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 2 (PAGES 452-707)

PAUL D. CLEMENT
Counsel of Record
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com
Counsel for Respondent

CHRISTOPHER G. MICHEL
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I St. NW, Suite 900
Washington, DC 20005
(202) 538-8308
christophermichel@quinnemanuel.com
Court-Appointed Amicus Curiae in Support of the Judgment Below

SETH P. WAXMAN
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
seth.waxman@wilmerhale.com
Counsel for Petitioner

APRIL 23, 2024

PETITION FOR CERTIORARI FILED MAY 4, 2023
CERTIORARI GRANTED JANUARY 22, 2024

TABLE OF CONTENTS

VOLUME 1

VOLUME 2

VOLUME 3

SUPPLEMENTAL APPENDIX
[FILED UNDER SEAL]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case No. D-2005-310

RICHARD EUGENE GLOSSIP,
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

From Oklahoma County District Court
CASE NO. CF-97-244
Before the Honorable Twyla Mason Gray,
District Judge
Filed April 14, 2006

ATTORNEYS FOR APPELLEE
W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH S. BRANHAM, OBA# 18019
ASSISTANT ATTORNEY GENERAL
2300 N. Lincoln Blvd.
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 521-6246 (FAX)

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Richard Eugene Glossip, hereinafter "Defendant", was convicted by jury for the crime of First Degree Malice Murder in Case No. CF-97-244, in the District Court of Oklahoma County before the Honorable Twyla Mason Gray, District Judge. The jury found the existence of one (1) aggravating circumstance, namely, that Defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration. The jury recommended a sentence of death. The trial court imposed the jury's recommendation. From this Judgment and Sentence, Defendant has perfected his appeal to this Court. It should be noted that this is the second conviction and death sentence imposed on Defendant for the murder of Barry Van Treese. This Court reversed Defendant's original conviction and death sentence based on alleged ineffective assistance of trial counsel. *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

STATEMENT OF FACTS

Barry Van Treese owned the Best Budget Inn, located at 301 South Council Road in Oklahoma City (Tr. IV 32-33; Tr. XIII 107). Van Treese hired Defendant in 1996 as on-site manager of the motel. Defendant and his girlfriend, D-Anna Wood, lived at the motel in an apartment behind the front office. Van Treese paid Defendant a salary plus free rent and utilities on the apartment (Tr. IV 38, 42-43, 50). Van Treese resided in the Lawton area but visited the motel every couple of weeks to pick-up daily receipts, check balance sheets and inspect the motel property. However, Defendant was responsible for the daily operations of the motel (Tr. IV 31-32, 41-42, 51-55).

In the second half of 1996, Van Treese's visits to the Oklahoma City motel decreased dramatically due to illness and deaths in his family. Van Treese made overnight visits to the motel only four (4) times during the last half of 1996 (Tr. IV 36-40, 42, 58-59). However, Van Treese and his wife maintained telephone contact with Defendant during this time period regarding, *inter alia*, daily collections and daily volume (Tr. IV 39, 41, 85, 120-21). During 1996, VanTreese and his wife, Donna, noticed shortages on the books for the Oklahoma City motel. By the end of December 1996, the Van Treeses discovered that approximately $6,101.92 was missing from accounts receivables for the entire year (Tr. IV 62-66). Defendant provided unsatisfactory explanations for these shortages when questioned at various points during the year (Tr. IV 72-78). Donna testified that she and Barry "were very upset" about this shortage (Tr. IV 66). Defendant, as manager of the motel, was responsible for maintaining the ledger and doing the accounting to make sure that the revenue turned over to the Van Treeses matched the volume of actual business at the motel. Defendant was personally in possession of the daily motel receipts because Van Treese did not use a local Oklahoma City bank for motel deposits. Defendant simply kept the cash in an envelope in his kitchen until Van Treese arrived to collect it (Tr. IV 53-55).

Because of the shortage, Barry Van Treese told his wife that he intended to audit the motel and perform a room-to-room inspection to determine what repairs and renovations needed to be done at the motel. Van Treese intended to confront Defendant with the shortages and get an explanation during his visit to the motel on January 6, 1997 (Tr. IV 70-72). Indeed, in December 1996, Defendant told Billye Hooper, a desk clerk at the motel, that he "knew things had to be taken care" regarding

Defendant's management of the motel and that he would take care of those things after he returned from Christmas vacation (Tr. VII 37-40; Tr. VIII 32-34). The Van Treeses had previously tolerated the shortages on the motel books because of the distraction of their many family problems in the second half of 1996 (Tr. V 20-21). Cliff Everhart, a one percent owner of the motel, had audited the motel records on several occasions and felt Defendant "was probably pocketing a couple hundred a week extra" from motel cash receipts during the last two or three months of 1996 (Tr. XI 172-73). Everhart told Van Treese his concerns. Based on that information, Van Treese arranged with Everhart to confront Defendant the night of January 6th about the shortages at the motel (Tr. XI 169-70, 172-77, 201).[1]

On January 6, 1997, around 6:00 p.m., Van Treese arrived at the Oklahoma City motel to make payroll for his employees and collect daily sheets and revenues that had accumulated since his last visit (Tr. IV 79-80; Tr. VII 53, 55). Van Treese picked up approximately $3,500.00 to $4,000.00 in receipts that evening (Tr. VII 77; Tr. XIV 28-30; State's Exhibit 2; Court's Exhibit 4 at 4-5). Shortly before 8:00 p.m., Van Treese left for a motel he owned in Tulsa (Tr. VIII 109-11; Tr. XIV 5-7; State's Exhibit 1; Court's Exhibit 3 at 9). Van Treese arrived at the Tulsa motel sometime before midnight (Tr. VIII 62, 109). William Bender, manager of the Tulsa motel, observed that VanTreese "was all puffed up. He was

[1] However, Everhart did not have the opportunity to confront Defendant that night. Everhart arrived at the motel well before Van Treese arrived. Because Van Treese was not there, Everhart went home and made no further attempt to contact Van Treese. Everhart testified that he did not speak with Van Treese that night (Tr. XI 174-77).

upset. He was mad … He was all red in the face" (Tr. VIII 63). Bender had never seen Van Treese that angry (Tr. VIII 64). Van Treese stayed at the Tulsa motel for approximately thirty (30) to forty-five (45) minutes (Tr. VIII 64). During that visit, Van Treese made Bender produce the current daily sheet and daily report for the motel. Van Treese made Bender inspect with him several of the motel rooms to ensure no one was staying in rooms that were, according to the daily report, not rented out (Tr. VIII 80). During this inspection, Van Treese told Bender that there were a number of registration cards missing at the Oklahoma City motel in addition to weekend receipt money missing and people staying in rooms that were not registered (Tr. VIII 81). Van Treese was angry about what was going on at the Oklahoma City motel and was inspecting Bender's rooms because he assumed the same thing was happening at the Tulsa motel (Tr. VIII 81-82). Van Treese told Bender he gave Defendant until he returned to Oklahoma City "to come up with the weekend's receipts that were missing and if he came up with that, he was going to give him another week to come up with the registration cards and get all the year-end receipts together" (Tr. VIII 82). Otherwise, Van Treese was going to call the police (Tr. VIII 82).

After inspecting the rooms and obtaining from Bender financial records he needed for year-end reports, Van Treese returned to Oklahoma City (Tr. VIII 83). Pikepass records show that Van Treese arrived at the Oklahoma City Turner Turnpike gate at 1:36 a.m. on January 7th (Tr. VIII 109). He therefore arrived at the motel sometime around 2:00 a.m. (Tr. XIII 115-17). About 3:00 a.m., Defendant banged on the door to Room 117 and awoke Justin Sneed (Tr. XII 94; State's Exhibit 77). Sneed had lived at the motel for several months and

became Defendant's close friend. Sneed, an eighteen (18) year-old high school dropout, worked for Defendant as a maintenance man at the motel. Sneed received a free room in exchange for this work but no salary. Sneed depended largely on Defendant for food (Tr. VII 28; Tr. XII 44-47, 71-73). Defendant asked Sneed five (5) to ten (10) times previously to kill Barry Van Treese (Tr. XII 75-90). Defendant had told Sneed that with Van Treese out of the way, Defendant could control both the Oklahoma City and Tulsa motels owned by Van Treese. Defendant claimed that he could talk Van Treese's wife into letting him control both motels if Van Treese was killed. Defendant promised Sneed money if he killed Van Treese (Tr. XII 89-90).

