneed himself, had told her about his plans.

It is also apparent from the record that Walker worked very hard to get Sneed to agree to the State's terms. Hobbs recalled Sneed telling her his "attorneys were pushing real hard for him to take the offered deal," and he ultimately gave in. Attachment 11, ¶ 6. After Mr. Glossip's

conviction was reversed, when Sneed wrote to Walker in 2003 to ask about recanting, she wrote she would talk to him about that in person (Attachment 19), which, according to Sneed, she did, telling him, "you have to testify or they will kill you." Attachment 32, ¶ 12. Walker also assisted the State by preparing Sneed for his testimony, playing the video of his police interview for him, presumably to help ensure he provided consistent testimony. *See* Attachment 33; Attachment 28. Sneed has never reported receiving any advice or information from his attorneys about options he might have; only a consistent insistence that he testify against Glossip and accept life without parole. In short, communication between Sneed and Pope was not always direct; sometimes it went through Walker. Furthermore, no information concerning these communications between Sneed and Walker, done solely for the purpose of preparing Sneed's trial testimony, were ever disclosed to the defense.

POST-CONVICTION

No further materials regarding Sneed are available until shortly after Mr. Glossip's direct appeal from the second trial was denied on April 13, 2007. A few months after the denial, Sneed wrote to Walker (July 30, 2007), stating:

> There are a lot of things right now that are eating at me. Something **I need to clean up**. If I can't get in contact with you or anyone who gets your mail, I'm going to try to contact the indigent defense over his case or the D.A.s. I think you know were [sic] I'm going **it was a mistake reliving this**.

Attachment 34 (emphasis added). Walker quickly wrote back, but rather than reassure Sneed that he had done the right thing in telling the truth, she advised him:

> I know it was very hard for you to testify at the second trial. I also know that OIDS lawyers tried to talk you out of it—acting totally against your best interests to the benefit of their client. Had you refused, you would most likely be on death row right now. Mr. Glossip has had two opportunities to save himself and has declined to do so both times. I hope he has not or his lawyers have not tried to make you feel responsible for the outcome of his case and his decisions.

Attachment 35. When asked about this exchange by Reed Smith very recently, Sneed had no explanation. Attachment 2 at 2 n.6

During this period, as previously reported, two men who were incarcerated with Sneed at Joseph Harp remember him. Michael Scott, who spent about a year at Joseph Harp, heard Sneed laughing "about setting Richard Glossip up for a crime Richard didn't do. It was almost like Justin was bragging about what he had done to this other guy—to Richard Glossip. Justin was happy and proud of himself for selling Richard Glossip out." Attachment 36, ¶ 7. According to Scott, "Justin made stuff up to try to save his own life, and to get a better deal," and he "heard Justin talking about the deal he made, and what he did to Richard." *Id.* ¶ 9. Frederick Gray, who worked in the library at Joe Harp, recalled that in 2008 or 2009, "Sneed was seeking to have his sentence commuted," and had said that since Glossip "wouldn't help me in my need," i.e., covering up the crime, "I'll see if I can get some revenge and I testified for the state for a L-WOP . . . against him; he got death." Attachment 37.

In 2014, a letter surfaced that purportedly was written by Justin Sneed's daughter, reporting that Sneed had told her he was considering recanting his testimony. Attachment 1. The authenticity of that letter could never be established, and, as recently as July 18, 2022, Sneed denied saying any such thing to his daughter. Attachment 2 at 3.

2022 INDEPENDENT INVESTIGATION

In 2022, a republican-led group of Oklahoma legislators commissioned an independent report on Mr. Glossip's case from international law firm Reed Smith, which conducted an exhaustive investigation *pro bono*. Reed Smith was able to gain access to myriad materials that had never been available to Mr. Glossip's defense team.

Reed Smith issued an initial report in June of 2022, concluding that Mr. Glossip's conviction and sentence were unreliable and identifying myriad problems in the case.[11] Shortly thereafter, Mr. Glossip filed the July 1 successive application, alleging actual innocence, among other claims. Reed Smith, however, continued to investigate, and has since issued two supplements to their initial report, on August 9 and August 20, 2022, addressing information that emerged after the issuance of their primary report in June, 2022.[12]

Among the materials obtained after the primary report and addressed in the supplement was the correspondence between Sneed and his attorney. Mr. Glossip's team had sought material from that file years ago, but was told all files on Sneed's case had been destroyed. Attachment 38. Reed Smith ultimately obtained these materials directly from the office that had represented Sneed, the Oklahoma County Public Defender. While the materials were generally protected by the attorney-client privilege and not subject to disclosure, the Public Defender determined, after extensive conversation with Reed Smith and in reliance on Reed Smith's original report and findings, that certain items from the file satisfied the crime-fraud exception to the attorney-client privilege. Attachment 2 at 9. A number of Sneed's letters were thus released for the first time in Reed Smith's two supplemental reports in August 2022, and had not been available before Reed Smith's original report.

After the August 9 supplement, Reed Smith was also able to interview Justin Sneed in person, which they did on three occasions: August 15, August 26, and September 7, 2022. Sneed told these investigators a number of crucial things he had never admitted before, in large part because they were able to confront him with the letters they had finally obtained from the Public

[11] The complete report was attached to Mr. Glossip's July 1, 2022 application. It is available online at https://www.reedsmith.com/-/media/files/news/2022/glossipindependentinvestigation_finalreport.pdf.
[12] Both of these supplements were filed in the case opened with the July 1, 2022 application.

Defender's office after the release of their original report.

- He stated that in fact he did tell his daughter, and his mother, in 2015 that he was considering recanting his testimony. Attachment 2 at 2-5.
- He felt immense pressure to testify, including being led to believe that "if I didn't do that, they were going to kill me." Attachment 32 at ¶¶ 11-12.
- He discussed wanting to undo his plea deal specifically in a meeting where Connie Pope was present, *id.* ¶¶ 14-16, and believes Pope was aware that he did not want to testify. *Id.* ¶ 18. He recalls telling Pope and Walker that Burch had given him the case *State v. Dyer,* which "infuriated" them. *Id.* ¶ 20.
- At the second trial, he met with his attorney and Pope in a conference room off of the courtroom where he told them he did not want to testify, and "it was to the point of breaking me and me saying ok. Maybe in the reality of life I could have kept waiting more time but it seemed like we were not leaving the scene until I agreed to do it." *Id.* ¶ 16. He was "told really you're out of time and your plea agreement is right here," and was "marched out to the stand." *Id.* ¶ 17. In other words, he was attempting to refuse to testify up until the time he took the stand.

Having collected this new information and reviewed it in the context of the entire existing record, Reed Smith came to the conclusion that Sneed had discussed his desire to take back his testimony and/or seek to get a better deal with Connie Pope prior to the second trial, and that based on Sneed's correspondence and Pope's subsequent actions, including seeking to ensure the availability of Gina Walker's testimony, that conversation left Pope concerned that Sneed would not testify against Glossip as he previously had. Attachment 2 at 9-14. Sneed's correspondence, both before and after this meeting, strongly corroborate the conclusion that he was threatening to

recant his testimony.

Second chair prosecutor Gary Ackley confirmed to Reed Smith that "if somebody told me Sneed told me he is thinking about recanting, of course, that's clearly Brady material." *Id.* at 13. Yet the prosecution to this day has not disclosed to Mr. Glossip Sneed's statements to them about his unwillingness to testify as he had in the first trial.

ACCESS TO THE DISTRICT ATTORNEY'S FILE

Since entering the case in 2015, Mr. Glossip's current counsel have been seeking access to the District Attorney's file in this case, in a series of letters that have received no response, as well as publicly. Nonetheless, Mr. Glossip's team continued requesting materials, without response, well into 2021. A letter sent in October of 2020, for instance, while noting it followed prior requests for access, specifically sought "access to the notes taken by prosecutors and any investigators or staff members working with them during interviews with witnesses in preparation for Mr. Glossip's 1998 and 2004 trials," citing *Brady* and *Giglio* obligations. Attachment 39. Even more specifically, on January 8, 2021, Mr. Glossip's counsel wrote again, requesting documentation of specific interviews, including those of "Justin Sneed, both prior to the first trial in 1998, and by ADAs Gary Ackley and Connie Pope on October 21, 2003 and in April, 2003, including a 'list' Pope referred to in her questioning of Mr. Sneed at trial." Attachment 40. The State never responded.[13]

Some time after Reed Smith released its initial report and Mr. Glossip filed his July 1 application, the Attorney General's Office took possession of seven boxes of case file material from the District Attorney's Office, and on August 26, 2022, the Attorney General's Office

[13] The District Attorney also refused to provide access to the file to legislators seeking to investigate the case and to Reed Smith. *See* Reed Smith Report at 4.

contacted counsel for Mr. Glossip, stating they had decided to allow an on-site review of those materials, *excluding anything the office considered to be attorney work product*. Two attorneys for Mr. Glossip completed that review on September 1. They were provided access to seven boxes from which all materials regarding interviews with any witnesses after the initial police reports, and unknown other documents, had been removed. Counsel for Mr. Glossip requested a log of information taken from the boxes by the DA or AG's offices, but that request was denied.

The boxes did, however, contain several items that had never been made available to the defense, including correspondence between witness Kenneth Van Treese and prosecutor Connie Pope, several motel financial documents that had never been disclosed, materials indicating the District Attorney's Office had investigated several witnesses who came forward in support of Mr. Glossip in 2015, typed notes reflecting a conversation with witness Cliff Everhart, only a portion of which were disclosed to the defense before trial, and the above-discussed mid-trial memorandum from Pope to Walker concerning Justin Sneed's planned testimony.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

The facts underlying this Application are continuing to emerge, as they largely depend on information only recently uncovered by the law firm Reed Smith in its independent investigation of the case. Reed Smith has continued to investigate and continues to gain access to new information.

Although Mr. Glossip recognizes that an applicant generally cannot supplement and add new information to his application after it has been filed, this Application is not intended to be Mr. Glossip's full and final presentation of this claim. Rather, it is being filed now to comply with the requirement in Rule 9.7(G)(3) that a petition must be filed "within 60 days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered," and in recognition of the very limited time available in light of Mr. Glossip's scheduled execution on December 8, 2022, to avoid any suggestion that he has slept on this claim in order to delay his execution.

This Court has directed Petitioners to file applications within 60 days even if they are not fully developed or complete to "notify the Court" of the new grounds, and that "[o]nce a timely application is filed, an extension of time to further develop the application with added materials pertaining to the timely raised issue can be submitted to the Court." *Slaughter v. State*, 2005 OK CR 6, 108 P.3d 1052 (2005) at ¶ 21 fn 12. Concurrently filed with this Application are a Motion for Discovery and Motion for Evidentiary Hearing. Mr. Glossip requests that the Court allow him to amend and/or supplement this timely Application when he has had the opportunity to fully develop the claim, or when the continually evolving situation including the independent investigation conducted by Reed Smith produces any additional relevant evidence.

In each proposition, Mr. Glossip explains how he has met the requirements of Ok. St. T.

22 § 1089. However, this Court maintains the power to grant post- conviction relief any time "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703, 710-11. *See also* Okla. Stat. tit. 20, § 3001.1. The rule announced in *Valdez* is not an anomaly. This Court has consistently followed similar rationale when addressing successive post-conviction applications. *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234; *Torres v State*, 2005 OK CR 17, 120 P.3d 1184; *Slaughter v. State*, 2005 OK CR 6, 108 P.3d 1052; *McCarty v. State*, 2005 OK CR 10, 114 P.3d 1089. The claims presented here concern unfair tactics by prosecutors in a death penalty case; an execution resulting from such unfair proceedings would be the epitome of a miscarriage of justice.

PROPOSITION ONE: THE STATE WITHHELD MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE OF JUSTIN SNEED'S PLAN TO RECANT HIS TESTIMONY OR RENEGOTIATE HIS PLEA DEAL.

A. DUE PROCESS REQUIRES PROSECUTORS TO DISCLOSE EVIDENCE FAVORABLE TO AN ACCUSED.

The prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). As first declared by the Supreme Court in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), prosecutors in possession of evidence favorable to the defendant are required, by principles of due process and the guarantee of a fair trial, to disclose it. To obtain relief from a conviction for violation of this duty, a defendant must show both that the withheld information had exculpatory or impeachment value, and that it was material. *Harris v. State,* 2019 OK CR 22, ¶¶ 38-40, 450 P.3d 933, 949-50. A defendant is *not* required to show the prosecutor acted deliberately. *Id.* The State's suppression of favorable evidence violates the Applicant's right to due process under the Oklahoma and

United States Constitutions. Article II, Sections 7 and 20, Oklahoma Constitution; Fourteenth Amendment to the United States Constitution.

1. Favorable to the Accused

Evidence need not be exculpatory in the traditional sense to be subject to *Brady*'s disclosure requirements. Rather, "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States,* 405 U.S. 150, 154 (quoting *Napue v. Illinois,* 360 U.S. 264 (1959)). Even "such subtle factors as the possible interest of the witness in testifying falsely" can determine "a defendant's life or liberty." *Napue,* 360 U.S. at 269. If the State is unsure, it must err on the side of disclosure, especially because only the prosecutor knows what she has chosen not to disclose. *Banks v. Reynolds,* 54 F.3d 1508, 1516-17 (10th Cir. 1995)

2. Material

Brady's materiality standard is not a high one: a defendant need only show a "reasonable probability of a different result," i.e., that the suppression merely "undermines confidence in the outcome of the trial." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995). While a mere possibility of an effect is insufficient, there is no need for a finding that the suppressed evidence would more likely than not have changed the verdict; only that the Court cannot be confident the system has gotten it right. *Brown v. State,* 2018 OK CR 3 ¶ 103, 422 P.3d 155, 175.

Impeachment evidence need not be entirely novel to be material; evidence "significantly enhancing the quality of the impeachment evidence" usually will be material, even when the witness was already impeached at trial. *United States v. Waldron*, 756 F. App'x 789, 795 (10th Cir. 2018). Moreover, "[a]lthough Brady claims typically arise from nondisclosure of facts that occurred before trial, they can be based on nondisclosure of favorable evidence (such as

impeachment evidence) that is unavailable to the government until the trial is underway." *Id.* And of course, where the State's case is heavily dependent on a single witness, suppression of evidence impeaching that witness undermines confidence in the trial to a significantly greater extent than it might for an ordinary witness. *See, e.g., Nuckols v. Gibson,* 233 F.3d 1261, 1266 (10th Cir. 2000) (suppressed evidence impeaching witness whose "trial testimony was key to a successful prosecution" left court "not confident of the outcome of the trial" and with "no doubt Petitioner suffered prejudice."); *Douglas v. Workman,* 560 F.3d 1156, 1174 (10th Cir. 2009) (evidence about motivation of "indispensable witness" who provided only direct evidence linking defendants to murder was material, and not rendered otherwise by the State's argument that "one of [his] several contradictory post-shooting statements was corroborated by other evidence"); *cf. Harris v. State,* 2019 OK CR 22 ¶ 46, 450 P.3d 933, 952 (suppressed impeachment evidence not material where [t]he State's case did not rest on [the witness]'s credibility.").

For example, in 2015, the Oklahoma Supreme Court publicly reprimanded two Oklahoma County prosecutors for withholding evidence that would have impeached an important witness. In *State ex rel. Oklahoma Bar Association v. Miller and Kimbrough,* 2015 OK 69, 360 P.3d 508, shortly before trial, the prosecutors interviewed a witness who "gave statements that were inconsistent with his earlier statements in the police report," and "had contradicted himself during the interview multiple times;" importantly, he gave a location for the stabbing that was different from what he'd said before and was inconsistent with the State's case. *Id.* ¶¶ 10-11. The prosecutors promptly stopped taking notes, then showed the witness crime scene photographs, and the witness eventually "affirmed the facts he told the police detectives immediately after the stabbing, which facts were consistent with the State's case." *Id.* ¶ 12. The

prosecutors gave defense counsel the witness's current address, and indicated he seemed confused and unable to remember clearly, but did not tell him what he had said in the interview, even though one of them later referred to it as "borderline *Brady*." *Id.* ¶ 15. Based on the witness's apparent lack of competency, the parties agreed to stipulate to his testimony as reflected in the police report, and the prosecutors exploited this stipulation without disclosing that the witness had, in fact, later given them a contradictory statement. *Id.* ¶¶ 16, 20. The Court found they had violated their disclosure obligations, even though the witness eventually returned to his first version, and even though the prosecutors had created no written documentation of the exculpatory information.

B. THE STATE FAILED TO DISCLOSE ITS CONVERSATIONS WITH JUSTIN SNEED IN WHICH SNEED TOLD PROSECUTORS HE WAS NOT PLANNING TO TESTIFY IN MR. GLOSSIP'S SECOND TRIAL AS HE HAD IN THE FIRST.

The combination of Sneed's correspondence (newly available), the record surrounding Pope's actions after meeting with him and heading into trial, and Sneed's recent statements to investigators (newly available) establish that in at least one meeting with prosecutor Connie Pope, Justin Sneed stated that he did not intend to testify in the second trial as he had in the first, and that he continued to indicate an unwillingness to provide the same testimony he had previously provided right up until the start of the second trial. The record is mixed about whether he planned affirmatively to recant his testimony, or whether he was intending to withhold his testimony in hopes of leveraging a more favorable deal than the one he already had. But the State never disclosed any of it to Mr. Glossip's defense counsel as it was required to do.

In a recent interview with investigators in which he was confronted with his own letters to his attorney, Sneed has confirmed that he met with Pope and discussed his desire to withhold

his testimony or renegotiate his deal, and that at the second trial, they had him "in a little conference room" at the courthouse, and while he continued to resist, "it seemed like we were not leaving the scene until [he] agreed to do it." Attachment 32, ¶ 16. There is thus no doubt that the State was aware that Sneed did not plan to testify as he had before. Moreover, the evidence is clear that information about Sneed and his testimony was flowing freely between Pope and Walker, as discussed *supra,* and *Walker* was explicitly told, in letter after letter, of Sneed's wavering.

The evidence shows that the reservations Sneed expressed to the State (directly in these meetings, and also likely through his counsel) likely included discussion of actually recanting his testimony. The strongest evidence of this is Sneed's correspondence. In 2003 (before the meeting), he wrote that he wanted to know, should he testify again, whether he would "have the choice of recanting my testimony at any time during my life," and asked for information "on [Glossip's] court date and about re-canting." Attachment 18. To recant means to formally withdraw or disavow a prior statement (not simply to decline to make it again), and Sneed clearly would have known this, as his letters reflect he had been thinking and researching extensively about his situation. Indeed, at least ten opinions of this Court using that word were available at that time, and if Sneed had been doing legal research as he said, he certainly knew what the word meant and how it was used. He has further admitted using that word again when speaking with his family in 2014. Attachment 2 at 2-5.

When shown this letter in 2022, Sneed claimed when he wrote the word "recant," he did not mean recant, but rather "that he wanted to break his plea deal and get a better deal." Attachment 32, ¶ 8. But it is unlikely someone who had been thinking about and researching these issues for years would have misused this important word in that way. Moreover, several

years later, in another letter written after he ultimately did agree to testify in the second trial, while not using the word "recant," he did clearly express a desire to formally take back the testimony he had given (i.e., recant), consistent with the words he chose in 2003. Specifically, he wrote in 2007 not that he wished he had gotten, or still sought to procure, a better deal, but that there were things "eating at" him that he "need[ed] to clean up," and that "it was a mistake reliving this." Attachment 34. Those are not the words of someone who merely wishes he had come out better in a negotiation. Lest there be any doubt that he had returned to the recantation idea expressed in 2003, he stated that should his attorney not help him, he planned to approach the prosecutors or—crucially—"indigent defense," i.e., OIDS, Mr. Glossip's lawyers. They would obviously have nothing to do with the terms of Sneed's deal—but they very much could help him do what he'd been saying he wanted to do since 2003: recant his testimony. Sneed has been unable to explain why he said that. Attachment 2 at 2 n.6. In any event, it is beyond debate that whether or not he sought to affirmatively recant, he absolutely sought to re-negotiate his deal, which would entail threatening to withhold his testimony unless better terms were offered.

After the 2003 letters, Pope met with Sneed and Walker at least twice—once on October 22 , 2003, and once in April, 2004. RT Vol. 12 at 60-62. It appears there were additional meetings, on September 23 as reflected in Sneed's October 1 letter, at the Oklahoma County Jail October 30-31, and at the courthouse immediately prior to his testimony in the second trial. Attachment 2 at 20; Attachment 32, ¶ 16. As noted above, when confronted with these letters after they became available in August, 2020, Sneed admitted "they discussed him wanting to undo the deal so he could get a better one." *Id.* In other words, Sneed has explicitly confirmed that he told Pope he did not plan to testify as he had in the first trial.

Pope's actions after this meeting, including formally disclosing Walker as a witness and

her explanations for why that was necessary, along with her disruption of the November 2003 trial with information that had been available to her for months and the plea offer, strongly corroborate this admission by Sneed. The only logical reason for Walker or Burch to be needed as a witnesses, for which Pope argued shortly before the trial was set to begin, was if Sneed did not testify as planned. The State's last-minute extension of a plea offer it had never offered before and its raising of what it termed a "hearsay issue" that had been apparent for months, right when a jury was about to be selected, when the State clearly already had out-of-state witnesses physically present and ready to begin trial, is again highly consistent with Sneed's present admission that he told Pope he would not testify under his existing agreement.

The State never disclosed these conversations to the defense. Lead trial counsel Silas Lyman confirms that "[a]t no time prior to trial" was he "aware that Mr. Sneed had expressed wanting to either: recant his testimony or leverage his testimony in order to get a better deal." Attachment 41, ¶¶ 4-5; *see also* Aff. of Wayne Woodyard, Attachment 42, ¶ 5. And while Burch and Hobbs knew that earlier on, Sneed had reservations about testifying—Sneed told Burch it was to do with being treated as a snitch—they did *not* know that Sneed had told prosecutors he planned to recant or required a better deal, or that he adamantly insisted on that until they actually put him on the stand. The State had an obligation to tell the defense about that, even if they already had some notion that Sneed had reservations. *See Fontenot v. Crow,* 4 F.4th 982, 1066 (10th Cir. 2021) (noting obligation attaches "regardless of the defense's subjective or objective knowledge of such evidence"). Indeed, courts have *rejected* the argument from the State that its obligation only exists when the information was otherwise entirely unknown to the defense. *Banks v. Reynolds,* 54 F.3d 1508, 1516-17 (10th Cir. 1995) (fact that defense counsel had the information "irrelevant to whether the prosecution had an obligation to disclose the

information"). But here, the defense never knew that Sneed was attempting to recant or renegotiate.

Although the State was required to disclose this information of its own accord, the situation is worsened by the fact that defense counsel made an explicit request for disclosure of statements Sneed made to anyone, specifically including police and prosecutors, *after* the case was remanded by this Court for a second trial, and specifically targeted toward statements made since the reversal had occurred. O.R. 707-08. Perhaps at the time of this request in January of 2003, the State had not yet had any discussion with Sneed about his testimony for the second trial, but the Court made the State's obligation crystal clear, saying "the State's absolutely going to comply with the law and I have every confidence about that." Tr. 1/10/03 at 33. In other words, the Court expected that should Justin Sneed give any further statements to prosecutors, they would be disclosed—something the Court seemed to find so obvious as not to warrant further discussion. Yet when Sneed gave statements, the prosecutors failed to disclose them.

In evaluating the evidence supporting this claim, the Court must bear in mind that the very nature of a *Brady* claim is that the defense has not been provided information to which it was entitled. Thus, strong circumstantial evidence of what occurred is often the most that is available, no matter how egregious the violation, unless or until full discovery is afforded. The circumstantial evidence here is exceedingly strong; without discovery and a hearing, nothing more could possibly be expected. To deny this claim, or refuse to allow discovery or a hearing, because Mr. Glossip does not yet have evidence that could only ever be obtained through those very processes would eliminate the possibility of any check on prosecutors' decisions of what to turn over and what to withhold. History has shown that prosecutors do not always get that right. *See, e.g., State ex rel. Oklahoma Bar Association v. Miller and Kimbrough,* 2015 OK 69, 360

P.3d 508; *Douglas v. Workman,* 560 F.3d 1156, 1174 (10th Cir. 2009) (both cases of Oklahoma County prosecutors illegally withholding evidence they claimed to have decided was not material).

C. THE STATE'S SUPPRESSED CONVERSATIONS WITH JUSTIN SNEED WERE MATERIAL.

1. Justin Sneed's Testimony was Indispensable to the State's Case.

If there is one thing everyone has agreed on throughout the life of this case, it is that the State's case against Mr. Glossip for first-degree murder was heavily dependent on the testimony of Justin Sneed:

- In a pre-trial hearing in 1998, the first trial prosecutor, Fern Smith, told the Court, "This case rests basically on the testimony of Justin Sneed. The physical evidence basically all goes to Justin Sneed." Tr. 5/29/98 at 12.

- In its 2001 reversal, this Court recognized "[t]he State concedes the only 'direct evidence' connecting Appellant to the murder was Sneed's trial testimony." 2001 OK CR 21 ¶ 7, 29 P.3d 597, 599.

- In her findings of fact underlying this Court's 2001 reversal, Judge Gray wrote that "Sneed was the State's star witness in the case against Richard Glossip," and that "Glossip could not have been charged with Murder in the First Degree without Sneed's testimony." O.R. 606.

- The federal district court wrote in 2010 that "[t]he State's case hinged on whether Sneed's testimony that he committed the murder at Glossip's direction was credible—whether the jury believed Sneed's statement that he would not have attacked VanTreese if Glossip had not told him to do so." *Glossip v. Workman*, 5:08-cv-326-HE, Order, Sept. 28, 2010, at 18.

- In 2017, this Court distinguished another case from Mr. Glossip's because the witness an allegedly ineffective attorney had failed to impeach was not sufficiently central to the case, whereas in Mr. Glossip's case "the State's case entirely relied" upon the testimony of Justin Sneed. *Frederick v. State,* 2017OK CR 12 ¶ 175, 400 P.3d 786, 828.

As has been recognized in all of these contexts, if the jury did not believe Justin Sneed, it is highly unlikely they would have convicted Mr. Glossip of first-degree murder.

