No. 22-7466

IN THE

Supreme Court of the United States

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

[PUBLIC COPY—SEALED MATERIAL REDACTED]

JOINT APPENDIX
VOLUME 3 (PAGES 708-998)

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CERTIORARI GRANTED JANUARY 22, 2024

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SUPPLEMENTAL APPENDIX
[FILED UNDER SEAL]

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

Case No. PCO-2022-819
DEATH PENALTY CASE

RICHARD GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

Filed October 10, 2022
DEATH PENALTY CASE

RESPONSE TO PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

COMES NOW Respondent, the State of Oklahoma, by and through undersigned counsel, and hereby provides the following response to Petitioner's Successive (Fourth) Application for Post-Conviction Relief. The State will respond separately to Petitioner's Motions for an Evidentiary Hearing and for Discovery.

STATEMENT OF THE CASE

In June 2004, an Oklahoma jury convicted Petitioner of First Degree Murder and sentenced him to death upon the finding of one aggravating circumstance: that the murder was committed for remuneration.[1]

[1] Petitioner was also convicted of First-Degree Murder and sentenced to death in 1998. This Court reversed and remanded

Petitioner's conviction and sentence have since survived a litany of challenges. *See Glossip v. State*, 2007 OK CR 12, 157 P.3d 143, *cert. denied*, 552 U.S. 1167 (2008) (direct appeal); *Glossip v. State*, No. PCD-2004-978, slip op. (Okla. Cr. App. Dec. 6, 2007) (unpublished) (first post-conviction); *Glossip v. Workman*, No. CIV-08-0326-HE, slip op. (W.D. Okla. Sept. 28, 2010) (unpublished) (federal habeas petition); *Glossip v. Trammell*, No. 10-6244, slip op. (10th Cir. July 25, 2013) (unpublished) (habeas appeal); *Glossip v. Trammell*, 572 U.S. l 104 (2014) (certiorari petition from habeas); *Glossip v. State*, No. PCD-2015-820, slip op. (Okla. Cr. App. Sept. 28, 2015) (unpublished) (second post-conviction).

On June 6, 2022, Judge Stephen P. Friot issued Findings of Fact and Conclusions of Law rejecting Petitioner's claims and removing the last impediment to the rescheduling of Petitioner's execution for a fourth time. *Glossip, et al. v. Chandler, et al.*, No. CIV-14-0665-F (W.D. Okla. June 6, 2022).[2]

Petitioner thereafter filed a Successive (Third) Application for Post-Conviction Relief, raising five allegations of error, which is still pending before this Court. Petitioner has supplemented this application with two supplemental reports prepared by the Reed Smith law firm.[3]

Petitioner's conviction for a new trial. *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

[2] The lawsuit dealt with the constitutionality of the State's execution protocol and did not address any of the claims Petitioner raises in this application.

[3] Reed Smith has unequivocally stated that it is committed to "[f]ighting the death penalty" and the firm regularly assists anti-death penalty organizations such as Amicus and Reprieve in their

On September 18, 2022, Reed Smith made public a third supplemental report. Thereafter, Petitioner filed the instant application, again raising five propositions of error.

STATEMENT OF THE FACTS

This Court found the following facts on direct appeal following Petitioner's retrial in 2004:

> ¶ 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

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legal representation of those facing the death penalty. *See* Reed Smith Report for Europe, the Middle East and Asia 2017/18 (https://reedsmithpublications.corn/responsible-business-2017-18/r4/files/assets/common/downloads/publication.pdf?uni=51babe43d96880e5a2b682a7808c8be 5 at 14) (last accessed August 5, 2022).

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.

> FN2 Glossip's salary was $1,500.00 per month, which was divided twice monthly. The net amount was after other usual deductions.

¶ 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 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.
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> ¶ 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 l0:00 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.
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> ¶ 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.

Glossip v. State, 2007 OK CR 12, ¶¶ 3-24, 157 P.3d at 147-50.

PRELIMINARY MATTERS

Petitioner's third post-conviction application alleged he was actually innocent. The State waived all procedural defenses to that claim, but argued the remaining legal claims were waived.

The State strongly believes that most, if not all, of the claims raised in this *fourth* post-conviction application were previously available and are therefore waived pursuant to 22 O.S.2021, § 1089(G). However, Petitioner's attorney and others are waging a public relations campaign in which they (falsely) argue both that he is innocent, and that the State engaged in egregious misconduct. Petitioner's attorney held a press conference on the day he filed his fourth application in which he thoroughly discussed the allegations therein.[4]

This media campaign is an attempt to place pressure on numerous State entities, including this Court, the Governor, the Oklahoma Attorney General, and the Oklahoma Pardon and Parole Board, with a one-sided and inaccurate narrative. One member of the Legislature has even vowed to eliminate the death penalty in Oklahoma if Petitioner is executed.[5] This Court is the only proper entity to address the allegations raised as it has the ability to review the entire record and make a complete and impartial determination on Petitioner's claim of actual innocence. The State is concerned that, if this Court does not address the merits of these claims, the damage will be done. Accordingly, and with reluctance, the State waives its right to argue the claims within this fourth post-conviction application are waived because they could have been raised

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[4] *See* https://okcfox.comlnews/Iocal/attorney-for-death-row-inmate-richard-glossip-calling-for-trial-in-light-of-new-evidence.

[5] https://www.mcalesternews.com/news/state/lawmaker-claims-new-report-clears-death-row-inmate/article_aa103709-5d45-5136-961B-e7d70527b78c.html

previously.[6] The State further respectfully requests that this Court fully adjudicate those claims.[7]

The State needs to make three additional observations, related to the foregoing paragraphs, before addressing Petitioner's claims. First, Petitioner's seventy-seven page application (which has a 172 page appendix) repeatedly and expressly incorporates wholesale his third post-conviction application. 9/22/2022 Successive Application for Post-Conviction Relief ("Pet. 4th PC" at 55, 70 n.22, 68, 72 n.23, 76. The third application was 122 pages long and was accompanied by a 1,114 page appendix; and it was supplemented twice. Because the third application and the State's response thereto address Petitioner's claim of factual innocence—which is related to the prejudice he will have to show in order to obtain relief for the propositions of error raised in the fourth application—the State asks that, if this Court considers matters from Petitioner's third post-conviction proceeding, it will also consider the argument and evidence provided by the State.

Second, Petitioner announces his intention to file *yet another* post-conviction application in the future. Pet. 4th PC at 42. To this, the State strenuously objects.

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[6] As will be discussed, the State does not waive Petitioner's failure to follow this Court's briefing rules.

[7] The Tenth Circuit in *Fontenot v. Crow*, 4 F.4th 982 (10th 2021), determined that the petitioner's showing of actual innocence was sufficient to overcome the procedural bars which would otherwise apply to his constitutional claims. The State requests a full merits adjudication of these claims within Petitioner's application to trigger the state court deference anticipated in 28 U.S.C.A. §§ 2254(d) & (e)(2). *See, e.g.*, *Simpson v. Carpenter*, 912 F.3d 542, 562-63 (10th Cir. 2018).

Petitioner's current attorney has been investigating his case since 2015. *See, e.g.*, Pet. PC Appx. 4, Att. 15 at 6, Att. 22 at 9. The Reed Smith law firm has been investigating since February of 2022, and it has been four months since they issued their "final" report. 7/1/2022 Successive Application for Post-Conviction Relief ("Pet. 3rd PC") Appx. 1, Att. 3 at Bates 1, 9. The State has permitted Petitioner to review all non-privileged materials from the files of the Oklahoma County District Attorney's Office. Enough is enough. The State will raise all procedural defenses going forward.

Third and finally, Petitioner's fourth post-conviction application is riddled with insinuations, half-truth, and assumptions. For example, Attachment 27 is a memo which Kenneth Van Treese, the brother of Barry Van Treese, sent to former Assistant District Attorney Connie Pope Smothermon. According to Petitioner, the memo

> detail[ed Kenneth Van Treese's] version of the events of the previous two days [in which Petitioner's second trial was supposed to begin], 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 [Smothermon], 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 [of Petitioner's lead counsel Lynn Burch] that could have been addressed the

> week before, or at any time in the preceding year).

4th PC at 28. This single paragraph contains two provably false statements.

As will be discussed in more detail below, Petitioner's former trial attorney Lynn Burch twice visited Justin Sneed after Petitioner's conviction was reversed and remanded for a new trial. Mr. Burch attempted to persuade Mr. Sneed not to testify at the retrial, assuring him that the State could not lawfully punish him for this refusal (11/3/2003 Tr. 9). On November 4, 2003, although jury selection was supposed to have begun, Petitioner was given an extra day to consider whether to accept a plea agreement (11/3/2003 Tr. 6).[8] After Petitioner refused, the State notified the court that it may need to make a pretrial ruling on the admissibility of hearsay evidence through Mr. Sneed's attorney Gina Walker (11/3/2003 Tr. 6). At that point, and despite having known for two weeks that Ms. Walker was a potential witness regarding his conduct, Mr. Burch asked to withdraw from representing Petitioner (O.R 1052; 11/3/2003 Tr. 15). Petitioner refused to waive the conflict and his new first chair counsel, Silas Lyman, requested a continuance (11/3/2003 14-16). The State announced ready for trial (11/3/2003 Tr. 20). The State did not formally object to the request for a continuance—likely out of concern that the denial of a continuance could result in reversal—but did suggest, or express agreement with the trial court's

[8] Petitioner insinuates that these plea negotiations reflect panic on the State's part about its case. Pet. 4th PC at 24. However, as this Court is aware, there are numerous reasons the State makes plea offers. Petitioner's preferred interpretation is not supported by any evidence.

suggestions of, various ways to avoid Mr. Burch's withdrawal or to avoid a continuance. (11/3/2003 Tr. 12, 19-20, 23-24). Petitioner's statement that the State did not want to proceed is wholly inaccurate. In fact, the same memo relied upon by Petitioner indicates Ms. Pope Smothermon was "visibly upset (her hair was on fire)" over the development. Pet. 4th PC Att. 27.

In addition, Petitioner says Kenneth Van Treese's statement that "YOUR MOMMA SHOULD BE PROUD!" was directed at Ms. Pope Smothermon. The truth is that Kenneth Van Treese was referring to Petitioner's second chair attorney, Silas Lyman, who had just been promoted to first chair: "I ask [sic] Lyman if his mother was proud of him for having a job like he has!" App. 108.

Petitioner's misrepresentations are egregious. The State will use the actual facts to show this is not an isolated instance. The incendiary allegations in this application are fabrications which should be denied.

ARGUMENT AND AUTHORITY

PROPOSITION I: PETITIONER'S *BRADY V. MARYLAND*, 373 U.S. 83 (1963) CLAIM IS WITHOUT MERIT.

Petitioner's first proposition of error asserts that Mr. Sneed wanted to recant his testimony before Petitioner's second trial, that the State knew this information, and that the State failed to inform the defense. This claim is based on a false premise. Mr. Sneed has never wanted to recant his testimony. Further, Petitioner's trial attorneys were well aware that Mr. Sneed did not want to testify at the second trial; they are the ones who pressured him not to. This proposition is without merit.

A. Standard of Review

A criminal defendant may be entitled to relief if the State fails to disclose to the defense favorable information within the control of the prosecutor or law enforcement. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, the undisclosed evidence must be material. *Id.* That is, there must be a reasonable probability that, if not for the State's failure to disclose, the result of the trial would have been different. *United States v. Bagley*, 473 U.S. 667,682 (1985).