Once inside Room 117, Defendant told Sneed that Van Treese had just returned to the motel. Defendant appeared "real nervous, real jittery" and wanted Sneed to murder Van Treese "right now" (Tr. XII 95). Defendant said that if Van Treese walked around the motel in the morning and "seen a couple of the rooms that were already supposed to be remodeled that weren't that [Defendant] was going to be fired" (Tr. XII 95). Defendant was supposed to have completely remodeled one of the handicapped rooms at the motel and make minor repairs in other rooms (Tr. XII 96-97). Defendant threatened that Sneed too would be evicted from the motel if Defendant were fired (Tr. XII 95-96). Defendant told Sneed that VanTreese was asleep in Room 102 (Tr. XII 98). As he walked out of Room 117, Defendant picked up a baseball bat laying in Sneed's room and said "why don't [you] just grab that bat and go over there and do it right now" (Tr. XII 96). Defendant urged Sneed to murder VanTreese three or four times during this conversation. Defendant promised $10,000.00 to Sneed if Van Treese was killed immediately. Defendant also promised that

he would put Sneed in charge of one of the motels once Van Treese was dead (Tr. XII 98-99).

Sneed agreed to kill Van Treese and Defendant left (Tr. XII 99-100). After walking to a nearby Sinclair station where he bought a soda, Sneed returned to his room, grabbed the baseball bat and his master room key, and walked to Room 102 (Tr. XII 100-01). When Sneed opened the door to the darkened room, Van Treese got out of bed and started walking towards him. Sneed described what happened next:

> At that point I took one swing with the baseball bat. [Van Treese] 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…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.

(Tr. XII 101-02). John Beavers, a motel resident who was walking through the parking lot around 4:30 a.m., heard the breaking glass from Room 102's window. Beavers heard agitated voices engaged in "clipped speech" going back and forth prior to the window breaking. Based on what he heard, Beavers believed "there was a fight going on" (Tr. VI 20-26, 30). Sneed testified that he was in Room 102 for fifteen (15) or twenty (20) minutes

and that he hit VanTreese a maximum of ten times with the baseball bat (Tr. XII 112-13, 223). Sneed left the murder weapon in Room 102 (Tr. XII 119).

Once Sneed believed Van Treese was dead, he returned to Room 117 and changed out of his bloody clothes. Sneed stuffed the bloody clothes into a metal popcorn container. Sneed then went to the motel office and made contact with Defendant (Tr. XII 117-19). Sneed told Defendant that Van Treese was dead and that the window to Room 102 was broken (Tr. XII 120-22). Defendant told Sneed to clean up the glass from the sidewalk in front of Room 102, to retrieve the bat from Room 102 and then to return to his motel room (Tr. XII 121-22). Sneed complied and Defendant eventually appeared at Sneed's room (Tr. XII 123, 168; State's Exhibit 15). Defendant "was nervous" and made Sneed go with him to Room 102 to make sure that Van Treese was dead (Tr. XII 123). Once inside Room 102, Defendant removed a one hundred dollar bill from Van Treese's wallet and pocketed it (Tr. XII 123-24). Defendant then told Sneed to drive Van Treese's car to an adjacent parking lot at a nearby credit union, that Sneed would find the money he was promised under the front seat of Van Treese's car (Tr. XII 124). Sneed retrieved Van Treese's car keys from a pair of jeans laid over the back of a loveseat and complied with Defendant's orders. Sneed found an envelope with approximately $4,000.00 cash in the place described by Defendant (Tr. XII 125-27, 129).

Defendant met Sneed in Room 117 where they divided up the money. Defendant took half of the cash (Tr. XII 128-29). Defendant and Sneed returned to Room 102 and duct taped a shower curtain over the inside part of the room's window (Tr. XII 130, 132). Sneed

also placed a sheet over Van Treese's body "out of respect' (Tr. XII 131). Defendant had Sneed turn up the air conditioner "full blast" so that VanTreese's body would not start to smell (Tr. XII 130, 132). As they walked out of the room around dawn, Defendant asked Sneed to break a key off in the lock. Sneed complied and the lock's tumbler fell out (Tr. XII 130, 137). Defendant told Sneed to tell anyone who asked about the broken window in Room 102 "that two drunks had rented the room and they had ended up breaking the window and then early in the morning we ran them off the premises (Tr. XII 136). To keep the motel maids away from the body, Defendant told Sneed that they would perform housekeeping on the downstairs rooms at the motel, which included Room102 (Tr. IX 49-51; Tr. XII 138-39). Defendant told Sneed to go to the hardware store and buy a sheet of plexiglass that would fit over the outside of the broken window. Defendant also told Sneed to buy some trash bags, a hacksaw and muriatic acid. Defendant explained that the muriatic acid and hacksaw could be used to dissolve and cut up Van Treese's body and that the remains could be disposed of in the trash bags (Tr. XII 142-46). Sneed returned later that morning with a sheet of plexiglass, trash bags and a hacksaw-he was unable to find any muriatic acid (Tr. XII 147). Defendant and Sneed installed the sheet of plexiglass over the outside of the broken window (Tr. XII 149, 167; State's Exhibit 30).

Around 2:30 p.m. or 3:00 p.m., Billye Hooper received a call from Weokie Credit Union telling her that Van Treese's unlocked car had been found in the credit union parking lot adjacent to the motel (Tr. VII 70). The search for Barry Van Treese ensued (Tr IX 193). Cliff Everhart arrived at the motel around 4:00 p.m. and told Defendant to have Sneed search all the rooms in the

motel for Van Treese. Defendant made it appear as though he complied with that request. He also assisted Everhart search the area around the motel (Tr. XI 185-87; Tr. XII 156-59). Defendant provided multiple and conflicting statements throughout the day in order to deflect attention from Room 102. Around 8:30 a.m. that morning, Defendant told Billye Hooper that VanTreese had "got up early that morning and had gone to get breakfast and was going to get some materials. They were going to start working on the motel" (Tr. VII 62). Defendant told a motel resident that morning who asked about the broken window in Room 102 that two drunks got into a fight, threw a footstool through the window and that he and Sneed threw them out of the motel (Tr. IX 45-47). When that same resident observed blood on the outside of the window to Room 102, Defendant told her that someone got cut cleaning up the glass (Tr. IX 53-56). After Van Treese's vehicle was located, Defendant told Sgt. Tim Brown of the Oklahoma City Police Department (OCPD) that he last saw Van Treese walking through the motel parking lot at 7:00 a.m. that morning (Tr. IX 193-95). During a second conversation that night, Defendant told Sgt. Brown that Sneed said "that a couple of drunks had got in a fight and broke the window and that he had to take them off the property." Defendant stated that he saw Van Treese after the broken window incident (Tr. IX 206). Defendant later told Sgt. Brown that "everything started getting confused" and "[r]eally, the last time I remember seeing [Van Treese] is 8:00 the night before when he was picking up the payroll money" right before Van Treese left for Tulsa (Tr. IX 209). Defendant stated that he saw someone walking through the motel parking lot the morning of January 7th but he was not sure it was VanTreese (Tr. IX 215-19). When Sgt. Brown mentioned to

Defendant his original statement about seeing Van Treese at 7:00 a.m., Defendant denied making that statement (Tr. IX 219).

Around 9:30 p.m., Sgt. Brown and Everhart discussed Defendant's conflicting statements and decided to enter Room 102 (Tr. IX 220-21; Tr. XI 191). They made entry using a pair of hemostats to open the door. Once inside, the pair discovered the body and Sgt. Brown secured the room (Tr. IX 222-24; XI 193-97). Sgt. Brown took Defendant into investigative detention. Once in the backseat of the patrol car, Defendant made the spontaneous statement that "[w]ell, I guess I better tell you now" that he heard the glass breaking earlier that morning followed by Sneed banging on the side wall of his apartment. Defendant stated that he believed the entire time that Sneed had something to do with Van Treese's disappearance but did not want to say anything until he knew for sure. Defendant also stated that Sneed "had said something to him in the past about setting up a fake robbery" (Tr. IX 233-34). Defendant was interviewed by homicide detectives in the early morning hours of January 8th. During that interview, Defendant denied any involvement in, or prior knowledge of, the murder. However, Defendant told homicide detectives in a second interview on January 9th that Sneed appeared at his apartment early in the morning on January 7th and confessed to the murder. Defendant admitted his involvement in cleaning up the glass in front of Room 102 and sealing up the broken window with plexiglass. He also admitted that he did not share any of this information with investigators, or anyone else for that matter, during the search for Van Treese. However, Defendant denied either going inside Room 102 room or seeing Van Treese's body (Tr. XIV 5-7, 29; State's Exhibits 1 & 2; Court's Exhibits 3 & 4). Sneed was arrested

on January 14th and, after initially denying participation in the homicide, implicated both himself and Defendant as described in Sneed's trial testimony (Tr. IV 4-6; Tr. XIV 74-75).

Additional facts will be presented below as they become relevant.

ARGUMENT AND AUTHORITY

I.

SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT DEFENDANT'S CONVICTION.

Defendant argues in his first proposition of error that insufficient corroboration was presented to support Justin Sneed's accomplice testimony . Defendant reasons that without Sneed's testimony, insufficient evidence was presented to support his first degree malice murder conviction. Defendant argues that, at best, he could be found guilty only as an accessory after the fact to Barry Van Treese's murder. Opening Br. at 10-33.

Oklahoma law provides that:

> A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof.