2. Information that Sneed Wanted to Take Back His Testimony Would Have Seriously Damaged His Credibility.

Given Sneed's correspondence, his later attempts at explaining away that correspondence, and his statements to his daughter, it appears that he was in fact planning to recant his testimony, and that would obviously have been highly exculpatory. The fact that Sneed has continued to assert publicly that his trial testimony was truthful does not rob his private expressions of a desire to recant of their truth and power. Sneed has a very strong reason to maintain his public position, no matter what he believes to be true: the State has continually threatened to revoke his agreement and seek the death penalty, should he step out of line. Sneed's attorney conveyed this to Wyndi Hobbs in 2001 when she wrote that "the District Attorney's Office would rip up the deal, and Sneed would risk facing the death penalty" if he gave exonerating information to the defense. Attachment 11, ¶ 13. Fern Smith said it on the record in 2003, telling the Court Sneed was "still under an agreement to testify and if he doesn't testify pursuant to his agreement, then he comes back and we try him for the death penalty." Tr. 1/16/03 at 19. And Walker reminded Sneed in 2007 that "[h]ad you refused, you would most likely be on death row right now." Attachment 35; *see* Attachment 32, ¶ 12 (Sneed told "you have to testify or they will kill you."). Under these circumstances, the fact that while continuing to waffle in private, Sneed has always come down on the side of formally sticking to his story says little about whether that story was, in fact, true. It is difficult to imagine more clear-cut *Brady* evidence than the key witness expressing a desire to recant.

But even if Sneed said to Pope only what he now claims—that he wanted not to recant, per se, but to renegotiate for a better deal—that information would have been important impeachment material that was favorable to the defense and needed to be disclosed. It establishes

that Sneed considered his testimony not merely a true statement he was obligated to make on the stand, but rather a commodity to be sold—and revoked—for his own benefit. Trial prosecutor Gary Ackley, while unaware himself of these conversations, unequivocally stated that if he had known of such conversations, that would have been *Brady* material. Attachment 2 at 13. Lyman confirms he could have used this information to cross-examine Sneed, and it "could have been crucial information." Attachment 41, ¶ 6. Woodyard agreed that "such information would have been helpful in challenging the credibility of Mr. Sneed who was the State's principal witness." Attachment 42, ¶ 5.

In sum, given Sneed's centrality to the State's case, information that he was considering recanting, or that he was attempting to re-negotiate his deal, was both exculpatory/impeaching and material, and the State's failure to disclose that information violated Mr. Glossip's due process rights.

D. THIS CLAIM MEETS THE REQUIREMENTS OF SECTION 1089(D)(8) AND RULE 9.7(G).

The current claims and issues have not and could not have been presented previously, because "the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence" prior to now. 22 OK St. § 1089(D)(8)(b)(1). Moreover, if prosecutors had not illegally withheld Justin Sneed's attempts to recant from the defense, "no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." 22 OK St. § 1089(D)(8)(b)(2). The previously unavailable factual basis has continued to unfold, but the first piece of correspondence underlying this claim was announced in Reed Smith's August 9, 2022 supplement. This application is being presented well within the 60 days permitted by Rule 9.7(G).

1. The Claim Could Not Previously Have Been Discovered Through the Exercise of Reasonable Diligence.

This claim depends heavily on the uncovering of correspondence between Justin Sneed and his attorney. That correspondence makes clear for the first time that Sneed seriously considered recanting his testimony both before and after Mr. Glossip's second trial and wanted at least to re-negotiate his deal. Without the information about Sneed's position provided by those letters, there was no way for the defense to know what Sneed had told prosecutors about his plans. Moreover, it was only with the benefit of those letters that investigators were able to learn directly from Sneed that he had discussed with prosecutors his plan not to testify. Those letters, uncovered by Reed Smith in August 2022, made this claim available for the first time.

Brady claims do *not* require defendants to affirmatively seek out or even request the evidence, and the State has disclosure obligations if the defense has some knowledge of the evidence. *See Fontenot v. Crow,* 4 F.4th 982, 1066 (10th Cir. 2021) (noting the Supreme Court "has never required a defendant to exercise due diligence to obtain Brady material") (citations omitted); *Banks v. Dretke,* 540 U.S. 668, 696 (2004) (rejecting rule that "prosecutor may hide, defendant must seek" as "not tenable in a system constitutionally bound to accord defendants due process."). But here, where Mr. Glossip did explicitly ask for this material, he was entitled to rely on the State's representation that it had none. *See Amado v. Gonzalez,* 758 F.3d 1119, 1136 (9th Cir. 2014) ("[D]efense counsel may rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce."). Nor does the fact that this claim is being raised years after the fact reflect in any way on credibility. *See, e.g.*, *Harris v. State*, 2019 OK CR 22, ¶ 39, 450 P.3d 933, 950 ("Because *Brady* claims, by definition, involve information that was not timely disclosed to the defense, they typically do not arise until sometime after trial.").

The State must not be rewarded for successfully concealing information for long periods of time.

Nonetheless, here, Mr. Glossip *did* try to get the evidence that has ultimately given rise to this claim and was wrongly told it had all been destroyed. And he *did* seek access to the District Attorney's files for years when he had no prospect of an impending execution date; it was the State that decided only to provide that access with mere months before a scheduled execution.

2. <u>But For This *Brady* Violation, No Reasonable Juror Would Have Convicted Richard Glossip of Murder or Sentenced Him to Death.</u>

As detailed at length above, the State's case against Mr. Glossip for first-degree murder depended heavily on the testimony of Justin Sneed. If the jury did not believe Sneed, there is no way they would have convicted Mr. Glossip of murder. If the defense had been able to cross-examine Sneed about his plan to recant or his willingness to withhold and alter his testimony to secure better conditions for himself, his already suspect credibility would have been dramatically eroded. If the jurors were not sure they could trust Sneed—and hearing of his plans to recant or renegotiate, how could they?—they could never have found beyond a reasonable doubt that Mr. Glossip had hired Sneed; there was no other evidence of that.

Additionally, there is now copious other evidence that Sneed's testimony was false, and that he altered it in response to a mid-trial request from prosecutors. That evidence is presented at length in Mr. Glossip's prior application and in Claims Two and Three, *infra*. Knowing all of that *and* knowing that Sneed planned to recant, or at the very least to exploit his testimony however he could to secure better conditions for himself makes it impossible to rationally believe he was being truthful when he implicated Mr. Glossip.

PROPOSITION TWO: THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN SHE VIOLATED THE RULE OF WITNESS SEQUESTRATION

TO ORCHESTRATE SNEED'S TESTIMONY, INTENDING TO COVER A MAJOR FLAW IN THE STATE'S CASE.

When interviewed by police in 1997, Justin Sneed said the pocketknife found under Van Treese's body belonged to him, but he did not use it in the attack. In the 2004 retrial, the medical examiner testified that there were several wounds on Van Treese's body, around his heart and on his buttocks, that were likely made by that knife—a serious problem for the State's case, given Sneed had always said he acted alone, and had also said he did not use that knife. But when he took the stand, Sneed testified, contrary to his prior statement, that he *had* attempted to force the knife into Van Treese's chest.

In between, prosecutor Connie Pope wrote a memo to Sneed's attorney Gina Walker describing "a few items that have been testified to" that she "needed to discuss with Justin," and noted they "should get to him this afternoon," i.e., before he took the stand. Attachment 30. Pope emphasized to Walker in this very recently disclosed memo that "[o]ur biggest problem is still the knife." *Id*. This communication manifests Pope's flagrant violation of the trial court's sequestration order immediately before Sneed's decisive testimony in the State's case. The emergence of Pope's memo to Walker evinces the prosecutor's violation of 12 Okla. Stat. Ann., § 2615; Article II, Sections 7 and 20 of the Oklahoma Constitution; and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The "night and day" change in Sneed's testimony (Attachment 2 at 19) was brought about by the prosecutor's illegal and surreptitious intervention, rendering the trial fatally unreliable.

A. THE TRIAL COURT ORDERED THE WITNESSES SEQUESTERED.

After opening statements in Mr. Glossip's 2004 retrial, the defense invoked Oklahoma's Rule of Sequestration. RT Vol. 4 at 25 *et seq*.[14] This rule provides, with enumerated exceptions: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." in 12 Okla. Stat. Ann., § 2615. While the statute contemplates the court "shall" sequester witnesses upon a party's request, that determination rests within the trial court's discretion, which, here, was soundly exercised and is not in question. *See Bosse v. State*, 2017 OK CR 10, ¶ 45, 400 P.3d 834, 852, citing *Edwards v. State*, 1982 OK CR 204, ¶ 12, 655 P.2d 1048, 1051-52. This "rule is intended to guard against the possibility that a witness's testimony might be tainted or manipulated by hearing other witnesses." *Bosse*, *supra*, citing *McKay v. City of Tulsa*, 1988 OK CR 238, ¶¶ 5-6, 763 P.2d 703, 704; *Weeks v. State*, 1987 OK CR 251, ¶ 4, 745 P.2d 1194, 1995; *see also Geders v. United States,* 425 U.S. 80, 87 (1976) (rule "exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses). Indeed, this rule "is so fundamental to the trial process that it is traditionally referred to as 'THE' Rule of Evidence." Daniel J. Capra & Liesa Richter, "'The' Rule: Modernizing the Potent, But Overlooked, Rule of Witness Sequestration," 1 William and Mary Law Review 63, 1020-21 (2021). Violation of the rule accords a trial court the discretion to refuse to allow a tainted witness to take the stand, *Edwards*, 1982 OK CR 204, ¶¶ 9-10, 655 P.2d at 1051,[15] and a

[14] The State, at that time, invoked the statutory exception to this rule to permit Barry Van Treese's brother, Kenneth, and his widow, Donna, to attend the proceedings, with Pope representing that the defense had notice of the anticipated testimony of Kenneth, who had not testified at the first trial, and that she did not "anticipate that there would be any changes because [Kenneth] hears Ms. Van Treese speak, but I will just leave that up to the Court. RT Vol. 4 at 27. The court instructed the State "in an abundance of caution to ask [Kenneth] to step out only during [Donna's] testimony. *Id.* at 27.

[15] In *Edwards*, the trial court stated: "The Court finds that due diligence has not been used by the defendant in discovering the witness and advising the witness of the Rule—sequestration of witnesses and since the witness has been in the courtroom all day, the Court will overrule the request to put her on the stand and waive the rule." 1982

violation of the rule, if prejudicial, can be grounds for reversal. *United States v. Buchanan,* 787 F.2d 477, 485 (10th Cir. 1986).

A witness need not be physically present in the courtroom during testimony for a violation to occur; they need only be exposed to the testimony. *See Sheppard v. Maxwell,* 384 U.S. 333, 359 (1966) (publication of a witness's testimony during the trial "completely nullified the judge's imposition of the rule."); *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978) ("[A] circumvention of the rule does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify.") Attorneys, including prosecutors, "are responsible to the court, not to cause any indirect violation of the Rule by themselves discussing what has occurred in the courtroom with the witnesses." *Id.*

B. FLOUTING THE SEQUESTRATION ORDER, THE PROSECUTOR RELAYED KEY TESTIMONY TO SNEED BEFORE HE TOOK THE STAND.

During the 2004 retrial, the State set out to circumvent the trial court's application of the sequestration rule, as Pope went to great lengths to contaminate the evidence that would come from Sneed by providing him—through his attorney, Walker, whom Pope had enlisted as her agent—with important details from the testimony of others who took the stand before him concerning matters where either Sneed's prior statements were inconsistent, or Sneed had not previously testified at all. Most crucially, the memo addressed the use of a knife in the attack, something Sneed had always denied doing.[16]

OK CR 204, ¶¶ 9-10, 655 P.2d at 1051.

[16] As noted in the Statement of Facts, the State had suppressed this memo for over 18 years, not making it available until September 1, 2022, when undersigned counsel were permitted to review it within portions of seven boxes of files from the District Attorney's case now kept by the Attorney General.

On the first day of testimony, Donna Van Treese testified for the first time (having given no similar testimony in the first trial or statement elsewhere) that Barry "carried . . . sometimes, normally always a pocketknife." RT Vol. 4 at 86. Pope had apparently elicited this testimony out of concern that the knife found under Van Treese's body would appear inconsistent with the State's theory that Sneed had attacked Van Treese alone with a baseball bat.

Ten days later, on May 24, the investigator who initially processed the crime scene, John Fiely, testified on cross that he recovered from Van Treese's pants pockets two still-folded pocketknives. RT Vol. 10 at 124-25. Further, Fiely recovered a third pocketknife, with its tip broken off, which was found open and under Van Treese's head. *Id.* at 126-28.

The next day, May 25, Dr. Chai Choi, the medical examiner, testified on direct that in addition to the fatal blunt force wounds to Van Treese's head, the autopsy identified five smaller wounds (four on his chest, one on his buttocks), and two cuts on a finger and an elbow. RT Vol. 11 at 72-79. The prosecutor did not ask how those wounds may have been inflicted. On cross, it emerged that Dr. Choi had been unaware any knife had been found at the scene, let alone one beneath Van Treese's head. *Id.* at 82. The defense showed the medical examiner the knife Fiely had recovered with the broken-off tip, which still possessed sharp edges. She testified that that particular weapon matched the wounds in question (the chest and buttocks wounds were particularly distinctive) and that it appeared someone had tried stabbing Van Treese in the heart but, perhaps due to the missing tip of the blade, the attempt merely caused patterned marks and did not pierce the skin. *Id.* at 83.

At the time of this testimony, the only statement Sneed had ever given about the knife recovered from underneath Van Treese's head was during the 1997 police interview a week after

the murder, when he was first taken into custody. Attachment 29. In that interview, Sneed stated that the knife was his, but that he had not used it while attacking Van Treese. *Id.* at 61.

In response to this incompatibility between the evidence in the record at that point and Sneed's previous statement, Pope took action. The memo she wrote to Walker, apparently prepared immediately following Dr. Choi's testimony that day, addressed no fewer than six different "items that have been testified to that I needed to discuss with Justin," and emphasized that the State's "biggest problem is still the knife." Attachment 30.

Pope electing to discuss *anything* about the trial testimony up to that point in the retrial with *any* witness,[17] especially intending to "get to him" before his testimony, violated the sequestration order and constituted flagrant prosecutorial misconduct. But Pope did not merely list topics; she drove an agenda to secure untruthful testimony from the State's pivotal witness. Pope accurately perceived that the evidence about the broken pocketknife substantially undermined the State's theory, which derived from Sneed's account of the crime. In light of the testimony that Van Treese's body bore marks from that knife, Sneed's prior denial of using the knife when he attacked Van Treese did not square with the State's theory that Sneed, alone, killed Van Treese in Room 102. If Sneed did not use the pocketknife, then somebody else must have been inside the room, and that flatly contradicted the State's case that rested on Sneed's account of committing the murder alone.

Specifically, Pope emphasized:

> Our biggest problem is still the knife. Justin tells the police that the knife fell out of his pocket and that he didn't stab the victim with it. There are no stab wounds, however the pocket knife blade is open and the knife is found under the victim's head. The victim and Justin both have 'lacerations' which could be caused from

[17] Walker herself was on the State's witness list, and thus should not have been provided this information, independent of the obligation not to pass it to Sneed.

> fighting/falling on furniture with edges or from a knife blade. It doesn't make much sense to me that Justin could have control of the bat and a knife, but I don't understand how/when the blade was opened and how/when they might have been cut. Also, the blade tip is broken off. Was the knife like that before or did that happen during?

Attachment 30. Pope betrays the implausibility of an account that Sneed could have simultaneously used a bat and knife in his attack. Critically, this memo draws from Fiely's testimony about recovering the knife and Dr. Choi's testimony about the lacerations and the possibility that Van Treese fell on a furniture edge causing a laceration wound. RT Vol. 11 at 92-93 (concerning wound to buttocks).

This violation of the rule alone requires reversal. The change in Sneed's testimony following Pope's advising him of prior witnesses' testimony was no minor variation. Former ADA Gary Ackley, himself, with the benefit of reviewing Pope's surreptitious memo to Walker, opined last week, given this fuller context of Pope's conduct, that the "night and day" change to Sneed's testimony in relation to stabbing Van Treese calls into serious question the reliability of his testimony. Attachment 2 at 19 n.96 (regarding Reed Smith's Sep. 14, 2022 interview of Ackley).[18] As detailed in Proposition One, Sneed's testimony was crucial to the case. Had his testimony been incompatible with other evidence in the record, the State's case would have fallen apart—as Pope herself seemed to realize. Moreover, in light of the newly available memo, the passing of information by the prosecutor was undeniably deliberate. If ever there were a

[18] The trial included numerous previously known opportunities for other witnesses to conform their testimony to one another. The display of posters summarizing testimony around the courtroom throughout the trial, while not ultimately requiring reversal, raised concern in this Court and in the federal courts. Moreover, as noted above, Kenneth Van Treese was permitted to observe the testimony of every witness except for Donna Van Treese, and was recalled at the end of the trial specifically to give tailored testimony in response to witnesses who testified after he did. While not providing an independent basis for relief, these events further confirm that the State was working hard to have witnesses coordinate their testimony that might otherwise not be consistent.

prejudicial violation of the sequestration rule, this is it. The Court should reverse Mr. Glossip's conviction on this basis.

C. THE STATE ORCHESTRATED SNEED'S CHANGED TESTIMONY THAT WHILE HE ALONE FATALLY BLUDGEONED VAN TREESE WITH A BAT, HE ALSO USED A KNIFE TO TRY TO STAB HIM IN THE HEART.

The newly provided Pope memo contains handwritten marginalia apparently reflecting answers to some of Pope's queries. The writer of those notes is not yet established, but it appears Pope may have taken the notes on her own memo either in discussing it with Sneed directly or with Walker.[19]

These handwritten notes, in part, appear to state:

> tip broke when found it. brought knife down one time. possibly rolled over on it *** hit – knocked down w/bat – [illegible] in chest w/ knife – turned away – but again dropped it – don't know why didn't tell.

Attachment 30. When testifying about his attack of Van Treese, after describing his use of a baseball bat, Sneed offered this:

> And then at one point -- at that point I tried to – I took my knife out of my pocket and tried to force it through his chest but it didn't go, and then that caused him to roll over onto his stomach to where his back was facing the ceiling and then I hit him quite a few more times with the baseball bat.

RT Vol. 12 at 101-02.

The defense then moved for a mistrial, because Sneed's account at the first trial had not included this information and the State had never provided "information concerning Mr. Sneed

[19] These notes cannot have been taken during Sneed's testimony, because they include information that is not in his testimony. For instance, next to the item about Kayla Pursley, it says "Saw her when patching window – left to get Plexiglas ~ 7:30." But when he testified, he said she was not there with them, then says he saw her at some point that morning but could not remember. RT Vol. 12 at 149-50. Apparently, he could not even give consistent information on the same point on two consecutive days.

testifying that he either forced or tried to force the knife into Mr. Van Treese's chest, ever, at any point." RT Vol. 12 at 105.

With the benefit of her newly uncovered memo, Pope's next averments on the record are patently untruthful. She stated she "asked Mr. Sneed about this knife one time and that was last year [2003]. He told me that he had the knife open during the attack, that he did not stab Mr. Van Treese with it. I knew all the wounds to be blunt force trauma and so I didn't pursue it any further." *Id.* Both halves of this—that she had not spoken to him about it since 2003, and what he had said at that time—are belied by the newly available memo.

Her memo states that Sneed had told police in 1997 "that the knife fell out of his pocket and that he didn't stab the victim with it." It says nothing about anything Sneed told her in 2003—that he had the knife open, or anything else. Arguing to defeat the mistrial motion after Sneed's testimony, however, Pope stated that she "thought that he had told me last year that he has just, you know, tried once to attack him with it." RT Vol. 12 at 108. If he had actually told her that back in 2003, she would not have written privately that his prior statement was that he did not stab Van Treese. If he ever told her that, it was right before he took the stand.

The memo also confirms that contrary to her assertion, she had asked Sneed about the knife either the night before or that very morning (directly or through Walker)—not just the once in 2003. Pope told the Court during Sneed's testimony that she had called Walker the night before, *see* RT Vol. 12 at 107-08, and this memo reveals that Pope had not merely consulted Walker, as could be discerned from the record, but asked Walker to convey and obtain certain information about testimony that had already occurred directly to Sneed, contrary to her insistence there had been no discussion. In addition, immediately prior to taking the stand, Pope and Walker conferred with Sneed in a courthouse conference room, and may have discussed it,

although those conversations were not recorded. Attachment 2 at 13. Pope then claimed to be utterly surprised by Sneed's testimony on "[t]he chest thing, we're all hearing at the same time." RT Vol. 12 at 105, when in fact, the notes on her memo reflects she discussed that with Walker and/or Sneed before he took the stand.

The existing record on this mistrial motion is troubling, with Pope's indication—precipitated by Dr. Choi's testimony—of her communication with Walker, Sneed's attorney, *id*., although the previously available record does not conclusively show that Pope had given Walker information about what the testimony had been thus far. The trial court did not grant the motion based on what was visible at that juncture. But now, Pope's machinations and intentions are unmistakable: she intentionally thwarted the sequestration order, either directly or through Walker, and sought to orchestrate testimony shoring up a perceived major weakness in the State's case.

D. THE PROSECUTION'S SURREPTITIOUS, FLAGRANT VIOLATION OF THE SEQUESTRATION ORDER, CULMINATING IN AN ORCHESTRATED CHANGE IN THE TESTIMONY OF THE STATE'S KEY WITNESS, RENDERED THE RETRIAL FUNDAMENTALLY UNFAIR.

When, as here, prosecutorial misconduct so infects the trial as to render it "fundamentally unfair, such that the jury's verdicts should not be relied upon," the judgment must be reversed. *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286, citing *Roy v. State*, 2006 OK CR 47, ¶ 29, 152 P.3d 217, 227; *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). Prosecutorial misconduct is evaluated with reference to the "context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Sanders*, 2015 OK CR 11, ¶ 21, 358 P.3d at 286, citing *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuesta-Rodriguez v.*

State, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243. Generally, this Court "review[s] claims of prosecutor misconduct cumulatively, to determine if the combined effect denied the defendant a fair trial." *Harris v. State*, 2019 OK CR 22, ¶ 52,450 P.3d 933, 953, citing *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891.

Where, as here, "the prosecutor's flagrant misconduct so infected" the proceeding, the trial is "rendered fundamentally unfair" and the result "must be vacated and the case remanded to the trial court." *Bramlett v. State*, 2018 OK CR 19, ¶ 42, 422 P.3d 788, 801 (ordering sentencing stage relief from prosecutorial misconduct during closing argument); *see Bench v. State*, 2018 OK, CR 31, ¶ 123, 431 P.3d 929, 963. As *Bramlett* notes, "the United States Supreme Court has admonished [that] a prosecutor 'is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.'" 2018 OK CR, ¶ 42, 422 P.3d at 801, quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (gender pronouns from original).

In the context of this retrial and the State's case that was heavily dependent on a single witness with a history of inconsistent statements and a strong motivation to lie, the prosecutor's rank cheating must be understood to have rendered the jury's verdict unreliable. *Sanders*, 2015 OK CR 11, ¶ 21, 358 P.3d at 286. As detailed in Proposition One, without Justin Sneed's testimony, the State had no case for first-degree murder. Tampering with that testimony on a material point necessarily renders the proceeding unfair. In addition, this Court should consider Sneed's constant wavering about whether he was willing to testify at all, as detailed in Proposition One, and the State's suppression of that fact when evaluating the effect of the State's actions.

Addressing the posters summarizing prior witnesses' testimony displayed around the Courtroom in a dissenting opinion in the direct appeal, Judge Chapel found the State's actions were "totally unjustified and prejudiced Glossip's right to a fair trial." *Glossip v. State*, 2007 OK CR, 12, ¶ 2, 157 P.3d 143, 165 (Chapel, J., dissenting). The present revelation of Pope's misconduct in yet further shaping Sneed's testimony must be weighed in the broader context of the State's excesses in orchestrating its witnesses' testimonies throughout the proceedings. On this record, reversal is required.

E. THIS CLAIM MEETS THE REQUIREMENTS OF SECTION 1089(D)(8) AND RULE 9.7(G).

The current claims and issues have not and could not have been presented previously, because "the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence" prior to now. 22 OK St. § 1089(D)(8)(b)(1). Moreover, if prosecutors had not illegally manipulated Justin Sneed's testimony by feeding him information from prior witnesses' testimony, "no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." 22 OK St. § 1089(D)(8)(b)(2). The memo on which this claim depends was in the possession of the State, and was not made available to Mr. Glossip until September 1, 2022, despite repeated requests. This application is being presented well within the 60 days permitted by Rule 9.7(G).

1. <u>The Claim Could Not Previously Have Been Discovered Through the Exercise of Reasonable Diligence.</u>

This claim depends heavily on the newly disclosed memo from Connie Pope to Gina Walker. Without that memo, the record reflected a change in testimony, and it reflected that a conversation occurred between Pope and Walker prior to Sneed's testimony, but there was no

indication that Pope had intentionally attempted to ensure that Sneed's testimony matched the existing record by discussing other witnesses' testimony with him, directly or through Walker. Pope stated on the record that she had *not* discussed the knife with Sneed other than during a 2003 meeting, which the memo reveals was untrue. The memo further reveals that Pope considered the evidence about the knife to be the States "biggest problem," information crucial to the claim that she acted deliberately to try to patch up holes in the State's case. Without the memo, there was no claim.

The State has had this memo in its files since the retrial, where it has been unavailable to Mr. Glossip. Mr. Glossip repeatedly requested access to the State's files, but the State chose not to grant that access until September 1, 2022.[20]

2. <u>But For This Rule Violation and Misconduct, No Reasonable Juror Would Have Convicted Richard Glossip of Murder or Sentenced Him to Death.</u>

As detailed at length above, the State's case against Mr. Glossip for first-degree murder depended heavily on the testimony of Justin Sneed. If Sneed, unaware of the prior testimony, had testified consistent with his police statement that he did not use the knife in the attack, the State would have found itself unable to explain the physical evidence, and its case would have fallen apart. It would have been apparent that Sneed's account of the killing was at best incomplete and at worst completely false. If Sneed's testimony about the actual killing were proven false, the jury would likely not have put any stock in his account of how it came about. Because his testimony was the only evidence that Glossip had enlisted him to carry out the killing, this lethal

[20] Again, the State actually made the file available the day before, but Mr. Glossip's counsel were unable to review it until September 1.

blow to his credibility would not have allowed any reasonable juror to convict Mr. Glossip of first-degree murder.