Significantly, evidence is not "withheld" or "suppressed", in the *Brady* sense, if it was actually known to the defense. *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 292 (3d Cir. 2016) ("Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense."); *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (*Brady* does not apply if the evidence is known to the defense, or if the defense should have known of the evidence); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (*Brady* does not apply if the evidence is available to the defense); *Williams v. State*, 7 A.3d 1038, 1050 (Md. Ct. App. 2010) ("The cases are legion" that evidence known to the defense is not "suppressed" per *Brady*).[9]

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[9] Petitioner relies upon two Tenth Circuit cases that are not binding on this Court and are, respectfully, incorrect. Pet. 4th PC at 49 (citing *Fontenot v. Crow*, 4 F.4th 982, 1066 (10th Cir. 2021); *Banks v. Reynolds*, 54 F.3d 1508, 15 I6-17 (10th Cir. 1995)). The Tenth Circuit recognized that "many of [its] sister circuits" have held that *Brady* does not apply where evidence was available to the defense. *Fontenot*, 4 F.4th at 1066. *See Jalowiec v. Bradshaw*, 657 F.3d 293, 311 (6th Cir. 2011) (*Brady* is not violated when the

B. Argument and Authority

Petitioner claims the State knew, and failed to inform the defense, that when Petitioner's conviction was remanded for a new trial, Mr. Sneed either: 1) planned to recant (*i.e.*, affirmatively disavow or materially change) his testimony from the first trial or 2) sought to obtain further consideration in exchange for testifying again. The State will show that the bulk of Petitioner's claim is built on a false premise. Mr. Sneed has never discussed recanting, in the legal sense, his testimony regarding Petitioner's involvement in the murder. The State will further show that the defense was well aware that Mr. Sneed did not wish to testify a second time, and that he was hopeful of at least obtaining further consideration if he did. Finally, because Mr. Sneed did testify at Petitioner's second trial *in spite of being given no further consideration*, Petitioner has failed to show materiality.

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defendant could have discovered the evidence "with minimal investigation"); *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007) (evidence is not suppressed if the defense could have discovered it through due diligence); *Leka*, 257 F.3d at 100; *Yearby v. State*, 997 A.2d 144, 153 (Md. Ct. App. 2010) (there is no *Brady* violation if the defense could have discovered the evidence through a reasonable investigation). Further, while *Fontenot* did not consider the defendant's knowledge to assess the issue of suppression, it did note that the defendant's knowledge of the allegedly withheld evidence would factor into the materiality analysis. *Fontenot*, 4 F.4th at 1066 ("[I]f the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." (citing *Banks*, 54 F.3d at 1517) (internal quotations omitted)). Regardless of where the analysis concerning Petitioner's knowledge occurs, as will be shown, the result remains: this was no *Brady* violation.

1. Petitioner's claim is built on a false premise

Petitioner claims "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.'" Pet. 4th PC at 14. This is patently false. It is abundantly clear from the September 18, 2022 Reed Smith supplemental, the transcripts of Reed Smith's interviews with Justin Sneed, and the transcript of the State's recent interview with Mr. Sneed, that Mr. Sneed's testimony at both trials was truthful.[10] Attachment 3 at 24 ("I tried to tell them the only legal way that I ever really seen being able to go home would be if I recanted the story about everything that I already had happened [sic] which is really impossible because I told the truth."). While Mr. Sneed did not want to testify again, for a number of reasons,[11] he has not ever waivered from his truthful testimony that Petitioner was the person who induced him to murder Barry Van Treese.[12] Mr. Sneed wanted

[10] Reed Smith declined to make the transcripts of Mr. Sneed's interviews public, citing sensitive information contained therein. Petitioner also declined to provide the transcripts to this Court. The State has redacted information from these transcripts that is sensitive, and will file a motion to file the unredacted transcripts with this Court under seal. These transcripts are Attachments 1-3 and are contained within the Appendix to this response. The transcript of the State's interview with Mr. Sneed is Attachment 4.

[11] These include problems he had in prison as a result of being seen as a "snitch", the fact that he was very settled at the prison and did not want his life disrupted, and perhaps sympathy for Petitioner. Pet. 4th PC, Appx., Att. 11 at ¶¶ 8-9; Attachments 1-4.

[12] As was discussed in the State's response to Petitioner's third post-conviction application, the jailhouse informants relied upon by Petitioner, who claim Mr. Sneed has admitted to setting Petitioner up, are not credible. *See* Respondent's Response to Petitioner's Successive Application for Post-Conviction Relief at 6-59 (filed Aug.

very much to avoid testifying again, hut he *never* indicated he would testify that Petitioner was not involved in the murder.

Petitioner clings to Mr. Sneed's use of the word "recant". Indeed, that single word essentially provides the sole basis for this proposition. However, the State will show more fully below that Mr. Sneed wished to renege on his plea agreement, by either not testifying at all or obtaining further consideration. It is clear from the evidence that when Mr. Sneed said "recant" he was referring to his plea agreement, not his testimony from the first trial. In that context, Mr. Sneed's use of the word "recant" while perhaps not technically accurate, makes complete sense.[13]

In the same vein, Petitioner makes the following incorrect assertions later in his application:

12, 2022) ("State's Response to 3rd PC"), OCCA Case No. PCD-2022-589. Attached to this Response as Attachments 5A-5G are recordings of the State's interviews and phone calls with many of these individuals. Mr. Sneed has also explained that he never told his mother or daughter that Petitioner was not involved in the murder. *See, e.g.*, Attachment 1 at 13-14, 46-47; Attachment 3 at 24 ("I tried to tell them the only legal way that I ever really seen being able to go home would be if I recanted the story about everything that I already had happened [sic] which is really impossible because I told the truth.").

[13] Mr. Sneed did once inquire about the possibility of "recanting my testimony" at any point in his life. Pet. 4th PC at 47. This was *before* his testimony in the second trial. Moreover, it is likely that Mr. Sneed was trying to determine whether any testimony at the second trial could be guaranteed to be his last. What if Petitioner received a third trial? Mr. Sneed had not realized, when he signed the plea agreement, that it bound him for life. Attachment 1 at 8-10; Attachment 2 at 7, 67; Attachment 3 at 23-24.

> 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 [Smothermon], 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.

Pet. 4th PC at 46; *see also* Pet. 4th PC at 55 (referencing an alleged intention by Sneed to "alter" his testimony for which there is no evidentiary support); Pet. 4th PC at 47 ("There is thus no doubt that the State was aware that Sneed did not plan to testify as he had before.").[14]

The truth is that there is *no* evidence that Mr. Sneed "planned affirmatively to recant his testimony." Rather, in transcripts Petitioner has chosen not to provide to this Court, Mr. Sneed has repeatedly told those working on Petitioner's behalf (and the State) that he was trying to find a way to avoid testifying altogether or leverage the

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[14] It is likely that Petitioner intentionally uses the ambiguous phrase, "as he had before". *See also* Pet. 4th PC at 48. This phrase could mean either 1) that Mr. Sneed did not intend to provide the same factual testimony he had before or 2) that Mr. Sneed did not wish to testify at all. The latter is true. The former is wholly disproven.

unanticipated second trial to obtain the hope of eventual release from prison. Attachment 1 at 8-10, 50-51. Petitioner even acknowledges this, although the admission is buried within the almost 200 pages of attachments.[15] *See* Pet. 4th PC, 1415 Appx., Att. 32, ¶¶

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[15] The investigator who prepared this affidavit opines that Mr. Sneed would not have spoken, in a 2007 letter, of contacting Petitioner's counsel unless he wanted to recant (in the legal sense, *i.e.*, provide materially different testimony). This investigator is either unaware of, or ignoring, the several instances—discussed below—in which Petitioner's prior attorneys had contacted Mr. Sneed, informed him that he did not have to testify, pressured him not to testify, and apparently indicated they might be able to help him reduce his sentence. In light of that context, it makes perfect sense that Mr. Sneed might think about contacting Petitioner's attorneys to obtain assistance with his own sentence. As noted above, the State has provided the transcripts of Mr. Sneed's interviews with the State and Reed Smith so that this Court will have all the relevant evidence at its disposal. *See* Attachments 1-4.

Another interesting note about this affidavit is that it acknowledges (at ¶ 22) that Petitioner's prior attorneys asked Sneed whether he still "ha[d] the same details." Petitioner has signed waivers of the attorney-client privilege. Attachment 6 at 189-92. Yet, to this day, none of his prior attorneys have claimed Mr. Sneed told them anything other than what he testified to at trial. Nor has Petitioner produced any documents from his prior attorneys' files regarding these conversations with Mr. Sneed. A reasonable inference from these facts is that Mr. Sneed, if he answered the attorneys' questions, told them the same things he told two juries. In fact, Ms. Pope Smothermon made an offer of proof that Mr. Sneed truthfully answered every question Mr. Burch asked him (2004 Tr. XII 107).

In addition, related to Petitioner's claim that police used improper interrogation techniques which caused Mr. Sneed to falsely implicate Petitioner, the affidavit states the following:

> During the August 26, 2022[,] interview, when asked when the police were mentioning Glossip multiple times did Sneed feel they were focusing or signaling they wanted to hear about Glossip, Sneed responded as follows:

8-9. Petitioner's affiant even admits that, "During the August 15, and August 26, 2022 interviews, Sneed denied he told an Assistant District Attorney that he wanted to substantively change his testimony regarding Glossip's urging Sneed to murder Barry Van Treese." Pet. 4th PC, Appx., Att. 32, ¶ 24. Setting aside Petitioner's jailhouse informants, Mr. Sneed has never said, publicly or privately, that Petitioner was not involved in the murder.

Petitioner's claim that Mr. Sneed wanted to affirmatively disavow or materially change his testimony is not supported by even a single item of evidence. All available evidence contradicts Petitioner's attempt to hold Mr. Sneed, an eighth grade drop-out (2004 Tr. XII 48), to a lawyer's understanding of the word "recant." This claim falls under its own weight.

2. The State did not suppress Mr. Sneed's desire to renege on, or renegotiate, his plea agreement

Petitioner's trial attorneys were well aware that Mr. Sneed wished to either avoid testifying in the second trial altogether or obtain additional consideration for doing so. In fact, Petitioner's attorneys were the ones

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> "what I was thinking that it was going into my mind that they already knew that he had something to do with that. They wanted to pin down where/when/how he had something to do with *it or if their thoughts were wrong, could I clarify why they're having the wrong thoughts*. But to me they already knew he was in on it somewhere, they couldn't pinpoint the whole storyline, *they wanted to give full the whole storyline or truth to have clarity and understanding why this man just lost his life*."

Pet. 4th PC, Appx., Att. 32, ¶ 26 (emphasis added).

who planted the idea in Mr. Sneed's mind. Petitioner cannot now accuse the State of impropriety.

On April 16, 2001, *before this Court reversed Petitioner's first conviction*, Petitioner's post-conviction attorney, Wyndi Hobbs, visited Mr. Sneed in prison. Pet. 4th PC, Appx., Att. 11, ¶ 4. With Ms. Hobbs was an investigator named Lisa Cooper. Pet. 4th PC, Appx., Att. 11, ¶ 3. Ms. Hobbs told Mr. Sneed "that 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." Pet. 4th PC, Appx., Att. 11, ¶ 8. Mr. 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." Pet. 4th PC, Appx., Att. 11, ¶ 8.

Ms. Hobbs was going to "set up a second meeting and take [Mr. Sneed) an affidavit to review and sign." Pet. 4th PC, Appx., Att. 11, ¶ 11. Ms. Hobbs gives no indication of what this proposed affidavit might have said.[16] Mr. Sneed "signed releases for juvenile, jail, prison and criminal records." Pet. 4th PC, Appx., Att. 11, ¶ 10. It is unclear why Mr. Sneed would provide Petitioner's counsel all of these records unless they had insinuated they could do something to help him.

Indeed, in May of 2001, Mr. Sneed wrote Ms. Hobbs a letter requesting a copy of his plea agreement and other information. Pet. 4th PC, Appx., Att. 11, ¶ 12; 8/20/2022 Reed Smith Second Supplemental Report

[16] Ms. Hobbs indicated she was optimistic "that Sneed would provide us the information to exonerate Mr. Glossip from any part of the murder." Pet. 4th PC, Appx., Att. 11, ¶ 9. However, Ms. Hobbs does not in any way indicate that Mr. Sneed told her Petitioner did not participate in the murder. Rather, this appears to be her hope/supposition. Certainly, if Mr. Sneed had said anything exculpatory, it would have been in Ms. Hobbs' affidavit.

("RS 2nd Supp."), Exhibit C. Mr. Sneed expressed his appreciation that Ms. Hobbs let him know about the potential for a new trial and asked her to keep him informed. Pet. 4th PC, Appx., Att. 11, ¶ 12; RS 2nd Supp., Exhibit C. Mr. Sneed closed by saying he hoped the information he provided to her was of benefit to Petitioner. RS 2nd Supp., Exhibit C. Reed Smith has apparently taken this to mean that Mr. Sneed knew Petitioner was not guilty and wished to help him. RS 2nd Supp. at 2 n.7. Another possibility is that Mr. Sneed was hopeful that Petitioner's attorneys might be able to help Petitioner avoid a second trial, which would spare Mr. Sneed from testifying. And yet another possibility is that Mr. Sneed was interested in helping Petitioner because he believed Petitioner's attorneys could help him.