22 O.S.2001, § 742. This Court recently reaffirmed its jurisprudence interpreting Section 742:

> In *Cummings v. State*, we recognized the "general rule" that testimony of an accomplice "must be corroborated with evidence,

> that standing alone, tends to link the defendant with the commission of the crime charged." We have likewise described as "well settled" the interpretation of § 742 as requiring that "corroborative evidence must of itself, without the aid of the testimony of an accomplice, tend to some degree to connect the defendant with the commission of [the] offense," and noted that "independent evidence merely consistent with the main story is not sufficient to corroborate it if it requires any part of the accomplice's testimony to make it tend to connect the defendant with the crime."
>
> The State correctly notes that we have not required that the *quantity* of the independent evidence connecting the defendant to the crime be great, though we have insisted that the evidence raise more than mere suspicion. In *Cummings*, we recognized that an accomplice's testimony need not be corroborated in all material respects and that the amount of corroboration required is simply "at least one material fact of independent evidence that tends to connect the defendant with the commission of the crime." We also recognized that circumstantial evidence can be adequate to corroborate an accomplice's testimony.

Pink v. State, 2004 OK CR 37, ¶¶15-16, 104 P.3d 584, 590 (citing *Cummings*, 1998 OK CR 45, 968 P.2d 821) (footnotes omitted). "The purpose behind the requirement of corroboration is to protect an accused from being falsely implicated by another criminal in the hope of clemency, a desire for revenge, or for any other reason." *Fleming*

v. State, 1988 OK CR 163, ¶8, 760 P.2d 208, 209-10. It should be noted, however, that there is no federal constitutional requirement that accomplice testimony be corroborated. *Foster v. Ward*, 182 F.3d 1177, 1193 (10th Cir. 1999); *Boyd v. Ward*, 179 F.3d 904, 921-22 (10th Cir. 1999). Thus, Defendant's challenge to the accomplice testimony in this case rests on pure state law grounds.

Analysis. It is undisputed that Justin Sneed must be considered an accomplice under Section 742. Sneed pled guilty to the first degree murder of Barry Van Treese and testified that he personally went inside Room 102 and beat Van Treese to death with a baseball bat. However, Sneed testified that the only reason he murdered VanTreese was because Defendant had repeatedly asked him to do it and that on the night of the murder, Defendant offered Sneed, *inter alia*, $10,000.00 to commit the murder. Sneed testified that Defendant feared being fired by Van Treese if he lived to see the condition of various rooms at the motel that were supposed to have been renovated or repaired by Defendant but were not. Defendant also threatened that Sneed would be evicted from the motel by Van Treese if Defendant was fired. Sneed received a plea deal of life without possibility of parole in exchange for his truthful testimony at Defendant's trial (Tr. XII 57-58, 75-101, 174, 178, 184; State's Exhibit 43). Thus, Sneed is an accomplice for Section 742 purposes. *Carter v. State*, 1994 OK CR 49 ¶9, 879 P.2d 1234, 1246 (definition of accomplice under Section 742).

Consistent with Section 742's mandate, Defendant's jury was provided OUJI-CR(2d) 9-27, 9-28, 9-30 & 9-32, Oklahoma's uniform instructions stating the requirement that accomplice testimony must be corroborated if used to convict a defendant (O.R. 1273-75). Discussing

Justin Sneed's testimony during closing argument, the prosecutor told the jury that "[t]he instructions say that the testimony of Justin Sneed must be corroborated … The instructions say that no person may be convicted on the testimony of an accomplice unless the testimony of that witness is corroborated by other evidence. And there's no getting around that" (Tr. XV 89). The prosecutor then discussed the balance of instructions and detailed the evidence he believed provided sufficient corroboration for Sneed's accomplice testimony (Tr. XV 89-98). Defendant's jury was therefore correctly instructed on the law of accomplice corroboration. Further, Defendant's jury was instructed on the lesser-related offense of accessory to first degree murder (O.R. 1289-91). The jury found Sneed's testimony corroborated and credible and convicted Defendant of first degree malice murder (O.R. 1313-14).

Review of the record shows why. Sufficient evidence was presented by the prosecution at trial to corroborate Sneed's testimony. The prosecution presented circumstantial evidence that Defendant: (1) actively concealed, and deflected attention from, the victim's body in Room 102 over a nearly seventeen hour period while civilians and law enforcement searched for the victim at and around the motel; (2) possessed proceeds from the $4,000.00 Sneed recovered from the victim's car after the murder; (3) had strong motive and opportunity to cause the victim's death; (4) had control over the actions of Justin Sneed, an immature, uneducated 18 year old; and (5) began selling his possessions and stated his intention to leave the state. The totality of this circumstantial evidence tends to connect Defendant as an aider and abettor to the first degree malice murder of Barry Van Treese and therefore corroborates Sneed's testimony.

From the outset, this Court must consider the unique circumstances involved in analyzing the type of "murder for hire" or "crime for hire" scenario at issue here. As noted by the Alabama Supreme Court:

> The nature of a "crime for hire" is that a physical connection between the defendant and the crime, or even the scene of the crime, may never exist. The defendant hires an accomplice for the purpose, among others, of avoiding a physical connection or presence. Thus, the corroboration of an accomplice's testimony may be accomplished by a number of pieces of circumstantial evidence, which, when considered collectively, support a reasonable inference by the jury that the defendant participated in the crime charged by hiring the accomplice to commit the physical acts necessary to perpetrate the crime. *See Colvette v. State*, 568 So.2d 319 (Ala. Crim. App. 1990) (arson for hire). Indeed, the corroboration of an accomplice's testimony in cases of "crimes for hire" may consist primarily of the defendant's statements which, interpreted by reference to the circumstances, tend to connect the defendant to the crime. *See Prewitt v. State*, 460 So.2d 296 (Ala. Crim. App. 1984) (murder for hire).

Ex parte Bullock, 770 So.2d 1062, 1068 (Ala. 2000). Defendant's actions and statements the day of the murder are the primary evidence connecting him with the murder. However, his actions and statements must be interpreted by reference to the other circumstantial evidence presented at trial. As shown below, Defendant actively concealed the fact of the murder for approximately

seventeen hours from both law enforcement and civilians at the motel who were searching for the victim. Even after the body was found, Defendant lied to detectives during his first interview by claiming that he knew nothing about the murder. Defendant admitted during the second interview that he knew about the murder but actively concealed its existence during the search for Van Treese. Defendant's words, taken in conjunction with his clear motive to kill and his undisputed control over Sneed, and evidence showing his possession of the victim's money after the murder, all establish a substantive connection between Defendant and the first degree malice murder of Van Treese that is inconsistent with either Defendant's innocence or Defendant's culpability as mere accessory after the fact.

1. Actively Concealing the Murder for Seventeen Hours. Evidence that Defendant lied to motel employees, guests and police the day of the murder in order to conceal the location and condition of the victim's body in Room 102 corroborates Sneed's testimony. Defendant admitted to Detective Bemo in the second interview on January 9th that he knew in the early morning hours of January 7th that VanTreese had been murdered and that the body was in Room 102. According to Defendant, Sneed told him that he committed the murder because he thought the victim would evict him from the motel. Defendant further admitted that he did nothing to disclose Sneed's confession to anyone during the extensive search at the motel that day. Indeed, Defendant admitted that he told Sneed to clean up the broken glass from Room 102's broken window. Defendant also admitted to helping Sneed install plexiglass over the broken window later that morning (Tr. XIV 28-30; State's Exhibit 2; Court's Exhibit 4 at 6-16, 22).

In addition, Defendant provided multiple conflicting versions of when he last saw the victim alive. Defendant provided no fewer than three (3) different stories to Sgt. Tim Brown when asked to tell the last time he saw Van Treese alive. Sgt. Brown was actively searching for Van Treese throughout the afternoon of January 7th. Defendant initially told Sgt. Brown that he last saw VanTreese at 7:00 a.m. on January 7th walking across the motel parking lot (Tr. IX 193-95). Later, Defendant told Sgt. Brown that he had seen Van Treese shortly after 4:30 a.m. on January 7th. Defendant claimed that Sneed told him that the window in Room 102 was broken out by a couple of drunks who got into a fight. Defendant said he observed Van Treese in the motel parking lot after the window was broken. Defendant claimed that Sneed told him that he had taken the drunks who broke the window off the property (Tr. IX 206). Later in the evening, Defendant told Sgt. Brown that "everything started getting confused" and "[r]eally, the last time I remember seeing [Van Treese] is 8:00 the night before when he was picking up the payroll money" before leaving for Tulsa (Tr. IX 209). When Sgt. Brown mentioned to Defendant his original statement about seeing Van Treese at 7:00 a.m., Defendant denied making the statement (Tr. IX 219).

Defendant also concealed the fact of the murder from employees and residents of the motel that day. Defendant told Billye Hooper around 8:00 a.m. that VanTreese had "got up early that morning and had gone to get breakfast and was going to get some materials. They were going to start working on the motel" (Tr. VII 62). Defendant told Hooper that VanTreese was staying in Room 108 (Tr. VII 66). Defendant also told Hooper not to put Room 102 on the housekeeping list because he and Sneed were going to clean up that room (Tr. VII 64).