Additionally, there is now copious other evidence that Sneed's testimony was false, and that he altered it in response to a mid-trial request from prosecutors. That evidence is presented at length in Mr. Glossip's prior application and in Claim One, *infra*. Knowing all of that *and* knowing that Sneed planned to recant, or at the very least to exploit his testimony however he could to secure better conditions for himself makes it impossible to rationally believe he was being truthful when he implicated Mr. Glossip.

PROPOSITION THREE: THE STATE PRESENTED FALSE TESTIMONY FROM SNEED ABOUT ATTEMPTING TO THRUST THE KNIFE INTO VAN TREESE'S HEART.

As discussed in Proposition Two, *supra*, the prosecutor orchestrated Sneed's retrial testimony stating that he used the pocketknife recovered from underneath Van Treese's head to attempt to stab him in the heart while fatally bludgeoning him with a baseball bat. This testimony departed from Sneed's only prior statement about the knife, and his account of the murder in the first trial made no mention of this element of his struggle to murder Van Treese. Sneed had never before discussed using a knife in the attack—because he did not use one. The prosecutor knew that, but faced with irrefutable forensic evidence that *someone* used a knife, she presented the testimony anyway, falsely telling the court afterwards that Sneed *had* previously suggested to her he may have used the knife.

A. THE PROSECUTION ORCHESTRATED SNEED'S NOVEL ACCOUNT TO RECOVER FROM A HARMFUL CROSS-EXAMINATION OF THE MEDICAL EXAMINER THE DAY BEFORE.

After medical examiner Dr. Choi testified on May 25, Pope composed a memo about Sneed's impending testimony (Attachment 30). The related discussion with Sneed's attorney, Walker, culminated in a courthouse conference with Sneed and Walker. Attachment 32, ¶¶ 16-17. In violation of the trial court's sequestration order, those discussions, according to Pope's memo, covered Dr. Choi's testimony concerning the knife-related injuries to Van Treese's chest apparently made by the pocketknife recovered from underneath the victim's head, of which Dr. Choi had been unaware prior to her cross-examination the day before. Immediately following this conference with Sneed, he took the stand and presented a new—and false—account that he attempted to thrust the pocketknife into Van Treese's chest. The State's use of this testimony violates the Applicant's right to due process under the Oklahoma and United States Constitutions. Article II, Sections 7 and 20, Oklahoma Constitution; Fourteenth Amendment to the United States Constitution.

The State has had the duty to disclose Pope's memo since its creation, over 18 years ago, but only made it available earlier this month. While this suppression itself violates Mr. Glossip's due process rights pursuant to *Brady*, Sneed's false testimony arising out of the prosecutor's communication with him—communication that was in flagrant misconduct in disregard of the trial court's sequestration order—stands as a distinct, separate violation of the Due Process Clause. *Napue v. Illinois*, 360 U.S. 264 (1959); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

In the wake of Sneed's novel testimony about the knife, the defense moved for a mistrial, citing a discovery violation. RT Vol. 12 at 105. While Pope indicated she had conferred with

Sneed's attorney the day before and even alluded to having addressed the medical examiner's recent testimony with her, her professed surprise from Sneed's testimony on "[t]he chest thing," which she averred "we're all hearing at the same time," was deceitful. Pope's memo and, critically, what appear to be her handwritten notes on that memo reflecting her then-understanding of what Sneed would testify to, explicitly forecasted Sneed's newly fashioned account, confirming that it was not, in fact, news to Pope when it happened on the stand.[21]

Worse, given the contents of the memo, it appears Pope herself devised the account, to at least some extent, for the sake of modifying the State's long-held theory to accommodate the forensic evidence just introduced the day before during the cross-examination of Dr. Choi. The theory that Sneed, alone in Room 102, murdered Van Treese, was falling apart with the evidence as it stood in the record at that point of the retrial. Dr. Choi's testimony presented unexpected evidentiary support for a co-conspirator participating in the killing inside Room 102. Such evidence was fatal to the State's theory because it flatly contradicted Sneed's account and validated other evidence that a second person, likely a woman, was in the room.[22] Pope targeted the State's, in her words, "biggest problem," by fabricating an explanation for the knife and wounds for which Sneed had previously disclaimed responsibility—that contrary to his previous statement, he had made an unsuccessful attempt to stab Van Treese.

The untruthfulness of Sneed's pocketknife testimony is further illuminated by Pope's intimation in her memo to Walker recounting that Sneed's prior position on the knife, stated to

[21] As noted above, these handwritten notes appear, in part, to state:

> tip broke when found it. brought knife down one time. possibly rolled over on it *** hit – knocked down w/bat – [illegible] in chest w/ knife – turned away – but again dropped it – don't know why didn't tell.

Attachment 30.

[22] The evidence supporting the theory that Sneed had a female accomplice who lured Van Treese to the room with plans of an assignation, where she and Sneed planned to rob him, is discussed at length in Mr. Glossip's July 1 Application ((PCD-2022-589), which remains pending in this Court.

the police the week after the murder in 1997, was that he did not use it. Attachment 30 ("Justin tells the police that the knife fell out of his pocket and that he didn't stab the victim with it."). Pope never suggested in this memo that Sneed had conveyed to her, in her October 2003 visit or any other time, that he had used the knife in any way during his attack. If he had, there is no doubt that Pope would have noted that in her memo, as it would have been immensely helpful to her. But the next day, immediately after having written this memo and conversing about it with Walker, Pope stated in court, that she "thought that he had told me last year that he has just, you know, tried once to attack him with it." RT Vol. 12 at 105. On this record, there are ample reasons to disbelieve Pope's representation. Such a severe allegation against a member of the bar and a representative of the State is not made lightly, but the fact that Pope felt the need to lie about this—to claim Sneed had said this before, when he had not—strongly supports the conclusion that it was not true, and Pope knew it. Yet she presented that testimony, necessary to salvage the State's case, anyway.

B. ESPECIALLY GIVEN THE QUESTIONABLE VALIDITY OF THE CONVICTION AND SENTENCE, THE FALSE TESTIMONY OF THE STATE'S KEY WITNESS CAUSES GRAVE DOUBT IN THE RELIABILITY OF THE TRIAL COURT JUDGMENT, NECESSITATING ITS REVERSAL.

It is self-evident that "the presentation of known false evidence is incompatible with the 'rudimentary demands of justice.'" *Mooney v. State*, 1999 OK CR 34, ¶ 53, 990 P.2d 875, quoting *Reed v. State*, 1983 OK CR 12, ¶ 7, 657 P.2d 662, 664 (quoting *Mooney v. Holohan*, 294 U.S. 103 (1935)). Upon "the use of perjured testimony where the prosecution knew or should have known of the perjury," the "resulting conviction 'is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Hall v. State*, 1982 OK CR 141, 650 P.2d 893, 897, quoting *United States*

v. Agurs, 427 U.S. 97, 103 (1976). When "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Hunter v. State*, 1992 OK CR 19, 829 P.2d 64, 67, citing *Agurs*, 427 U.S. at 113. But the present evidence of Pope's misconduct in relation to Sneed's testimony is not "relatively minor" and, considered in the context of this highly questionable verdict,[23] demands reversal. Further, for the same reasons discussed in Propositions One and Two, serious problems with Sneed's testimony, which was indispensable to the State's case, would almost certainly have affected the outcome.

C. THIS CLAIM SATISFIES SECTION 1089(D)(8) AND RULE 9.7(G).

This claim founded upon the disclosure of Pope's conduct surrounding this testimony of Sneed could not have been presented prior to the disclosure of Pope's memo on September 1, 2022. The memo was provided along with the partial contents of seven boxes that undersigned counsel have long requested to review and that counsel for the State made available for the first time mere weeks ago. Thus, "the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence" prior to now. 22 OK St. § 1089(D)(8)(b)(1). Given the foregoing, this application is being presented well within the 60 days permitted by Rule 9.7(G). Given the centrality of Sneed's testimony, had this memo, including its handwritten notations, been available to the defense during this retrial, or had the State not presented false testimony from Justin Sneed, "no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." 22 OK St. § 1089(D)(8)(b)(2).

[23] Reasons for questioning the verdict are detailed at length in Mr. Glossip's July 1, 2022 Application. Crucially, Reed Smith's independent investigation concluded that this trial could not be relied upon to support a conviction or death sentence; that alone renders the verdict here "questionable."

PROPOSITION FOUR: THE STATE SUPPRESSED IMPEACHMENT EVIDENCE OF SNEED'S KNIFE TESTIMONY.

As discussed in Proposition Two, the prosecutor orchestrated Sneed's retrial testimony that he used the pocketknife recovered from underneath Van Treese's head to attempt to stab him in the heart while fatally bludgeoning him with a baseball bat. This testimony departed from Sneed's only prior statement about the knife, and his testimony in the first trial made no mention of this element of his struggle to murder Van Treese.

The memo Pope drafted following the cross-examination of Dr. Choi, the medical examiner, about the involvement of the pocketknife recovered from underneath Van Treese's head, supplied substantial impeachment evidence of Sneed's testimony about using the knife in his murder of Van Treese. As discussed extensively above, this memo not only underscored that Sneed had never given any account involving the knife, but included handwritten notes appearing to capture a scripting of his new account, over seven years after the murder, prepared shortly before he took the stand. Had the State turned this memo over to the defense during trial in 2004, rather than a few weeks ago, under its obligation to disclose impeachment evidence pursuant to *United States v. Bagley*, the defense's cross-examination of Sneed would have drained any remaining credibility he had in the jury's eyes. 473 U.S. 667, 676 (1985), construing *Brady v. Maryland*, 373 U.S. 83 (1963).

Despite its clear constitutional obligations *and*, since 2015, current counsel's persistent specific requests to review the District Attorney's file, the State has suppressed this disclosure until this month, in violation of the Oklahoma Constitution, Article II, Sections 7 and 20, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A. THE PROSECUTOR'S HIGHLY MATERIAL MEMO OBVIOUSLY IMPEACHED SNEED'S KNIFE TESTIMONY AND THEREBY SNEED'S

TRUTHFULNESS OVERALL.

As explained in Propositions Two and Three, the memo Pope drafted following Dr. Choi's cross-examination reflects a plan to orchestrate new, false testimony about Sneed's use of the knife. The defense were entitled to that memo—and, critically, the handwritten marginalia—for impeachment of Sneed in connection with his new claim on the stand that actually he attempted to thrust a pocketknife through the victim's heart.

The State's breach of this disclosure obligation requires relief from Mr. Glossip's conviction and sentence because his case meets the two criteria, namely, that the withheld information had exculpatory or impeachment value, and that it was material. *Harris v. State,* 2019 OK CR 22, ¶¶ 38-40, 450 P.3d 933, 949-50. The mid-trial timing of the memo does nothing to reduce the State's obligations. "Although Brady claims typically arise from nondisclosure of facts that occurred before trial, they can be based on nondisclosure of favorable evidence (such as impeachment evidence) that is unavailable to the government until the trial is underway." *United States v. Waldron*, 756 F. App'x 789, 795 (10th Cir. 2018).

Of course, the materiality of impeachment evidence increases when, as here, the State's case largely rests on the credibility of the given witness. *Harris v. State,* 2019 OK CR 22 ¶ 46, 450 P.3d 933, 952. This particular instance of impeachment evidence would have eviscerated Sneed's credibility in connection with his new claim that he attempted to use the knife to murder Van Treese, but it he would have lost any credibility with the jury not only for that pivotal issue, but more broadly, as he would have been exposed as a liar whom the prosecutor manipulated for the sake of convicting Mr. Glossip. Here, "[t]he State's case hinged on whether Sneed's testimony that he committed the murder at Glossip's direction was credible—whether the jury believed Sneed's statement that he would not have attacked Van Treese if Glossip had not told

him to do so." *Glossip v. Workman*, No. 5:08-cv-326-HE, Order at 18 (W.D. Okla. Sep. 28, 2010).

B. THIS CLAIM SATISFIES SECTION 1089(D)(8) AND RULE 9.7(G).

The Applicant could not have presented sooner this claim based upon the disclosure of Pope's memo, as that document only came to light on September 1, 2022. For the reasons set forth in Propositions Two and Three, and expressly incorporated for this proposition, the Applicant satisfies both § 1089(D)(8) and Rule 9.7(G).

PROPOSITION FIVE: THE CUMULATIVE EFFECT OF THE STATE'S SUPPRESSION OF EXCULPATORY AND IMPEACHMENT EVIDENCE REQUIRES REVERSAL OF THE CONVICTION AND SENTENCE.

The effect of the entirety of the State's unlawfully withheld exculpatory and impeachment evidence set forth in this Application renders Mr. Glossip's conviction and sentence not "worthy of confidence," requiring from this aggregate violation of his due process rights. *Jones v. State*, 2006 OK CR 5, ¶ 51, 128 P.3d 521, 541, quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Fundamentally, the State's obligation "to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government." *Id.* at 421, citing *Brady v. Maryland*, 373 U.S. 83 (1963). This requirement under *Brady* of a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different … does not mean that the defendant would more likely than not have received a different verdict." *Browning v. Trammell*, 717 F.3d 1092, 1107 (10th Cir. 2013), quoting *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). Rather, this requirement means "only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." *Id.* (internal quotation marks omitted; alterations incorporated).

The evidence comprising Propositions Once, Three, and Four shakes any reasonable confidence in the reliability of Mr. Glossip's 2004 conviction and sentence in the District Court of Oklahoma County. The myriad substantial problems chronicled in Mr. Glossip's pending subsequent application filed July 1 and herein, coupled with yet more severe flaws currently chronicled in the Reed Smith reporting, cast in relief the grave inadequacy of this judgment. *See generally*, *Mitchell v. State*, 2006 OK CR 20, ¶ 107, 136 P.3d 671, 712 (reversing death sentence, recognizing that "multiple errors or irregularities during a trial" requires reversal if the "cumulative effect" is "to deny the defendant a fair trial."), citing *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157; *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158; *Matthews v. State*, 2002 OK CR 16, ¶ 57, 45 P.3d 907, 924.

Mr. Glossip could not have presented this cumulative claim sooner because the factual bases arose from the disclosure of correspondence and related material and information from either (i) the ongoing independent investigation of Reed Smith, specifically beginning with the firm's supplement to its report dated August 9, 2022, or (ii) undersigned's review of the seven boxes of the District Attorney's file conducted in the Attorney General's Office as soon as it was permitted, on September 1, 2022. For the reasons set forth herein, and expressly incorporated for this proposition, this Proposition satisfies both § 1089(D)(8) and Rule 9.7(G).

PRAYER FOR RELIEF

Wherefore Mr. Glossip respectfully requests that this Court enter an order granting the requested discovery, remand the case for an evidentiary hearing in the district court, enter an order reversing his conviction and sentence, and any other relief as may be just and appropriate.

_____
Warren Gotcher, OBA #3495

VERIFICATION

I, Warren Gotcher, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

_____ _____
Date Warren Gotcher, OBA #3495

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2022, a true and correct copy of the foregoing Successive Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the Clerk of this Court, with one of the copies being for service on theAttorney Counsel for Respondent.

_____
Warren Gotcher

APPENDIX M

Motion Requesting Production of All Statements of Co-Defendant Justin Sneed, *State v. Glossip v. State*, No. CF-97-244 (June 17, 2002)

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

ORIGINAL

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	FILED IN THE DISTRICT COURT
vs.	)	**Case No. CF-97-244** OKLAHOMA COUNTY, OKLA.
	)	
RICHARD EUGENE GLOSSIP,	)	JUN 17 2002
	)	
Defendant.	)	PATRICIA PRESLEY, COURT CLERK by M Bamm Deputy

MOTION REQUESTING PRODUCTION OF ALL STATEMENTS OF CO-DEFENDANT JUSTIN SNEED

Comes now the Defendant, Richard Eugene Glossip, by and through his counsel undersigned below, and moves the Court to enter an order directing the State of Oklahoma, by and through the Oklahoma County District Attorney's office, to disclose any and all statements made by Justin Blayne Sneed, whether the State intends to utilize said statements at trial pursuant to 22 O.S. Subs. 2002 (A)(1)(c). Specifically, the Defendant requests that the State produce the following, to wit;

1. Any written or recorded statements and the substance of any oral statement the State has knowledge whether the State intends to offer said statements at trial.

2. Identify by name, address, social security number, date of birth or any other identifying descriptions the person(s) who obtained said statements whether oral or written.

3. Identify the time, place and circumstances of obtaining the statements.

4. Identify any and all law enforcement officer/agent who obtained or facilitated the obtaining any and all statements of the accused.

5. Identify and produce any and all statements made by Justin Blayne Sneed to law enforcement and/or the Oklahoma County District Attorney's office.

WHEREFORE premises considered the Defendant respectfully requests this Court to order the State of Oklahoma to produce any and all statements of the Justin Blayne Sneed.

Respectfully submitted,
RICHARD EUGENE GLOSSIP

By: _____

G. LYNN BURCH, III
Oklahoma Bar Assoc. No. 14986
Capital Defense Counsel

SILAS LYMAN
Oklahoma Bar Association No 13165
Capital Defense Counsel

L. WAYNE WOODYARD
Oklahoma Bar Association No. 9879
Capital Defense Counsel

Capital Trial Division - Tulsa
Oklahoma Indigent Defense System
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-0802

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on the date of filing the above and foregoing instrument, a true and correct copy of the same was mailed to the Oklahoma County District Attorney's Office.

_____
G. LYNN BURCH, III

APPENDIX N

State Response to Defendant Motion Requesting Production of All Statements of Co-Defendant Justin Sneed, *State v. Glossip*, No. CF-97-244 (June 26, 2002)

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUN 26 2002

PATRICIA KIESSLEY, COURT CLERK
By _____ Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. CF-97-244
	)	
RICHARD EUGENE GLOSSIP,	)	
	)	
Defendant.	)	

STATE'S RESPONSE TO DEFENDANT'S MOTION REQUESTING PRODUCTION OF ALL STATEMENTS OF CO-DEFENDANT JUSTIN SNEED

COMES NOW the State of Oklahoma, by and through C. Wesley Lane II, District Attorney for Oklahoma County and moves this Honorable Court to declare Defendant's Motion moot.

The State intends to utilize the testimony of Justin Sneed's testimony elicited at the defendant's prior trial which has been transcribed by a qualified court reporter, and all of his previous statements previously disclosed to defendant including State's exhibit #4 (video tape).

The State has complied with 22 O.S. 2002(A)(1)(c) regarding the statements of Justin Sneed.

For the above and foregoing reasons, the State prays this Honorable Court rule defendant's motion is moot.

Respectfully submitted,

C. WESLEY LANE II
DISTRICT ATTORNEY

BY: Fern L. Smith
FERN L. SMITH, OBA # 8347

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served on G. Lynn Burch, III, by mailing a copy to the Capital Trial Division – Tulsa, Oklahoma Indigent Defense System, 1660 Cross Center Drive, Norman, Oklahoma 73019, this 28 day of June, 2002.

Fern L. Smith

FERN L. SMITH
Assistant District Attorney

APPENDIX O

Attachment 25 to Successive Application for Post-Conviction Relief, *Glossip v. State*, No. PCD-2022-589 (July 1, 2022)

ATTACHMENT 25

OKLAHOMA COUNTY
CRISIS INTERVENTION CENTER

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY
JUL 17 1997
PATRICIA PRESLEY, COURT CLERK
By ________ Deputy

July 1, 1997

THE HONORABLE JUDGE Richard Freeman
Oklahoma County District Court
321 West Park Avenue
Oklahoma City, OK. 73102

RE: Justin B. Sneed
Case No: CF-97-0244

Dear Judge: Richard Freeman

Enclosed, please find the Psychiatric Evaluation for the Determination of Competency to Stand Trial on.

Respectfully submitted,

Edith B. King, Ph.D.

Edith King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern L. Smith , Assistant District Attorney
George Miskovsky III, Assistant Public Defender

ATTACHMENT R

EXHIBIT
COURTS
#2

A facility of the Oklahoma Department of Mental Health and Substance Abuse Services
1200 N.E. 13TH · P.O. BOX 53277 · OKLAHOMA CITY, OK 73152-3277 · BUSINESS NUMBER 405-271-6800 V/TDD
CRISIS NUMBER 405-271-5050 V/TDD · FAX 405-271-3554

DETERMINATION OF COMPETENCY TO STAND TRIAL
PSYCHIATRIC EVALUATION

DATE: July 1, 1997

RE: Justin B. Sneed
CF: 97-0244

By order of the Oklahoma County District Court, Judge Richard Freeman, under Oklahoma Statute Section 1175.3 dated April 22, 1997 and received in this office April 24, 1997. Justin B. Sneed was examined at the Oklahoma County Jail July 1, 1997.

The following statutory questions are responded to accordingly, and a more detailed psychiatric summary is attached.

1. Is this person able to appreciate the nature of the charges against him or her?

Yes. Mr. Sneed said he is in jail on a "Murder I" charge which he said is "for killing somebody." He explained "If I'm found guilty it means the death penalty." He also said "It (Murder I) carries life, life without parole, or death." Asked about his options, he said "after what I've said to some people going home is probably not possible." He indicated that the alleged crime was in connection with a burglary but that he does not carry a charge of burglary. His history includes some "hot checks" in Texas but, he said, "that doesn't matter."

2. Is this person able to consult with his or her lawyer and rationally assist in the preparation of his or her defense?

Yes. Mr. Sneed correctly identified his lawyer by name and said he has seen him one time. He also identified an investigator he has talked to. He said he has also been assigned another lawyer in addition to the first. In his appraisal, he said his only hope to get out of the death penalty is to plead guilty. He also said that if his only possibility is either life without parole or death he would not plead guilty, since he does not want to spend the rest of his life in prison. He explained that if he received life without parole he would get tired of it --- it would be depressing, with no sunlight and no air. He understands other terms such as probation, and said he had a year's probation as a juvenile for burglary of a house and a bomb threat. He is very aware of how limited his options are at this point.

3. If the answer to question 1 or 2 is "no", can the person attain competency within a reasonable time if provided with a course of treatment, therapy or training?

N/A.

4. Is the person a mentally ill person or a person requiring treatment as defined by Oklahoma Statute Title 43A, Section 3?

Yes. Mr. Sneed denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling. He was apparently married and said his wife used to tell him she thought he had "problems." She thought he had trouble "paying attention" and may have had ADHD (Attention Deficit Hyperactivity Disorder). He admits to using a variety of drugs including marijuana, crank, cocaine, and acid. He said he drank alcohol for one summer but didn't like it.

He is currently taking lithium at the jail and said it was administered after his tooth was pulled. He was not on lithium before coming to the jail and was started on it in March. He does not think he has any serious mental problems although he said he has "deja vu" sometimes. When he first came to the jail he said he had a strong feeling the pod was familiar. He now has this sensation once or twice a month. The lithium helps him "not to feel so angry" and he used to get angry quite often. He said he used to "yell at teachers and reject everyone and get into fights." It sounds as if he may well have had ADDHD and mood instability which lithium may help. He denies auditory or visual hallucinations but said he sometimes gets a ringing in his ears.

At this time Mr. Sneed gives an impression of being depressed to a moderate degree. He is able to communicate quite well for the most part, but his affect is flat and sad. Medication is probably helpful.

5. If the person were released without treatment, therapy, or training, would he or she pose a significant threat to the life or safety of himself/herself or others?

Yes. This is answered in the affirmative only because he has a violent history, a history of polysubstance abuse, and is facing charges on a violent crime. He does not give an impression of being a violent person. He was calm and quiet and cooperative. He answered questions fully and did not seem to conceal anything. He was not at all threatening in manner.

Summary of Psychiatric Examination

Justin B. Sneed is a 19 year old Caucasian male who was born on September 22, 1977. He stated that he was born in New Mexico and lived in both Texas and Oklahoma after that. He lived with his mother and stepfather because his parents divorced when he was four and she remarried. He has one stepbrother and one full brother. He has two sisters. He said he was the "baby" until recently when his mother had a baby.

He said he was kicked out of school in the 8th grade for fighting other students and teachers. He was described as "a trouble maker."

He was married when he was 17 years old to a girl he had been with from the age of 16. She became pregnant and they are still married but separated. He and his wife have two daughters who are with his mother.

Mr. Sneed said he used to "reject authority" and grew up as a boy who often got into trouble. He had "plenty of spankings" and was especially hateful toward his stepfather. He said he and his mother have always gotten along "just great" and his wife referred to him as a "momma's boy."

It may well be that Mr. Sneed has had an atypical mood swing disorder in his past characterized by "ups and downs" including anger outburst. His hyperactivity would be consistent with that picture. His present medication is probably helping him control his moods.

Mr. Sneed is able to assist an attorney and communicate satisfactorily regarding his legal situation. He is in touch with reality and positive in his attitude toward his lawyers. It is recommended that he be considered competent to stand trial.

Edith G. King, Ph.D.

Edith G. King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

I, PATRICIA PRESLEY, Court Clerk for Oklahom
County, Okla., hereby certify that the foregoing is
true, correct and complete copy of the instrumer
herewith set out as appears of record in the Dist
Court Clerk's Office of Oklahoma County, Okla.,
this 26th day of February, 20[illegible].
PATRICIA PRESLEY, Court Clerk
By _____ Depu

xc: Fern L. Smith, Assistant District Attorney
George Miskovsky III, Assistant Public Defender

APPENDIX P

Response to Petitioner's Motion for Discovery, and Motion for Evidentiary Hearing, *Glossip v. State*, No. PCD-2015-820 (Sept. 16, 2015)

ORIGINAL

No. PCD-2015-820

Execution September 16, 2015
At 3:00 p.m.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION REVIEW, EMERGENCY REQUEST FOR STAY OF EXECUTION, MOTION FOR DISCOVERY, AND MOTION FOR EVIDENTIARY HEARING

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

JENNIFER B. MILLER, OBA # 12074
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)
Jennifer.miller@oag.ok.gov
ATTORNEYS FOR RESPONDENT

SEPTEMBER 16, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2015-820**
	)	
THE STATE OF OKLAHOMA,	)	**Execution September 16, 2015**
	)	**At 3:00 p.m.**
Respondent.	)	

RESPONSE TO PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION REVIEW, EMERGENCY REQUEST FOR STAY OF EXECUTION, MOTION FOR DISCOVERY, AND MOTION FOR EVIDENTIARY HEARING

COMES NOW the State of Oklahoma, by and through Jennifer B. Miller, Assistant Attorney General, and hereby provides the following response to Petitioner's Successive Application for Post-Conviction Review, Emergency Request for Stay of Execution, Motion for Discovery, and Motion for Evidentiary Hearing filed with this Court on September 15, 2015.