After the visit, Mr. Sneed wrote a letter to Ms. Cooper. RS 2nd Supp., Exhibit C. In the letter, Mr. Sneed references signing notarized forms for Ms. Cooper and ensuring Ms. Cooper received information about Mr. Sneed's participation in a vo-tech program. Mr. Sneed says,

> I do have a question or two though. I don't understand why in your letter you mentioned,[17] that you didn't need a report of my grades, you just wanted to show the courts I have taken advantage of a program that has been offered to me. Because you all are not *technically* working on my behalf? Also, closer to getting my co-defendts [sic] case back in court I'd like to speak with you or possible [sic] some-one [sic] on what choices I have and possible outcomes on those

[17] The State has not been provided a copy of this letter.

> choices. If they (D.A.'s Office) try to call me back to Oklahoma City. Because that still desturbs [sic] me.

RS 2nd Supp., Exhibit C (emphasis added).

Then, after Petitioner's conviction was reversed, Petitioner's trial attorney Lynn Burch visited Mr. Sneed. According to former Assistant District Attorney Fern Smith, Mr. Sneed's lawyer, Gina Walker (who is now deceased) told her that Mr. Burch "'pressured Mr. Sneed' concerning his testimony" (1/16/2003 Tr. 18). Mr. Burch denied the accusation that he was pressuring Mr. Sneed (1/16/2003 Tr. 19). However, the State made a record that:

> Mr. Burch encouraged Mr. Sneed not to testify in this case against his client, gave him a case that said that even though he had an agreement with the State of Oklahoma, that the law was on his side, that he didn't have to testify and encouraged Mr. Sneed that even though Mr. Glossip was not mad at him that there might be ramifications in the yard there in prison if he testified. I expect that's what Mr. Sneed's version of the conversation would be.

(11/3/2003 Tr. 9).[18] This is what Mr. Sneed told Ms. Walker (11/3/2003 Tr. 9). Mr. Burch disagreed with

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[18] Incredibly, Mr. Lyman and Mr. Woodyard claim they were not aware of the goings-on with Mr. Sneed. Perhaps their memories are simply faulty; it has been almost twenty years. But Mr. Lyman and Mr. Woodyard were present in court when this matter was discussed and they were co-counsel with Mr. Burch. In fact, they were at the prison during one of Mr. Burch's visits, although they were not allowed into the room with Mr. Sneed. (11/3/2003 Tr. 14). Further, it is likely that Mr. Lyman and Mr. Woodyard would have

that characterization (11/3/2003 Tr. 12). However, Mr. Sneed recently confirmed that Mr. Burch visited him in prison and provided him with a case to give to Ms. Walker. Attachment 2 at 68. That case was *State v. Dyer*, 2001 OK CR 31, 34 P.3d 652, which this Court had, at the time, recently decided. *See* Attachment 2 at 68. *Dyer* held that the State was prohibited from reneging on a defendant's plea agreement after the defendant refused to testify at his co-defendant's second trial because the language of his plea agreement contained no waiver of the defendant's double-jeopardy rights. *Dyer*, 2001 OK CR 31, ¶ 1-7, 34 P.3d at 653-54.

Moreover, in discussing the *Dyer* case with Mr. Burch, Mr. Sneed recalled that he *did* tell Mr. Burch that he did not want to testify at the second trial. Attachment 2 at 68 ("Yeah, well, I was telling [Mr. Burch] that I didn't want to [testify]."). This evidence should definitively confirm that no *Brady* violation occurred; if anything, Petitioner's defense team possessed knowledge that Mr. Sneed did not want to testify at Petitioner's second trial even before the State came into possession of this knowledge.

Because of Mr. Burch's visit to Mr. Sneed, Mr. Burch had a conflict of interest (11/3/2003 Tr. 13).[19] Petitioner refused to waive that conflict so Mr. Burch withdrew from the case (11/3/2003 Tr. 13-16). As a

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been aware of Ms. Hobbs' and Ms. Cooper's communications with Mr. Sneed.

[19] Second chair, and eventual first chair, counsel Silas Lyman argued that he and Wayne Woodyard also had a conflict of interest although they were not present at the meeting between Mr. Burch and Mr. Sneed (11/3/2003 Tr. 14). The court disagreed (11/3/2003 Tr. 14).

result, and in spite of attempts by the Court and the State to accommodate defense counsel without a lengthy continuance, the trial which was scheduled to start that very day was continued (11/3/2003 Tr. 16-27).

There can be absolutely no doubt that Petitioner's prior attorneys attempted to influence Mr. Sneed. At the very least, they informed Mr. Sneed that he would not lose the benefit of his plea bargain if he refused to testify at the second trial. *See* Attachment 2 at 68, 77. They also said they would be presenting evidence in court of Mr. Sneed's efforts to better himself while in prison. RS 2nd Supp., Exhibit C. The only possible interpretation of this is that Petitioner's attorneys indicated they were willing and able to help Mr. Sneed attempt to, at the very least, reduce his sentence.[20]

It does appear that Mr. Sneed later discussed these possibilities with Ms. Walker and Ms. Pope

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[20] This explains why Mr. Sneed would say, in a 2007 letter to Ms. Walker, that he might approach Petitioner's attorneys over his concern that "it was a mistake reliving this." Pet. 4th PC at 48. Contrary to Petitioner's assertion, this could very well represent a form of "buyer's remorse" rather than an expression of guilt over having testified falsely. Mr. Sneed told Reed Smith that, when he wrote this letter, he was again under pressure because of Petitioner's direct appeal. *See* Attachment 1 at 37-38; Attachment 2 at 99.

Mr. Sneed also explained the letter his daughter wrote. Petitioner tells only part of the truth. The application states that Mr. Sneed has admitted that "he *did* tell his daughter in 2015 that he was thinking about recanting." Pet. 4th PC at 13 (emphasis in original). However, as he told Reed Smith, he knew that his daughter wanted him to come home, but the only way that would even be a possibility was if he recanted; but Mr. Sneed knew recanting was "impossible because I told the truth." Attachment 3 at 24.

Smothermon. However, having planted these seeds in Mr. Sneed's mind, Petitioner can hardly complain he was not aware of Mr. Sneed's hopes. The State did not suppress evidence.

3. The evidence was not material

Petitioner claims that Mr. Sneed's credibility would have been damaged had the jury been aware that he wanted, and possibly attempted to secure, additional consideration for his testimony in the second trial. As set forth in the standard of review, Petitioner must show a reasonable probability that had the allegedly suppressed evidence (which, as shown, was not suppressed) been known to him, he would have been acquitted. Petitioner cannot make this showing.

Mr. Sneed explored two possibilities. First, he wished to avoid testifying altogether. But the jury was aware that Mr. Sneed was testifying "under subpoena" and "obligated to be [t]here" by his plea agreement (2004 Tr. XII 38, 58). Mr. Sneed testified that, "[t]o escape the death penalty, I have to testify today." (2004 Tr. XII 62). Mr. Sneed further testified that it was possible he might face "ramifications in prison" as a result of his testimony (2004 Tr. XII 185).[21] The jury was aware Mr. Sneed was not testifying voluntarily.

Second, Mr. Sneed hoped to get additional consideration, such as the possibility of parole, in exchange for his testimony. The jury was not aware of this fact, although Petitioner's prior attorneys certainly were. In any event, Mr. Sneed's hope is in no way

[21] This fact casts grave doubt on Petitioner's claim that Mr. Sneed repeatedly boasted to groups of people that he had falsely testified against Petitioner.

relevant. There is no evidence the State ever even considered modifying Mr. Sneed's plea agreement, much less that they suggested to him that they were considering it. Mr. Sneed hoped to condition his testimony on more favorable treatment, but that did not happen.

Evidence of a plea agreement, or even a tacit expectation of leniency, is favorable to a defendant because it may establish a motive to testify, and possibly testify falsely. *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009). However, when there is no actual expectation of a benefit, there is no material suppression of evidence.[22] *Fuston v. State*, 2020 OK CR 4, ¶ 60, 470 P.3d 306, 322. Because Mr. Sneed received no further benefit for his testimony in the second trial, and had no express or tacit agreement with the prosecutor for any such benefit, the "suppressed" evidence was not material.

C. Conclusion

Petitioner's entire proposition hinges on his claim that, although Mr. Sneed has explained that he did not use the word "recant" in the legal sense, he must have actually meant it that way. But, as discussed, Petitioner has presented *no* evidence that Mr. Sneed ever contemplated providing testimony that Petitioner was not involved in the murder. This is in spite of several conversations between Petitioner's own attorneys and Mr. Sneed. *See* (2004 Tr. XII 107) (Ms. Pope

[22] It bears repeating that in this case evidence was not suppressed at all. It was Petitioner's attorneys who planted this hope in Mr. Sneed's mind and who were aware that their seed had somewhat taken root well before the State knew of this development.

Smothermon made an offer of proof that Mr. Sneed truthfully answered every question Mr. Burch asked him).

Further, Petitioner's interpretation is contradicted by a literal mountain of other evidence. Setting aside the (not credible) jailhouse informants, Mr. Sneed has *never, ever* in the *twenty-five years* since his first police confession told anyone that Petitioner was not involved in the murder. Instead, he has said over and over again, up to and including on September 7, 2022, that Petitioner induced him to murder Mr. Van Treese. Attachment 3 at 134-58. While it is clear that Mr. Sneed strongly wished to either not testify at all in the second trial, or receive further consideration for that testimony, it is equally clear that Mr. Sneed has asserted Mr. Glossip's guilt at all times for the last twenty-five years.

Petitioner tacitly admits he is simply speculating. Pet. 4th PC at 50. He claims he needs further discovery and an evidentiary hearing in order to attempt to find evidence to support his speculation. However, all available evidence *refutes* Petitioner's claim. Accordingly, Petitioner is not entitled to discovery. an evidentiary hearing, or substantive relief on this claim.[23]

PROPOSITION II: PETITIONER'S ALLEGATION THAT THE PROSECUTOR VIOLATED THE RULE OF SEQUESTRATION IS WITHOUT MERIT.

In his second proposition of error, Petitioner argues the prosecutor violated the rule of sequestration when

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[23] In its response to Petitioner's cumulative error claim, the State will show that any or all of the errors alleged by Petitioner are harmless in light of the evidence against him and the utter lack of credibility which should be given to statements made by Petitioner and his advocates.

she spoke with Ms. Walker to find out whether Mr. Sneed attempted to stab Mr. Van Treese. The rule of sequestration does not apply to attorneys who are trying a case. There was no error.

A. Standard of Review

"At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." 12 O.S.2001, § 2615. The trial court generally has discretion with respect to who is subject to the rule of sequestration and the potential remedies for any violation thereof. *See Bosse v. State*, 2017 OK CR 10, ¶47, 400 P.3d 834, 852 (evaluating the trial court's exception of witnesses from the rule of sequestration for an abuse of discretion); *McKay v. City of Tulsa*, 1988 OK CR 238, ¶¶ 5-6, 763 P.2d 703, 704 (evaluating trial court's decision to permit a witness to testify in spite of alleged violation of the rule of sequestration for an abuse of discretion).

However, Petitioner was aware of this alleged error at the time of trial. On direct examination, Mr. Sneed testified that he tried to stab Mr. Van Treese in the chest (2004 Tr. XII 102).[24] Petitioner objected that they did

[24] Many of Petitioner's arguments in this proposition result from his apparent belief that Mr. Sneed's early statements that he did not "stab" Mr. Van Treese are inconsistent with his later admission that he "tried to" stab Mr. Van Treese. The knife did not penetrate Mr. Van Treese's body (2004 Tr. XI 69-85). Thus, it is accurate that Mr. Sneed did not "stab" him. As this Court is well aware, criminal defendants will often admit to only the barest details, and need to be confronted with additional evidence to provide additional information. It appears that, before the 2004 trial, no one had asked Mr. Sneed whether the marks on Mr. Van Treese's chest are indicative of an attempted stabbing with Mr. Sneed's broken knife.

not have notice of this testimony (2004 Tr. XII 105). Ms. Pope Smothermon explained that:

> Yesterday after I heard the M[edical] E[xaminer]'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.