Defendant explained that VanTreese had rented that room to "a couple of drunks and they had busted out a window" and that Defendant had run the drunks off the motel property (Tr. VII 64-66). Hooper said Defendant did not normally clean rooms (Tr. VII 65). Around the same time, Defendant told Kalya Pursley, a resident of the motel who had asked about Room 102's broken window, that two drunks got into a fight inside the room, threw a footstool through the window and that he and Sneed threw them off the motel property. Defendant suggested a man Pursley observed at the Sinclair station earlier that morning was one of the drunks who broke the motel room's window (Tr. IX 45-48). Defendant told Jackie Williams, a maid at the motel, not to clean any downstairs rooms, which would include Room 102 (Tr. VIII 122). During a telephone conversation, Defendant told the victim's wife sometime after 3:00 p.m. that the last time he saw the victim was between 7:00 and 7:30 a.m. on January 7th. Defendant said at that time the victim told him "he was going to buy supplies for the motel and he would be back later" (Tr. IV 99). Defendant said the victim looked and sounded fine (Tr. IV 100). Defendant told her that he would search all rooms at the motel for the victim (Tr. IV 101-02).

Defendant originally told Cliff Everhart during the search for Van Treese that the victim had arrived back at the motel from Tulsa around 2:30 or 3:00 a.m. on January 7th and had gone to bed. Defendant also told Everhart that he had rented Room 102 to a couple of drunk cowboys who eventually broke the window out (Tr. XI 188-90). Later in the evening, Defendant told Everhart that he last saw the victim at 7 a.m. that day when the victim left the motel (Tr. XI 183-84). In Everhart's presence, Defendant made it appear as though he had Sneed search the motel rooms for the victim (Tr. XI 185-86).

Defendant also actively searched the motel grounds with Everhart that day to make it appear as though he did not know the location or condition of the victim (Tr. XI 187). Defendant even provided false leads to those searching for the victim. At some point during the search, Defendant told Everhart and Sgt. Brown that he believed some people in an upstairs motel room may have been responsible for Van Treese's disappearance because they left their property in their room and had disappeared without checking out. Based on that information, Everhart and Sgt. Brown needlessly searched the motel room described by Defendant (Tr. XI 191-92).

Defendant did not stop lying, however, when the victim's body was found. Defendant attempted to exculpate himself by shifting blame for the murder to Sneed. When Sgt. Brown placed Defendant into investigative detention immediately after discovering the body, Defendant said he always suspected Sneed had something to do with the murder but he "didn't want to say anything until he knew for sure" and that Sneed said something to Defendant in the past about "setting up a fake robbery" (Tr. IX 233). Defendant also lied to homicide detectives during his first interview on January 8th around 3:00 a.m., claiming that he knew nothing about the murder or the body being in Room 102 (Tr. XIV 5-7, 85; State's Exhibit 1; Court's Exhibit 3). As noted by this Court:

> A statement that is believed to be completely false may be admitted by a party opponent merely because it shows that the defendant has lied about his involvement in the crime. **Such a lie, designed to conceal guilt, may on occasion be more convincing evidence of guilt than truthful admissions…A statement by a**

> **defendant intending to deny guilt may incidentally prove his guilt of the crime, or an element of the crime, or his identity, or his presence at the scene of the crime.**

McElmurry v. State, 2002 OK CR 40, ¶42, 60 P.3d 4, 19 (citing 12 O.S.1991, § 2801(4)(b)(1)) (emphasis added). *See also State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003) ("Admissions and inadequacies in a defendant's testimony may corroborate an accomplice's testimony"); *State v. Miller*, 396 N.W.2d 903, 905 (Minn. App. 1986) (recognizing that evidence that defendant initially lied to police corroborated accomplice's testimony). In the instant case, the prosecution presented extensive evidence showing that Defendant provided multiple conflicting and false statements for nearly seventeen hours at the motel on January 7th in order to deflect attention from the victim's body in Room 102. These statements, combined with the other circumstantial evidence presented to corroborate Sneed's testimony, tend to connect Defendant to the first degree malice murder of Barry Van Treese. Simply put, Defendant's active attempts to conceal the victim's murder for most of the day on January 7th is totally inconsistent with either his innocence of the murder or his alleged culpability as an accessory after the fact. Defendant's own words during the second interview make that point clear.

It is significant that during the second interview, Defendant denied that he lied about the murder in order to protect Sneed**. Rather, Defendant said he initially lied to detectives because when Sneed told him about the murder, he felt like he "was involved in it, I should have done something right then" and that he did not want to lose his girlfriend over it** (State's Exhibit 2; Court's Exhibit 4 at 16-17). This

statement is wholly inconsistent with either Defendant's innocence or his mere culpability as an accessory after the fact. Defendant's active concealment of the body in Room 102 on the day of the murder, and his many lies to detectives during the first interview, are consistent with Defendant as mere accessory only if one believes he is attempting to protect Sneed. Accessory after the fact, by definition, requires concealment of, or aid to, the offender with knowledge he has committed a felony and with intent that the offender may avoid or escape arrest, trial, conviction or punishment. 21 O.S.2001, § 173. Defendant's admission to police that he actively concealed the body not to protect Sneed but because he "felt like he was involved in it" is wholly inconsistent with Oklahoma's definition of accessory and, by extension, any theory of Defendant as mere accessory.

2. Proceeds from Murder. Recovery at book-in by police of approximately $1,757.00 from Defendant's person on January 9, 1997, also corroborates Sneed's testimony (Tr. XII 5-13). Sneed testified that he recovered approximately $4,000.00 from an envelope under the front seat of the victim's vehicle after committing the murder. According to Sneed, Defendant told him where the money was located. Sneed testified that he split this amount with Defendant as proceeds for committing the murder (Tr. XII 124-30).

Defendant admitted to Detective Bemo in the second interview that he gave the victim approximately $4,000.00 to $4,500.00 in motel receipts, all in cash and traveler's checks, in the motel office the night before the murder (Tr. XIV 28-30; State's Exhibit 2; Court's Exhibit 4 at 4-5). Billye Hooper testified that motel records established that the victim picked up approximately $3,500.00 to $4,000.00 in motel receipts from Defendant

the night before the murder (Tr. VII 77). Defendant had no legal source for approximately $1,200.00 of the cash recovered from his person at time of book-in. On January 6, 1997, Defendant received a paycheck from the victim for $429.33 (Tr. XIV 42; Tr. XV 17). Defendant spent all but approximately $60.00 of that paycheck on January 7th (Tr. XIV 42-43). Defendant received, at most, around $500.00 for furniture, vending machines and an aquarium he sold prior to his arrest (Tr. XV 16-17). Defendant had no apparent savings according to his girlfriend D-Anna Woods. She told police the pair were living paycheck to paycheck and "she didn't think [Defendant] could save any money" (Tr. XIV 44).

Thus, Defendant had approximately $1,200.00 cash at book-in with no legitimate source. The jury could infer that this money was proceeds from the cash he split with Sneed immediately after the murder. This evidence, taken together with the evidence described below, corroborates Sneed's testimony as it tends to connect Defendant with the murder-for-hire plot concocted by Defendant.

3. Motive. The State presented evidence establishing that Barry Van Treese was going to confront Defendant on January 6th or 7th about shortages on the motel books that had persisted through the end of 1996. Cliff Everhart testified he was supposed to meet Van Treese at the Oklahoma City motel on the night of January 6th so they could confront Defendant about these shortages (Tr. XI 169-70, 172-77, 201). Everhart had previously told Van Treese he believed Defendant "was probably pocketing a couple hundred extra" a week from the motel cash receipts during the last two or three months of 1996 (Tr. XI 172-73). In December 1996, Billye Hooper, the front desk clerk, had also shared her

concerns about Defendant's management of the motel with Van Treese, who told her he "knew things had to be taken care" of regarding Defendant's management of the motel. Van Treese promised her that he would take care of it after Christmas (Tr. VII 37-40; Tr. VIII 32-34). Van Treese's wife testified that by the end of December 1996, she and the victim discovered shortages from the motel accounts receivables totaling $6,101.92 and that the victim intended to confront Defendant about these shortages on January 6th. VanTreese told his wife that he would also audit the Oklahoma City motel and perform a room-to-room inspection of the motel at that time (Tr. IV 62-66, 70-72).

William Bender testified that VanTreese "was all puffed up. He was upset. He was mad…He was all red in the face" when Van Treese arrived at the Tulsa motel just before midnight on January 6th (Tr. VIII 63-64). During Van Treese's brief visit to the motel, he told Bender that there were a number of registration cards missing at the Oklahoma City motel, that weekend receipt money was missing and that Defendant was falsifying the motel daily reports by allowing people to stay in rooms that were not registered (Tr. VIII 80-82). Van Treese said that he gave Defendant until he returned to Oklahoma City "to come up with the weekend's receipts that were missing and if he came up with that, he was going to give him another week to come up with the registration cards and get all the year-end receipts together." Otherwise, Van Treese told Bender he was going to call the police (Tr. VIII 82).