In June 2004, an Oklahoma jury convicted Petitioner of first degree murder and sentenced him to death.[1] The state trial court sentenced Petitioner in accordance with the jury's recommendations. This Court affirmed Petitioner's murder conviction and death sentence on direct appeal, *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143, *cert. denied*, 552 U.S. 1167 (Jan. 22, 2008), and denied

[1]Petitioner was also convicted of first degree murder and sentenced to death in 1998. This Court reversed and remanded Petitioner's conviction for a new trial. *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

state post-conviction relief. *Glossip v. State*, No. PCD-2004-978, slip op. (Okla. Crim. App. Dec. 6, 2007) (unpublished).

On November 3, 2008, Petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254. The federal district court denied relief in an unpublished opinion. *Glossip v. Workman*, No. CIV-08-0326-HE, slip op. (W.D. Okla. Sept. 28, 2010) (unpublished). The Tenth Circuit thereafter affirmed the denial of habeas relief. *Glossip v. Trammell*, No. 10-6244, slip op. (10th Cir. Jul. 25, 2013) (unpublished). The Tenth Circuit also denied panel and *en banc* rehearing. *Glossip v. Trammell*, No. 10-6244, Order (10th Cir. Sept. 23, 2013) (unpublished). On May 5, 2014, the United States Supreme Court denied Petitioner's petition for writ of certiorari seeking review of the Tenth Circuit's ruling affirming the denial of federal habeas relief. *Glossip v. Trammell*, __ U.S. __, 14 S. Ct. 2142, 188 L. Ed. 2d 1131 (May 5, 2014).

On July 8, 2015, this Court set Petitioner Richard Eugene Glossip's execution date for September 16, 2015, pursuant to 22 O.S.2001 § 1001.1(E). Prior execution dates of November 20, 2014 and January 29, 2015 had been previously set by this Court.[2] After the Supreme Court issued its opinion in

[2]This Court set the November 20, 2014 execution date on May 28, 2014. At the State's request, the execution date was then moved to January 29, 2015. This Court set the January 29, 2015 execution date on October 24, 2014. However, on January 28, 2015, the United States Supreme Court, at the State's request, stayed Petitioner's execution in *Glossip v. Gross*, Case No. 14-7955.

Glossip v. Gross, __ U.S. __, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (June 29, 2015), this Court set the current execution date.

Petitioner has now filed a second post-conviction application with this Court raising four allegations of error. Petitioner seeks a stay of his September 16, 2015 execution date to facilitate review of this application. In addition, Petitioner seeks discovery and an evidentiary hearing.

RESPONSE TO SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF AND EMERGENCY REQUEST FOR STAY OF EXECUTION

To obtain a stay of execution from this Court, Petitioner must show "that there exists a significant possibility of reversal of the defendant's conviction, or vacation of the defendant's sentence, and that irreparable harm will result if no stay is issued." 22 O.S.2011, § 1001.1(C). As this Court stated in *Lockett v. State*, 2014 OK CR 3, ¶ 3, 329 P.3d 755, 757-58:

> 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.

Petitioner fails to show that he is entitled to a stay of execution as he has failed to show likely success and irreparable harm.

Petitioner alleges that he has newly discovered evidence to support his claims. Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), states that a subsequent post-conviction application shall not be

considered unless the claims raised "have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable". Title 22, Section 1089(D) states, in pertinent part:

> 8. If an original application for post-conviction relief is untimely or 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 or untimely original 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 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.

Petitioner's allegations of error do not meet the requirements for filing a successive application. Further, Petitioner has failed to show that the 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. Thus, Petitioner is not entitled to post-conviction relief or a stay of his execution.

Procedural Default

As noted above, before Petitioner may obtain review of the merits of any claim he raises in this successive application for post-conviction relief, he must present sufficient specific facts establishing that the current claims and issues 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 factual or legal basis for the claim was unavailable. 22 O.S.2011, § 1089(D)(8). *See, e.g., Bland v. State*, 2007 OK CR 25, ¶ 2, 164 P.3d 1076, 1077; *Duvall v. Ward*, 1998 OK CR 16, ¶ 3-4, 957 P.2d 1190, 1191. Petitioner does not rely on a legal basis that was unavailable, but instead contends that his facts are newly discovered. To show that a factual basis was unavailable at the time of the prior post-conviction application, Petitioner must show that "the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date." 22 O.S.2011, § 1089(D)(8)(b)(1). Additionally, Petitioner must show that "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." *Id.*, § 1089(D)(8)(b)(2).

As will be shown, review of Petitioner's supporting documents confirms that the factual basis for the claims and issues raised here was available previously.

There is no reason why these issues could not have been developed and presented in Petitioner's original application for post-conviction relief.

Petitioner, in his introduction (App. at 13-14), claims post-conviction counsel was ineffective. Petitioner does not include this allegation within any proposition of error nor adequately develop the claim. Thus, this allegation is waived. Rule 3.5, *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (Supp. 2014). Further, as will demonstrated his claims are without merit.

Petitioner's second application for post-conviction relief is therefore procedurally barred from review under § 1089(D)(8) and/or Rule 9.7(G)(3).

Valdez Exception

Petitioner alleges that he is entitled to review of this application pursuant to *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703. Petitioner contends that a miscarriage of justice would arise were this Court to refuse to consider the merits of his procedurally barred claims. Pet. Appl. at 13.

Petitioner's attempt to overcome the procedural default of his claims must fail. In *Valdez*, this Court held that it had "power to grant relief when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez*, 2002 OK CR 20, ¶ 28, 46 P.3d at 710. The cases cited by Petitioner invoking the miscarriage of justice exception differ substantially from his situation and illustrate *Valdez's* limits.

Brown v. State, No. PCD-2002-781 (Okl.Cr. Aug. 22, 2002), an unpublished case, involved supposed newly discovered evidence supporting ineffective assistance and *Brady* claims. In *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234, this Court addressed a substantive Eighth Amendment challenge to Oklahoma's lethal injection protocol that amounted to an attempt to prevent the setting of an execution date upon the exhaustion of all of Malicoat's regular state and federal appeals. *Malicoat*, 2006 OK CR 25, ¶ 2, 137 P.3d at 1235. That case arose from the nationwide flurry of challenges to lethal injection protocols launched by death row inmates and their attorneys and attempted to address an issue of first impression for the Oklahoma courts. Further, it addressed only the manner of carrying out Malicoat's death sentence and did not implicate the validity of his conviction or death sentence. *Id. See also Hill v. McDonough*, 547 U.S. 573, 579-81, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (distinguishing Eighth Amendment challenges to lethal injection protocol which do not impact conviction or death sentence from constitutional challenges seeking to permanently enjoin method of execution authorized by state law which may amount to challenges to the death sentence itself).

In *McCarty v. State*, 2005 OK CR 10, 114 P.3d 1089, the State waived any possibly applicable procedural default rules and requested an evidentiary hearing on the merits of the underlying claims. McCarty's successive post-conviction relief application was based on the then-recent findings of the Oklahoma City Police

Department regarding former police chemist Joyce Gilchrist. Simply put, the *Valdez* miscarriage of justice exception was not an issue in *McCarty*.

In *Torres v. State*, 2005 OK CR 17, 120 P.3d 1184, the case was remanded to the trial court on issues dealing with violation of Torres's Vienna Convention rights.

Petitioner's case does not involve issues approaching the magnitude of these type of claims. Petitioner's second post-conviction relief application does not involve newly discovered evidence or a situation where the State has waived the applicable procedural default rules. Nor does his case involve a substantial issue of first impression warranting this Court's attention. Thus, Petitioner's attempt to overcome Oklahoma's bar to claims not raised in an initial post-conviction application by invoking the miscarriage of justice exception from *Valdez* must fail.

Petitioner's attempt to gain post-conviction relief by asserting actual innocence must also fail. *Slaughter v. State*, 2005 OK CR 6, 108 P.3d 1052 involved review of a substantive actual innocence claim as a basis to disregard Oklahoma's bar to claims initially raised in a second or successive post-conviction application. *Slaughter* recognized that "this Court's rules and cases do not impede the raising of factual innocence claims *at any stage* of an appeal. We fully recognize innocence claims are the Post-Conviction Procedure Act's foundation." *Slaughter*, 2005 OK CR 6, ¶ 6, 108 P.3d at 1054 (emphasis in original). Here, Petitioner fails to show, by clear and convincing evidence, a showing of factual

innocence that warrants merits review of his constitutional claims or any form of post-conviction relief. The following recitation of the facts, as well as review of his specific allegations and evidence make this point abundantly clear.

PETITIONER IS NOT AN INNOCENT MAN

The evidence at trial revealed Petitioner's involvement in the murder of the victim, Barry Van Treese. This Court found sufficient evidence to corroborate Mr. Sneed's testimony revealing Petitioner's involvement in the murder. The State presented evidence showing Petitioner: (1) actively concealed the victim's body in Room 102 over a nearly seventeen hour period while civilians and law enforcement searched for the victim at and around the motel; (2) possessed proceeds from the $4,000.00 Mr. Sneed recovered from the victim's car after the murder; (3) had strong motive and opportunity to cause the victim's death; (4) had control over the actions of Mr. Sneed; and (5) began selling his possessions and stated his intention to leave the state.

A. Concealing the Murder. Petitioner admitted to Detective Bemo in his second interview on January 9, 1997 that he knew in the early morning hours of January 7, 1997 that Mr. Van Treese had been murdered and that the body was in Room 102. (State's Exhibit 2; Court's Exhibit 4 at 6).[3] However, Petitioner provided multiple conflicting versions of when he last saw Mr. Van Treese alive.

[3]References to Petitioner's 2004 trial transcripts will be designated as "Vol. __, Tr. __". References to Petitioner's 1998 trial transcripts will be designated as "1998 Vol. __, Tr. __". References to the original record in D-2004-877 will be designated as "O.R. __"). References to trial exhibits will be designated as presented at trial.

Petitioner provided three different stories to Sgt. Tim Brown. Petitioner initially said he last saw the victim at 7:00 a.m. on January 7, 1997, walking across the motel parking lot (Vol. 9, Tr. 193-95). Later, Petitioner told Sgt. Brown that he had last seen the victim at 4:30 a.m. on January 7 in the motel parking lot (Vol. 9, Tr. 206). Finally, Petitioner claimed he last saw the victim was at 8:00 p.m. the night before (Vol. 9, Tr. 209).

Petitioner also lied about seeing the victim to Billye Hooper,[4] Cliff Everhart, and the victim's wife. Petitioner told Billye Hooper that he had seen the victim around 8:00 a.m. He claimed that the victim had "got up early that morning and had gone to get breakfast and was going to go get some materials. They were going to start working on the motel." (Vol. 7, Tr. 62). Petitioner told Mr. Everhart that he last saw the victim leave the hotel at 7:00 a.m. (Vol. 11, Tr. 183-84). Petitioner told the victim's wife, during a telephone conversation sometime after 3:00 p.m., that the last time he had seen the victim was between 7:00 a.m. and 7:30 a.m. that morning. He advised Mrs. Van Treese that "[the victim] was going to buy supplies for the motel and he would be back later" (Vol. 4, Tr. 99).

Petitioner also told numerous lies about Room 102. Petitioner told Ms. Hooper that the victim had stayed in Room 108 (Vol. 7, Tr. 55). He also told Ms. Hooper not to put Room 102 on the housekeeping list. He stated he and Mr. Sneed would clean that room (Vol. 7, Tr. 64). He advised Jackie Williams, a

---

[4]Ms. Hooper was the front desk clerk.

housekeeper at the motel, not to clean any downstairs rooms. Ms. Williams had never been given that type of instruction before (Vol. 8, Tr. 122-23). Petitioner initially claimed that Mr. Sneed told him the window in Room 102 was broken by a couple of drunks (Vol. 9, Tr. 206). Petitioner told Mr. Everhart that he had rented Room 102 to a couple of drunk cowboys who broke the window (Vol 11, Tr. 188-90). He told Ms. Pursley, a motel resident, the same lie that the window in Room 102 had been broken by two drunks (Vol. 9, Tr. 45-48).

Additionally, Petitioner made it appear that he had searched the motel rooms for the victim. He searched the grounds with Mr. Everhart to make it appear as though he did not know the location or condition of the victim (Vol. 11, Tr. 185-87). Petitioner also provided false leads, telling Mr. Everhart and Sgt. Brown that he believed some people in an upstairs room may have been responsible for the murder because they left their property in the room and disappeared without checking out. As a result, Mr. Everhart and Sgt. Brown needlessly searched the room.

After the body was found, Petitioner continued lying. In his first interview with the police, on January 8, 1997, Petitioner lied to the detectives claiming that he knew nothing about the murder or the body being in Room 102 (State's Exhibit 1; Court's Exhibit 3 at 10-11). In the second interview, after being asked why he lied, Petitioner said it wasn't to protect Sneed. Rather, Petitioner said he initially lied to detectives because when Mr. Sneed told him about the murder, he felt like

he "was involved in it, I should have done something right then" and that he did not want to lose his girlfriend over it (State's Exhibit 2; Court's Exhibit 4 at 16-17).

B. Proceeds from Murder. At Petitioner's book-in, the police recovered approximately $1,757.00 from Petitioner (Vol. 12, Tr. 5-13). Mr. Sneed testified that he obtained approximately $4,000.00 from the victim's vehicle after committing the murder. Mr. Sneed testified that Petitioner told him where the money was located. He testified that the money was split with Petitioner (Vol. 12, Tr. 124-30). The evidence showed that Petitioner had no legitimate source for the money that was recovered. On January 6, 1997, Petitioner received a paycheck for $429.33 (Vol. 14, Tr. 42; Vol. 15, Tr. 17). Petitioner spent all but approximately $60.00 of that paycheck on January 7, 1997 (Vol. 14, Tr. 42-43). Petitioner received, at most, approximately $500.00 for furniture, a vending machine, and an aquarium he sold prior to his arrest (Vol. 15, Tr. 16-17). Petitioner had no savings according to his girlfriend, D-Anna Woods. Ms. Woods told the police that the two were living paycheck to paycheck and "she didn't think [Petitioner] could save any money." (Vol. 14, Tr. 44). This Court found this to be "[t]he most compelling corroborative evidence" noting there was "no evidence that Sneed had independent knowledge of the money under the seat of the car." *Glossip*, 2007 OK CR 12, ¶ 43, 157 P.3d 143, 152.

C. Motive. The evidence established that the victim was planning to confront Petitioner on January 6 or January 7, 1997, about shortages on the

motel books (Vol. 11, Tr. 169-70, 172-77, 201). Mr. Everhart had previously told the victim he believed Petitioner "was probably pocketing a couple hundred a week extra" from the motel cash receipts during the last two or three months of 1996 (Vol. 11, Tr. 172-73). In December 1996, Billye Hooper had also shared her concerns about Petitioner's management of the motel with Mr. Van Treese, who told her he "knew things had to be taken care" of regarding Petitioner's management of the motel. Mr. Van Treese advised he would take care of it after Christmas (Vol. 7, Tr. 37-40; Vol. 8, Tr. 32-34). Donna Van Treese testified that by the end of December 1996, she and the victim discovered shortages from the motel accounts receivables totaling $6,101.92 and that the victim intended to confront Petitioner about these shortages on January 6, 1997. Mr. Van Treese told his wife that he would also audit the Oklahoma City motel and perform a room-to-room inspection of the motel at that time (Vol. 4, Tr. 62-66, 70-72).

William Bender testified that the victim "was all puffed up. He was upset. He was mad . . . He was all red in the face" when the victim arrived at the Tulsa motel just before midnight on January 6, 1997 (Vol. 8, Tr. 63-64). During Van Treese's brief visit to the motel, he told Bender that there were a number of registration cards missing at the Oklahoma City motel, that weekend receipt money was missing and that Petitioner was falsifying the motel daily reports by allowing people to stay in rooms that were not registered (Vol. 8, Tr. 80-82). Van Treese said that he gave Petitioner until he returned to Oklahoma City "to come

up with the weekend's receipts that were missing and if he came up with that, he was going to give him another week to come up with the registration cards and get all the year-end receipts together." Otherwise, Van Treese told Bender he was going to call the police (Vol. 8, Tr. 82).

Evidence was presented that the condition of the Oklahoma City motel on January 7, 1997 was deplorable. Kenneth Van Treese, the victim's brother, assumed control of the motel immediately after the murder. He discovered that only around 24 of the rooms at the motel were in habitable condition. Twelve rooms had no working heat. Other problems included keys that did not fit room doors, broken or dirty plumbing fixtures and broken telephone systems (Vol. 11, Tr. 116-18). Kenneth Van Treese testified that "the main thing that was wrong with the motel was it was filthy . . . absolutely filthy" (Vol. 11, Tr. 119). The jury could easily infer that the victim was unaware of these deteriorating conditions because he made only four overnight trips to the motel during the last half of 1996 (Vol. 4, Tr. 36-40, 42, 58-59).

This evidence corroborates Mr. Sneed's testimony that Petitioner feared being fired the morning of January 7, 1997 because of Petitioner's mismanagement at the motel and provides strong motive for the murder. Petitioner's motive to murder Mr. Van Treese explains why Petitioner's active concealment of the body for seventeen hours is inconsistent with either Petitioner's innocence or mere culpability as an accessory. The jury could infer

that Petitioner wanted the victim murdered so he would not lose his job and not be prosecuted for embezzlement.

D. Control Over Mr. Sneed. Justin Sneed testified that the sole reason he murdered the victim was because of pressure from Petitioner. The State presented extensive evidence that Petitioner largely controlled Mr. Sneed, an 18 year old, eighth-grade dropout who worked as a maintenance man for Petitioner at the motel (Vol. 12, Tr. 47-48) and that Mr. Sneed's mental capacity and personality made it unlikely he would plan to kill anyone, let alone Van Treese, whom he barely knew. One motel resident testified that, based on his limited observations, Mr. Sneed "didn't have a lot of mental presence." (Vol. 6, Tr. 16). Bob Bemo, a retired homicide detective who interviewed Mr. Sneed, testified that Mr. Sneed did not appear very mature and had below average intelligence. He also testified that Petitioner appeared more aggressive and intelligent than Mr. Sneed. Bemo observed that Petitioner was "a very intelligent individual . . . a very manipulative individual . . . what he does with everything that he does is he's manipulating, using people." (Vol. 14, Tr. 46-48). Kayla Pursley described Mr. Sneed as being "very childlike" (Vol. 9, Tr. 17). Mr. Sneed assisted caring for her children when Ms. Pursley broke her foot. Ms. Pursley testified that Mr. Sneed played with her children "[m]ore as a peer . . . [that] he fit kind of in with my boys, you know, he played and he was real simple. He had a skateboard and that was his life . . . he didn't make a lot of decisions. You had to tell him sometimes what

to do." (Vol. 9, Tr. 17). Ms. Pursley described how Mr. Sneed would not eat unless someone told him to eat (Vol. 9, Tr. 18).

Petitioner and Mr. Sneed were described as "very close" friends by Billye Hooper (Vol. 7, Tr. 28). Mr. Sneed was largely dependent upon Petitioner for food and money (Vol. 7, Tr. 28; Vol. 9, Tr. 21). Ms. Pursley testified that Mr. Sneed usually followed Petitioner when they were together, that you normally did not see one without the other and that "[Petitioner] would have to tell him what to do and how to do it." (Vol. 9, Tr. 19-20, 23). Petitioner had control over Mr. Sneed because Mr. Sneed had no other place to go and no family in the area (Vol. 9, Tr. 21, 24). Ms. Pursley observed that "[y]ou had to almost tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal." (Vol. 9, Tr. 23). Cliff Everhart testified that Mr. Sneed was Petitioner's "puppet", that Mr. Sneed "was not self-motivated. [Petitioner] told him everything to do. [Petitioner] would tell him to do this, he'd do it . . . If he needed something, he'd come to [Petitioner]." (Vol. 11, Tr. 185). Billye Hooper testified that Mr. Sneed did not know the victim very well (Vol. 7, Tr. 34). This corroborated Mr. Sneed's testimony that he had only met the victim approximately three times prior to the murder during which time the pair had no real conversations (Vol. 12, Tr. 76-77). Witnesses who knew both Petitioner and Mr. Sneed testified that, based on Sneed's personality, they did not believe Mr. Sneed would commit a murder on his own (Vol. 7, Tr. 34; Vol. 9, Tr. 25).

This evidence shows that Petitioner largely had control over Mr. Sneed's actions, that Mr. Sneed was dependent upon Petitioner and that Mr. Sneed's personality and mental capacity made it unlikely that he would murder Mr. Van Treese on his own volition. The evidence shows Mr. Sneed had the type of personality in January 1997 that allowed him to be easily influenced by Petitioner into committing the murder. In the words of the trial judge during a bench conference, Mr. Sneed was "an illiterate guy who's just one notch above a street person" (Vol. 13, Tr. 61). Evidence of Mr. Sneed's personality and mental capacity and Petitioner's control over him, combined with evidence that Petitioner: (1) turned up with a large sum of cash shortly after the murder; (2) actively concealed the body in Room 102 for practically an entire day by misleading investigators and others who were searching for the victim at the motel; and (3) had strong motive to kill the victim, connects Petitioner with the murder in this case.

E. Stated Intent to Flee. After being interviewed by detectives, Petitioner began the process of selling all of his possessions. He told Cliff Everhart that "he was going to be moving on" (Vol. 11, Tr. 199-200). When homicide detectives got word of Petitioner's stated intention to leave Oklahoma, they put police surveillance on him (Vol. 14, Tr. 23). On January 9, 1997, Petitioner failed to appear for a previously scheduled meeting with homicide detectives at police headquarters. Petitioner was eventually intercepted and taken downtown to meet with homicide detectives where he eventually gave a second interview (Vol. 12, Tr.

6-9). Evidence that Petitioner sold his possessions shortly after his initial contact with homicide detectives (but before he admitted in the second interview to actively concealing the victim's body in Room 102) represents evidence tending to connect Petitioner with the murder of the victim. Evidence that Petitioner was preparing to leave the state demonstrates a consciousness of guilt which, combined with the additional circumstantial evidence discussed above, corroborates Mr. Sneed's testimony by connecting Petitioner with the murder.

Summary. Based on the above evidence, this Court concluded Justin Sneed's testimony was sufficiently corroborated to support Petitioner's first degree murder conviction. *Glossip*, 2007 OK CR 12, ¶¶ 43 - 53, 157 P.3d at 151-54. In summary, this Court held:

> In this case, the State presented a compelling case which showed that Justin Sneed placed himself in a position where he was totally dependent on Glossip. Sneed testified that it was Glossip's idea that he kill Van Treese. Sneed testified that Glossip promised him large sums of cash if he would kill Barry Van Treese. Sneed testified that, on the evening before the murder, Glossip offered him $10,000 dollars if he would kill Van Treese when he returned from Tulsa. After the murder, Glossip told Sneed that the money he was looking for was under the seat of Van Treese's car. Sneed took an envelope containing about $4,000.00 from Van Treese's car. Glossip told Sneed that he would split the money with him, and Sneed complied. Later, the police recovered about $1,200.00 from Glossip and about $1,700.00 from Sneed. The most compelling corroborative evidence, in a light most favorable to the State, is the discovery of the money in Glossip's possession. There was no evidence that Sneed had independent knowledge of the money under the seat of the car.

Id. 2007 OK CR 12, ¶ 43, 157 P.3d at 152. This Court also concluded:

> Glossip's motive, along with evidence that he actively concealed Van Treese's body from discovery, as well as his plans to "move on," connect him with the commission of this crime. Evidence that a defendant attempted to conceal a crime and evidence of attempted flight supports an inference of consciousness of guilt, either of which can corroborate an accomplice's testimony.

Id. 2007 OK CR 12, ¶ 47, 157 P.3d at 153. In response to Petitioner's claim that the State's evidence showed merely that he was an accessory after the fact, the OCCA wrote: "[d]espite this claim, a defendant's actions after a crime can prove him guilty of the offense. Evidence showing a consciousness of guilt has been used many times." *Id.*

In a separate opinion, Judge Charles Chapel stated: "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." *Id.* 2007 OK CR 12, ¶ 44, 157 P.3d at 175 (J. Chapel, dissenting).

Petitioner has repeatedly attempted to undermine the reliability of Mr. Sneed's testimony. As shown above, Mr. Sneed's testimony was sufficiently corroborated. It was also highly credible as found by the trial judge, the late Twyla Mason Gray. Judge Gray, during an *in camera* conference, noted:

> . . . I've also had an opportunity to observe the witnesses and it is fascinating to me to see the difference that it makes to observe the witnesses on the stand.
>
> Some of the opinions that I had based on reading the first transcripts I, frankly, had very different opinions after listening to the testimony as it was presented and observing the witnesses. **And I've got to tell you that one of those observations was about Justin Sneed. And I did find him to be a credible witness on the stand.**

(Vol. 15, Tr. 45) (emphasis added).

ARGUMENT AND AUTHORITY

I.

PETITIONER'S EIGHTH AMENDMENT CLAIM IS PROCEDURALLY BARRED FROM REVIEW.

In his initial proposition of error, Petitioner claims his entire case rested on the testimony of Justin Sneed. As shown above, this Court, in Petitioner's direct appeal from his 2004 jury trial, specifically found the evidence was sufficient to support Petitioner's conviction as sufficient evidence was presented to "first, corroborate Sneed's story about [Petitioner's] involvement in the murder, and, second, the evidence sufficiently ties [Petitioner] to the commission of the offense, so that the conviction is supported." *Glossip*, 2007 OK CR 12, ¶ 53, 157 P.3d at 153-54. Petitioner claims newly discovered evidence supports his claim that he is innocent and, thus, that his execution would violate the Eighth Amendment.