(2004 Tr. XII 107-08). The trial court denied the objection to an alleged lack of notice, but at no time did Petitioner allege a violation of the rule of sequestration (2004 Tr. XII 105-09). Accordingly, this Court's review is limited to plain error review. *See Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121. Petitioner is thus entitled to relief only if there was error that was plain or obvious, and which affected the outcome of trial. *Id.* Petitioner must further show that any error represents a miscarriage of justice. *Id.*

B. Argument and Authority

Petitioner recently found, in the prosecutor's files, a memo concerning Ms. Pope Smothermon's conversation with Gina Walker during Petitioner's second trial about Mr. Sneed's anticipated testimony.[25] Pet. 4th PC at 56. This has prompted Petitioner to claim a violation of the

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[25] While the memo is addressed to Ms. Walker, it does not appear that Ms. Pope Smothermon delivered it to Ms. Walker. As Petitioner admits, it appears that Ms. Pope Smothermon made notes on this paper. Pet. 4th PC at 31. This is consistent with Ms. Pope Smothermon' s statement during trial that, after hearing the Medical Examiner's testimony, she spoke with Ms. Walker on the telephone, and then spoke with Ms. Walker again after Ms. Walker spoke with Mr. Sneed.

rule of sequestration *eighteen* years after Ms. Pope Smothermon publicly acknowledged her second-hand consultation with Mr. Sneed. Although the State has waived its right to ask this Court to find this claim waived, the fact that this alleged violation has been known since 2004 is nevertheless relevant for three reasons. One, it is doubtful that Ms. Pope Smothermon would have announced in open court that she had communicated indirectly with Mr. Sneed had such been prohibited. Two, there is no indication that the trial court believed Ms. Pope Smothermon violated the rule of sequestration. And three, Petitioner's trial attorneys, direct appeal attorneys, federal habeas attorneys, and attorneys in three prior post-conviction applications—to include the two prior applications prepared by Petitioner's current attorney—did not see fit to raise this alleged error.

The reason no one has batted an eye until now is that the prosecutor did nothing wrong. For one thing, this Court has never addressed the ability of attorneys to discuss potential testimony with their witnesses during trial. Because there is no controlling authority, there can be no plain error. *Moore v. State*, 2019 OK CR 12, ¶ 35, 443 P.3d 579, 587.

In fact, there is no error at all. For purposes of this case, Oklahoma's rule of sequestration is functionally identical to the federal rule. Oklahoma's rule provides that: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." 12 O.S.2001, § 2615. The federal rule states: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." Fed. R. Evid. 615. This Court should, therefore, find federal cases "highly persuasive".

See State v. Thomason, I975 OK CR 148, ¶ 14, 538 P.2d 1080, 1086 (stating federal cases interpreting the Fifth Amendment are "highly persuasive"); *accord Murphy v. State*, 2012 OK CR 8, ¶ 42, 281 P.3d 1283, 1294 (this Court interprets Oklahoma's ex post facto provision consistent with federal cases).

"It is clear from the plain and unambiguous language of [section] 615 that lawyers are simply not subject to the Rule. This Rule's plain language relates only to 'witnesses,' and it serves only lo exclude witnesses from the courtroom." *United States v. Rhynes*, 218 F.3d 310,316 (4th Cir. 2000) (*en banc*) (plurality op.). In *Rhynes*, the defense attorney admitted that he discussed a prior witness's testimony with another witness before that witness testified. *Id.* at 314. The court in that case had gone beyond the plain terms of Rule 615, and further ordered that "'the witnesses shall not discuss one with the other their testimony.'" *Id.* at 317. Nevertheless, the Fourth Circuit held that the attorney did not violate Rule 615 or the trial court's additional order: "The relevant authorities interpreting Rule 615, including court decisions and the leading commentators, agree that sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party[.]" *Id.* (collecting cases and authorities). The court further rejected the argument that it should look beyond the plain language of Rule 615 to find its "spirit" had been violated:

> In short, the Government's position requires the implication that by discussing prior trial testimony with Corwin Alexander, Mr. Scofield necessarily coached Alexander or made it likely that Alexander would commit perjury. To the

> contrary, we must trust and rely on lawyers' abilities to discharge their ethical obligations, including their duty of candor to the court, without being policed by overbroad sequestration orders.

Id. at 320; *accord United States v. Guthrie*, 557 F.3d 243, 247-49 (6th Cir. 2009) (finding no error where the prosecutor was permitted to speak with the victim during an overnight recess taken during defense counsel's cross-examination of the victim: "the district court clearly and correctly articulated the limits of the prosecutor's permitted interaction with the witness by stating: '[The prosecutor] may have conversations with his witness. He may not coach the witness.'" (alteration adopted)); *United States v. Teman*, 465 F. Supp. 3d 277, 323-25 (S.D.N.Y. 2020) (finding no violation of Rule 615 where the prosecutor and case agent spoke with a witness during an overnight recess taken during the witness's testimony and collecting cases to reject the defendant's argument that the court should "embrace[] a broader interpretation of the rule that restricts witness communication of any kind (including outside of the courtroom) for the duration of trial"); *id.* at 325 ("the purpose of the call was the familiar one in which trial counsel alerts a witness to possible inconsistencies in his testimony so as to prepare for cross examination"); *People v. Villalobos*, 159 P.3d 624, 628-29 (Colo. App. 2006) (finding no violation of the rule of sequestration where the prosecutor discussed the testimony of a prior witness with a prospective witness: "Defendant argues that an attorney's discussion of one witness's testimony with a prospective witness violates [Colorado's equivalent rule]. We are not persuaded."); 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 615.06 (Joseph M. McLaughlin ed., 2d ed.

2006) (noting that sequestration orders "usually permit the witnesses to discuss their own or other witnesses' testimony with counsel for either side").

As noted by the Fourth Circuit plurality in *Rhynes*, it would be proper for an attorney to ask a witness during their testimony about the testimony of a prior witness. *Rhynes*, 218 F.3d at 320 n.11. Thus, Ms. Pope Smothermon could have asked Mr. Sneed, "The Medical Examiner testified that Mr. Van Treese's body had wounds consistent with the knife found under his body, can you explain that?" In fact, during cross examination, Petitioner's counsel told Mr. Sneed what the Medical Examiner had testified to (2004 Tr. XII 228). There was no violation of the rule of sequestration.

Petitioner goes even further, accusing Ms. Pope Smothermon of feeding a false story to Mr. Sneed. This allegation, which is untrue, will be addressed in response to Petitioner's third proposition of error.

Ms. Pope Smothermon's attempt to determine whether Mr. Sneed used a knife in his attack on Mr. Van Treese before his testimony was proper. Petitioner has failed to show error, much less plain error. Further, as will be discussed in response to Petitioner's cumulative error claim, Petitioner has failed to demonstrate that this alleged error affected the outcome of the trial. Petitioner is not entitled to relief.

PROPOSITION III: PETITIONER'S ALLEGATION THAT THE STATE KNOWINGLY PRESENTED FALSE TESTIMONY IS WITHOUT MERIT.

In his third proposition of error, Petitioner claims the State knowingly presented perjured testimony when Mr. Sneed testified that he used a knife in the assault on Mr. Van Treese. Petitioner even goes so far

as to accuse the prosecutor of "herself devis[ing]" Mr. Sneed's testimony. Pet. 4th PC at 70. There is no evidence that Mr. Sneed's testimony was false, or that the State knew it to be false, much less that the State told Mr. Sneed what to say. This claim is without merit.

A. Standard of Review

Due process is violated if the State knowingly introduces false testimony or fails to correct testimony it knows to be false. *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). This Court has established a three-part test for alleged *Napue* violations: 1) the State intentionally concealed an element affecting the credibility of key evidence; 2) the prosecutor knew or had reason to know the evidence was false but did not bring that fact to the trial court's attention; and 3) the concealment caused the fact-finder to be unable to properly evaluate the case. *Runnels v. State*, 1977 OK CR 146, ¶ 30, 562 P.2d 932, 936.

However, *Runnels* was decided forty-five years ago, and this Court has had little occasion to discuss *Napue* in published cases. The State respectfully asks this Court to overrule *Runnels* and adopt the federal test for alleged *Napue* violations: "(1) a government witness committed perjury, (2) the prosecution knew the testimony to be false, and (3) the testimony was material." *United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015). This is particularly important because, after *Runnels* was decided, the Supreme Court defined materiality in a way that conflicts with *Runnels*. Per the Supreme Court, evidence is material under *Napue* unless the State's failure to disclose the falsity of the evidence is harmless beyond a reasonable doubt. *Id.* (citing *United States v. Bagley*, 473 U.S. 667,680 (1985)).

B. Argument and Authority

Petitioner claims Mr. Sneed's testimony that he attempted to stab Mr. Van Treese once in the chest was false and that the State knew it to be false. Pet. 4th PC at 69-71. According to Petitioner, someone did attempt to stab Mr. Van Treese, but it was not Mr. Sneed. Rather, it was Mr. Sneed's girlfriend, "Fancy." There is absolutely no evidence that Mr. Sneed's testimony was false, much less that the prosecutor knew it to be so.[26]

Petitioner claims Dr. Chai Choi's testimony about possible knife wounds "presented unexpected evidentiary support for a co-conspirator participating in the killing inside Room 102."[27] 4th PC at 70. Thus, Petitioner accuses Ms. Pope Smothermon of telling Mr. Sneed what to say to explain Dr. Choi's testimony.

The problem with Petitioner's theory is that, if Ms. Pope Smothermon had coached Mr. Sneed on how to explain Dr. Choi's testimony, she surely would have

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[26] Within this proposition of error, Petitioner also alleges the State failed to disclose Ms. Pope Smothermon's memo, and that Ms. Pope Smothermon was "deceitful" with the trial court. Pet. 4th PC at 69-70. These asides are wholly insufficient to raise claims of error and are improperly combined with Petitioner's *Napue* claim. They should not be considered. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2021) (requiring claims of error be set forth separately within a brief).

[27] Mr. Sneed explained that he hit Mr. Van Treese with the baseball bat, causing him to fall to the ground (2004 Tr. XII 112-13). He then tried to stab Mr. Van Treese (2004 Tr. XII 112-13). When that did not work, Mr. Sneed hit Mr. Van Treese repeatedly with the bat (2004 Tr. XII 112-13). There is nothing implausible about this testimony, nor anything about Mr. Van Treese's injuries which necessitates the presence of another perpetrator. One person could use a baseball bat to overcome their victim, set the bat down and use a knife, and then pick the bat back up.

done a better job. Mr. Sneed testified that he tried to stab Mr. Van Treese once in the chest (2004 Tr. XII 112, 211). Dr. Choi testified that Mr. Van Treese's body had two cuts, one on his left arm and one on his right hand (2004 Tr. XI 22, 45-46). A cut is caused by a sharp instrument such as a knife (2004 Tr. XI 65, 70-73). Mr. Van Treese also had five patterned injuries—four on his chest and one on his buttocks—that were not stab wounds but were also not caused by the baseball bat (2004 Tr. XI 73-83, 86). Dr. Choi measured the blunt edge of the knife and opined that it was more likely than not that Mr. Sneed's knife made those five wounds (2004 Tr. XI 73-83, 97). Dr. Choi even did a demonstration whereby she pressed the knife into her hand and the imprint was similar to the wounds on Mr. Van Treese (2004 Tr. XI 94-98). She agreed the injuries were made by "either that knife or a similar instrument with that same kind of pattern on the tip of that knife" (2004 Tr. XI 99). Although the State suggested Mr. Van Treese might have fallen on a piece of furniture (2004 Tr. XI 93), the injuries did not appear to Dr. Choi to be random (2004 Tr. XI 94).

So, after Dr. Choi's testimony, Ms. Pope Smothermon was aware that there were at least five, and possibly seven, injuries that were likely made by Mr. Sneed's knife. If Ms. Pope Smothermon had coached Mr. Sneed, he would have testified that he tried to stab Mr. Sneed at least five times. He did not. Rather, Mr. Sneed testified that he tried to stab Mr. Van Treese one time (2004 Tr. XII 112, 211).