Evidence was presented that the condition of the Oklahoma City motel on January 7th was deplorable. Kenneth Van Treese, the victim's brother, assumed control of the motel immediately after the murder. He

discovered that only around 24 of the 54 rooms at the motel were in habitable condition. 12 rooms had no working heat. Other problems included keys that did not fit room doors, broken or dirty plumbing fixtures and broken telephone systems (Tr. XI 116-18). Kenneth testified that "the main thing that was wrong with the motel was it was filthy…absolutely filthy" (Tr. XI 119). The jury could infer that the victim was unaware of these deteriorating conditions because he made only four overnight trips to the motel during the last half of 1996 (Tr. IV 36-40, 42, 58-59).

This evidence corroborates Sneed's testimony that Defendant feared being fired the morning of January 7th because of Defendant's mismanagement at the motel and provides strong motive for the murder. "While evidence of motive is insufficient in itself to corroborate an accomplice, it may be considered with other evidence to connect the accused with the crime." *Ganesan v. State*, 45 S.W.2d 197, 202 (Tex. App. Austin 2001) (citing *Reed v. State*, 744 S.W.2d 112, 127 (Tex. Crim. App. 1988)). Defendant's motive to murder Barry Van Treese explains why Defendant active concealment of the body for seventeen hours is inconsistent with either Defendant's innocence or mere culpability as an accessory. The jury could infer that Defendant wanted the victim murdered so he would not lose his job and not be prosecuted for embezzlement.

4. Control Over Accomplice. Justin Sneed testified that the sole reason he murdered the victim was because of pressure from Defendant. The State presented evidence that Defendant largely controlled Sneed, an 18 year old, eighth-grade dropout who worked as a maintenance man for Defendant at the motel (Tr. XII 47-48) and that Sneed's mental capacity and personality made

it unlikely he would plan to kill anyone, let alone Van Treese, whom he barely knew. One motel resident testified that, based on his limited observations, Sneed "didn't have a lot of mental presence" (Tr. VI 16). Bob Bemo, a retired homicide detective who interviewed Sneed, testified that Sneed did not appear very mature and had below average intelligence. He also testified that Defendant appeared to be more aggressive and intelligent than Sneed. Bemo observed that Defendant was "a very intelligent individual…a very manipulative individual…what he does with everything that he does is he's manipulating, using people" (Tr. XIV 46-48). Kayla Pursley, another motel resident, described Sneed as being "very childlike" (Tr. IX 17). Sneed assisted caring for her children when Pursley broke her foot. Pursley testified that Sneed played with her children "[m]ore as a peer … that he kind of fit in with my boys, you know, he played and he was real simple. He had a skateboard and that was his life…he didn't make a lot of decisions. You had to tell him sometimes what to do" (Tr. IX 17). Pursley described how Sneed would not eat unless someone told him to eat (Tr. IX 18).

Defendant and Sneed were described as "very close" friends by people at the motel (Tr. VII 28). Sneed was largely dependent upon Defendant for food and money (Tr. VII 28; Tr. IX 21). Pursley testified that Sneed usually followed Defendant when they were together, that you normally did not see one without the other and that "[Defendant] would have to tell him what to do and how to do it" (Tr. IX 19-20, 23). Defendant had control over Sneed because Sneed had no other place to go and no family in the area (Tr. IX 21 & 24). Pursley observed that "[y]ou almost had to tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal" (Tr. IX 23). Cliff Everhart testified that

Sneed was Defendant's "puppet", that Sneed "was not self-motivated. [Defendant] told him everything to do. [Defendant] would tell him to do this, he'd do it…If he needed something, he'd come to [Defendant]" (Tr. XI 185). Employees at the motel testified that Sneed did not know the victim very well (Tr. VII 34). This corroborated Sneed's testimony that he had only met the victim approximately three times prior to the murder during which time the pair had no real conversations (Tr. XII 76-77). Witnesses who knew both Defendant and Sneed testified that, based on Sneed's personality, they did not believe Sneed would commit a murder on his own (Tr. VII 34; Tr. IX 25).

This evidence shows that Defendant largely had control over Sneed's actions, that Sneed was dependent upon Defendant and that Sneed's personality and mental capacity made it unlikely that he would murder Barry Van Treese, practically a stranger, on his own volition. The evidence shows Sneed had the type of personality in January 1997 that allowed him to be easily influenced by Defendant into committing the murder. In the words of the trial judge during a bench conference, Sneed was "an illiterate guy who's just one notch above a street person" (Tr. XIII 61). Evidence of Sneed's personality and mental capacity and Defendant's control over him, combined with evidence that Defendant: (1) turned up with a large sum of cash shortly after the murder; (2) actively concealed the body in Room 102 for practically an entire day by misleading investigators and others who were searching for the victim at the motel; and (3) had strong motive to kill the victim, tends to connect Defendant with the murder in this case. *See State v. Her*, 668 N.W.2d at 927 (opinion testimony of gang expert that defendant would have been in charge of accomplices he drove to robbery of motel, would have had authority to

direct their activities and would have been aware of everything that was happening, sufficient to corroborate accomplice testimony that defendant ordered the robbery).

5. Stated Intent to Flee. After being interviewed by detectives, Defendant began the process of selling all of his possessions. He told Cliff Everhart that "he was going to be moving on" (Tr. XI 199-200). When homicide detectives got word of Defendant's stated intention to leave Oklahoma, they put police surveillance on Defendant (Tr. XIV 23). On January 9th, Defendant failed to appear for a previously scheduled meeting with homicide detectives at police headquarters. Defendant was eventually intercepted and taken to police headquarters to meet with homicide detectives where he eventually gave a second interview (Tr. XII 6-9). Evidence that Defendant sold off his possessions shortly after his initial contact with homicide detectives (but before he admitted in the second interview to actively concealing the victim's body in Room 102) represents evidence tending to connect Defendant with the murder of the victim. Evidence of flight can be a corroborating circumstance because it demonstrates consciousness of guilt. *Hernandez v. State*, 939 S.W.2d 173, 178 (Tex. Crim. App. 1997). In the instant case, evidence that Defendant was preparing to leave the state demonstrates a consciousness of guilt which, combined with the additional circumstantial evidence discussed above, corroborates Sneed's testimony by tending to connect Defendant with the murder.

Summary. The circumstantial evidence discussed above was sufficient to corroborate Justin Sneed's accomplice testimony. This evidence tended to connect Defendant with the murder. That is all Oklahoma law

requires. Defendant nonetheless devotes nearly twenty (20) pages of his opening brief to arguing inferences from the evidence presented at trial that he believes demonstrates his innocence. In short, Defendant recycles on appeal the same defense arguments previously rejected by his jury. Opening Br. at 12-31. Defendant ignores, however, the applicable standard of review. As noted by this Court in *Frederick v. State*, 2001 OK CR 34, 37 P.3d 908:

> Whenever the sufficiency of the evidence is challenged on appeal, this Court will apply the test set out in *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204:
>
> "In *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the United States Supreme Court held that due process requires a reviewing court to determine 'whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.'"
>
> Further, this Court will accept, on review, all reasonable inferences and credibility choices that tend to support the jury's verdict. *See e.g.*, *Roldan v. State*, 1988 OK CR 219, ¶ 8, 762 P.2d 285, 287.

Id., 2001 OK CR 34, ¶84, 37 P.3d at 933. Likewise, this Court must view evidence corroborating accomplice testimony in the light most favorable to the prosecution. *Leppke v. State*, 1977 OK CR 21, ¶33, 559 P.2d 459,466 ("This Court will view the corroborating evidence in the strongest light"); *Edwards v. State*, 1977 OK CR 166, ¶23, 571 P.2d 129, 134 ("[t]his Court will take the strongest view of corroborating testimony such testimony will

warrant"). *See also Turnage v. State*, 708 N.W.2d 535, 543 (Minn. 2006) (quoting *State v. Adams*, 295 N.W.2d 527, 533 (Minn. 1980)) ([w]hen reviewing the sufficiency of evidence to corroborate accomplice testimony, 'we view the evidence in the light most favorable to the state and all conflicts in the evidence are resolved in favor of the verdict'"); *Cantelon v. State*, 85 S.W.3d 457,461 (Tex. App. Austin 2002) (citing *Knox v. State*, 934 S.W.2d 678, 686-87 (Tex. Crim. App. 1996) & *Gill v. State*, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994)) ("[w]e must view the corroborating evidence in the light most favorable to the verdict"); *State v. Fey*, 7 P.3d 358, 359 & 361 (Mont. 2000) (same); *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997) (same); *Leitner v. State*, 672 So.2d 1371, 1373-74 (Ala. Crim. App. 1995) (same); *State v. Canada*, 481 P.2d 859,860 (Ariz. 1971) (same); *State v. Duggan*, 333 P.2d 907, 915 (Ore. 1958) (same).