Petitioner claims his "new evidence" includes (1) expert opinions that Mr. Sneed was interrogated in a manner to produce false and unreliable information;

(2) evidence that Mr. Sneed, while in prison, bragged about lying about Petitioner and that Petitioner was not involved; and (3) evidence that Mr. Sneed was a "severe, thieving, methamphetamine addict". Most of this "new evidence", is not truly new, as it could have been discovered over ten years ago. Accordingly, Petitioner is not entitled to any relief.

Opinions regarding interrogation of Mr. Sneed.

Petitioner claims the opinion of Richard A. Leo, Ph.D., J.D. is new evidence which reveals that interrogation techniques used during Mr. Sneed's interrogation were improper and increased the risk of obtaining false statements.[5] None of this information is new evidence that could not have been discovered with reasonable diligence. 22 O.S.2011, § 1089(D)(8)(b)(1). Mr. Sneed was interviewed by the police only days after the crime in 1997. With reasonable diligence, Petitioner could have investigated this claim, prior to his first trial, second trial, direct appeals, and initial post-conviction. In fact, it is evident from Dr. Leo's report that the study of interrogation techniques has been researched and documented since at least 1998 when Dr. Leo published his article entitled "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation." *The Journal of Criminal Law and Criminology*, Vol.

[5]Petitioner also footnotes defense counsel's version of the statements provided by Mr. Sneed and a letter written to Governor Mary Fallin. Attachments D and E.

88, No. 2. See Attachment B, footnote 4.[6] This evidence cannot support a claim of newly discovered evidence. *Sellers v. State*, 1999 OK CR 6, ¶ 5, 973 P.2d 894, 895 (Sellers's alleged newly discovered evidence was available and could have been investigated at the time of his trial, thus, it cannot support a claim of new evidence). Thus, the proposition must be denied.

Further, Petitioner has not alleged facts that, 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 him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b)(2). Dr. Leo concludes that the interrogation techniques **"could have caused"** Mr. Sneed to make a false statement. Although Petitioner provides this Court with select portions of Mr. Sneed's interview, Petitioner has failed to provide a complete copy. Mr. Sneed's interview was not admitted at his trial and, thus, is not before this Court. The record reveals that Mr. Sneed, like most individuals accused of a crime, including Petitioner, began by minimizing his involvement and then finally admitting his own involvement and the involvement of Petitioner in the murder. Although Mr. Sneed may have continued adding facts, even during Petitioner's second trial, Mr. Sneed was consistent in his statement that Petitioner was the mastermind behind the murder. Further, trial counsel effectively cross-examined Mr. Sneed on the evolution of his statement from denial to admission of guilt and his withholding

[6]Respondent notes that Dr. Leo also cites to a 1986 interrogation training manual. Attachment B, footnote 8.

of information. (Vol. 12, Tr. 205-213; Vol. 13, Tr. 6-50). In addition, the record shows Mr. Sneed was not promised anything, nor had he spoken to anyone from the District Attorney's office prior to giving his statement (Vol. 12, Tr. 54-55). Thus, the statement was not given to receive a plea agreement.[7] The opinion of Dr. Leo does not support a claim of innocence nor support a finding that no reasonable fact finder would have found Petitioner guilty or would have rendered the penalty of death.

Unsworn Affidavit of Michael Scott

Petitioner also relies on an unsworn and undated affidavit by Michael G. Scott in support of his successive application for post-conviction relief. To summarize, Mr. Scott allegedly writes in his affidavit that, from 2006 to 2007, he was incarcerated at Joseph Harp Correctional Facility and was housed across from Mr. Sneed's cell. Attachment F at ¶¶ 4, 5. Mr. Scott claims that he heard Mr. Sneed, on multiple occasions, say that he "set Richard Glossip up" and that "Richard Glossip didn't do anything." *Id.* at ¶ 7. Mr. Scott states that he never told anyone about Mr. Sneed's statements until he "saw the Dr. Phil show" about Petitioner, after which he called defense counsel. *Id.* at ¶ 11. Petitioner also attaches a September 9, 2015, affidavit by private investigator Quinn O'Brien, who states that he witnessed Mr. Scott read, initial, and sign Mr. Scott's affidavit on

[7]The docket of Oklahoma County Case No. CF-1997-244 reveals that Mr. Sneed's plea agreement was made on June 18, 1998.

September 5, 2015. Attachment F at ¶¶ 1-2. Mr. O'Brien's affidavit notes that "[n]o notary was available at the time Mr. Scott signed the affidavit." *Id.* at ¶ 4.

As an initial matter, Mr. Scott's affidavit is not properly before this Court because it is both undated and unsworn. Mr. O'Brien's affidavit does not explain where Mr. Scott's affidavit was allegedly signed or why a notary was unavailable at this location. Petitioner even indicates in his Motion for Discovery that Mr. Scott is no longer imprisoned, so it is unclear why Mr. Scott could not sign his affidavit in front of a notary. Motion for Discovery at 1. In any event, even if Mr. Scott's affidavit is properly before this Court, Petitioner has not demonstrated that his claim in Proposition One, to the extent that it is based on Mr. Scott's affidavit, meets the requirements of 22 O.S.2011, § 1089(D)(8)(b)(1) and (2).

First, Petitioner has not set forth sufficient specific facts showing that this evidence of Mr. Sneed's bragging about "setting up" Petitioner was unavailable through the exercise of reasonable diligence at the time of his first application for post-conviction relief filed in October 2006. *See* 22 O.S.2011, § 1089(D)(8)(b)(1); Attachment A at 1. Mr. Scott states that during his incarceration with Petitioner beginning in 2006, it was "common knowledge" among the inmates that "Justin Sneed lied and sold Richard Glossip up the river." Attachment F at ¶ 4. Indeed, Mr. Scott notes that he learned within a month or two of his arrival at Joseph Harp that "Justin Sneed had snitched on a guy who didn't do anything." *Id.* ¶ 9. Thus, even assuming that Mr. Scott did not come forward with his claim until

after viewing the Dr. Phil segment on Petitioner, this evidence was discoverable as early as 2006.

Petitioner does not even allege that a reasonable investigation would not have uncovered this evidence prior to his first post-conviction application, let alone provide "sufficient *specific facts* establishing that the current claim[] . . . could not have been presented previously . . . because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence . . . ." *See* 22 O.S.2011, § 1089(D)(8)(b)(1) (emphasis added). Put simply, it is irrelevant under the statute when Mr. Scott came forward with his claims–instead, the statute focuses on when the factual basis for Petitioner's claim became ascertainable through the exercise of reasonable diligence. Here, Petitioner does not explain what investigation was undertaken prior to his original post-conviction application or provide sufficient specific facts to demonstrate that evidence of Mr. Sneed's bragging about "setting up" Petitioner was earlier unascertainable.

Second, Petitioner has not alleged facts that, 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 him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b)(2). For starters, it is apparent that Mr. Scott's affidavit offers little more than inadmissible hearsay. *See Matthews v. State*, Case No. PCD-2010-1193, slip op., at 7-9 (Okla. Crim. App.

Jan. 7, 2011)[8] (unpublished) (holding that affidavit provided neither sufficient support for post-conviction relief or required an evidentiary hearing in part because the affidavit contained inadmissible hearsay). Thus, Petitioner has not shown that Mr. Scott can offer any admissible testimony in light of which no reasonable fact finder would have found him guilty. To the extent that Petitioner seeks relief based on Mr. Scott's affidavit, relief may be denied on this ground.[9]

Further, this Court has explained that affidavits such as Mr. Scott's, made within days of a scheduled execution date, are "inherently suspect." *Matthews*, slip op., at 7. Jeffrey Matthews, who was set to be executed on January 11, 2011, presented with his third application for post-conviction relief an affidavit by the

---

[8]Pursuant to Rule 3.5(C)(3), Title 22, Ch. 18, App. (Supp. 2014), this unpublished summary opinion in *Matthews* is attached hereto as Exhibit A because no published opinion would serve as well the purpose for which it is being cited.

[9]Petitioner again relies on hearsay for his claim that Mr. Sneed wished to recant his testimony. Petitioner appends to this application an affidavit from Crystal Martinez, Attachment H, that claims she spoke to Ryan Justine Sneed and communicated with her through e-mail "[j]ust before [Petitioner's] clemency hearing October 2015". Clearly, Ms. Martinez meant October, 2014. Thus, this information has been available for more than 60 days and cannot be considered by this Court. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Nonetheless, Ms. Martinez claims that Ms. Sneed stated her father had lied about Petitioner's involvement to avoid the death penalty. Ms. Martinez claims to have received a "rough draft" of a letter written by Ms. Sneed and swears that she has "the e-mail traffic saved." However, attached to Ms. Martinez's affidavit is neither "the e-mail traffic" or a copy of the actual letter she claims to have received from Ms. Sneed. There is absolutely nothing to indicate that what is attached to Ms. Martinez's affidavit is from Ms. Sneed. Contrary to Ms. Martinez's claims, Mr. Sneed has spoken on the issue and has denied recanting. *See* Exhibit D attached hereto. After reading the article attached as Exhibit D, Respondent sought records showing recent visitations with Mr. Sneed. Attached is an affidavit from Warden Carl Bear showing recent visitations with Mr. Sneed. *See* Exhibit E. Due to time constraints, Respondent is unable to attach the original affidavit. The original can be provided at a later date.

surviving victim's brother dated October 21, 2010. *Matthews*, slip op., at 2, 4, 6. In the affidavit, the brother claimed that the surviving victim told him that Matthews was not inside the house at the time of the murder. *Matthews*, slip op., at 4, 6. Similarly here, Petitioner has produced an affidavit that was allegedly signed by Mr. Scott on September 5, 2015, less than two weeks before Petitioner's scheduled execution date, and has presented the affidavit to this Court less than 24 hours prior to the scheduled execution. Accordingly, this "inherently suspect" affidavit, containing only inadmissible hearsay, falls far short of clear and convincing evidence of actual innocence that demonstrates that no reasonable fact finder would have found Petitioner guilty.

Mr. Scott's affidavit further lacks credibility because it was generated around eight years after Mr. Scott claims he heard Mr. Sneed make the alleged statements in 2006 and 2007. Mr. Scott's affidavit does not provide a convincing explanation for why he did not come forward with his allegations concerning Mr. Sneed's statements until the eve of Petitioner's execution. Mr. Scott claims he "realized just how important this information was" only when he viewed a Dr. Phil segment on Petitioner. However, this explanation is inconsistent with Mr. Scott's claim that, among the Joseph Harp inmates, "it was common knowledge that Justin Sneed lied and sold Richard Glossip up the river" and that Mr. Sneed repeatedly bragged about "selling Richard Glossip out." In other words, Mr. Scott understood at the time of Mr. Sneed's statements the implications of Mr. Sneed's

alleged perjury for Petitioner, and Mr. Scott does not explain what new information he learned during the Dr. Phil segment that in any way changed his understanding of Mr. Sneed's statements or their implications for Petitioner. Accordingly, Mr. Scott's affidavit is not credible on its face and is insufficient to warrant post-conviction relief or an evidentiary hearing.

In sum, to the extent that Petitioner relies on Mr. Scott's affidavit, he has not demonstrated that the factual basis supporting this proposition (a) could not have been earlier discovered through reasonable diligence and (b) shows that no reasonable fact finder would have found him guilty. In particular, Mr. Scott's affidavit is unsworn and undated, consists of inadmissible hearsay, and lacks credibility.

Affidavit of Richard Barrett

Likewise, the affidavit of Richard Barrett is not new evidence that could not have been ascertained with reasonable diligence prior to trial, direct appeal, or initial post-conviction. Richard Barrett was known to Petitioner at the time of his first trial as Mr. Barrett was listed as a potential witness on May 21, 1998 (O.R. 183). This list was incorporated by counsel in his second trial (O.R. 1084, ¶ 14). Thus, any information from Mr. Barrett could have been discovered through reasonable diligence.

Further, the affidavit of Mr. Barrett does not support a finding that no reasonable fact finder would have found Petitioner guilty or would have rendered

the penalty of death. The affidavit merely discusses his unlawful actions with Bobby Glossip and Mr. Sneed. He claims that Mr. Sneed was a drug user. This information was known at Petitioner's trial as Mr. Sneed testified to his use of marijuana and crank (Vol. 12, Tr. 47). The record also reveals, contrary to the affidavit of Mr. Barrett, that Mr. Sneed admitted during Petitioner's first trial to using methamphetamine, however, Mr. Sneed testified that he snorted it, rather than shooting it in his arm (1998 Vol. 6, Tr. 111-112).

Further, Mr. Barrett's affidavit is highly suspect because contrary to trial testimony,[10] Mr. Barrett claims he "saw nothing to make me think that Justin Sneed was controlled by Richard Glossip". Attachment G. However, Mr. Barrett also states that he met Petitioner when "he would come to Rule 102" to see his brother and tell them to quiet down. He also states he "never saw Richard come to the room when Justin Sneed was there." Attachment G at ¶ 10. Thus, it is unclear how Mr. Barrett would know whether Mr. Sneed was controlled by Petitioner unlike others who dealt with Petitioner and Mr. Sneed on a continuous

---

[10]Petitioner and Justin Sneed were described as "very close" friends by Billye Hooper, the front desk clerk at the motel (Vol. 12, Tr. 28). Mr. Sneed was largely dependent upon Petitioner for food and money (Vol. 9, Tr. 21; Vol. 12, Tr. 28). Kayla Pursley testified that Mr. Sneed usually followed Petitioner when they were together, that you normally did not see one without the other and that "[Petitioner] would have to tell him what to do and how to do it." (Vol. 9, Tr. 19-20, 23). Petitioner had control over Mr. Sneed because Mr. Sneed had no other place to go and no family in the area (Vol. 9, Tr. 21, 24). Ms. Pursley observed that "[y]ou had to almost tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal." (Vol. 9, Tr. 23). Cliff Everhart testified that Mr. Sneed was Petitioner's "puppet", that Mr. Sneed "was not self-motivated. [Petitioner] told him everything to do. [Petitioner] would tell him to do this, he'd do it . . . If he needed something, he'd come to [Petitioner]." (Vol. 11, Tr. 185).

basis. Mr. Barrett's untimely affidavit does not support a finding that there exists a significant possibility of reversal of Petitioner's conviction or vacation of his death sentence.

Opinion of Dr. Pablo Stewart

Petitioner asserts that the opinion of Dr. Stewart supports a finding that Mr. Sneed acted alone. Like the affidavit of Mr. Barrett, the opinion of Dr. Stewart was ascertainable at the time of trial. Further, it does not support a finding of innocence as the findings of Dr. Stewart are based on speculation that Mr. Sneed was a methamphetamine addict and that he used it intravenously over a period of time. Attachment J. As noted above, Mr. Sneed testified specifically that he used marijuana and "a little bit of crank" (Vol. 12, Tr. 47). He also testified that he snorted it, rather than injecting it intravenously (1998 Vol. 6, Tr. 111-12). Further, testimony of the motel staff did not support a finding that Mr. Sneed's behavior showed "extreme agitation, rapid cycling of thoughts, and significantly impaired executive functioning." Attachment J at 2. Even Petitioner does not describe Mr. Sneed's behavior on the night of the murder as fitting the behavior described by Dr. Stewart of an individual on methamphetamine.

Further, Dr. Stewart based his opinion on information that he received stating that Mr. Sneed was prescribed lithium upon his arrest. However, records submitted by Petitioner in his original application for post-conviction relief, No. PCD-2004-978, reveals that Petitioner was not prescribed lithium until March,

1997 after having a tooth pulled. *See* Appendix 4 attached to original application for post-conviction. (A copy is attached as Exhibit B). Thus, Dr. Stewart's opinion is based on unreliable and false information. Accordingly, Petitioner is not entitled to relief.

Conclusion

The Petitioner has not provided this Court with any reliable facts supporting his claim that could not have been presented previously in Petitioner's direct appeal or original post conviction application. Further, Petitioner has not alleged facts that, 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 him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b). Petitioner cannot show there exists a significant possibility of reversal of Petitioner's conviction or vacation of Petitioner's sentence based on the evidence submitted in his second post-conviction application or that irreparable harm will result if no stay is issued. Nor has he shown that a miscarriage of justice will occur if his execution is carried out. This is because Petitioner's evidence in no way calls into question the evidence contained in the existing appellate record, evidence which, as previously found by this Court, shows Petitioner's significant involvement in the murder. *Glossip v. State*, 2007 OK CR 12, ¶ 37-53, 157 P.3d 143, 151-54. He is therefore not entitled to post-conviction relief or a stay of execution.

II.

PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE PROCEDURALLY BARRED FROM REVIEW.

In this application, Petitioner raises two claims of ineffective assistance. This Court has found that "[a] claim of ineffective assistance of trial counsel is appropriate for post-conviction review if it has a factual basis that could not have been ascertained through the exercise of reasonable diligence on or before the time of direct appeal" or, in the case of a successive application, in his initial post-conviction application. *Coddington v. State*, 2011 OK CR 21, ¶ 3, 259 P.3d 833, 835.

Petitioner, in his second proposition of error, contends that his trial counsel was ineffective in failing to attack Mr. Sneed's credibility by attacking (a) the alleged improper interrogation techniques, and (b) Mr. Sneed's "modus operandi" of breaking into cars and motel rooms to support his drug addiction. In his fourth proposition of error, Petitioner contends trial counsel was ineffective in failing to adequately cross-examine Dr. Chai Choi's testimony. As shown above, and as will be shown below in discussing the testimony of Dr. Choi, Petitioner's claims of ineffective assistance rely on facts that have been available and could have been considered in his prior post-conviction application. Further, these claims do not in any way advance a claim that Petitioner is innocent. Thus, Petitioner is not entitled to any relief. 22 O.S.2011, § 1089(D)(8).

Proposition Two

Petitioner alleges trial counsel was ineffective in failing to investigate and attack the credibility of Mr. Sneed. In Petitioner's initial application for post-conviction relief, Petitioner also asserted that trial counsel was ineffective in failing to investigate Mr. Sneed and adequately cross-examine him. *Glossip v. Oklahoma*, Case No. PCD-2004-978, Proposition II. In responding to his claim, this Court found that on direct appeal Petitioner claimed ineffective assistance of trial counsel in failing to adequately cross-examine Mr. Sneed and object to testimony portraying Mr. Sneed as a follower. This Court found that the proposition filed in his original application was "merely an attempt to expand on claims made on direct appeal; therefore the claim is barred." *Glossip v. State*, No. PCD-2004-978, slip op. at 6 (Okla. Crim. App. Dec. 6, 2007) (unpublished). This Court then went further and found the claim without merit, finding that the "introduction of this information at trial or on direct appeal would not have changed the outcome of this case." *Id.* Accordingly, Petitioner's claim raised in Proposition Two is barred for two reasons. First, to the extent that the claim is not the same as raised on direct appeal and post-conviction, Petitioner has not provided this Court with any reliable facts supporting his claim that could not have been presented previously in Petitioner's direct appeal or original post conviction application. Further, Petitioner has not alleged facts that, 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 him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b). Second, to the extent that the claim is merely a further extension of the claim raised on direct appeal and in Petitioner's initial application, it is barred by *res judicata*. *See Smith v. State*, 2010 OK CR 24, ¶ 38, 245 P.3d 1233, 1243 (issues raised and decided are barred by *res judicata* from further consideration).

Proposition Four

Petitioner's claim of ineffective assistance in Proposition Four is based on the trial testimony of Dr. Choi. Evidence obtained over eleven years after trial which is used merely to impeach or discredit the trial testimony of an expert cannot be considered new evidence that could not have been discovered with reasonable diligence. With reasonable diligence, this alleged impeachment evidence could have been discovered prior to Petitioner's initial post-conviction.[11] Accordingly, Petitioner is not entitled to relief on this claim. *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835.

Further, Petitioner cannot show, based on these opinions merely challenging Dr. Choi's testimony that no reasonable fact finder would have found

---

[11]Additionally, this Court has held that "newly discovered evidence" which merely goes to impeach a witness is not sufficient to warrant a new trial. *Bowen v. State*, 1984 OK CR 105, ¶ 28, 715 P.2d 1093, 1101-02. To the extent Petitioner is seeking a new trial, he cannot succeed. *See also U.S. v. Trujillo*, 136 F.3d 1388, 1394 (10th Cir. 1998) (a motion for new trial based on newly discovered evidence must be "(1) more than impeaching or cumulative, (2) material to the issues involved, (3) such that it would probably produce an acquittal, and (4) such that it could not have been discovered with reasonable diligence and produced at trial.").

Petitioner guilty of murder or would have rendered the penalty of death. Dr. Choi testified, consistent with her report, that the cause of death was "multiple blunt force injury, mainly on the head." (Vol. 11, Tr. 55).[12] She explained that due to the blunt force injury, the victim bled to death due to hemorrhages on top of the bone surface (Vol. 11, Tr. 48-50). She opined that it would take hours, not minutes for the victim to die, but she could not "pin down the number of hours" (Vol. 11, Tr. 56). Whether it took Mr. Van Treese hours to die or only minutes does not impact Petitioner's guilt, nor the aggravating circumstance found in this case – that the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration. Petitioner is not entitled to any relief.

Conclusion

Once again, Petitioner has failed to provide this Court with any reliable facts supporting his claim that could not have been presented previously in Petitioner's original post conviction application. Further, Petitioner has not alleged facts that, 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 him guilty. *See* 22 O.S.2011, §

[12]Even were this Court to review this claim under the two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), Petitioner cannot show prejudice as the evidence does not support a finding that but for counsel's alleged errors, there is a reasonable probability that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

1089(D)(8)(b). Petitioner cannot show there exists a significant possibility of reversal of Petitioner's conviction or vacation of Petitioner's sentence based on the evidence submitted in his second post-conviction application or that irreparable harm will result if no stay is issued. Nor has he shown that a miscarriage of justice will occur if his execution is carried out. This is because Petitioner's evidence in no way calls into question the evidence contained in the existing appellate record, evidence which, as previously found by this Court, shows Petitioner's involvement in the murder. *Glossip v. State*, 2007 OK CR 12, ¶ 37-53, 157 P.3d 143, 151-54. He is therefore not entitled to post-conviction relief or a stay of execution.

III.

PETITIONER'S DOUBLE JEOPARDY ALLEGATION IS PROCEDURALLY BARRED.

In Proposition Three, Petitioner argues that the evidence at his first trial was insufficient to support his conviction and therefore his retrial violated double jeopardy. Petitioner does not present any newly discovered evidence in support of this Proposition and instead primarily attacks the reliability of the evidence presented at his first trial.

As an initial matter, Petitioner has waived his double jeopardy argument by failing to offer any relevant authority or meaningful argument in support. Although Petitioner extensively argues the law concerning sufficiency-of-the-evidence claims and the evidence presented at his first trial, he offers a mere two

sentences about double jeopardy and cites zero supporting authority. Specifically, while Petitioner notes that double jeopardy would prohibit the retrial of a defendant if the evidence were insufficient at the defendant's first trial, he cites no case law or other authority in support of this proposition. Petitioner further fails to mention "double jeopardy" in his statement of the issue for Proposition Three. Petitioner's statement of the issue instead states simply that the evidence at his trial was insufficient to support his conviction.[13]

This Court's Rules state that arguments must be supported by citations to the authorities and statutes and that "[m]erely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal." Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2014); *see also* Rule 9.7(A)(3)(g), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2014) (providing that post-conviction applications shall contain argument and authority in the same manner as direct appeal briefs). Moreover, "[f]ailure to list an issue pursuant to these requirements constitutes waiver of alleged error." *Id.* Thus, Petitioner's reference to double jeopardy only in passing, without citation to

---

[13]To the extent that Petitioner attempts to bring a free-standing claim of insufficient evidence concerning his *first trial* (absent a double jeopardy claim), such a claim does not warrant relief because Petitioner is in custody pursuant to the conviction resulting from his retrial, not his first trial. To the extent that Petitioner attempts to challenge the sufficiency of the evidence at his *retrial*, this claim would be *res judicata* because Petitioner raised this claim on direct appeal from his retrial and this Court denied relief. *See Slaughter v. State*, 2005 OK CR 2, ¶ 4, 105 P.3d 832, 833; *Glossip v. State*, 2007 OK CR 12, ¶ 53, 157 P.3d 143, 153-54.

authority or the development of meaningful argument concerning the double jeopardy aspect of Proposition Three, constitutes a waiver of this issue.

Alternatively, even assuming that this Court determines that Petitioner has sufficiently raised this issue in his current successive application, Proposition Three is nonetheless procedurally barred because Petitioner waived the issue by failing to earlier raise it. As this Court has repeatedly stated, the Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Slaughter v. State*, 2005 OK CR 2, ¶ 4, 105 P.3d 832, 833. Therefore, claims that could have been raised in previous appeals but were not are generally waived. *Id.*

As background, in Petitioner's first direct appeal, this Court reversed Petitioner's conviction based on a finding of ineffective assistance of counsel and remanded for a new trial. *Glossip v. State*, 2001 OK CR 21, ¶¶ 8, 36-37, 29 P.3d 597, 599, 605. This Court stated that, in light of its finding of ineffective assistance, it need not reach Petitioner's claim based on the sufficiency of the evidence. *Glossip v. State*, 2001 OK CR 21, ¶ 8, 29 P.3d 597, 599. Petitioner then filed a petition for rehearing arguing that the evidence in his first trial was insufficient to support his conviction and that therefore his retrial would violate double jeopardy. Petitioner thus urged this Court to review the merits of his insufficiency-of-the-evidence claim, reverse his conviction on that basis, and remand with instructions to dismiss the murder count. In denying Petitioner's

petition for rehearing, this Court concluded that it had not overlooked Petitioner's insufficiency-of-the-evidence claim and that Petitioner had not presented any persuasive reason or case law requiring this Court to reconsider the claim when reversal was warranted on other grounds.

Although this Court declined to consider the merits of Petitioner's double jeopardy claim when raised in his petition for rehearing, Petitioner has had, at a minimum, two additional opportunities to raise this claim at prior stages of his case. Accordingly, Petitioner has waived his double jeopardy claim by failing to raise it at these times.

First, Petitioner could have, but did not, file a petition for writ of prohibition or mandamus with this Court prior to his retrial to prevent the retrial on grounds of double jeopardy. This Court has recognized that petitions for writ of prohibition are appropriate vehicles for asserting that a retrial violates double jeopardy. *See, e.g., Todd v. Lansdown*, 1987 OK CR 167, ¶¶ 7-8, 747 P.2d 312, 315 (granting writ of prohibition to prohibit murder trial in violation of double jeopardy); *Sussman v. Dist. Court of Oklahoma Cnty.*, 1969 OK CR 185, ¶ 48, 455 P.2d 724, 735 (granting writ of prohibition to prevent trial court from retrying petitioner on the same charge in violation of double jeopardy).