Thus, defense counsel was able to use this inconsistency to challenge Mr. Sneed's credibility: "He puts this knife, tries to stab him in the left chest one time. The guy can't even lie right now. One time." (2004

Tr. XV 141); (2004 Tr. XV 142 ("He can't even lie right when he decides to change his story to get it [to] fit so he can keep his deal.")). Petitioner's allegation that Ms. Pope Smothermon induced Mr. Sneed to tell a lie that is contradicted by the very evidence she was allegedly trying to explain is nonsensical.

Petitioner cannot satisfy any of the three elements of a *Napue* claim. First, he has failed to prove that Mr. Sneed's testimony was false. Mr. Sneed admitted he tried to stab Mr. Van Treese, and the defense and prosecution agreed that was truthful (2004 Tr. XV 70 (Prosecutor Gary Ackley: "State's Exhibit No. 14 and all the other evidence in this case stands for the notion that he tried to stab Barry Van Treese with a blunt knife."); 2004 Tr. XV 141). Today, Petitioner agrees someone tried to stab Mr. Van Treese, but argues "Fancy" did it. *There is not one scintilla of evidence that "Fancy" tried to stab Mr. Van Treese or that "Fancy" was even in the room.*

In his third post-conviction application, Petitioner argues that this phantom woman lured Mr. Van Treese into the room. Tellingly, however, although Petitioner was well aware of Dr. Choi's trial testimony, he never argued that "Fancy" tried to stab Mr. Van Treese.

The State refuted the "Fancy" story in its response to Petitioner's third post-conviction application and will further address it in response to Proposition V. For now, however, Petitioner cannot show that Mr. Sneed committed perjury when he said he tried to stab Mr. Van Treese. All evidence says he did.

Petitioner has also failed to prove the prosecution knew Mr. Sneed's testimony that he tried to stab Mr. Van Treese was false. Petitioner has pointed to

absolutely no evidence that the State knew "Fancy" even existed, much less that she allegedly stabbed Mr. Van Treese.

Finally, because Mr. Sneed's testimony was truthful, the question of materiality is moot. The State supposes that, if Petitioner's entire (current) story—*i.e.*, that he had nothing to do with the murder and Mr. Sneed and "Fancy" acted without him—were true then he would be entitled to relief because his story is that he is innocent.[28] The problem for Petitioner is, as demonstrated in the State's response to his third post-conviction application and Proposition V herein, Petitioner is not innocent.

Mr. Sneed did not lie when he testified that he tried to stab Mr. Van Treese. The State was thus unaware of any alleged falsehood. Petitioner's *Napue* claim must be denied.

PROPOSITION IV: PETITIONER'S *BRADY* CLAIM REGARDING THE KNIFE IS WITHOUT MERIT.

In his fourth proposition of error, Petitioner claims the State withheld information that "the prosecutor orchestrated Sneed's retrial testimony that he used the pocketknife recovered from underneath Van Treese's head to attempt to stab him …." Pet. 4th PC at 73. Again, this claim is based on a false premise, and is unworthy of relief.

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[28] The State refers to Petitioner's "current" story because, as will be shown in Proposition V, Petitioner has once claimed to know exactly who committed the murder, and it's a very different tale from the one he is telling now.

A. Standard of Review

A criminal defendant may be entitled to relief if the State fails to disclose to the defense favorable information within the control of the prosecutor or law enforcement. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, the undisclosed evidence must be material. *Id.* That is, there must be a reasonable probability that, if not for the State's failure to disclose, the result of the trial would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Significantly, evidence is not "withheld", in the *Brady* sense, if it was actually known to the defense. *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 292 (3d Cir. 2016) ("Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense."); *Leko v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (*Brady* does not apply if the evidence is known to the defense, or if the defense should have known of the evidence); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (*Brady* does not apply if the evidence is available to the defense); *Williams v. State*, 7 A.3d 1038, 1050 (Md. Ct. App. 2010) ("The cases are legion" that evidence known to the defense is not "suppressed" per *Brady*).

B. Argument and Authority

As was shown in Proposition III, Ms. Pope Smothermon did not coach Mr. Sneed much less orchestrate a lie. Further, as discussed in Proposition II, the defense knew at the time of trial, in fact prior to cross-examination of Mr. Sneed, that Ms. Pope Smothermon had communicated with Mr. Sneed,

through Ms. Walker, to obtain clarification of whether and how Mr. Sneed used the knife.

Furthermore, the defense vigorously cross-examined Sneed regarding his failure to previously disclose having attempted to stab Mr. Van Treese (2004 Tr. XIII 7, 14-15, 35-36, 99). The defense further emphasized the knife in its closing argument:

> And last week was the first time he ever said he tried to use this knife in any way on Mr. Van Treese.
>
> After the deal. This is what we call a big fact. He puts this knife, tries to stab him in the left chest one time. The guy can't even lie right now. One time. Medical Examiner, Defendant's Exhibit No. 18, there are four patterned marks on this man's chest consistent with the end of this knife. By way of demonstration she put it on her own hand. Not one, but four, and another one of the same pattern on his — Mr. Van Treese's back side. Is it a coincidence that his testimony and revelation for the very first time about this knife occurred after the Medical Examiner testified in this courtroom?

(2004 Tr. XV 141): *see also* (2004 Tr. XV 142 ("He can't even lie right when he decides to change his story to get it fit so he can keep his deal.")).

Petitioner was aware of the fact of the communication. *See Dennis*, 834 F.3d at 292; *Leka*, 257 F.3d at 100; *Wilson*, 901 F.2d at 380; *Williams*, 7 A.3d at 1050 ("The cases are legion" that evidence known to the defense is not "suppressed" per *Brady*). Petitioner's only claim about the substance of Ms. Pope Smothermon's memo, which would make it *Brady*

material, is that it shows the prosecutor suborned perjury. She did not. Petitioner has failed to establish that the State withheld favorable, material evidence. For the reasons given in Propositions II and III, this claim fails.

PROPOSITION V: PETITIONER'S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT.

In his final proposition of error, Petitioner claims the accumulation of errors argued in his third and fourth post-conviction applications warrants reversal of his conviction. The State has shown in its response to Petitioner's third post-conviction application and this response that there was no error. A claim of cumulative error must be denied when there are no errors. Moreover, the State will provide additional evidence that all of Petitioner's allegations rest on false premises, and Petitioner himself has told many, many lies. Petitioner's conviction should be affirmed.

A. Standard of Review

A defendant may be entitled to relief if several errors occurred, the combined effect of which deprived him of a fair trial. *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263. "A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal." *Id.*

B. Argument and Authority

The State has shown, both throughout this response and in its response to Petitioner's third post-conviction application, that no errors occurred. Petitioner is not actually innocent, the remainder of the claims in his third post-conviction application are waived, and the State did not violate *Brady*, *Napue*, or the rule of sequestration.

See Al-Mosawi v. State, 1998 OK CR 18, ¶ 9, 956 P.2d 906, 910 ("Because we have found that the claims raised in this application are either waived, procedurally barred, or without merit, we find no cumulative error that warrants relief.").

Nevertheless, due to Petitioner's claim of actual innocence and his allegations of gross misconduct by the State,[29] the State believes it to be critically important for this Court to be able to place the claims within this fourth application and Petitioner's third application in a greater context.

As has been shown, there is no evidence to support Petitioner's allegations, only innuendo and supposition. There is, however, evidence that refutes Petitioner's allegations. As for Petitioner, it is undisputed that he lied in his first interview with police (1/9/1997 Glossip Interview with Police at 2 ("I know. I should have never lied, man.") Since then, he has engaged in a pattern of fabrication which renders the claims raised in his third and fourth post-conviction applications unworthy of belief.

Attached to this response are letters Petitioner wrote after he was convicted in 1998.[30] In one letter, to a former cellmate named "Steve", Petitioner wrote: "I

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[29] https://theintercept.com/2022/09/23/richard-glossip-execution-investigation/. The complete press conference can be viewed on the Oklahoma House of Representatives' Facebook page.

[30] These letters were published by a local new outlet in 2015. Oklahoma Death Row Inmate Files Last Minute Appeal After Governor Refuses to Stay Execution, https://kfor.com/news/oklahoma-death-row-inmate-files-last-minute-appeal-after-governor-refuses-to-stay-execution/ (last visited October 5, 2022). They are all included as Attachments 8A-8G, although not all of them are discussed herein.

may need you to testify for me about that letter if you would and maybe Jenny to [sic] for a new trial on new evidence on that letter I wrote." Attachment 8A at 2. In another letter, Petitioner asked Steve to

> send that letter to my (in care of new attorney's [sic] Perry Hudson or Mr. Berch [sic] at the (Oklahoma Indigent Defense System, Direct Appeal's [sic] Division [address omitted] and put a small letter with it just to tell them that you came a cross [sic] this letter when Steve was my celly. Don't tell them I gave it to you that way maybe if they get that letter from you they will talk to the D.A. Can you please do this I need to do something and this way they will talk to Steve but I want them to believe I know nothing about it and if they ask you how you got there [sic] names just say we still stay in touch and I told you in a letter. Can you guy's [sic] please do this for me maybe they can use it right away to do something for me if we can show that I have been telling the same story all a long [sic].

Attachment 8D at 1. Petitioner was apparently referring to an eleven-page letter in which he provides a detailed account of the day before, and day of, the murder. Attachment 8F. In it, he claims Rick Page, who was a friend of Mr. Sneed, arrived shortly after Mr. Van Treese left for Tulsa on January 6, 1997. Attachment 8F at 2. Petitioner claims he heard Mr. Paige tell Mr. Sneed over the phone, "I got it, I got it." Attachment 8F at 2. Petitioner wrote that he later found his girlfriend, D-Anna Wood, in Mr. Sneed's bedroom, which led to an argument between Petitioner and Ms. Wood. Attachment 8F at 2.

Some time around 1:00 a.m. on January 7, Petitioner got into the bathtub where he stayed until approximately 3:00 a.m. Attachment 8F at 3. He went to the living room and found Ms. Wood fully clothed and wearing boots. Attachment 8F at 3. Ms. Wood was acting very nervous, but she said she had been at the front desk with a customer. Attachment 8F at 3. The couple went to sleep at about 3:45 a.m. Attachment 8F at 3.

Mr. Sneed knocked on Petitioner's door around 5:15 a.m. and asked for Ms. Wood. Attachment 8F at 3-4. Mr. Sneed told Petitioner about the broken window, confessed to killing Mr. Van Treese, and left. Attachment 8F at 4. Billye Hooper, the desk clerk, woke Petitioner at approximately 12:30 p.m. Attachment 8F at 6. As he was walking around, he saw Ms. Wood leave Room 102. Attachment 8F at 6.

Later that afternoon, before Mr. Van Treese's body was found, Petitioner asked Ms. Wood if he should tell police about Mr. Sneed's confession. Attachment 8F at 8. "She then looked at me and said no because she was involved that it was a robbery went bad and that she was in the room and thought she might have left a print or something …." Attachment 8F at 8. Petitioner claimed Ms. Wood "was questioned in Salt Lake City on a drug related beating and a drug related murder … [she] has a drug problem and some mental problems." Attachment 8F at 9. Ms. Wood allegedly told Petitioner that she, Mr. Sneed, and Mr. Paige committed the murder.[31] Attachment 8F at 10.

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[31] According to a memo apparently written by Lynn Burch, who represented Petitioner prior to his 2004 trial, Petitioner told Mr. Burch that Petitioner's brother, Bobby Glossip, was "one of the real killers." Attachment 6 at 67-68. The State recently made a

This story is not the defense Petitioner used in either of his trials, nor is it what he now claims happened. When Reed Smith interviewed Petitioner on April 6, 2022, he was asked if he thought Ms. Wood was involved in the murder. His response was, "Look, D-Anna used to do drugs and stuff, so I don't know." Attachment 6 at 100. Either Petitioner lied in the 1998 letter, or in his interview with Reed Smith.

Attached to this response is a table which lists various things Petitioner told Reed Smith that are inconsistent with evidence from other sources, including at times Petitioner's own words. Attachment 9. Not a single one of these inconsistencies is noted in the Reed Smith report. And there are many other examples of things Reed Smith failed to disclose to the public in its report which should have been included in any *independent* assessment of the evidence in this case.