While Defendant claims that the State's corroborative evidence in this case is equally consistent with innocence, "[c]orroborative evidence…need not be entirely inconsistent with innocence." *State v. Willman*, 244 N.W.2d 314, 315 (Iowa 1976). Simply put, "corroborating evidence is not insufficient merely because it is circumstantial, disputed *or possibly consistent with innocent conduct; it is the jury's duty to resolve such factual questions*." *Fey*, 7 P.3d at 361 (emphasis in original) (quoting *State v. Kaczmarek*, 795 P.2d 439, 442 (Mont. 1990)). *See also Duggan*, 333 P.2d at 915 (in reviewing sufficiency of accomplice- corroboration testimony "[w]e are not concerned with the weight of the evidence nor the conflict of the testimony"). Defendant's attempt to dispute the validity of the State's corroboration evidence is therefore of no consequence for purposes of the instant analysis. His jury was properly instructed on the use of accomplice testimony. Sufficient evidence was presented

to allow any rational trier of fact to find that Sneed's testimony was corroborated as a matter of Oklahoma law. The credibility determinations Defendant currently seeks are appropriately made by a jury, not an appellate court.

Defendant's challenge to the circumstantial evidence in this case amounts to his complaint that the prosecution presented no direct evidence corroborating Sneed's testimony. As noted by the Texas Court of Criminal Appeals nearly forty years ago in addressing the Texas accomplice-corroboration rule:

> The law forbidding a conviction upon the uncorroborated testimony of an accomplice does not demand that there be direct evidence pointing to the accused as the offender, but merely requires that there be 'other evidence tending to connect the defendant with the offense committed.' * * * Circumstances proved by credible witnesses may be as potent as direct testimony in tending to connect the accused with the commission of the offense. The state is not called upon to point to some single or isolated fact which in itself, unrelated to other proven facts, will be sufficient corroboration. It is the combined and cumulative weight of the evidence furnished by non-accomplice witnesses which supply the test.

Edwards v. State, 427 S.W.2d 629, 632 (Tex. Crim. App. 1968) (quoting *Minor v. State*, 299 S.W. 422, 428-29 (Tex. Crim. App. 1927)). *See also State v. Marshall*, 531 N.W.2d 284, 288 (N.D. 1995) ("Evidence to corroborate an accomplice's testimony need not be incriminating in itself, or sufficient, standing alone, for a conviction").

The State noted at the outset of this discussion the unique circumstances attendant to corroborating accomplice testimony used in "crime for hire" and "murder for hire" cases like the instant case. The totality of the corroborating evidence presented in this case, however, goes well beyond mere suspicion that Defendant was involved in the murder.

Defendant's comparison of his case to others where this Court found insufficient corroboration of accomplice testimony does not warrant relief. Opening Br. at 32-33. "Judicial experience has shown that no precise rule can be formulated as to the amount of evidence that is required to corroborate the testimony of an accomplice witness. Each case must be judged on its own facts." *Gill*, 873 S.W.2d at 48. That the State did not present testimony that Defendant told other people he had solicited someone to murder the victim, as in *Bowie v. State*, 1991 OK CR 78,816 P.2d 1143, is therefore not relevant. This Court did not state that such evidence was required as a matter of law.

Defendant's comparison of his case to *Cummings v. State*, 1998 OK CR 45, 968 P.2d 821, also lacks merit. Unlike Cummings, evidence was presented in the instant case that Defendant turned up with a large sum of cash immediately after the murder that the jury could infer were proceeds from the money Sneed took from the dead victim's car. Further, the defendant in *Cummings* admitted only to moving the body of his dead sister. Defendant, by contrast, actively concealed the body for nearly seventeen hours by lying to multiple police officers and civilians who were actively searching for the victim at the motel. Defendant lied about how the window in Room 102 was broken and presented multiple false statements regarding the last time he saw the victim alive, all in an attempt to deflect attention from evidence

in Room 102 of the murder. Defendant admitted to homicide detectives that he lied because he "felt like he was involved in it, I should have done something right then" (State's Exhibit 2; Court's Exhibit 4 at 16-17). Defendant's active concealment of the body in Room 102, and the wild goose chase he led everyone on that day at the motel, goes well beyond merely moving a body as was the case in *Cummings*.

Evidence of Defendant's clear motive to murder the victim, along with his stated intent to leave the state and his near total control over Justin Sneed provides additional corroboration tending to connect Defendant with the murder. Simply put, the evidence showed that Sneed would not have committed such an act alone. The evidence also showed that Defendant had near total control over Sneed. All things considered, the instant case is distinguishable from *Cummings*.

Defendant has spilt much ink attempting to undermine the reliability of Justin Sneed's testimony. As shown above, Justin Sneed's testimony was sufficiently corroborated. It was also highly credible. Proof of this fact may be found in the words of the trial court during an in camera instructions conference:

> Well, you know, I find myself in a very unique position here because generally when cases are retried by the Court, so far I guess in my six years here, the cases that I've had for retrial, some of them were my own and some of them were tried by somebody else. I've never had a situation where I've had to basically study the entire first trial and then try the case again.
>
> * * * * * I've also had an opportunity to observe the witnesses and it is fascinating to me to see the difference that it makes to observe the

> witnesses on the stand. Some of the opinions that I had based on reading the first transcripts I, frankly, had very different opinions after listening to the testimony as it was presented and observing the witnesses. **And I've got to tell you that one of those observations was about Justin Sneed. And I did find him to be a credible witness on the stand.**

(Tr. XV 44-45) (emphasis added). This Court should reject Defendant's attempt to keep from the jury Sneed's highly credible testimony. There is no legal basis for suppressing this testimony. Defendant's jury was properly instructed on the proper use of corroboration evidence and found that Sneed's testimony was not only corroborated, but that it was credible and warranted a conviction of first degree murder. Taken in the light most favorable to the State, as this Court must, the evidence in this case was sufficient to allow any rational trier of fact to find Sneed's testimony corroborated and to find sufficient evidence to support Defendant's conviction for the first degree malice murder of Barry Van Treese. That is especially so considering the exceptionally low standard of proof required to corroborate accomplice testimony. Relief is clearly unwarranted on this claim.

II.

DEFENDANT IS NOT ENTITLED TO RELIEF BASED ON THE ADMISSION OF ALLEGED IRRELEVANT EVIDENCE.

Defendant next launches multiple evidentiary challenges, based on relevancy and unfair prejudice grounds, to a litany of prosecution testimony. Opening Br at 34-43. It is well established that the scope of either party's examination of a witness and the admission of evidence

"lie in the sound discretion of the trial court, whose rulings will not be disturbed unless that discretion is clearly abused, resulting in a manifest prejudice to the accused." *Davis v. State*, 2004 OK CR 36, ¶30, 103 P.3d 70, 79. Defendant failed to object to any of the testimony he now complains about on appeal. He has therefore waived all but plain error review. *Littlejohn v. State*, 2004 OK CR 6, ¶34, 85 P.3d 287, 299. "Plain error arises from those 'errors affecting substantial rights although they were not brought to the attention of the court." *Primeaux v. State*, 2004 OK CR 16, ¶72, 88 P.3d 893,907 (quoting *Jones v. State*, 1989 OK CR 7, ¶8,

* * *

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

PCD-2004-978
Direct Appeal No.: D-2005-310
Oklahoma County District Court
Case No: CF-1997-244

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

Filed October 20, 2006

COURT OF CRIMINAL APPEALS FORM 13.11A
ORIGINAL APPLICATION FOR POST CONVICTION RELIEF IN A DEATH PENALTY CASE

PART A—PROCEDURAL HISTORY

Petitioner, Richard Eugene Glossip, through undersigned counsel, submits his application for post-conviction relief under Okla. Stat. tit. 22, § 1089. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death by Lethal Injection

1. **Court in which sentence was rendered:**

   (a) District Court of Oklahoma County, Case Number: CF-1997-244

2. **Date of sentence:** August 27, 2004

3. **Terms of sentence:** Death by Lethal Injection[1]

4. **Name of Presiding Judge:** Hon. Twyla Mason Gray

* * *

[37] 231 (1985). Mr. Glossip was deprived of his due process right to a fair trial and a reliable sentencing proceeding in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 11, Sections 7, 9, and 20 of the Oklahoma Constitution by the repeated abuses of the prosecutor; therefore, his conviction and sentence must be reversed.

PROPOSITION II

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

---

[1] See Attached Judgment and Sentence (Appendix 1) and Death Warrant (Appendix 2).

Trial and appellate counsel were ineffective for failing to object to and argue on appeal that Mr. Glossip was denied a fair trial and reliable sentencing proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471; *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003).