Second, Petitioner failed to raise the claim that his retrial violated double jeopardy in his second direct appeal. Specifically, in his second direct appeal, Petitioner argued that the State presented insufficient evidence to convict him of

first-degree murder because Mr. Sneed's testimony was not sufficiently corroborated and the State's evidence regarding motive was flawed. *Glossip v. State*, 2007 OK CR 12, ¶ 37, 157 P.3d 143, 151. However, Petitioner did not raise any claim or suggestion that his retrial violated double jeopardy. Such a claim could properly have been raised in Petitioner's second direct appeal. *See, e.g., Lambert v. State*, 1999 OK CR 17, ¶¶ 7-18, 984 P.2d 221, 226-29 (considering the merits of defendant's argument that his retrial, held upon the reversal by this Court of his original convictions, was barred by double jeopardy because of his first trial). In sum, Petitioner has waived the double jeopardy claim underlying Proposition Three by failing to raise the claim in either a petition for writ of prohibition or his second direct appeal.

In any event, even assuming that Proposition Three were not procedurally barred because of Petitioner's waiver, Proposition Three is barred by 22 O.S.2011, § 1089(D)(8)(a). Pursuant to that provision, this Court may not consider the merits of or grant relief based on a subsequent application for post-conviction relief unless "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.*" 22 O.S.2011, § 1089(D)(8)(a) (emphasis added). The statute further provides that a legal basis is unavailable if it (a) either was not previously recognized or could not have been reasonably formulated from a

decision of an enumerated appellate court, or (b) is a new rule of constitutional law given retroactive effect by an enumerated appellate court. 22 O.S.2011, § 1089(D)(9).

In this case, Petitioner does not cite any authority providing the legal basis for his double jeopardy argument and certainly does not identify a new legal basis or rule of constitutional law that was previously unavailable. Moreover, although Petitioner cites a number of cases concerning his sufficiency-of-the-evidence arguments, none of these cases–ranging in date from 1913 to 1998–was decided after Petitioner's original post-conviction application was filed in October 2006. Because Petitioner has failed to show that Proposition Three could not have been presented in his original post-conviction application, this Court may not consider the merits of or grant relief based on this claim. *See Duvall v. Ward*, 1998 OK CR 16, ¶ 6, 957 P.2d 1190, 1191 (holding that Petitioner failed to establish that claims could not have been presented in a previously considered application for post-conviction relief where he did not show that the legal basis of each claim was not recognized by or could not have been reasonably formulated from a final decision of an enumerated appellate court or that the claims relied on a new rule of constitutional law given retroactive effect).

As a final matter, even if the merits of Proposition Three were considered, this claim does not warrant relief because the claim is without merit. This Court has explained that "double jeopardy bars retrial only where a conviction is

reversed on appeal for insufficient evidence." *LaFevers v. State*, 1995 OK CR 26, ¶ 16, 897 P.2d 292, 302. In Petitioner's first direct appeal, however, this Court reversed based on a finding of ineffective assistance of counsel, not based on the insufficiency of the evidence. *Glossip*, 2001 OK CR 21, ¶¶ 8, 36-37, 29 P.3d 597, 599, 605. Indeed, this Court expressly declined to reach Petitioner's claim based on the sufficiency of the evidence and certainly did not make a determination that the evidence was insufficient. *See Glossip*, 2001 OK CR 21, ¶ 8, 29 P.3d 597, 599. Because this Court did not reverse Petitioner's original conviction because of insufficient evidence, double jeopardy did not bar his retrial. *See Cannon v. State*, 1995 OK CR 45, ¶ 16, 904 P.2d 89, 98 (rejecting defendant's claim that his original convictions barred future prosecution because this Court's reversal of those convictions, while ostensibly a reversal and remand for a separate trial from defendant's accomplice, was actually a reversal based on insufficiency of the evidence).

In conclusion, Proposition Three warrants neither post-conviction relief nor an evidentiary hearing because it is not properly raised in the current successive application, is procedurally barred because it is waived, is foreclosed by § 1089(D), and fails on the merits.

UNREASONABLE DELAY IN REQUESTING STAY OF EXECUTION

In *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006), the United States Supreme Court underscored its opinion in *Nelson v.*

Campbell, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004), that a stay of execution is an equitable remedy and that "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the [] courts." *Hill*, 547 U.S. at 584, quoting *Nelson*, 541 U.S. at 649-50. Further, "[t]he last-minute nature of an application to stay execution" bears on the propriety of granting relief. *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654, 112 S. Ct. 1652, 1653, 118 L. Ed. 2d 293 (1992) (per curiam).

Petitioner has been extremely dilatory in bringing his claims to this Court. The claims could have brought more than a decade ago as most of the challenged evidence has been available since the time of Petitioner's trial. The Petitioner has not offered a reason for the delay, clearly because there is no good reason for this abusive delay.

MOTION FOR DISCOVERY AND EVIDENTIARY HEARING

Petitioner has filed, separately from his second application for post-conviction relief, motions for discovery and an evidentiary hearing. Both motions should be denied. First, Petitioner's request for discovery is nothing more than a fishing expedition and is insufficient to satisfy this Court's rules. Petitioner supports his discovery requests to this Court with an unsworn affidavit of Michael Scott[14]. This is his sole basis for his request for "identifying information for all

[14]Although Petitioner claims to this Court that Mr. Scott "swears under oath," as (continued...)

inmates who have been released or transferred from this prison who were in Snead's [sic] 'pod' since he has been imprisoned." Petitioner also claims he needs "access to all inmates currently housed near Sneed on the *chance* that one of them will speak the truth regarding Mr. Sneed." This Court has "never allowed unfettered discovery in post-conviction proceedings" and Petitioner must present facts, not speculation, to be entitled to discovery. *See Bland v. State*, 1999 OK CR 45, ¶ ¶ 6-8, 991 P.2d 1039, 1041-1042.

He makes numerous other requests without explaining the significance or relevance of these requests. For instance, Petitioner seeks discovery of medical records at the time of his arrest so that Petitioner can "explore" Sneed's mental health during the interrogation and seeks details of alleged "psychiatric treatment" Sneed received prior to trial. Petitioner alleges details of Sneed's psychiatric treatment show he was treated with lithium during his pre-trial incarceration and that such information is filed under seal in federal court. Petitioner states he needs this file to be unsealed. A review of Petitioner's federal pleadings do in fact show a "Determination of Competency to Stand Trial, Psychiatric Evaluation of Justin B. Sneed, by Edith King, Ph.D., dated July 1, 1997" was filed under seal in Petitioner's federal habeas corpus action, Case No. CIV-08-326-HE. However, this exact document was appended to Petitioner's Original Application for Post Conviction Relief, appendix 4, and attached hereto as Exhibit B. Clearly,

---

[14](...continued)
shown above, the affidavit is undated, and is not notarized.

discovery is not warranted for information Petitioner already has in his possession.

Petitioner also speculates "police may have found and confiscated needles and drug paraphernalia from Sneed's room at the motel" and that he needs access to those alleged police reports. Again, these requests are based on pure speculation as to what might be discovered.

In paragraph 4 of his motion for discovery, Petitioner seeks assistance in obtaining "actual polygraph charts," claiming they have determined that certain information discussed during Petitioner's clemency was "highly suspect" and refers this Court to a report from Charles R. Honts, Ph.D. that he claims he attached to this successive application for post-conviction relief. First, there is no such report attached. Second, "polygraph tests are not admissible for any purpose." *Matthews v. State*, 1998 OK CR 3, ¶ 18, 953 P.2d 336, 343. Finally, although not admissible, the evidence that Petitioner took a polygraph test and failed it was testified to during Petitioner's preliminary hearing on April 22, 1997. See Exhibit C attached hereto. Thus, this information has been available for years, such that Petitioner cannot show reasonable diligence in attempting to obtain this information.

Finally, Petitioner again speculates that further investigation of jurors is necessary to determine if jurors were in fact swayed by the medical examiner's testimony regarding the time it took for Mr. Van Treese to die. As discussed

above, Petitioner has had this information available for years and was not diligent.[15]

Petitioner's discovery and evidentiary hearing requests are intended to explore the meritless allegations set forth in the post-conviction relief application. Petitioner's complaints in this application were available and could have been pursued at Petitioner's first and second trials and raised in his previous appeals. *Cf. Slaughter v. State*, 2005 OK CR 2, ¶ 18, 105 P.3d 832, 836. As shown above, Petitioner's alleged new evidence is not new. Regardless, it fails to show by clear and convincing evidence that he is actually innocent of the murder of Mr. Van Treese. Thus, there is no basis for an evidentiary hearing or discovery to further explore these claims. These motions reflect Petitioner's desire to retry his case on collateral review, not any legitimate need for post-conviction discovery or an evidentiary hearing. There is no question that the State complied with discovery requirements at the time of both trials, thus that cannot be a basis for discovery. *See* Rule 9.7(D)(3) & (4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011); *Browning v. State*, 2006 OK CR 37, ¶ 3, 144 P.3d 155, 157. Petitioner's claims contained in the instant application are procedurally barred as they do not rely on new evidence and fail to show actual innocence. Further, Petitioner fails to show by clear and convincing evidence that the materials sought

[15]Petitioner also makes general discovery requests of the District Attorney's file, including the Investigator's file. However, Petitioner does not claim he did not receive full discovery during trial. As such, this discovery request, like some of the above, is redundant as Petitioner should already have access to the documents requested.

to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the second application for post-conviction relief. *Id.*

Petitioner's motion for discovery and evidentiary hearing should therefore be denied.

CONCLUSION

Based upon the foregoing, Petitioner's successive application for post-conviction relief, request for a stay of execution, motion for discovery, and motion for evidentiary hearing should be denied.

Respectfully submitted,

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

JENNIFER B. MILLER, OBA# 12074
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 FAX

ATTORNEYS FOR THE RESPONDENT

CERTIFICATE OF MAILING

I certify that on this 16th day of September, 2015, a true and correct copy of the foregoing was mailed, with full first-class postage pre-paid, to:

Mark Henricksen
600 N. Walker, Suite 201
Oklahoma City, OK 73102

JENNIFER B. MILLER

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JEFFREY DAVID MATTHEWS,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2010-1193
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

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

A. JOHNSON, PRESIDING JUDGE:

Before the Court is Petitioner Jeffrey David Matthews' third application for post-conviction relief, motion for evidentiary hearing and emergency motion for stay of execution. A jury convicted Matthews in 1999 in the District Court of Cleveland County, Case No. CF-95-183, of the first degree murder of his great uncle and sentenced him to death.[1] Since then Matthews has challenged his Judgment and Sentence on direct appeal,[2] in collateral

[1] Matthews' jury found two aggravating circumstances to support the death penalty: 1) Matthews created a great risk of death to more than one person; and 2) that the murder was committed while Matthews was serving a sentence of imprisonment. Matthews' jury also convicted him of Assault and Battery With a Deadly Weapon (Count II), Conspiracy to Commit a Felony (Count III) and Unauthorized Use of a Motor Vehicle. Matthews' jury recommended one hundred years imprisonment on Count II, fifty years imprisonment on Count III and twenty years imprisonment on Count IV. The Honorable Candace Blalock followed the jury's sentencing recommendation and ordered Matthews' sentences to be served consecutively.

[2] This Court affirmed Matthews' Judgment and Sentence in *Matthews v. State*, 2002 OK CR 16, 45 P.3d 907. Certiorari was denied by the United States Supreme Court in *Matthews v. Oklahoma*, 537 U.S. 1074, 123 S.Ct. 665, 154 L.Ed.2d 570 (2002).

EXHIBIT
tabbies
A

proceedings in this court,[3] and in habeas corpus proceedings and other lawsuits in federal court.[4] All of these challenges have proven unsuccessful. Matthews is set to be executed on January 11, 2011. The State filed a response to this third application on December 27, 2010.

In this most recent challenge to his judgment and sentence, Matthews raises two claims. He argues that newly discovered evidence supports his claim that he was denied a fair trial and that his execution must be stayed because the State intends to use pentobarbital as the barbiturate drug in the lethal injection process in violation of Oklahoma law.

We reject both arguments and deny his application for post-conviction relief.

The Post-Conviction Procedure Act governs post-conviction proceedings in this State. 22 O.S.Supp.2006, §§1080 -1089. It provides in relevant part:

---

[3] Matthews' second application for post-conviction relief was denied earlier this year in *Matthews v. State*, Case No. PCD-2010-266 (unpublished opinion)(April 14, 2010) Matthews' original application for post-conviction relief was also denied. *See Matthews v. State*, Case No. PCD-2002-391 (unpublished opinion)(Aug. 26, 2002).

[4] Matthews sought a writ of habeas corpus in the United States District Court for the Western District of Oklahoma which was denied. *See Matthews v. Workman*, No. Civ-03-417-R. 2007 WL 2286239 (W.D.Okla. Aug. 6, 2007). Matthews appealed the federal district court's decision and the Tenth Circuit denied relief in *Matthews v. Workman*, 577 F.3d 1175 (10th Cir.2009). The United States Supreme Court denied certiorari in *Matthews v. Workman*, ___U.S.___, 130 S.Ct. 1900, 176 L.Ed.2d 378 (2010). This Court originally set Matthews's execution date for June 17, 2010. His execution date was rescheduled to August 17, 2010 after the governor granted Matthews two reprieves. On August 17, 2010, the Honorable Stephen Friot of the United States District Court for the Western District of Oklahoma stayed Matthews's execution pending review of a motion for preliminary injunction filed by Matthews in *Pavatt v. Jones, et al.*, No CIV-10-141-F. Matthews intervened in that federal civil rights lawsuit challenging Oklahoma's lethal injection protocol on Eighth Amendment grounds. Judge Friot held a hearing and ruled against Matthews and Matthews's stay of execution dissolved on November 20, 2010. The Tenth Circuit upheld the district court's ruling on December 14, 2010. *See Pavatt, et al. v. Jones, et al.*, No. 10-6268.

> 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 section, because the legal basis for the claim was unavailable, or
>
> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
>
> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S.Supp.2006, § 1089(D)(8). Further, the rules of this Court provide that "[n]o 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 (2010).

A. Newly Discovered Evidence

Matthews argues that newly discovered evidence demonstrates that he was denied a fair trial. He maintains that executing him for the murder of his

great-uncle without a fair trial would constitute a miscarriage of justice. In support, he relies on 1) the evidence previously offered in his second post-conviction relief application, 2) affidavits from friends, family members and a juror generated for purposes of obtaining executive clemency, and 3) an October 21, 2010 affidavit from Bobby Ray Matthews, Minnie Short's brother, attesting that Minnie Short, the surviving victim, said that Matthews was not inside the Short residence when Earl Short was murdered. Matthews submits that these materials support a finding that the validity of his conviction is in doubt for these reasons 1) no physical evidence connected him to the crime scene, 2) the possibility local police framed him for the murder, 3) alternative perpetrators have not been eliminated, 4) the jury struggled to reach a guilty verdict with the evidence presented, and 5) Bobby Ray Matthews' recent affidavit provides proof that the State's theory portraying Matthews as the shooter was wrong.

Matthews' primary obstacle to review here is that the majority of the information submitted in support of this claim was discovered more than sixty days ago and cannot be considered by this Court under our rules. To overcome this procedural bar, Matthews claims the failure of this Court to review his claim and all materials together would create a miscarriage of justice under *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11.[5]

[5] Under Valdez, this Court may exercise its inherent power to grant relief when an error complained of has resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right.

Of the several filings he provides in support of his current application for relief, only one complies with our sixty day rule—the October 21, 2010 affidavit of Bobby Ray Matthews. The remaining affidavits and exhibits were available more than sixty days before the filing of this third application for post conviction relief. Also Matthews includes in this third application many of the same affidavits and arguments rejected in his second application for post-conviction relief. These recycled materials will not be considered not only because they are untimely, but also because we have previously rejected them and further consideration is barred under the doctrine of *res judicata*.[6]

With the exception of Bobby Ray Matthews' affidavit, Matthews has not shown that the affidavits obtained after the filing of his second application for post-conviction relief could not have been presented earlier with the exercise of reasonable diligence. Nothing in these affidavits suggests the affiants were unavailable or unwilling at that earlier time to provide the information contained in their affidavits filed in this matter. We note these affidavits were originally generated for purposes of obtaining executive clemency for Petitioner. The affidavits of Wilma JoAnn Daniels (attachment 2), Judith Elkins (attachment 3), Amanda Smith (attachment 4), Randy L. Howell (attachment 5) and Bobby Youngblood (attachment 6) are consistent with Matthews' claim in his second post-conviction application that prosecutorial and law enforcement misconduct deprived him of a fair trial and that he is actually innocent. In

[6] This includes Matthews' attachments 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 18.

these affidavits it is alleged that Matthews should not be executed because 1) the evidence was insufficient to establish that Matthews was the gunman, 2) Matthews was framed by local police because of animosity between law enforcement and the Matthews' family, and 3) alternative suspects have not been eliminated. With the exercise of reasonable diligence, Matthews could have presented these affidavits in conjunction with his similar arguments and claims in his second post-conviction relief application. Under the Capital Post-Conviction Procedure Act, we are barred from considering these affidavits and the arguments based upon them. 22 O.S.Supp.2006, § 1089(D)(8).

We reject Matthews' claim that he has suffered or will suffer a miscarriage of justice if we decline to review his most recent claim based on these materials. Because we find no miscarriage of justice here, we decline to exercise our inherent power to override all procedural bars and grant relief.

Matthews' primary piece of new evidence is the October 21, 2010 affidavit of Bobby Ray Matthews (attachment 1). Bobby Ray Matthews attests that he spoke with his sister, the surviving victim Minnie Short, at the hospital within hours of the murder. He claims Minnie told him that Matthews was involved in the burglary and murder, but had remained outside the house during the crime. He claims further that Minnie told him that it was two other boys who entered her house that morning and that she was adamant that Matthews was not with them. Matthews explains that he withheld this information during the August 2010 interview with Petitioner's defense team

because he "wanted to stay out of it," "didn't want to stir up any trouble within my family" and because he never believed Matthews would be executed.

The State correctly notes that this affidavit offers little more than inadmissible hearsay to prove that Matthews was not the triggerman and was not inside the house at the time of the murder.[7] 12 O.S.Supp.2002, §§ 2801, 2803 & 2804. The submission of this affidavit now—within days of Matthews' scheduled execution date—makes it inherently suspect. This is particularly so in light of the fact that the same Bobby Ray Matthews made a similar affidavit as recently as August, 2010 and therein made no mention of statements by Minnie Short tending to exonerate Petitioner. He does state in that earlier affidavit, however, that he believes "they don't have the right person," that "Jeff was probably involved in some way and could have been out there when it happened," but that he does not believe "Jeff was the one who shot and killed Earl."

It requires a stretch of credulity to reconcile those statements Bobby Ray Matthews attested to in August with the statements he makes in his most recent affidavit. The reasons he provides for withholding information about Minnie's hospital bed revelations until now are simply unworthy of belief.

Furthermore, the statements Bobby Ray Matthews belatedly attributes to Minnie are contradicted by the evidence. Minnie herself testified she could

[7] Mrs. Short has been dead now for several years and is unavailable to rebut these allegations. *See* Respondent's Exhibit D.

identify none of the intruders in her house and specifically did not identify Jeffery David Matthews. Also, Petitioner Matthews has relied in the past on the testimony of his co-defendant, Tracy Dyer, in his second trial exonerating him from any involvement in the crime.[8] The statements newly attributed to Minnie by her brother, Bobby Ray, implicate Petitioner Matthews in the crime and contradict his claim of actual innocence. Those statements are also inconsistent with the statements made in the affidavit of Wilma JoAnn Daniels (also submitted by Petitioner), that her sister Minnie told her that she could not say who was in her house because she was not wearing her glasses (attachment 2).

The Tenth Circuit, in rejecting Matthews' attack on the sufficiency of the evidence, reviewed the evidence against Matthews, and noted

> significant and uncontested other evidence pointed [to Matthews], including: (1) Mr. Matthews's girlfriend's testimony that Mr. Matthews left his home with Mr. Dyer the night before the murder and did not return that night; (2) Mark Sutton's testimony that he loaned Mr. Matthews his .45 caliber Ruger the day before the murder and that Mr. Matthews did not return it; (3) the same .45 caliber Ruger was later identified as the murder weapon and was discovered behind Mr. Matthews's home; (4) Bryan Curry's testimony that a year prior to the murder, he drove Mr. Dyer and Mr. Matthews to the Shorts' residence to burglarize their cellar; (5) Thomas Tucker's testimony that he saw two people in pickup trucks near the Shorts' residence around the time of the murder, one of whom was wearing khaki coveralls; (6) Mrs. Short's testimony that the shooter was wearing khaki coveralls; and (7) the

[8] Dyer pled guilty pursuant to a plea agreement in which he received a life sentence for the murder and agreed to testify against Matthews. In Matthews' first trial, Dyer testified that Matthews shot the victim and Matthews was convicted. Matthews appealed and we reversed his case for a new trial because of the erroneous admission of Matthews' statements that were the product of an illegal arrest. *See Matthews v. State*, 1998 OK CR 3, 953 P.2d 336. On retrial, Dyer recanted and claimed Matthews was not involved in the burglary-murder.

> fact that police seized Mrs. Short's pill bottle, $300.00 cash, and a pair of brown coveralls from Mr. Matthews's home two days after the murder.

Matthews v. Workman, 577 F.3d 1175, 1185 -1186 (10th Cir.2009). *See also Matthews v. State*, 2002 OK CR 16, ¶ 36, 45 P.3d 907, 920.

On this record, we find that the affidavit of Bobby Ray Matthews neither provides sufficient support for post-conviction relief in this case, nor requires an evidentiary hearing on the issues raised.

Oklahoma's Lethal Injection Protocol

> Oklahoma law states:
>
> The punishment of death ***must*** be inflicted by continuous, intravenous administration of a lethal quantity of an ***ultrashort-acting barbiturate*** in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.

22 O.S.2001, § 1014 (A) (emphasis added).

Matthews argues using pentobarbital as the barbiturate drug in the execution process violates Oklahoma's statute prescribing the manner of executing a death sentence because pentobarbital is an intermediate-acting barbiturate rather than an ultrashort-acting barbiturate.[9] Matthews raised this claim in summary fashion in federal court. *See Pavatt, et al. v. Jones, et al.*, No. 10-6268 (10th Cir.2010)(unpublished). Matthews presented no evidence, and few legal authorities, in support of the claim. *Id.* The federal district court

[9] The classification of "ultra-short" or "intermediate" refers to the duration the patient is unconscious or sedated rather than the length of time it takes the barbiturate to take effect.

summarily rejected the claim as meritless at a preliminary injunction hearing, and did not expressly address it in its subsequent written order memorializing its oral rulings. *Id.* In rejecting Matthews' claim that he has a protected "state-created life interest" in being executed in accordance with the precise protocol set forth in § 1014 (A), the Tenth Circuit noted that, though not entirely clear, the term "ultrashort-acting" barbiturate in Oklahoma's statute (22 O.S.2001, § 1014 (A)) appears to be used "in a different sense, to refer to how quickly the barbiturate takes effect." *Id.* n. 2. That court, however, made no ruling on the claim before us.

Prior to the execution of John David Duty on December 16, 2010, the Oklahoma Department of Corrections (ODOC) had used sodium thiopental as the ultrashort-acting barbiturate in all executions since the legislature enacted § 1014 (A) in 1977. In recent times, however, ODOC has been unable to obtain sodium thiopental and, in response, has changed its lethal injection protocol to allow for the use of pentobarbital in the event there is an insufficient quantity of sodium thiopental. *See* Respondent's Exhibit G "Revised ODOC Execution Protocol" OSP-040301-01 p. 15 (effective October 21, 2010). According to Matthews, ODOC intends to use pentobarbital in his execution.[10]

[10] The State argues Matthews has known that ODOC intended to use pentobarbital since September 2010 and that this claim is barred by this Court's sixty day rule. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2010). This Court set Matthews' current execution date on December 14, 2010 after two reprieves from the governor and the dissolution of a stay granted by the United States District Court for the Western District of Oklahoma. This Court has not yet had the opportunity to rule on this issue. If Matthews' claim is correct, then his legal sentence will be carried out in an illegal manner.

We are called upon to interpret the phrase "ultrashort-acting barbiturate" in 22 O.S.2001, § 1014 (A). Our task in construing a statute is to determine and give effect to the intent of the Legislature as expressed in the statute. *Head v. State*, 2006 OK CR 44, ¶ 13, 146 P.3d 1141, 1145. To determine the intent of a legislative enactment, we look, at among other things, to the evils and mischief to be remedied and consider the consequences of any particular interpretation. *Id.* "Where construction of a statute produces anomalous or absurd results, we must presume that such consequences were not intended and adopt a reasonable construction that avoids the absurdity." *Id.*

In considering the issue, we have reviewed the deposition testimony of the State's expert, Mark Dershwitz, M.D., Ph.D., presented in the federal civil rights lawsuit challenging Oklahoma's lethal injection protocol on Eighth Amendment grounds.[11] *See Pavatt, et al. v. Jones, et al.*, No. CIV-10-141-F, *supra*. His testimony shows that there is little practical difference between sodium thiopental and pentobarbital in the execution process. Pentobarbital is a longer lasting anesthetic than sodium thiopental. It reasonably follows that using a barbiturate with a longer duration would do no further harm to the condemned individual and would mitigate any concern the individual would

---

Given the nature of this claim, we address it on the merits. *See Malicoat v. State*, 2006 OK CR 25, ¶ 3, 137 P.3d 1234, 1235.

[11] Dr. Dershwitz is a medical doctor, a professor of anesthesiology at the University of Massachusetts and a board certified practicing anesthesiologist who holds a Ph.D. in pharmacology.

regain consciousness and suffer pain as the other two drugs are administered. Both pentobarbital and sodium thiopental cause rapid unconsciousness and both are lethal in the dosage specified by Oklahoma's lethal injection protocol. Furthermore, there is practically no difference in the time required for these drugs to take effect.