For instance, Petitioner told Reed Smith not only that he did not tell Donna Van Treese that he saw Mr. Van Treese the morning of January 7 (after he was already dead), but he said, "I didn't even talk to Donna

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request to Petitioner's counsel for any documents contained within Petitioner's trial files since Petitioner waived the attorney-client privilege by providing those documents to Reed Smith. Attachment 23. Petitioner also signed waivers of the privilege. *See* Attachment 6 at 189-91. Petitioner's counsel agreed he would provide access to the files *if* the State agreed to a number of conditions, including providing the State's files to Reed Smith. Attachment 23. The State is unwilling to provide its files to a third party who has no direct involvement in these proceedings. However, the discussion of this memo in Petitioner's interview with Reed Smith suggests there may be other inculpatory information within those files. In fact, as described in Proposition I, the State suspects Petitioner's files may contain memos which prove Mr. Sneed confirmed to Lynn Burch that Petitioner was involved in the murder.

Van Treese after the murder, no." Attachment 6 at 87. Yet, at his 2014 clemency hearing, Petitioner admitted that he told Ms. Van Treese that he saw Mr. Van Treese that morning. Attachment 10 at 8:39-10:00.

Petitioner also denied that he told Jackie Williams, the housekeeper, not to clean Room 102. He said he "never even talked to Jackie that day. Never even seen her." Attachment 6 at 128. Again, Petitioner admitted at his clemency hearing that he had no explanation for why he told the housekeepers to only clean the upstairs rooms the day after Mr. Van Treese's murder, while he and Mr. Sneed would clean the downstairs rooms, which included Room 102. Attachment 10 at 11:15-12:30.

Petitioner told Reed Smith the motel was sold out every night under his management. Attachment 6 at 30, 87. ("we sold out every day. Everybody stayed in that motel."). This is *far* from the truth, as shown by Attachment 42 to Petitioner's third post-conviction application. For example, the motel had 54 rooms (2004 Tr. XI 116-18). In December of 1996, the month before Mr. Van Treese was murdered, the number of rooms rented on any given night ranged from 12-31. Pet. 3rd PC, Appx. 4, Att. 42 at 2. In the highest grossing month of the same year (August), it ranged from 25-46. In fact, Petitioner admitted to police that "Barry was upset because the motel wasn't doing as well as it could." Pet. 3rd PC, Appx. 3, Att. 5 at 32.

Petitioner also claimed that he cleaned the motel up: "here's what they showed to say it was run down, a couple of syringes out in the parking lot after I was already arrested. This took place afterwards. … and one room that had air —something was wrong with the air conditioner … that motel wasn't in bad shape. That motel was in the best shape it had ever been in."

Attachment 6 at 80-81. However, the testimony of Kenneth Yan Treese at Petitioner's trial painted an entirely different picture, with the vast majority of the rooms being in pitiful condition (2004 Tr. XI 116-21). Rooms were filthy and several were not rentable due to a lack of heat, a functioning room key, adequate plumbing, or busted telephones (2004 Tr. XI 116-19). A memo prepared by Kenneth Van Treese following his assumption as manager of the motel after Mr. Van Treese's murder and recounting the motel's operations between January and March of 1997 further documented the disrepair of the motel. Attachment 11. In addition to the trial testimony of Kenneth Yan Treese, the memo discusses television sets not working, inadequate towels and linens throughout the motel, broken furniture in rooms, curtains falling off the walls, ceilings with missing tiles, exposed studs in bathroom areas, faulty laundry equipment, poor lighting around the motel, a dangerous boiler room, and more general overall dirtiness around the premises. Attachment 11. The well-documented dilapidation of the motel stands in stark contrast to Petitioner's recollection of the excellent job he was doing as manager.

Relatedly, Petitioner claimed he "kicked the hookers out of that motel." Attachment 6 at 50. However, Reed Smith admits "that the Oklahoma City Best Budget Inn was a constant source of calls for drugs, prostitution", etc. Pet. 3rd PC, Appx. 1, Att. 3 at Bates 163. Kenneth Van Treese also testified that the "motel looked more like a whorehouse than a motel" when he arrived in January 1997 (2004 Tr. XI 131). And Stephanie Garcia said in her affidavit that Petitioner did not like the women from the club staying at the motel, but that they *did* stay there. Pet. 3rd PC, Appx. 4, Att. 12, ¶¶ 2-3, 10, 16. Further, Petitioner admitted his own

brother was bringing "'dope hoes'" and "doing a lot of shady stuff in that hotel." Attachment 6 at 63, 66, 254.

Speaking of Ms. Garcia, there are also significant problems with her story. The State has transcribed an interview that Reed Smith did with Ms. Garcia, the only person who claims "Fancy" exists and was involved in the murder.[32] Petitioner's attorney has refused to provide the State with Ms. Garcia's contact information unless the State agrees to "simply … confirm that she is who she says she is and stands by her words in the affidavit. After all, this is not the time for her to be cross-examined-that is what the evidentiary hearing is for." Attachment 12.

Ms. Garcia would not stand up well to cross-examination. A recent article in *The Intercept* reports Ms. Garcia told them: "A week before the 1997 murder, Ms. Garcia said she and her friends fled the motel because Sneed grabbed one of her friends by the throat and pinned her to a motel room wall, only stopping when Ms. Garcia pulled out a knife and threatened him." Ghosts from the Past, The Intercept, https://theintercept.com/2022/08/20/richard-glossip-oklahoma-death-row-justin-sneed/ (last visited Oct. 5, 2022). Ms. Garcia's affidavit describes an instance in which Mr. Sneed allegedly choked a woman, but she says nothing about pulling a knife; nor does she indicate that this incident occurred shortly before Mr. Van Treese's murder or that she fled the club thereafter. Pet. 3rd PC, Appx. 4, Att. 12, ¶ 33.

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[32] One of Petitioner's jailhouse informants, Paul Melton, claims a woman participated in the murder with Mr. Sneed, but he does not identify her. Pet. 3rd PC, Appx. 4, Att. 14, ¶¶ 6-11.

Ms. Garcia's affidavit further provides that she was out of state when Mr. Van Treese was murdered but returned "a few days" later. Pet. 3rd PC, Appx. 4 Att. 12, ¶ 43. One night:

> Fancy drove up to the motel I was staying at. She was in the back seat of a car. She would not get out of the car, and so I went out to talk with her. She said she was having a customer from the club drive her to his boat on a lake so she could "get rid of a box" for Justin Sneed. She looked very pale and acted like she was very afraid.
>
> At this same time, Fancy also told me "I am not going down for this murder." That was the last time I ever saw Fancy.

Pet. 3rd PC, Appx. 4 Att. 12, ¶¶ 46-47. Ms. Garcia told Reed Smith that she left Oklahoma City approximately two weeks before the murder and returned almost one week after. Attachment 13 at 25-26. She first told Reed Smith that she never saw "Fancy" again after the murder. Attachment 13 at 46. When asked about her affidavit, Ms. Garcia changed her story and said,

> [Ms. Garcia]: Yeah. We all thought we were going to go to jail and get wrapped up in a murder trial. So [Fancy] said she — the last thing then said she said to me was thinking of going down to Fort Lauderdale.
>
> [Question]: Let me just read you — this might refresh your recollection. So it says, "Later that night [this refers to the last night Ms. Garcia spent in Oklahoma City *after* Mr. Van Treese's murder], Fancy drove up to the motel" —

> [Ms. Garcia]: She called her other sugar daddy to come and get her, and he came and got her. And from what I hear, she was hysterical, anyway, and — this is what l was just told, that she had her — her sugar daddy come and get her. And when she got in the car with him, she had — it was said that he said that there was blood splattered on her, and when he took her to the other hotel, she was scared and wouldn't even get out of the car. She made him go in and get the room and everything and brought her some clothes.
>
> [Question]: So you didn't personally observe her, you know, being in the back of the car?
>
> [Ms. Garcia]: No. That was just what everybody was saying, she was in the back of the car and wanting to get to her box. I don't know where the box went or what was in it or anything, but from the sugar daddy's point of view, she had a little blood on her shirt and was completely hysterical and just wouldn't even go in and get — and he had taken her to a completely different hotel and she wouldn't even get out of the car. And when she did, he said that she was scared to death. He was kind of wanting to know what the hell had happened, so that's why we heard about it.

Attachment 13 at 47-48. Reed Smith confirmed, and Ms. Garcia agreed, that Ms. Garcia did not personally observe "Fancy" in the car with the box. Attachment 13 at 49. This is entirely at odds with Ms. Garcia's affidavit.

Ms. Garcia's affidavit asserts that "Justin Sneed was involved in a relationship with Fancy." Pet. 3rd PC, Appx. 4, Att. 12, 11 27. In her interview with Reed

Smith, Ms. Garcia said there was a woman with whom Mr. Sneed acted like he was in a relationship, but she does not indicate this was "Fancy." Attachment 13. That is a pretty important detail to omit if Mr. Sneed in fact used his girlfriend "Fancy" to lure Mr. Van Treese to his death.

The other individual who is key to the "Fancy" story is no more credible than Ms. Garcia. Paul Melton, who was once in the Oklahoma County Jail with Mr. Sneed, claims Mr. Sneed told him an unnamed woman was involved in the murder. Pet. 3rd PC, Appx. 4, Att. 14, ¶¶ 7-11. Mr. Melton has a very lengthy criminal history, including a conviction for making a false statement to obstruct justice in 2009. Attachment 14 at 15. Other reasons to doubt Mr. Melton's story, including that he falsely said Mr. Sneed strangled Mr. Van Treese, were discussed in the State's response to Petitioner's third post-conviction application. State's Response to 3rd PC at 35-41.

In his third post-conviction application, Petitioner alleged that the Oklahoma County District Attorney's Office ordered the destruction of evidence during the pendency of Petitioner's first direct appeal. While a box of evidence was destroyed, neither Petitioner's post-conviction application nor the Reed Smith report acknowledge key problems with their version of events.

First, as discussed in the State's response to Petitioner's third post-conviction application, the form which the District Attorney's Office filled out indicates only that the evidence was "for return to the property room … ." Pet. 3rd PC, Appx. 4, Att. 39 at 5. The form says nothing about the evidence being destroyed. This is consistent with the report prepared by former Inspector Janet Hogue McNutt, the officer who marked

the evidence for destruction. Her report begins, "On 10-28-99, this detective was assigned to transfer property from the Okla. County DA's office back to the OCPD property room." Pet. 3rd PC, Appx. 4, Att. 18. The last sentence of the report indicates the evidence was "marked for destroy", but not why it was marked for destruction or who said it should be destroyed. Pet. 3rd PC, Appx. 4, Att. 18.

Truly, the allegation against the District Attorney's Office stems wholly from the word of Inspector Hogue in her interview with Reed Smith. A copy of the recording of that interview is attached. Attachment 15. Inspector Hogue does not recall who allegedly told her to destroy the evidence, but she stated that the District Attorney' s Office was the entity which decided whether evidence should be destroyed.[33] Attachment 15 at 15:00, 40:00, 1:04:00.

However, Petitioner failed to inform this Court that *three* other police officers contradicted Inspector Hogue. Detective John Fiely told Reed Smith that he had never heard of the District Attorney's Office ordering the destruction of evidence. Attachment 16 at 3:00. Lieutenant Bob Horn confirmed that the District Attorney's Office "never" instructed the police department to destroy evidence. Attachment 17 at 22:30. Finally, Officer Michael O'Leary, who was a transport officer at the time of this murder but later served in a supervisory role over the property management unit, told Reed Smith that, typically, evidence in homicide cases was kept indefinitely, but when evidence in a homicide case was destroyed, it was

[33] The interviewers noted that Ms. Hogue had given an interview to the media in which she said she did not even remember the box at issue. Attachment 15 at 52:00.

typically the property management unit initiating those decisions. Attachment 18A at 19:30, 22:00. Officer O'Leary theorized that the District Attorney's Office gave the evidence to Inspector Hogue for return to the property room and she marked it for destruction, for unknown reasons. Attachment 18A at 26:00, 31:00, 32:00. And former Assistant District Attorney Gary Ackley told Reed Smith that the destruction of evidence was never ordered by the District Attorney's Office; it was an administrative matter that was handled by the police department. Attachment 19 at 79:00.