Prior to trial, it was obvious the State's case relied almost solely on the testimony of Justin Sneed, Mr. Glossip's co-defendant in Oklahoma County Case CF-1997-244. As such, a reasonable attorney would have prepared, through investigation and interviews, to cross examine Mr. Sneed. This would include a review of the documents filed in Case CF-1997-244. *Rompilla v. Beard*, 545 U.S. 374, 125 S. CT. 2456, 162 L.Ed.2d 360 (2005)

[38] Throughout the trial the State presented Justin Sneed as a scared, poor, pitiful soul with a hard life who had easily been manipulated by Mr. Glossip into killing Barry Van Treese. (Tr. III 203-204, 208-209, 215-216, 223-224; Tr. XII 38-41, 100-101, 127-128, 130-131, 159, 188, 191-192; Tr. XV 67-73, 92, 94, 151, 157, 181) However, had trial counsel conducted additional investigation regarding evidence that was available in the court file in Oklahoma County Case CF-1997-244, and then presented this information during the cross examination of Mr. Sneed, the picture painted by the state would have been revealed as frauduent. (Appendix 4, letter from Oklahoma County Crisis Intervention Center dated July 1, 1997)

As noted above, the State repeatedly presented testimony and argument that Mr. Sneed was merely a "puppy" under the control of Mr. Glossip the "dog trainer" and that Mr. Sneed would have never committed the murder, but for Mr. Glossip. However, the readily available evidence in the court file showed that Mr. Sneed was not a "puppy". In fact, he was a untrained vicious dog long before ever meeting Mr. Glossip. (Appendix 4)

The real Mr. Sneed was an individual that could think for himself and commit crimes without Mr. Glossip's guidance. These included fighting, burglary and making a bomb threat. (Appendix 4) Had trial counsel thoroughly investigated and cross examined Mr. Sneed, the picture painted by the state would have been different and the weight of Mr. Sneed's testimony significantly reduced. (.Appendix 5, Affidavit of Christopher Evangelista)

Appellate counsel was ineffective for failing to argue that trial counsel failed to adequately developed and presented this issue. There is a reasonable probability that the results of Mr. Glossip's trial would have been different. As such, trial counsel's failure to conduct a thorough investigation and present this compelling evidence constitutes deficient **[39]** performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471; *Rompilla v. Beard*, 545 U.S. 374, 125 S. CT. 2456, 162 L.Ed.2d 360 (2005); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003). Therefore, Mr. Glossip asks this Court to reverse and remand this case for a new trial and sentencing.

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.

Trial and appellate counsel were ineffective for failing to object to and argue on appeal that Mr. Glossip was denied a fair trial and reliable sentencing proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct 2527, 156 L.Ed.2d 471; *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003); Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II § 6, 7, 9 and 20 of the Oklahoma Constitution; *See also Crouch v. State*, 1987 OK CR 222 (1987). As such, Mr. Glossip was denied the effective assistance of counsel.

* * *

FOR PUBLICATION

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA
2001 OK CR 12

No. 2005-310

RICHARD EUGENE GLOSSIP,
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

Filed April 13, 2007

OPINION

LEWIS, JUDGE

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

[1] In his first trial, Glossip was convicted and the jury found the existence of two aggravating circumstances. The jury found (1) that the killing was especially heinous, atrocious, and cruel; (2) that the appellant would pose a "continuing threat" to society and recommended a penalty of death. On direct appeal, the convictions and

alleged, during sentencing, the existence of two aggravating circumstances: (1) that the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration; and (2) the existence of the probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. *See*·21 O.S.2001, § 701.12(3) and (7).

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

I. FACTS

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

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

---

sentences were reversed. *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

¶5 The State presented testimony about the physical condition, financial condition, and the day to day operations of the motel. At the beginning of 1997, Mr. Van Treese decided to do an audit of both motels after it was determined that there were shortfalls. Before Mr. Van Treese left for Oklahoma City, Donna Van Treese, Bany's wife, calculated Glossip's net pay at $429.33 for the period ending January 5th, 1997, because Glossip had $211.15 in draws.[2] On January 6, 1997, she and Mr. Van Treese reviewed the books and discovered $6,101.92 in shortages for the Oklahoma City motel in 1996. Mrs. Van Treese testified her husband intended to ask Glossip about the shortages.

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

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

---

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

¶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.

¶23 Everhart and Oklahoma City Police Sgt. Tim Brown began discussing Glossip's conflicting statements, so they decided to check room 102 on their own. At about 10:00 p.m. they discovered Van Treese's body in his room. Sneed had already left the motel that afternoon, and he was not apprehended until a week later. Glossip was taken into custody that night, questioned and released. The next day, Glossip began selling his possessions. He told people he was leaving town. However, before he could leave town, he was taken into custody again for further questioning.

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

II: VOIR DIRE ISSUES

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

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

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

¶28 The trial court asked this juror, "So your reservations about the death penalty are such that

regardless of the law or the facts or the evidence, you would not consider imposing a penalty of death." The juror, unequivocally answered, "That's correct." She was then removed for cause without objection.

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

¶30 Glossip complains about the use of the language "equal consideration" used by the trial court, parroted by the first juror and repeated by the trial court to the second juror. Glossip claims that this Court has never required "equal consideration" be given to all three sentencing options. *See Frederick v. State*, 2001 OK CR 34, ¶¶ 52-53, 37 P.3d 908, 926-27.

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

¶32 The proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment is whether their views would prevent, or substantially impair, the performance of their duties as jurors in accordance with the instructions and their oath. *See Ledbetter v. State*, 1997 OK CR

5, ¶ 4, 933 P.2d 880, 885; *also see Wainwright v. Witt*, 469 U.S. 412,424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985).

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

¶34 In the present case, because there was no objection to the removal of these two jurors, any error must rise to the level of plain error. Here there is no such error. The first juror was unequivocal in her statement that she could not impose the death penalty. The second juror expressed concerns about her ability to impose the death penalty at a very early stage in the voir dire process stating that she couldn't impose death. This juror asked for more time to consider whether she would consider the death penalty if the law and facts warranted such a penalty. She vacillated back and forth and finally stated that she could not consider the death penalty equally. We find that based on the entire voir dire, the trial court did not abuse its discretion in removing these two jurors.

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

impartial in a criminal case when she, herself, had been prosecuted by the State. This juror agreed that it bothered her, and asked "what can I do about it?"

¶36 This juror agreed that she would be better suited for a non-criminal case. Before excusing her for cause, the trial court allowed defense counsel to object. The trial court stated that it had "a real problem with people who are on a deferred sentence sitting as jurors. They've got a lot at stake … ." Although the trial court made a blanket statement about all persons currently serving a deferred sentence, the trial court believed this juror would be biased because she was currently serving a deferred sentence. The trial court, did not abuse its discretion in finding that this juror could not be fair and impartial and removing her for cause.

III: FIRST STAGE ISSUES

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

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

¶39 For Glossip to be convicted as a principal in Van Treese's murder, the State had to establish that he either committed each element of first degree malice murder or that he aided and abetted another in its commission. 21 O.S.2001, § 172. Aiding and abetting requires the State to show "the accused procured the crime to be done, or aided, abetted, advised or encouraged the commission of the crime." *Spears v. State*, 1995 OK CR 36, ¶ 16, 900 P.2d 431, 438. Direct evidence supporting Glossip's commission of the crime came from admitted accomplice Justin Sneed.

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

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

---

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

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

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

---

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

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

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

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

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

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

¶47 The State concedes that motive alone is not sufficient to corroborate an accomplice's testimony.

See Reed v. State, 744 S.W.2d 112, 127 (Tex. Cr. App. 1988).[6] However, evidence of motive may be considered with other evidence to connect the accused with the crime. *Id.* Glossip's motive, along with evidence that he actively concealed Van Treese's body from discovery, as well as his plans to "move on," connect him with the commission of this crime. Evidence that a defendant attempted to conceal a crime and evidence of attempted flight supports an inference of consciousness of guilt, either of which can corroborate an accomplice's testimony. *See People v. Avila*, 133 P.3d 1076, 1127 (Cal. 2006); *also see Smith v. State*, 263 S.E.2d 910, 911-12 (Ga. 1980) (evidence that a party attempted to conceal his participation in a crime is sufficient to corroborate the testimony of an accomplice).

¶48 The State presented an enormous amount of evidence that Glossip concealed Van Treese's body from investigators all day long and he lied about the broken window. He admitted knowing that Sneed killed Van Treese in room 102. He knew about the broken glass. However, he never told anyone that he thought Sneed was involved in the murder, until after he was taken into custody that night, after Van Treese's body was found. Glossip intentionally lied by telling people that Van Treese had left early that morning to get supplies. In fact, Van Treese was killed hours before Glossip claimed to have seen Van Treese that morning. Glossip's stories about when he last saw Van Treese were inconsistent. He first said that he last saw him at 7:00 a.m.; later he said he saw him at 4:30 a.m. Finally, he said he last saw him at 8:00 p.m. the night before Van Treese's death, and

---

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

he denied making other statements regarding the time he last saw Van Treese.