Death by lethal injection prescribed in § 1014 (A) is designed to kill the individual. Using either barbiturate—pentobarbital or sodium thiopental—results in the rapid onset of unconsciousness followed by swift death.[12] Both barbiturates are ultrashort-acting insofar as the onset of sedation with either is rapid. The law requires the use of "an ultrashort-acting barbiturate" so that the condemned person will be executed as quickly and painlessly as possible. The intent of § 1014 is to ensure that the individual is unconscious before the potentially painful drugs (vecuronium bromide and the potassium chloride) are administered. The obvious purpose of § 1014 is to ensure that the onset of unconsciousness is quick and that the individual does not suffer during the execution process. The purpose and intent behind the statute lead us to conclude that the legislature did not use the term "ultrashort-acting" barbiturate in its clinical or kinetics sense, but rather to refer to how quickly the barbiturate takes effect to render the individual unconscious. To interpret § 1014 in such a way that requires the use of an anesthetic designed to render

[12] Oklahoma requires a minimum five minute delay between the administration of the barbiturate and the other drugs during which time a licensed physician monitors the inmate's

an individual unconscious for only a short period of time, as in a clinical setting, would be absurd and contrary to the obvious objective of the statute. The expert testimony from the recent federal proceeding shows that pentobarbital is an ultrashort-acting barbiturate in the onset of sedation. As the Tenth Circuit noted, the district court's findings—that the individual will not be sentient for more than a very short time following the intravenous injection of 5,000 milligrams of pentobarbital—is well supported by the evidence.[13] We find on this record that the use of the barbiturate pentobarbital in Oklahoma's execution protocol does not violate 22 O.S.2001, § 1014 (A). This claim is denied.

CONCLUSION

After carefully reviewing Matthews' third application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Matthews' third application for post-conviction relief is **DENIED**. Further, his motions for an evidentiary hearing and for an emergency stay of execution are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

---

level of consciousness to ensure that the condemned is sufficiently unconscious prior to the administration of the second drug (vecuronium bromide).

[13] According to the warden who supervised John David Duty's execution on December 16, 2010, Duty received the prescribed dosage of pentobarbital and appeared to expire within approximately three minutes. He was pronounced dead by the attending physician before the vecuronium bromide and potassium chloride could be administered. The warden perceived no difference with Duty's execution as compared to those where sodium thiopental was used. *See* Respondent's Exhibit G.

ATTORNEYS ON APPEAL

JAMES A. DRUMMOND
ATTORNEY AT LAW
JIM DRUMMOND LAW FIRM, PLC
220 ½ EAST MAIN ST., SUITE 2
NORMAN, OK 73069-1350
ATTORNEY FOR PETITIONER

W. A. DREW EDMONDSON
OKLAHOMA ATTORNEY GENERAL
SETH S. BRANHAM
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur
SMITH, J.: Concur in Part, Dissent in Part

LUMPKIN, JUDGE: CONCURRING IN RESULT

I concur in the results reached in this case but write separately to address the same concerns I raised in *Valdez v. State*, 2002 OK CR 20, ¶ 1, 46 P.3d 703, 711 (Lumpkin, P.J., concurring in part/dissenting in part) and *Malicoat v. State*, 2006 OK CR 25, ¶ 1, 137 P.3d 1234, 1239 (Lumpkin, V.P.J., concurring in part/dissenting in part). Appellant's claims are waived as he cannot show the claims could not have been presented to this Court previously.

In analyzing Petitioner's claim of newly discovered evidence the Court determines that: "[b]ecause we find no miscarriage of justice here, we decline to exercise our inherent power to override all procedural bars and grant relief." This broad statement is not supported by our Rules or precedent.

This Court has repeatedly stated that Oklahoma's Post-Conviction Procedure Act is not an opportunity to raise new issues, resubmit claims already adjudicated, or assert claims that could have been raised on direct appeal or the original application for post conviction relief. *Rojem v. State*, 1996 OK CR 47, ¶ 6, 925 P.2d 70, 72-73; *Moore v. State*, 1995 OK CR 12, ¶ 4, 889 P.2d 1253, 1255-56. This is a statutory requirement of the Post Conviction Procedure Act. 22 O.S.Supp.2006, § 1089. Further, it is a requirement of Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010). The legal doctrines of waiver and *res judicata* have been developed through the ages to ensure finality of judgments. *Valdez*,

2002 OK CR 20, ¶¶ 5-6, 46 P.3d at 712 (Lumpkin, P.J., concurring in part/dissenting in part). By disregarding binding authority, in order to assist a defendant in litigating issues already decided or waived, this Court disregards the concept of the Rule of Law. *Id.* Failure to adhere to statutory requirements, as well as this Court's own Rules, creates inconsistency and brings into question the validity of the Court's opinions. *Malicoat*, 2006 OK CR 25, ¶ 1, 137 P.3d at 1239 (Lumpkin, V.P.J., concurring in part/dissenting in part). "Either the doctrines of waiver and res judicata apply to all or the doctrines are eviscerated." *Valdez*, 2002 OK CR 20, ¶ 7 n. 3, 46 P.3d at 712 n. 3 (Lumpkin, P.J., concurring in part/dissenting in part).

In the present case, the basis for Bobby Ray Matthews' affidavit has been available since the date of the crime. He attests that the surviving victim provided him with the information at the hospital within hours of the murder. As the current claim could have been presented previously in the direct appeal or previously considered post conviction applications, the issue has been waived.

Additionally, the Court reviews the merits of Petitioner's claim that the use of pentobarbital violates Oklahoma's statute prescribing the manner of executing a death sentence "[g]iven the nature of this claim." Rule 9.7(G)(3) requires that "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." Neither the Post Conviction Procedure Act

nor our Rules provide for an exception "given the nature of the claim." 22 O.S.Supp.2006, §§ 1080-1089. The materials presented clearly reveal that Petitioner knew of the factual basis serving as the basis for this claim more than sixty (60) days before the filing of the present application. As such, Petitioner waived the claim and the Court is prohibited from reviewing the merits of Petitioner's claim.

This Court should adhere to Rule 9.7, the statutory requirements of 22 O.S.Supp.2006, § 1089 and consistently apply the doctrines of waiver and *res judicata* to all post conviction applications.

SMITH, J., CONCURS IN PART/DISSENTS IN PART:

I concur in the decision that the use of the barbiturate pentobarbital in Oklahoma's execution protocol does not violate 22 O.S.2001 § 1014(A).

However, I dissent to the denial of the Motion for Evidentiary Hearing and Emergency Request for Stay of Execution. Matthews should be granted an evidentiary hearing on the affidavit of Bobby Ray Matthews.

OKLAHOMA COUNTY
CRISIS INTERVENTION CENTER

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLAHOMA
JUL 17 1997
PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

July 1, 1997

THE HONORABLE JUDGE Richard Freeman
Oklahoma County District Court
321 West Park Avenue
Oklahoma City, OK. 73102

RE: Justin B. Sneed
Case No: CF-97-0244

Dear Judge: Richard Freeman

Enclosed, please find the Psychiatric Evaluation for the Determination of Competency to Stand Trial on.

Respectfully submitted,

Edith B. King, Ph.D.

Edith King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern L. Smith , Assistant District Attorney
George Miskovsky III, Assistant Public Defender

EXHIBIT
tabbies B

DETERMINATION OF COMPETENCY TO STAND TRIAL
PSYCHIATRIC EVALUATION

DATE: July 1, 1997

RE: Justin B. Sneed
CF: 97-0244

By order of the Oklahoma County District Court, Judge Richard Freeman, under Oklahoma Statute Section 1175.3 dated April 22, 1997 and received in this office April 24, 1997. Justin B. Sneed was examined at the Oklahoma County Jail July 1, 1997.

The following statutory questions are responded to accordingly, and a more detailed psychiatric summary is attached.

1. Is this person able to appreciate the nature of the charges against him or her?

Yes. Mr. Sneed said he is in jail on a "Murder I" charge which he said is "for killing somebody." He explained "If I'm found guilty it means the death penalty." He also said "It (Murder I) carries life, life without parole, or death." Asked about his options, he said "after what I've said to some people going home is probably not possible." He indicated that the alleged crime was in connection with a burglary but that he does not carry a charge of burglary. His history includes some "hot checks" in Texas but, he said, "that doesn't matter."

2. Is this person able to consult with his or her lawyer and rationally assist in the preparation of his or her defense?

Yes. Mr. Sneed correctly identified his lawyer by name and said he has seen him one time. He also identified an investigator he has talked to. He said he has also been assigned another lawyer in addition to the first. In his appraisal, he said his only hope to get out of the death penalty is to plead guilty. He also said that if his only possibility is either life without parole or death he would not plead guilty, since he does not want to spend the rest of his life in prison. He explained that if he received life without parole he would get tired of it --- it would be depressing, with no sunlight and no air. He understands other terms such as probation, and said he had a year's probation as a juvenile for burglary of a house and a bomb threat. He is very aware of how limited his options are at this point.

3. If the answer to question 1 or 2 is "no", can the person attain competency within a reasonable time if provided with a course of treatment, therapy or training?

N/A.

4. Is the person a mentally ill person or a person requiring treatment as defined by Oklahoma Statute Title 43A, Section 3?

Yes. Mr. Sneed denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling. He was apparently married and said his wife used to tell him she thought he had "problems." She thought he had trouble "paying attention" and may have had ADHD (Attention Deficit Hyperactivity Disorder). He admits to using a variety of drugs including marijuana, crank, cocaine, and acid. He said he drank alcohol for one summer but didn't like it.

He is currently taking lithium at the jail and said it was administered after his tooth was pulled. He was not on lithium before coming to the jail and was started on it in March. He does not think he has any serious mental problems although he said he has "deja vu" sometimes. When he first came to the jail he said he had a strong feeling the pod was familiar. He now has this sensation once or twice a month. The lithium helps him "not to feel so angry" and he used to get angry quite often. He said he used to "yell at teachers and reject everyone and get into fights." It sounds as if he may well have had ADDHD and mood instability which lithium may help. He denies auditory or visual hallucinations but said he sometimes gets a ringing in his ears.

At this time Mr. Sneed gives an impression of being depressed to a moderate degree. He is able to communicate quite well for the most part, but his affect is flat and sad. Medication is probably helpful.

5. If the person were released without treatment, therapy, or training, would he or she pose a significant threat to the life or safety of himself/herself or others?

Yes. This is answered in the affirmative only because he has a violent history, a history of polysubstance abuse, and is facing charges on a violent crime. He does not give an impression of being a violent person. He was calm and quiet and cooperative. He answered questions fully and did not seem to conceal anything. He was not at all threatening in manner.

Summary of Psychiatric Examination

Justin B. Sneed is a 19 year old Caucasian male who was born on September 22, 1977. He stated that he was born in New Mexico and lived in both Texas and Oklahoma after that. He lived with his mother and stepfather because his parents divorced when he was four and she remarried. He has one stepbrother and one full brother. He has two sisters. He said he was the "baby" until recently when his mother had a baby.

He said he was kicked out of school in the 8th grade for fighting other students and teachers. He was described as "a trouble maker."

He was married when he was 17 years old to a girl he had been with from the age of 16. She became pregnant and they are still married but separated. He and his wife have two daughters who are with his mother.

Mr. Sneed said he used to "reject authority" and grew up as a boy who often got into trouble. He had "plenty of spankings" and was especially hateful toward his stepfather. He said he and his mother have always gotten along "just great" and his wife referred to him as a "momma's boy."

It may well be that Mr. Sneed has had an atypical mood swing disorder in his past characterized by "ups and downs" including anger outburst. His hyperactivity would be consistent with that picture. His present medication is probably helping him control his moods.

Mr. Sneed is able to assist an attorney and communicate satisfactorily regarding his legal situation. He is in touch with reality and positive in his attitude toward his lawyers. It is recommended that he be considered competent to stand trial.

Edith G. King, Ph.D.

Edith G. King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern L. Smith, Assistant District Attorney
George Miskovsky III, Assistant Public Defender

DEATH PENALTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

The State of Oklahoma,)

Plaintiff.)

D-04-877

vs. CF 97- 0244

~~F-98-548~~

Richard Glossip,)

Defendant.)

Proceedings had April the 22nd, 1997

Before Judge Charles Humble

A P P E A R A N C E S

FOR THE STATE: Ms. Fern Smith, Assistant District Attorney, Oklahoma County Courthouse, Oklahoma City, Oklahoma 73102.

FOR THE DEFENDANT: Mr. Wayne M. Fournerat, Attorney at Law, 2525 N.W. Expressway, Suite 330, Oklahoma City, Oklahoma 73112.

REPORTED BY: Ken Sharpe, Certified Shorthand Reporter

second interview?

A Well, there are some things that preceded this interview. Mainly, we had asked Mr. Glossip if he would take a polygraph examination during the first interview, which he readily agreed to. He said he'd do anything he could to help out. We were advised later that evening that Mr. Glossip was selling some of his items that he owned and was trying to get money and was packing his things, planning on leaving town. At that point my partner and I decided to call in a couple of investigators that were working in a special unit there in which to watch Mr. Glossip the following morning. They drove to the motel and set up out there approximately 8:00 a.m. and observed his movements and then advised us that he was heading downtown.

Mr. Glossip had been scheduled to take the polygraph at 1:30 and was asked to be at the police department by 12:30. When he drove past the police department, continuing downtown, he drove to an office building, I think it was 228 Robert S. Kerr, where he made contact with an attorney by the name of Mr. McKinsey. A short while later, approximately 1:00 p.m., I believe, my partner received a call from Mr. McKinsey, who advised us that, Mr. Glossip was in his office and that he'd advised him not to take the polygraph examination and that he was not going to take it.

At that time we had no more conversation with the attorney, and it was reported to us that Mr. Glossip and his girlfriend were leaving the building and getting in their vehicle. At that time we asked the officers, Mauck and Creeth, if they would stop him and ask him if he would come over to the police department to talk with us, which he agreed to do.

At that time he informed us that he was not going to -- he'd been advised by his attorney not to take this polygraph examination and that he wasn't going to take it at that time. We left him in the interview room momentarily while we discussed what our next course of action was going to be, and because of the fact that we were concerned that Mr. Glossip was getting ready to leave town, we decided that we had enough probable cause to place him in jail.

He had made several conflicting statements to officers and other individuals at the crime scene and to us that clearly indicated that he was a possible principal in this homicide. We drew up a probable cause affidavit and our lieutenant signed it and we were escorting him to the jail when he stopped us and wanted to talk.

At this point we told him there was nothing else to talk about, that he was going to be placed in jail, and he said, "You're putting me in jail because I won't take a polygraph?" And I told him, "No, we're putting you in jail

because we think you're involved in this homicide."

And at that point he says, "Wait a minute," he says, "I'll take this polygraph." And I said, "Well, we can't give that to you. The time has passed." I said, "You have an attorney over there." And he said, "Well, I didn't hire that attorney. I didn't pay that attorney any money. That attorney is not representing me. I wanted to take the polygraph all along, and that's what I want to do now if we can do it."

We reiterate to him, "Are you sure you want to do this?" Mr. Glossip advised that he did if we could still get it, so we then escorted him back over to the homicide office, at which time I called our polygraph operator and asked him if we could still give the examination to Mr. Glossip, and he said that he could still do it and to bring him over, which we did.

At that time Mr. Glossip was given a polygraph, and after about an hour or two, we were called back over there and advised by our polygraph examiner that Mr. Glossip had failed his polygraph examination.

Q Okay. Were there certain specific questions that he had failed on the examination?

A Yes, ma'am. If I may refer to my report. There's so many different things. We were advised by Warren Powers, who is the polygraph examiner, that three questions that

Mr. Glossip did not do well on was, number one, "Did you plan or conspire with Justin Taylor to cause the death of Barry Vantrees?" The number two question was, "Do you know for sure who caused the death of Barry Vantrees?" And number three, "Did you, yourself, cause the death of Barry Vantrees?" Mr. Powers advised Mr. Cook and myself that on questions one and two, that Glossip failed those badly. He said on question three, that he -- on the first chart that was run, he flunked it. On the second chart, he didn't do badly, but on the third chart, he failed it completely. These questions were not necessarily given in the order that I presented them to you, but they were part of the control questions that were asked.

Q As a result of that, did you then have a second interview with the defendant?

A Yes, we did.

Q Did you inform him at the time you were conducting the interviews that he had in fact failed the polygraph and the questions that he had failed?

A Yes, we did.

Q What did the defendant then tell you concerning the murder of Mr. Barry Vantrees?

A The defendant was extremely nervous, as he was in the first interview, and said that he was sorry that he had lied to us during the first interview. Basically he said, "I

Two truths and a lie: What records, interviews reveal about Richard Glossip's murder conviction

By CARY ASPINWALL | SEPTEMBER 13, 2015 | LAW + ORDER, LONGREADS, WATCHDOG

As Richard Glossip faces execution on Wednesday, what do court records and his own words reveal about his case? Plus, his accomplice, Justin Sneed, speaks exclusively to The Frontier.

This story was written as part of The Next To Die, a multi-newsroom collaboration tracking upcoming executions. To see scheduled executions nationwide, please visit https://www.themarshallproject.org/next-to-die

The Next to Die
WATCHING DEATH ROW

Richard Glossip is scheduled to be executed by the state of Oklahoma in **2 days 2 hours and 31 minutes.**

RECENT STORIES

Two truths and a lie: What records, interviews reveal about Richard Glossip's murder conviction
20 hours ago

Kaiser Foundation: Gathering Place project not 'out of control'
3 days ago

Audit finds almost half of TCSO reserve deputy force had deficient files
4 days ago

The Frontier joins national execution reporting project
4 days ago

Stuart Price calls Shock majority owner 'morally delinquent'
2 weeks ago

EXHIBIT tabbies 2

It was Jan. 8, 1997, and Oklahoma City police had discovered motel owner Barry Van Treese's beaten, lifeless body inside room 102 at the Best Budget Inn.

INVESTIGATIONS

They suspected his killer was the maintenance man, Justin Sneed, who suddenly disappeared from the motel. Police were trying to find Sneed and solve the homicide, so they were questioning the motel's manager, Richard Glossip.

Police had read Glossip his Miranda warning, but he was not exercising his right to remain silent. He was talking — a lot. And investigators suspected he wasn't telling the truth.

The Best Budget Inn on the night Barry Van Treese was murdered.

A detective hounded Glossip: "We know it's a murder, okay? We know Justin's involved in it. And I think you know more about this than what you're telling."

"Honestly don't," Glossip replied.

We're going to find Justin, the detective replied, so you better tell us now what you know.

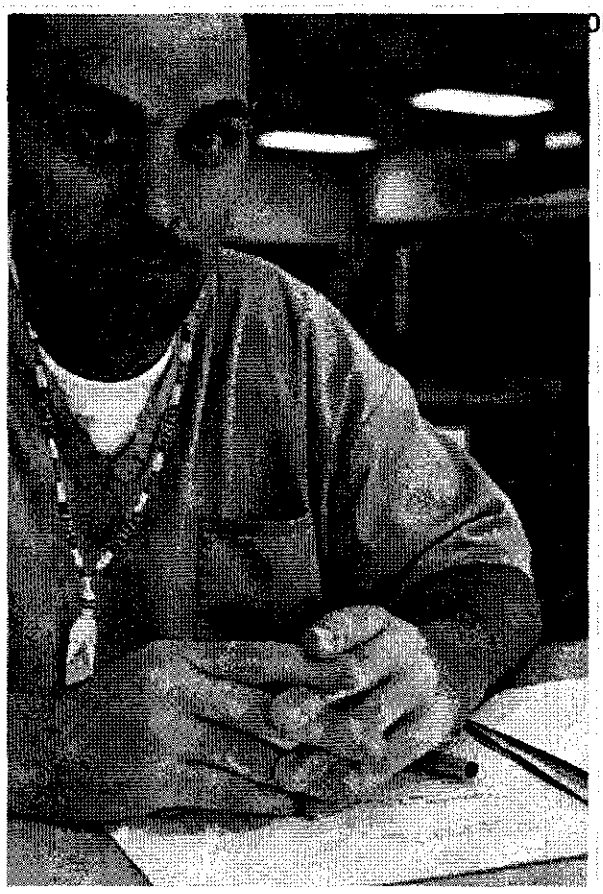
If he brings your name up in this thing, you're going down for first-degree murder, warned the cop.

Glossip replied he hoped police would find Sneed: "I didn't do none of this."

The detective responded: "I'm going to tell you right now, the first one that comes forward is the one that's going to be helping himself. ... If you didn't do the actual deed, buddy, then you don't have anything to worry about."

"I told you, and this is the God's honest truth, I had a hunch that Justin did it, and that's as far as it went. I do not know one hundred percent."

But that was a lie.



Justin Sneed agreed to recent interview at his prison to affirm he stands by what he said at trial: Richard Glossip gave him money to kill their boss in 1997. CARY ASPINWALL/The Frontier

The other guy's story

Justin Sneed has already taken one life, but he says he's not the one who can save Richard Glossip from the execution chamber on Wednesday.

"I stood on my truth," he told The Frontier in an exclusive interview. "I'm just trying to be an honest person."

Both men were convicted for the 1997 murder of Van Treese, but only one was sentenced to death.

Two separate juries convicted Glossip of paying Sneed, his young employee and friend, to kill their boss, splitting a few thousand dollars they found in Van Treese's car.

For decades, Glossip has fought a vigorous court battle against his conviction and argued he is innocent. His only mistake was helping cover up the crime, Glossip argues.

Since his arrest, Sneed has never denied his role in fatally beating Van Treese with a baseball bat. He received a life-without-parole sentence in exchange for testifying against Glossip.

While the public battle waged by Glossip's supporters has played out on the Dr. Phil show and in the National Enquirer, Sneed has remained mostly silent.

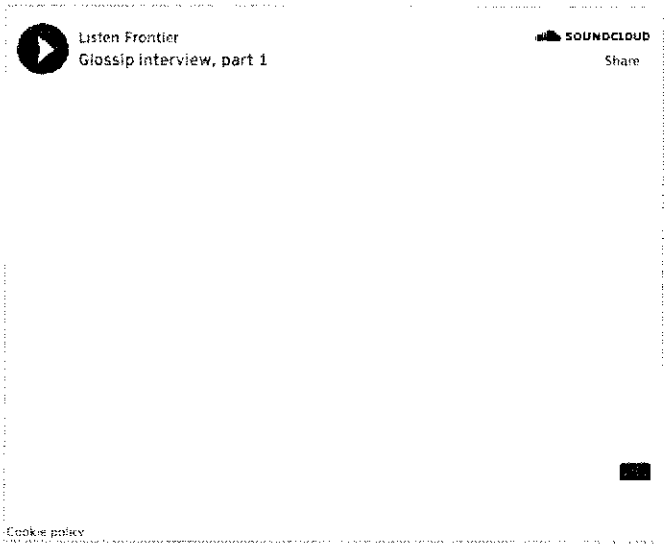
Until now.

Sneed, 37, agreed to an interview with The Frontier at Joseph Harp Correctional Center earlier this month, to address some of the claims that have been made about the case.

The Frontier also reviewed hundreds of pages of case files available at the Oklahoma Court of Criminal Appeals, in an attempt to answer public questions about Glossip's conviction as his execution date approaches.

Court testimony and police records document the reasons Glossip first became a suspect and was charged with first-degree murder in the killing, including the transcripts of his own 1997 interviews with police as they investigated the homicide.

"There has never, ever been any evidence against me," Glossip told The Frontier in a July phone interview from death row at Oklahoma State Penitentiary. "Because of a couple bad decisions I made that day, I'm here today."



'Light most favorable'

Justin Sneed is behind bars for the rest of his life; but plenty of people have been talking about him lately, guessing what they think he really wants to say or calling him an outright liar.

Glossip's legal team **issued a press release Friday:** "New counsel for Mr. Glossip have just uncovered additional evidence that Mr. Sneed lied to save his own life."

Monday morning, Glossip's attorneys have a press conference scheduled to discuss what they say is new evidence they've uncovered.

On Sept. 3, Glossip's supporters held a press conference where the anti-death penalty activist and nun **Sister Helen Prejean announced** more than 270,000 people had signed a petition supporting clemency for Glossip.

The day before, she also made a trip to the prison in Lexington to visit Sneed. But in front of the cameras the following day, Prejean didn't mention her conversation with Sneed. Nor have Glossip's attorneys mentioned in numerous press conferences what Sneed insists he has repeatedly told them: He told the truth at trial.

It was Glossip who paid him to kill Barry Van Treese, Sneed said, for a pool of money they would split. The amount changed depending on when Glossip was talking about it — at one point, it was $10,000, Sneed told investigators.

They were each caught with slightly less than $2,000.

When Glossip's final conviction was upheld by **a 2007 decision of the Oklahoma Court of Criminal Appeals,** the opinion stated: "The most compelling corroborative evidence, in a light most favorable to the State, is the discovery of the money in Glossip's possession.

There was no evidence that Sneed had independent knowledge of the money under the seat of the car. Glossip's actions after the murder also shed light on his guilt."

To understand what happened in 1997, Sneed said people need to know he was a 19-year-old who was abandoned by his older stepbrother at the motel Glossip managed.

No money, no job, no education. He had dropped out of school in the eighth grade. He worked with a roofing crew on occasion and did handyman repairs at the motel for room and board. He admits he was a drug user.

He grew up without his father, and always had an attachment to older male authority figures. His brother filled the role for a while, then Glossip.

"I can see now how cocky and manipulative he was," Sneed said.

When questioned by police in 1997, Glossip told detectives that he bought Sneed's meals and cigarettes and considered him his best friend. They played Nintendo together.

Sneed is not a smooth talker like Glossip, and comes across much as investigators described him in reports on the case: meek, quiet.

Sneed said his initial reluctance to testify against his former friend has been misinterpreted. It's not because he's lying, he told The Frontier. He was reluctant because he knew the state was seeking the death penalty against Glossip and he didn't want to be a part of that.

Glossip's supporters want Sneed to change his story to help postpone the execution, Sneed said.

Sneed's family members have told The Frontier that a letter that Glossip's supporters have claimed was written by Sneed's daughter was authored on her behalf by a group of supporters taking advantage of his then-teenage daughter's lack of knowledge about the case.

The letter alleges that Sneed has regrets about his testimony, and wants to recant.