Mr. Ackley asked Reed Smith if there was documentation showing that the District Attorney's Office blessed the destruction of the evidence because he could not imagine Fern Smith (the prosecutor in Petitioner's first trial) doing such a thing. Attachment 19 at 81:00. The Reed Smith interviewers did not answer Mr. Ackley's question. Mr. Ackley noted the failure to respond and asked again whether there was documentation to that effect. Attachments 19 at 82:00. He explained that Ms. Smith was as careful as any prosecutor he had worked with, and that anyone who thinks she authorized the destruction of evidence in a capital case "gravely misunderstood." Attachment 19 at 83:00. This was not in the Reed Smith report.

This contradictory evidence should have been disclosed so that anyone reading the Reed Smith report, and Petitioner's third post-conviction application, could appropriately weigh it in determining the validity of Petitioner's accusation against the District Attorney's Office — an accusation that was patently false.

There are many, many other discrepancies in the evidence. The State will list those which are most pertinent:

- Petitioner told Reed Smith that he did not believe Mr. Sneed when Mr. Sneed said he had killed Mr. Van Treese. Attachment 6 at 3. Petitioner also said that, after Mr. Van Treese's car was found, he did not check Room 102 because he was told the motel had been searched so he thought, "he's not here or, you know, they would have found him." Attachment 6 at 204. However, in his January 9, 1997 interview with police, Petitioner admitted that when he helped Mr. Sneed put up the plexiglas, he knew Mr. Van Treese's body was in Room 102. Pet. 3rd PC, Appx. 3 Att. 5 at 18-19. This was before Mr. Van Treese was known to be missing. Further, Mr. Glossip maintained to Reed Smith that he did not know Mr. Van Treese's body was in Room 102 even *after* Mr. Van Treese was reported missing. Attachment 6 at 4.
- Petitioner told Reed Smith that Ms. Wood "didn't say she gave Barry a key" to Room 102, "[s]he said she gave somebody a key." Attachment 6 at 33-34. Petitioner made this assertion in the context of claiming he did not know Mr. Van Treese would be returning to the motel on the night of January 6-7. Attachment 6 at 32-33.. Yet, Ms. Wood very specifically testified that Mr. Van Treese "walked over to the board and took the key to 102." (2004 Tr. V 79).
- Petitioner claimed, for the first time ever as far as the State is aware, that Mr. Sneed would have known that Mr. Van Treese had cash in the trunk of his car because Mr. Sneed once opened the trunk to

fix a light.[34] Attachment 6 at 59-60. If that is true, why did Mr. Sneed leave all of that money in the trunk?

- Petitioner told police that he went back to bed after helping Mr. Sneed put Plexiglas over the broken window and asked Billye Hooper to wake him at noon; she woke him at "about 1:00, 1:30" and he and Ms. Wood went to Walmart. Pet. 3rd PC, Appx. 2, Att. 4 at 18. Petitioner told Reed Smith that he and Ms. Wood were gone from the motel by 9:00 or 10:00 in the morning that day, and that he "never, ever got up at 1:00, ever. That's a crock. And I didn't even know she [Billye] said that." Attachment 6 at 141-42. Of course, it was Petitioner himself who said that. When Reed Smith reminded him of his statement to police, Petitioner said he must have been confused (although he then insisted again that he had not told police that he got up after 1:00). Attachment 6 at 143-44, 205. Yet, during his second police interview, Petitioner had said the same thing: "I told Billie [sic] to wake me up at noon. She finally got me up; it was, like, 1:40, I think it was, or something like that." Pet. 3rd PC, Appx. 3, Att. 5 at 20. It was then that Petitioner and Ms. Wood ran errands and went to Walmart. Pet. 3rd PC, Appx. 3, Att. 5 at 20.
- While it is not related to the murder, Petitioner told Reed Smith that he celled with a man named Earl Frederick who was sentenced to death. Attachment 6 at 85. According to Petitioner, Mr. Frederick said,

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[34] Apparently, Reed Smith did not believe Petitioner, as one of the interviewers later said she did not think Mr. Sneed knew there was money in the trunk. Attachment 6 at 109.

"'If you get sent to death row,' he goes, I'm dropping my appeals.' I got sent to death row. He dropped his appeals two weeks later and was executed not long after." Attachment 6 at 86. Earl Frederick did dismiss his appeals, but it was in 2002 (not 1998), shortly after his own direct appeal was denied.[35]

- One piece of evidence relied upon by Petitioner and Reed Smith is an affidavit from Margaret Humphrey who worked in the Tulsa motel owned by Mr. Van Treese. Pet. 3rd PC, Appx 5, Att. 58. Ms. Humphrey claimed Mr. Sneed came to Tulsa an unspecified number of times with Mr. Van Treese, and that she once overheard Mr. Sneed say that he was going to kill Mr. Van Treese. Pet. 3rd PC, Appx. 5, Att. 58 at ¶ 6. Ms. Humphrey had not given anyone this alleged evidence until 2019. Pet. 3rd PC, Appx. 5, Att. 58 at ¶ 11. However, Petitioner told Reed Smith that he did not know of Mr. Sneed ever going to the Tulsa motel. Attachment 6 at 111.
- Petitioner's reply brief in the third post-conviction proceeding said of the State's recent interviews with his jailhouse information witnesses, "It is Mr. Glossip's understanding from these witnesses that they each supplied the same information set forth in their respective affidavits … ." Petitioner's Reply to State's Response to Successive Application for Post-Conviction Relief at 36 (filed August 22, 2022) (Pet.'s Reply), OCCA Case No. PCD-2022-589. In fact, one of Petitioner's key affiants, Michael Scott, rather than affirm his prior statements made

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35 https://www.osen.net/dockets/GetCaseInformation.aspx?db=appellate&number=D-1998-293&emid=36771

in his affidavit, informed agents with the Attorney General's Office that he "had some trouble remembering stuff" and did not "feel like [he] would be a reliable witness." Mr. Scott's feelings on the issue were resolute: "At this point, I don't want to be involved in anything [because] I feel I cannot contribute accurately." Attachment 5A at 1:00, 2:00.

- The Reed Smith Report made it sound as if no one knew where the money in Mr. Van Treese's trunk came from, implying he acquired it through nefarious means. Pet.'s 3rd PC, Appx. 1, Att. 3 at Bates 92-93, 99-101. And Petitioner's third post-conviction application claimed, "Nor do records reflect any attempt by officers to interview others who may have known how Van Treese came by that cash, or to learn what activities he was involved in that could have yielded suspicious cash or who may have wanted to kill him." Pet. 3rd PC at 38. But Petitioner told Reed Smith, "when they showed me some of the receipts on the envelopes in the trunk, I'm sitting there going, 'That was money I gave him.'" Attachment 6 at 59. Further, Petitioner clearly had information accounting for the source of that money. *See* Pet. 3rd PC, Appx. 4 Att. 43 at 2 ("The envelopes found in Barry Van Treese's trunk had dates and amounts listed on the front side of the envelope." This document then goes on to discuss what was written on the envelopes).

- Petitioner went to see attorney David McKenzie on January 9 before he was arrested. When Reed Smith asked Petitioner if he had hired Mr. McKenzie, he replied, "I didn't hand him any cash, but that's why I had the cash on me. I was going to pay him, and he said, 'Not yet.'"

Attachment 6 at 132. In spite of this admission by Petitioner directly to Reed Smith, the Reed Smith report states, "Glossip was intercepted by police while he was at a lawyer's office (Oklahoma criminal defense attorney David McKenzie, Bar #12774) where the appointment *presumably required payment*." Pet.'s 3rd PC, Appx. 2, Att. 3 at 298(emphasis added).[36]

- Petitioner's third post-conviction application and the Reed Smith report repeatedly emphasized what they view as a suspicious lack of police reports. Pet.'s 3rd PC, Appx. 1, Att. 3 at Bates 94, 105-14. They fail to mention, however, that Ms. Pope Smothermon told Reed Smith that it was standard to have witnesses in a case for whom there were no police reports. Attachment 20 at 17:00. Ms. Pope Smothermon further stated that she and other prosecutors routinely continued to investigate after the police were finished. Attachment 20 at 18:00.

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[36] Reed Smith was not objective, and that can best be seen throughout their interview with Petitioner. Petitioner vehemently denied that Mr. Van Treese ever stayed in Room 102. Attachment 6 at 29-30. Later in the interview, Petitioner was looking at a map of the motel when he said, "This is Barry's room." Attachment 6 at 210. The Reed Smith interviewer declared, "And when you say 'Barry's room,' you just mean he was found here; right? He didn't stay in 102." Attachment 6 at 210. A truly impartial interviewer would have asked something like, "What do you mean when you say, 'Barry's room', instead of feeding Petitioner information. Another Reed Smith attorney accused Judge Twyla Mason Gray of falsely complimenting the defense attorneys during the second trial in order to avoid being reversed on appeal. Attachment 6 at 229-30. Further, Justin Sneed told Reed Smith he did *not* want his interview recorded, but they recorded it anyway. Attachment 1 at 3-4. While it was not unlawful for them to do so, they agreed but then recorded it anyway. Attachment 1 at 3-4.

- Reed Smith, and Petitioner's third post-conviction application, criticize the police for not following up on the fact that some of the money in Mr. Van Treese's car had dye on it, which might have indicated it was taken in a robbery. Pet.'s 3rd PC at 27, 37-38; Pet.'s 3rd PC, Appx. 1, Att. 3 at Bates 21, 40-41, 99, 155 n. 491. The fact is that police did check to see if money that had dye was from a robbery (1998 Tr. V 111).
- Petitioner told Reed Smith that he had "heard rumors that Barry messed with some of the girls from the Vegas Club and stuff like that. I didn't want to believe that stuff, you know. He's an older guy, he had kids. So I just blew it off and that's just people talking, right?" Attachment 6 at 35. But Petitioner said in Joe Berlinger's *Killing Richard Glossip* that, "Barry had messed with prostitutes. And once or twice I'd seen people leaving his room. It wasn't like a new thing. He had been doing that for quite a while." Killing Richard Glossip, Part I at 12:50.[37]

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[37] Interviewed by a reporter for the Irish Times in relation to another one of his documentaries, Berlinger noted that his work "allows [him] to play with the notion of truth. Because we live in a post-truth society." https://www.irishtimes.com/culture/tv-radio-web/joe-berlinger-a-lot-of-true-crime-documentaries-arevery-irrcsponsible-1.4476055 (last visited July 13, 2022). Berlinger further noted that he saw circumstantial evidence as not "real proof" in cases he examined. *Id.* Oklahoma's legal system rejects this notion held by Berlinger, seeing no distinction between the weight to be given to circumstantial or direct evidence. *See Dodd v. State*, 2004 OK CR 31, ¶ 80, 100 P.3d 1017, 1041 ('The law makes no distinction between direct and circumstantial evidence; either, or any combination of the two, may be sufficient to support a conviction.").

- Petitioner and Reed Smith have pointed to the fact that there was blood on the money Mr. Sneed had when he was arrested, but no blood on the money Petitioner had when he was arrested. 4th PC at 21 n.3; Pet. 3rd PC, Appx. 1, Att. 3 at Bates 46. However, the blood on Mr. Sneed's money was his own, not that of Mr. Van Treese (2004 Tr. XI 103-06; 2004 Tr. XV 29-30). Mr. Sneed testified that he had an injury on his hand when he was arrested that he sustained while working his roofing job (2004 Tr. XII 209-10). Thus, it is not surprising that Mr. Sneed's blood was on the money he had stolen, but not on the money which was left with Petitioner.

Petitioner's post-conviction applications, the Reed Smith report, and Petitioner's public relations campaign are built on assumptions, half-truths, and (in some cases) outright falsehoods. The evidence which established Petitioner's guilt in 1998 and 2004 remains the same today. It has not been credibly rebutted.

The first inkling police had of Petitioner's involvement came from Petitioner's inconsistent statements. Twenty-five years later, Petitioner's guilt is confirmed by his continually shifting stories.