Sneed said he can't say for sure that his daughter was manipulated, but she was uninformed about the crime.

O'Ryan Sneed grew up without her father, and her family spared her the gruesome details about his role in Van Treese's death, he said.

"I do not want to mislead or misguide my daughter. Even if I have to sacrifice myself, she deserves to know the truth," Justin Sneed said.

For nearly a year after the letter surfaced, O'Ryan Sneed has not responded to media requests for interviews or to verify that letter's authenticity.

Justin Sneed said he's had people ask him why he won't just change his story and say that Glossip is innocent, to spare him his death sentence. He's taken responsibility for his role in the murder and doesn't want to cause the Van Treese family any more pain, he explained.

Sneed said he's also struggled with watching the case unfold publicly, amid the uncertainty of a Supreme Court challenge that Oklahoma's death row inmates ultimately lost **this past June.** Glossip was the lead plaintiff **in the case.**

But the Supreme Court's vote to uphold Oklahoma's use of lethal injection was 5-4. It could have gone the other way with a single vote; Sneed said he wonders if it's a sign of what's coming for the death penalty.

"I thought it would be morally wrong for the state to execute him and then two years later, they do away with the death penalty," he said.

But he told The Frontier he stands by what he said under oath at two trials.

"Everybody's made the choices they've made."

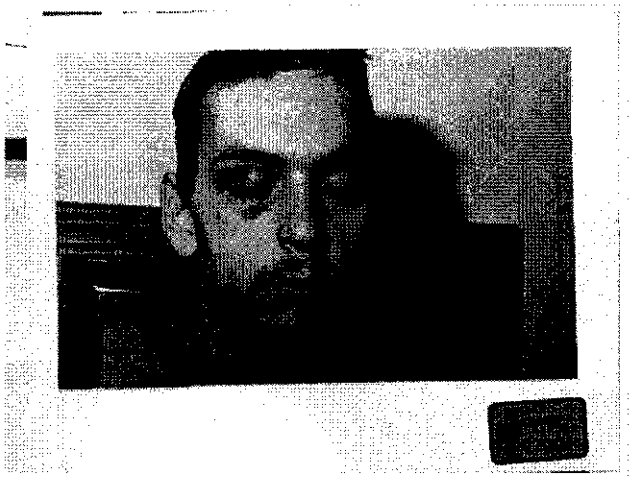
Glossip's own words

There are two transcripts of Glossip's interrogations by Oklahoma City police in the days after Van Treese's body was found, and one video, in rather poor condition.

At no time did Glossip exercise his right to remain silent, which in hindsight, may not have been the smartest choice.

Glossip told police that he and his girlfriend, D'Anna Wood, heard a tapping at the door early in the morning Jan. 7, 1997, and he

opened the door to find his friend Justin with a black eye: "It looked like somebody punched him."



Justin Sneed's black eye from the struggle with Barry Van Treese, from court exhibits.

Glossip told police that Sneed claimed he slipped and hit his head in the shower, on a soap dish. (Sneed later told police that was the story Glossip told him to tell about his black eye.)

This was Glossip's initial account to police of what happened: Sneed told him that a bunch of drunks got wild and out of hand and they broke the glass in room 102. He'd run the drunks off, and Glossip told him to put up some plexiglass.

And Sneed fixed it that morning, Glossip told police.

The transcripts show police growing more suspicious as Glossip continues over-explaining everything: "See this thing is, really, it got out of hand before I even got there."

After a while, Glossip starts to hint that Sneed may be involved. Then he starts to get defensive: "But I swear to you, I had nothing to do with this shit, I was at home in bed with my girlfriend, you can ask her."

At this point, according to the transcript, the detectives have not yet asked Glossip if he was involved. They can barely get in questions, he is so chatty.

The police don't know where Sneed is at this point, and are hoping Glossip can help them find him.

"Well he started hanging out with some pretty bad people that I started running out of the motel. My brother's one of them."

Glossip's brother, Bobby Glossip, had an extensive criminal record and his name has since been mentioned by Richard Glossip's attorneys as someone who might have played a [illegible] several years ago.

Detectives respond: "Well tell us a little about Justin now."
Glossip starts to offer: "Justin and his brother..."

The cops interrupt, wanting specific details about Justin.
Detectives: "How old of a person is he?"
Glossip: "He's nineteen or twenty, and that's another thing I kind of hesitated on. Because I, I just don't see him doing it, I mean, I do and I don't."

In fact, Glossip knows at this point that Sneed was the one who did it. But he doesn't admit that to police until a separate interrogation the following day.

Instead, he says Van Treese "told me when I got out of bed this morning to call the carpet guy." They were supposed to start working on remodeling that day, Glossip told police.

Investigators later alleged that Glossip only called the "carpet guy" to replace the flooring on which his boss bled to death.

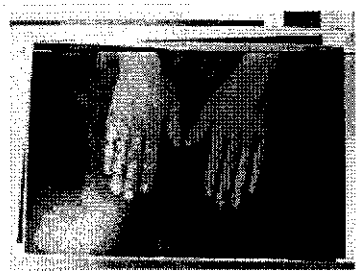
Glossip also told police about how much in deposits Van Treese took from the motel that night: "I would say thirty six hundred to four thousand, something like that."

What the witnesses said

There is very little, if any, physical evidence linking Glossip to the crime.

But then again, isn't that the point of murder for hire? You pay someone else to get his hands dirty.

Included in the four boxes sitting in the basement of the Oklahoma Court of Criminal Appeals are photos that were presented as exhibits at the two trials. One is of Sneed's hands, nicked from the beating of Van Treese, fingernails dirty.



Justin Sneed's hands, photographed by Oklahoma City police.

Supporters of Glossip have said it was Sneed who first pointed the finger at his former boss and friend.

But police reports and transcripts of interviews show police very quickly became suspicious of Glossip's possible involvement. Their suspicion was based on his behavior at the crime scene and in the days that followed, in conjunction with what others at the scene observed about his behavior.

Police caught Glossip in several lies, and he didn't tell anyone that he knew exactly where Van Treese's body was while people were searching.

After Sneed told him Van Treese was dead, Glossip went back to sleep. Then he got up and bought his girlfriend, D'Anna Wood, a $100 engagement ring and himself some pricey eyeglasses. After his first interrogation by police, he began selling his possessions.

Police asked him where Sneed was hiding: "Where the hell do you think he went, man?"

Glossip responded: "He's here. He couldn't have went nowhere. He ain't got nowhere to go."

Glossip has said lying to the police immediately after Van Treese was found slain was his biggest mistake. He hasn't explained why he lied to his co-workers.

Glossip not only lied to police when he said two drunks had stayed in room 102 and broken the window, he told the same lie to the motel's desk clerk, Billye Hooper, and Cliff Everhart, a friend of Van Treese's who worked security for him.

Despite some current claims that Sneed was the state's only witness, it was the testimony of Hooper and Everhart at trial that probably nailed Glossip. Hooper died in 2009, and Everhart died in 2005, records show.

At Glossip's second trial in 2004, Hooper testified she became suspicious of Glossip because his behavior on the day of Van Treese's killing was so different than usual.

The night before their boss was found slain, Glossip had asked Hooper to stop by the cable company on her way to work because the cable bill hadn't been paid.

"He wanted to get it turned on before Barry came back and found out that it had been disconnected," Hooper testified.

She paid with her personal money and Glossip reimbursed her with cash when she came to work the next morning. But she didn't see Van Treese's car when she arrived. So she asked Glossip where their boss was.

Glossip told her that Van Treese gotten up early to go get some breakfast and get some materials to work on the motel. Hooper said she thought that was odd: She'd never known Barry to be an early riser.

Something else raised her suspicion: Glossip told her not to have housekeeping clean room 102, because Barry "had rented the room to a couple of drunks and they had busted out a

She testified that she laughed at that claim and replied: "Well if he rented 102 to a couple of drunks, he must have rented it for a couple of hundred dollars as well because he would not have rented 102."

Room 102 was different: It was the nicest room at the motel, it had a waterbed and stereo. Van Treese usually stayed there.

Glossip seemed nervous, she testified.

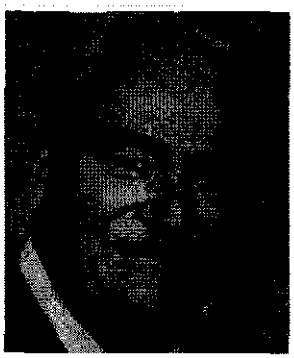
Hours later, Hooper was the one who paged Everhart to tell him Van Treese's car had been found, abandoned in the parking lot of a nearby credit union.

Everhart showed up to search the property for Van Treese, and Glossip told him two or three different stories about when he'd last seen the boss, Everhart testified at trial.

Everhart told the court Glossip had already tried to offer an explanation at the scene: "Maybe the people in the upstairs room were involved in something about why Barry is gone."

People in one of the rooms on the second floor had suddenly taken off and left their stuff behind, Glossip told him.

It was Everhart who found Van Treese's body in room 102, with the broken window. He spotted his friend's wristwatch, broken, laying near his dead body.



Barry Van Treese

Everhart told a police officer who'd arrived at the scene to go find Glossip, because he was too angry.

"Because at that point in time, I felt like if Richard Glossip had not done the crime, he had knowledge and was involved, and my temper was rather hot," Everhart testified.

Everhart and Hooper both also testified that Sneed was Glossip's puppet, and did whatever his friend asked.

The money man

"Why do I need Barry's money? I got my own damn money?" Glossip told the police who were interrogating him. He was found with $1,700 in his possession when cops arrested him.
A detective accuses him of "double talking" everything, and reminds him that when they find Sneed, it will be worse for Glossip if they find out from Sneed that his boss/friend was involved.
"If he puts you back in this, you got some serious problems," the detective warns.
"Then we'll go to court," Glossip responds.

Van Treese had hired Glossip in 1995 to manage the motel, along with his girlfriend, D'Anna Wood.

Wood was only 22 or 23 at the time, and used to tell the desk clerk Billye Hooper that "Rich" had promised her by the time she was 25, she would have an engagement ring, a Camaro, a boob job and a baby.

In fact, in the hours between when Sneed told Glossip he killed Van Treese and police found the body, Glossip bought Wood an engagement ring for about $100, according to trial records.

Everhart worked security for Van Treese in exchange for a small cut of the motel chain's profits. He had previously helped build an embezzlement case against another employee at the Weatherford motel Van Treese also owned.

Hooper had brought some suspicious behavior of Glossip's to the attention of Everhart and Van Treese, he testified.

"I felt that Mr. Glossip was probably pocketing a couple hundred a week extra," Everhart testified.

Everhart was supposed to meet Van Treese at the Best Budget Inn on Jan. 6, 1997, "to confront Rich and discuss the problems with him."

The confrontation never happened, Everhart testified.

In recent interviews, Glossip has tried to claim Hooper testified against him because she may have been the one taking money. It's not the first time he or his former girlfriend have tried to claim that.

Hooper was asked about these claims, and she testified under oath at trial that she never stole any money from the Best Budget Inn.

Had she needed money, she simply would have asked Van Treese, a generous man who "would have helped anyone."

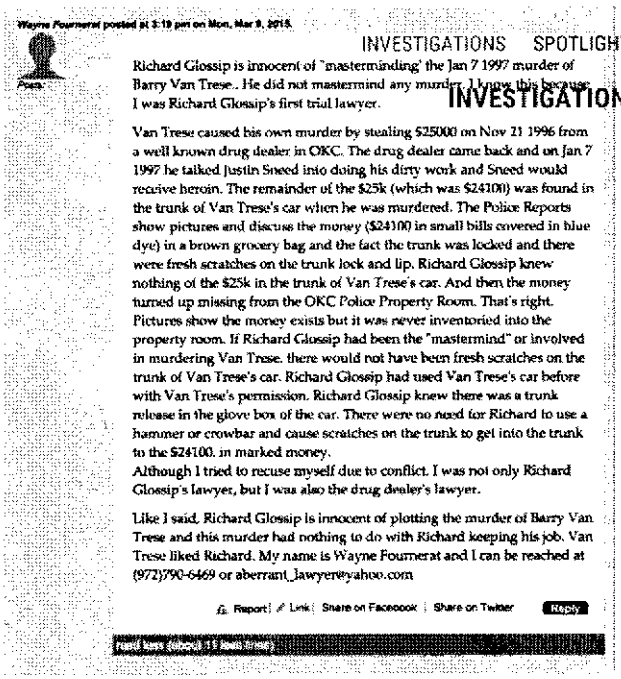
Alternate theories

Wayne Fournerat, Glossip's first trial attorney, has been trying to tell anyone who will listen: Glossip was not the mastermind of Van Treese's murder and does not belong on death row.

Fournerat said he is free from the bonds of attorney-client privilege, as he no longer has a law license and served prison time in Tennessee.

In comment sections and newspaper and TV stories and on websites devoted to freeing Glossip, he writes:

"Barry Van Treese actually had $23,000 hidden elsewhere in his car, but Glossip and Sneed found the smaller stash under the seat."



Wayne Fourmerat posted at 3:19 pm on Mon, Mar 9, 2015.

Richard Glossip is innocent of "masterminding" the Jan 7 1997 murder of Barry Van Trese.. He did not mastermind any murder. I know this because I was Richard Glossip's first trial lawyer.

Van Trese caused his own murder by stealing $25000 on Nov 21 1996 from a well known drug dealer in OKC. The drug dealer came back and on Jan 7 1997 he talked Justin Sneed into doing his dirty work and Sneed would receive heroin. The remainder of the $25k (which was $24100) was found in the trunk of Van Trese's car when he was murdered. The Police Reports show pictures and discuss the money ($24100 in small bills covered in blue dye) in a brown grocery bag and the fact the trunk was locked and there were fresh scratches on the trunk lock and lip. Richard Glossip knew nothing of the $25k in the trunk of Van Trese's car. And then the money turned up missing from the OKC Police Property Room. That's right. Pictures show the money exists but it was never inventoried into the property room. If Richard Glossip had been the "mastermind" or involved in murdering Van Trese, there would not have been fresh scratches on the trunk of Van Trese's car. Richard Glossip had used Van Trese's car before with Van Trese's permission. Richard Glossip knew there was a trunk release in the glove box of the car. There were no need for Richard to use a hammer or crowbar and cause scratches on the trunk to get into the trunk to the $24100, in marked money.

Although I tried to recuse myself due to conflict, I was not only Richard Glossip's lawyer, but I was also the drug dealer's lawyer.

Like I said, Richard Glossip is innocent of plotting the murder of Barry Van Trese and this murder had nothing to do with Richard keeping his job. Van Trese liked Richard. My name is Wayne Fourmerat and I can be reached at (972)790-6469 or aberrant_lawyer@yahoo.com

Report | Link | Share on Facebook | Share on Twitter Reply

INVESTIGATIONS SPOTLIGHT MEMBERS BLOGS ABOUT US CONTACT

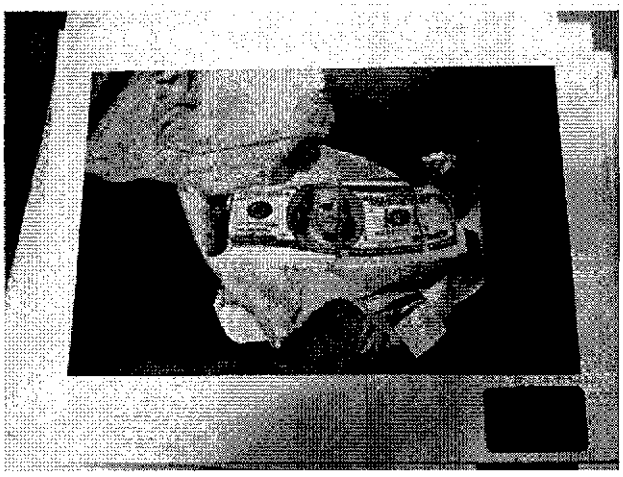
INVESTIGATIONS

BACK TO INVESTIGATIOI

Wayne Fourmerat hasn't been shy about posting his various theories on the Glossip case. This was posted on the Tulsa World website in March.

He alleges that Van Treese was killed because someone stole nearly $25,000 from a prominent heroin dealer, and somehow, it ended up in Van Treese's possession.

He told The Frontier he does not have documents or records to support this, but he says he has inside knowledge, as he was not only Glossip's first trial attorney, but he also represented the drug dealer who said the nearly $25,000 was stolen from him: Bobby Glossip, Richard's now-deceased brother.



Cash found at the scene of Barry Van Treese's murder in 1997.

Glossip's legal team released an affidavit Friday from a drug dealer who said he knew Bobby Glossip, aka "Critter," and recalled that he frequently sold drugs out of room 102 at the Best Budget Inn, to

Sneed and other clients. Sneed broke into cars and stole to support his drug habit, **the affidavit states.**

Glossip's attorneys have yet to file any new motions, but there is **another press conference scheduled Monday.** Former University of Oklahoma football coach Barry Switzer and former U.S. Sen. Tom Coburn are **the latest to call on Gov. Mary Fallin** to stay Glossip's execution at least 60 days.

In Glossip's first interrogation, a detective tells Glossip he's still trying to piece everything together, but strongly advises him to share anything he knows.
"This ain't no simple burglary, this ain't no simple robbery, this is a murder, and when you kill somebody, that's as serious as it gets because the people involved in this are going to get the needle."
"I hope they do man, because I'm sorry, I'm not involved in this thing."

Arbitrary and capricious

Through 2011, Oklahoma had the top rate of executions per capita among U.S. states. But between 1967 and 1990, the state didn't execute anyone.

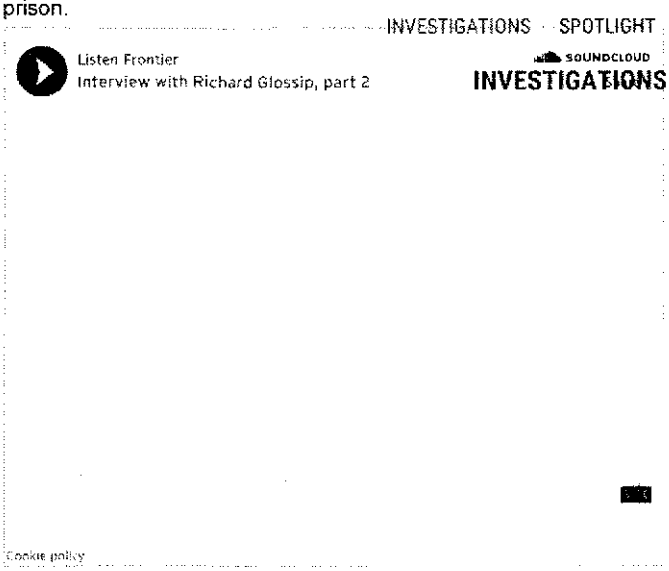
A series of legal challenges to the death penalty in the late 1960s began a voluntary federal moratorium on carrying out executions. And in 1972, **Furman v. Georgia** resulted in the landmark U.S. Supreme Court decision to overturn death penalty statutes in all states that had them, including Oklahoma.

The Court reached its decision because of the way states were using the death penalty: Juries were given unfettered discretion on whether to impose a life sentence or death.

Such discretion was unconstitutional because the way death sentences were handed out was "arbitrary and capricious" and violated the Eighth Amendment, the court ruled.

As a result of the Furman verdict, more than 600 inmates — 15 in Oklahoma — had their sentences converted from death to life in

prison.



When the death penalty was reinstated, each state developed a set of "aggravating circumstances," in an attempt to bring some uniformity and methodology to how death sentences were handed out.

Murder for hire is **an aggravating circumstance** for which prosecutors in Oklahoma can seek the death penalty. They do, and convicts have been executed for it.

The same year that Glossip and Sneed were charged with killing Van Treese, a Tulsa County jury convicted Timothy Shaun Stemple of brutally beating to death his wife of 11 years and running over her with a pickup, aided by a teenage accomplice.

Investigators said he planned his wife's killing to collect a nearly $1 million insurance policy. His accomplice was his mistress's younger cousin.

Though Stemple always denied his role in his wife's murder, Fallin declined to spare his life in 2012.

Stemple was executed while his teenage daughter, Lauren, sobbed on the front row of witnesses.

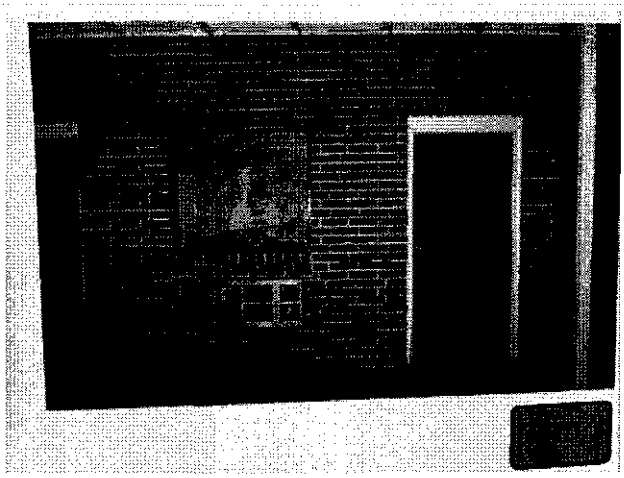
The second interrogation

When Oklahoma City police brought Glossip in for a second day of questioning in 1997, his story had suddenly changed.

He seemed instantly more contrite: "I know, I never should have lied."

Suddenly, his story changed: Early that morning on Jan. 7, when Sneed knocked on his door and woke him up, there was one thing Glossip had omitted in the previous version he told detectives: "He told me that he killed Barry."

Not only did he tell Sneed to buy plexiglass to cover the broken window, Glossip admitted he helped Sneed put up the plexiglass. It's a far different story than he told the day before.



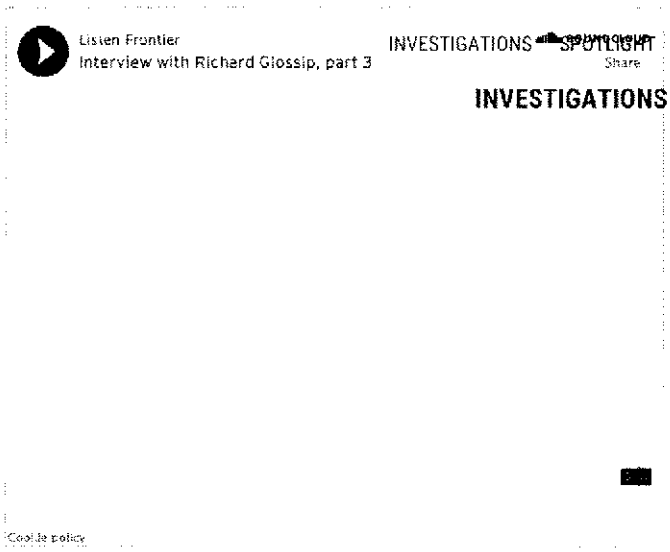
Room 102, with plexiglass covering the broken window.

And even though Glossip maintains he had nothing to do with the murder, he never called the police after Sneed told him about the killing. Glossip instead went back to sleep, got up hours later, bought new eyeglasses and an engagement ring for his girl and then they went to Walmart.

That's where Glossip and Wood were when they got the call that Van Treese's car had been found abandoned at the credit union nearby and things didn't look good.

Glossip continued lying to the police and everyone at the hotel. He pretended to search for Van Treese, looking in dumpsters with Everhart before the body was found.

Later, he admitted to police: "Yeah I was involved in it. I should have done something right then."



Glossip maintains he immediately started selling all his possessions because he knew he needed lawyer money, not because he was planning a getaway.

Just as his legal team is now doing, Glossip mentioned to the homicide investigators in 1997 the names of suspicious characters he thought they should look at, including his brother. He also tried to cast suspicion on Everhart, a former investigator for the Oklahoma Indigent Defense system.

In the police interrogation, he tried to discount the theory that Van Treese was about to fire him because of the books coming up short and the motel's rooms being in shoddy shape.

But Glossip later tells police: "Barry was upset because the motel wasn't doing as well as it could."

An employee at Van Treese's Tulsa motel testified that the boss had asked him to move to the Oklahoma City property, implying that Glossip was on the way out.

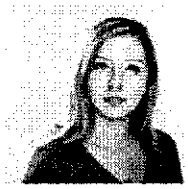
"Well I had no clue that he was doing it, so Barry must have been planning on firing me the next day," Glossip responded.

He seemed incredulous that police suspected he was involved in Van Treese's killing, or at least covering it up.

"Well how do I go about getting myself out the rest of it?" Glossip asks.
Detective: "I don't know, uh..."
Glossip: "Cause I, I, I never intended for Barry to ever get hurt."
Detective: "This isn't a question of Barry getting hurt."

"Well, no, I know."
"It's a question of Barry being murdered in the worst way."

The Frontier Editor in Chief Ziva Branstetter and Staff Writer Dylan Goforth contributed to this report.



Cary Aspinwall
CREATIVE DIRECTOR / STAFF WRITER
During more than 15 years as a newspaper reporter, Cary has written about everything from reality TV stars to inmates on death row. She's twice been named Great Plains Writer of the Year and was recently honored as a finalist for the Pulitzer Prize in local reporting. Contact: cary@readfrontier.com or 918-928-5835.

< Kaiser Foundation: Gathering Place project not 'out of control'

AFFIDAVIT OF CARL BEAR

STATE OF OKLAHOMA)
) ss.
COUNTY OF CLEVELAND)

I, Carl Bear, being of legal age and sound mind, do solemnly swear and state as follows:

1. I am the Warden for Joseph Harp Correctional Center located in Lexington, OK.

2. I am familiar with offender Justin Sneed #265681.

3. On September 14, 2015, I reviewed visitation records to determine if Mr. Sneed received visits during the month of August and September, 2015.

4. Records indicate that Mr. Sneed did not have any visits during the month of August 2015.

5. Records indicate that Mr. Sneed received the following visits in September 2015:

September 2, 2015 - Sister Helen Prejean

September 3, 2015 - Cary Aspinwall (Reporter for Frontier - Jenks, OK)

September 4, 2015 - John Coyle (Attorney at Law - Oklahoma City, OK)

FURTHER AFFIANT SAYETH NOT.

Carl Bear, Warden, Joseph Harp Correctional Center

Subscribed and sworn to before me this ___ day of September, 2015.

NOTARY PUBLIC

My commission number is: 09009197

My commission expires: 11/5/17

EXHIBIT E