"The only issues that may be raised in an application for post-conviction relief are those that … [s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is actually innocent." 22 O.S.2021, § 1089(C). Petitioner has failed to make either showing. He is not entitled to post-conviction relief.

Respectfully submitted,

JOHN M O'CONNOR
ATTORNEY GENERAL
OF OKLAHOMA

[Signature

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NOT FOR PUBLICATION

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case No. PCD-2022-819

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

Filed November 17, 2022

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

[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.

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.

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 postconviction relief) along with a motion for evidentiary hearing and motion for discovery. The facts of Glossip's crime are sufficiently 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.

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[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.

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

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[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

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 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.

> 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.

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

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.* 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 postconviction 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.

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

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 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 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

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

> Due process requires the State to disclose exculpatory and impeachment evidence favorable to an accused. S*ee 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. …
>
> 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]

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 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.

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IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

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

RICHARD GLOSSIP,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent(s).

Filed September 22, 2022

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF DEATH PENALTY—EXECUTION SCHEDULED DECEMBER 8, 2022

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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 other states or jurisdictions? No

I. CAPITAL OFFENSE INFORMATION

6. **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 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 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

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

ls 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)

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

Glossip v. State, 2001 OK CR 21, 29 P.3d 597 (2001)

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 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 UNITED STATES 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 AND FOURTEENTH 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 RELIABILITY 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.

PROPOSITION 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 or 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 I, 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 I, 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

[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.

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 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 slating, 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 finally 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, 200l), 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 or 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.

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[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.

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 would let Gina Walker know that he was back in Oklahoma County, which I did immediately." Attachment 14.

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[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 often items of evidence by the Oklahoma City Police Department. Tr. J/16/03 at 23. This event is discussed in detail in Mr. Glossip's July 1, 2022 application.

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. Aller 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 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

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[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.

[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.

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 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 Ackley, 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 Sheriffs 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

[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.

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 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

[8] It appears Ackley did not actually attend.

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 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

[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

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:
>
> > 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

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the conclusion that this memo was written during the second trial. Attachment 2 at 16-19]

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 mv 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]

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[10] ln 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.

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, al 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 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

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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.

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 testily 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

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[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/glossipindependentinvestigationfinalreport.pdf.

[12] Both of these supplements were filed in the case opened with the July 1, 2022 application.

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 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 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.

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[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.

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 tum 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 Van Treese 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 sul1iciently 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*, 2017 OK 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. <u>The Claim Could Not Previously Have Been Discovered Through the Exercise of Reasonable Diligence</u>.

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 Fonteno 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. But For This *Brady* Violation, No Reasonable Juror Would Have Convicted Richard Glossip of Murder or Sentenced Him to Death.

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

[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.

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 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

[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 OK CR 204, ¶¶ 9-10, 655 P.2d at 1051.

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]

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.

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[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.

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.

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[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.

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 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 or 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 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

[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 conform that the State was working hard to have witnesses coordinate their testimony that might otherwise not be consistent.

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 testifying that he

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[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.

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)(l).

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. The Claim Could Not Previously Have Been Discovered Through the Exercise of Reasonable Diligence.

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. But For This Rule Violation and Misconduct, No Reasonable Juror Would Have Convicted Richard Glossip of Murder or Sentenced Him to Death.

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 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

[20] Again, the State actually made the file available the day before Mr. Glossip's counsel were unable to review it until September 1.

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.

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[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 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 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

[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."

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)(l). 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).

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 counsels 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 al 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.

[Signature]
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.

9/22/22	[Signature]
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 the Attorney Counsel for Respondent.

[Signature]
Warren Gotcher

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

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

RICHARD GLOSSIP,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent(s).

Filed March 27, 2023

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

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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 reattached 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
(406) 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
(407) 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

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

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, 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 OVER-EMPHASIZED 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 UNITED-STATES 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 ANDSENTENCING 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 / Bigscreen / 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 midtrial 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 1AC 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, relisted 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 Bi]lye 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 $23,000 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.

[Signature]
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	[Signature]
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.

[Signature]
Warren Gotcher, OBA #3495

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

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Vi ask — Justin h...

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

Barry ⇒ looked got suspicious

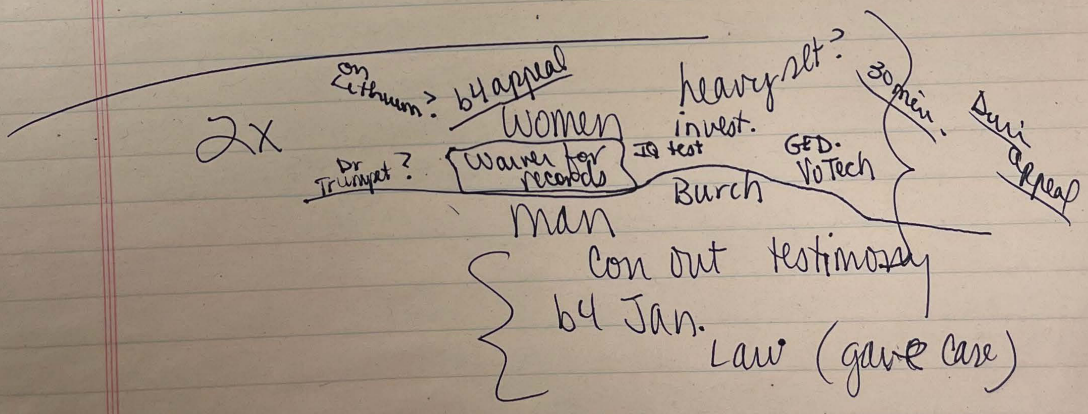
Vi asking everyone Barry thought someone opened his room maybe female figure

$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



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

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Attachment 1 to March 27, 2023 Application for Post-Conviction Relief: Page from Connie Smothermon's Handwritten Notes from Interview of Justin Sneed [with image of Pet. App. 101a]

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

Barry —> looked got suspicious

[marginal note: Vi asking everyone]

Barry thought someone opened his room
maybe female figure

$3000

—meals not steady
no hungry
get crank from girls

Glossip said he got rid of keys to Rm 102
△ said Vi took key to Rm 102

---

on Lithium? b4 appeal

2x women heavy set? 30 min. [illegible] appeal
invest

Dr. Trumpet? waiver for records IQ test GED
VoTech

---

man Burch
con out testimony
b4 Jan. law (gave case)
Glossip no hard feelings
didn't want to testify
not atty – can't legal advice

STATE OF OKLAHOMA
SS:
COUNTY OF OKLAHOMA

AFFIDAVIT OF
DR. LAWRENCE "LARRY" TROMBKA

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 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 Sherriff'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 Sherriff'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.

[Signature]
Dr. Lawrence "Larry" Trombka

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

[Signature]
Notary Public

Attachment A

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: **[Signature]**

STATE OF OKLAHOMA
SS:
COUNTY OF OKLAHOMA

AFFIDAVIT OF
GARY L. ACKLEY

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. l 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. l 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 Smotherman, 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 mold 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.

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

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

[Signature]

My commission expires 12/04/23

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5-26-04

Reverse - Dr. Choi -

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

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

Cuts ≠ knife cuts

Cuts OR splits in skin from impact?

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Attachment 7 to March 27, 2023 Application for Post-Conviction Relief: Page from Gary Ackley's Hand-written Notes from Medical Examiner Testimony, with Post-Its [with image of Pet. App. 120a]

5-26-04

Reverse – Dr. Choi

△ G tried to stab V
w/a ~~dull~~ blunt-pointed
knife – who's the brains
in the operation?

[Could cut be
made by
sharp furniture?
Gloss?
cut on elbow
& hand]

[Cuts ↘ knife cuts

Cuts OR splits
in skin from
impact?]

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11-11-03| Meeting w/ C... ope ... Donna

[in Storage Rm]

Cliff Everhart
933
0737

Looked for reg not one!

Billie knew Everh 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 fairly reg problem - knew & Used MJ

saw Sneed 2 hrs then gone
bruising around eye

common sense deposit under front
seat

not a leader
feel have to do everything

not see Sneed have need for $

Glossip had beat
not low class
no high values

{ Liquidated
B's screen
900 couch
Jewelry

wanted $ for boobs

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Attachment 8 to March 27, 2023 Application for Post-Conviction Relief: Page from Connie Smotherton's In-Trial Notes re Cliff Everhart [with image of Pet. App. 122a]

[in storage Rm] Cliff Everhart
933 0737

Looked for reg
not one

Billie knew Everh 1%

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

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

Not look at rooms
much

Sneed puppet

Drug fairly reg problem Knew △ Used MJ

Saw Sneed 2 hrs then gone
bruising around eye

Common sense deposit under front
seat

[following are marginal notes at 90 degrees to the notes above]

not a leader
tell how to do
everything

not
see Sneed have
need for $

Glossip
had best

{Liquidated
{Big Screen
{900 couch
Jewelry
wanted
$ for
boobs

not low
calib
no high
main.

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?

a.m.? p.m.?

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. ?????

Saw him when putting window – left to get plexiglass ~7:30

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?

tip broke when found it. brought knife down on top possibly rolled over on it

hit - knocked down w/bat - hit in chest w/ knife - turned away - hit again - dropped it - don't know why didn't tell

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? yes

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?

turned on full blast at before broke off key - lock

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

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Attachment 9 to March 27, 2023 Application for Post-Conviction Relief: 2003 Memo from Connie Smotherton to Gina Walker [with image of Pet. App. 124a]

[*Handwritten Margin Notes in Italics*]

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 this 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. ?????

[*a.m? p.m.?*]

[*saw when patching window -*
left to get plexiglass ≈ 7:30]

3 - Our biggest problem is still the knife. Justin tells the police that the knife fell out 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?

[*tip broke when found it.*
brought knife down one time.
possibly rolled over on it
hit-knocked down w/bat -
hit in chest w/knife -
turned away – bat again
dropped it -
don't know why
I didn't tell]

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?

[*yes*]

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?

[*turned on full blast rt before broke key off and lock*]

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

STATE OF OKLAHOMA
SS:
COUNTY OF OKLAHOMA

AFFIDAVIT OF
CHUCK LOUGHLIN

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.

[Signature]_____

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

[Signature]_____
Notary Public

STATE OF NEVADA
SS:
COUNTY OF WASHOE

AFFIDAVIT OF
PAUL MELTON

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:

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

15. Sneed said the second 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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."

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.

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."

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.

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.

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."

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.

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.

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.

56. No one ever talked to me about the case, and I never heard anything about it umtil 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.

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

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.

[Signature]
Paul Melton

SUBSCRIBED AND SWORN TO BEFORE ME on the 16th day of March, 2023.

Notary Public [Notary Stamp]

[Signature]

My commission expires: 03/15/2026

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case No. PCD-2023-267

RICHARD GLOSSIP,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

Filed April 6, 2023
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

[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.

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.

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 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.

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[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.

> 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.

FOR PUBLICATION

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case Nos. PCD-2023-267
D-2005-310

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

Filed April 20, 2023

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

[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.

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.[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 postconviction 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 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

[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.

"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.l(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 Oklah01na 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-Conviction

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[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

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

> 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.

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

¶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, ,i 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 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

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

> 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).

¶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 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

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

> Due process requires the State to disclose exculpatory and impeachment evidence favorable to an accused. *See United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d [104] (1972), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).
>
> *Wright v. State*, 2001 OK CR 19, ¶ 22, 30 P.3d 1 148, 1152.

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.

¶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.

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[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.

¶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 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

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[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.

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

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 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 Smotherman 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.l(C) is clear. This Court may grant a stay of execution only when: (1) there is an action pending in this Court; (2) the action challenges the death row inmate's conviction or death sentence; and (3) the death row inmate makes the requisite showings of likely success and irreparable harm.

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

CONCLUSION

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

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

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

Lumpkin, J., Specially Concur:

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

¶2 For over 20 years the facts, evidence, and law relating to this case have been reviewed in detail by judges and their staffs through every stage of appeal allowed under our Constitution. At no level of review has a court determined error in the trial proceeding of this Petitioner nor has there been a showing of actual innocence. As the Court's opinion notes, finality of judgments is a foundational principle of our system of justice. Petitioner has received every benefit offered by our system of justice and now his conviction and sentence are final. For these reasons, and the analysis set forth in the opinion, I concur in the judgment of the Court and 1n the denial of this application.