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

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

¶51 The next day, Glossip began selling all of his belongings, before he admitted that he actively concealed Van Treese's body. He told Everhart that "he was going to be moving on." He failed to show up for an appointment with investigators, so the police had to take him into custody for a second interview where he admitted that he actively concealed Van Treese's body. He said he lied about Sneed telling him about killing Van Treese, not to protect Sneed, but because he felt like he "was involved in it."

¶52 Glossip argues that all of this evidence merely proves, at best, that he was an accessory after the fact. Despite this claim, a defendant's actions after a crime can prove him guilty of the offense. Evidence

showing a consciousness of guilt has been used many times.[7]

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

¶54 In proposition two, Glossip claims that the State presented irrelevant and highly prejudicial evidence during the first stage of trial. He claims that the State attempted to elicit sympathy for the victim and for Sneed. However, trial counsel failed to object to any of the testimony Glossip now claims was improper. Therefore, he has waived all but a review for plain error. *Coddington v. State*, 2006 OK CR 34, ¶ 52, 142 P.3d 437, 451-52. Plain error is that error which goes to the foundation of the case or takes away a right which is essential to a defendant's case. *Mitchell v. State*, 2005 OK CR 15, ¶ 4 7, 120 P.3d 1196, 1209.

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

---

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

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

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

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

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

¶60 Evidence that Mr. Van Treese was a ham radio operator was relevant to the identification of his

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

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

¶62 The State portrayed Sneed as a person with low intellectual ability, and a child like demeanor. They presented testimony about his background, and his growing up in a single parent home, having a child early in life, dropping out of school after the eighth grade, coming to Oklahoma City with a roofing crew, and quitting that to work at the motel in exchange for rent. This was all meant to show how he placed himself in a position to be dependent on Glossip. Although there was some lay opinion evidence regarding whether Sneed had the personality that would allow him to kill Mr. Van Treese on his own, this testimony comprised only a small portion of the State's case. This testimony did not rise to the level of plain error.

¶63 Next, in this proposition, Glossip claims that the State introduced irrelevant evidence regarding the remedial measures taken after Mr. Van Treese's death to show the condition of the motel. Glossip argues that

this evidence was an indictment on the way Mr. Van Treese ran the motel, rather than relevant to show that Glossip had a reason to kill Mr. Van Treese.

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

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

¶66 We will, first, address the trial court's exclusion of these demonstrative aids as part of the record. Defense counsel requested that these poster sized note sheets be preserved by the trial court for appellate review, but the trial court refused the request. Then defense counsel requested that they be allowed to photograph the exhibits for their own records, but again the trial court refused. The trial court insisted that everything that the prosecutor wrote on the pads was in the record; however, the analysis of the pages in the

transcript where notations were made tells a different story. We are extremely troubled by the trial court's attitude toward defense counsel's attempt to preserve the demonstrative aides for appellate review.[8]

¶67 While it is incumbent on the moving party to make a sufficient record so that this Court can determine the content and extent of these documents, the trial court must allow counsel to make sufficient proffer so that the issues can be preserved. *See Ross v. State*, 1986 OK CR 49, ¶ 18, 717 P.2d 117, 122. This Court will not assume error from a silent record.[9] However, this was not a case where evidence or testimony was not allowed to be introduced at trial.

¶68 This is a case where demonstrative aids were made by the prosecution, placed before the jury and utilized extensively during trial and closing argument. Even though these aids were utilized extensively during trial, the trial court rejected any attempt by

---

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

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

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

defense counsel to preserve the "demonstrative exhibits" for future appellate review.

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

¶70 Here, the only way to determine what was on the posters, *in toto*, is to search the record and note where it appears that the prosecutor was writing on the note pad. According to the record cited, the prosecutor made notes of significant testimony on a large flip chart sized easel pad. This pad was left up for the jury to view during trial over trial counsel's objection which was made after the second day of testimony.

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

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

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

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

Lanning v. Brown, 377 S.W.2d 590, 594 (Ky. 1964). The chart displayed in *Lanning* was a poster sized chart noting the list of special damages claimed by the party in a personal injury case. The Court held that the display of the chart was harmless, because the damages were not in substantial dispute. The Kentucky court noted a dearth of precedent on this point.

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

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

¶76 In proposition ten, Glossip claims that the statute allowing an "in-life" photograph of the homicide victim is unconstitutional on its face and the photograph

was inadmissible because any relevance was substantially outweighed by the danger of harm.

¶77 Glossip's claim challenges the constitutionality of the amended 12 O.S.Supp.2003, § 2403, arguing the admission of an "in-life" photograph without regard to relevance or the evidentiary balancing test violates due process. Glossip maintains that the blanket admissibility of such photographs unnecessarily risks exposing jurors to prejudicial information. This issue was thoroughly discussed in *Coddington v. State*, 2006 OK CR 34, ¶¶ 53-57, 142 P.3d at 452-53. In *Coddington* this Court upheld the first-stage admission of a single, premortem photograph of the victim.

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

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

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

¶79 Contrary to Glossip's claim,§ 2403 only allows the admission of one "appropriate" photograph. 12 O.S.Supp.2003, § 2403. We held, in *Hogan*, that

photographs which violate the balancing test of § 2403 would be inadmissible. *Hogan*, 2006 OK CR 19, ¶64, 139 P.3d at 931; *see Coddington*, 2006 OK CR 34, ¶ 56, 142 P.3d at 152-53. Here, the State offered, in the first stage, an innocuous portrait of Van Treese, taken during the September preceding his death. The photograph was offered "to show the general appearance and condition of the victim while alive" in accordance with the statute. Other than the fact that Barry Van Treese had a beard at the time of his death, the photograph depicted his appearance just before his death. The photograph met the guidelines of the statute, and its probative value was not substantially outweighed by the danger of unfair prejudice.

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

IV: PROSECUTORIAL MISCONDUCT

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

We will not find plain error unless the error is plain on the record and the error goes to the foundation of the case, or takes from a defendant a right essential to his defense. *Simpson*, 1994 OK CR 40, ¶ 23, 876 P.2d at 698.

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

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

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

¶85 Next, Glossip argues that the prosecutor mislead the jury when arguing that the defense of "accessory after the fact" was baseless, because the State did not charge him with accessory after the fact to murder. In fact, the State did, initially charge Glossip with

accessory to murder and Sneed with murder in separate Informations. The State then dismissed the accessory Information and added Glossip as a co-defendant with Sneed on the murder Information.

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

¶87 The prosecutor argued that the lesser related offense instruction relating to accessory to murder was only given because defense counsel requested it. Glossip objected to this argument and the trial court admonished the prosecutor. Juries are to consider lesser related offenses, only if they have a reasonable doubt that a defendant has committed the greater offense. OUJI-CR 2d 10-27 (1996); *Graham v. State*, 2001 OK CR 18, ¶ 6, 27 P.3d 1026, 1027. The jury was properly instructed on the method of reviewing greater and lesser offenses. These instructions properly channeled the jury's decision making process and cured any error.

¶88 Glossip next argues that the prosecution attempted to elicit sympathy for the victim and his family during first stage of trial through evidence and argument. This argument relates to proposition two where Glossip argues that victim impact evidence was

introduced through the testimony of first stage witnesses. Our resolution of proposition two also resolves this issue.

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

¶90 The fact that the Van Treeses discussed firing both managers was not in conflict with the fact that they were going to fire Glossip first, move Bender to the Oklahoma City motel to take Glossip's place while managers were sought for both motels. This claim has no merit.

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

¶92 As indicated by the State, this questioning was to rebut the defense's cross-examination where counsel brought up the fact that she testified to things

not in the police report because she remembered these things after talking to the police. The prosecutor was merely attempting to show that Pursley was testifying from her memory and not from the police report. The fact that the jury was deprived of this evidence due to a lack of memory was not indicative of more evidence damaging to Glossip. This claim does not rise to the level of plain error.

¶93 Glossip also claims misconduct occurred during the penalty phase of trial. He first claims that the prosecutor misstated the law regarding the appropriate punishment by arguing that death is appropriate because society, the Van Treese family, the Glossip family, and the justice system is "worse off" because of Richard Glossip. The State also argued that Glossip was a "cold-blooded murderer" and "cold-blooded murders in the State of Oklahoma we punish with death." The prosecutor went on to argue that "He chose the option of murder in the face of other options and that makes death the appropriate option." There were no objections to these arguments.

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

¶95 Glossip claims that the prosecutor unfairly denigrated Glossip's mitigating evidence by pointing out that while he is awaiting trial he gets his niece to come visit him so he can bring her to trial so she can testify. The prosecutor also pointed out the fact that other mitigation evidence was from a 23-year-old detention officer. The prosecutor pointed out the fact that Sneed was about that age and he buddies up to this young kid so he

can have a witness to say he is not violent. There was no objection to this argument.

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

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

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

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

V: INEFFECTIVE ASSISTANCE OF COUNSEL

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

---

[10] Glossip has filed a motion for evidentiary hearing based on this claim so that he might be able to supplement the record with certain evidence. The evidence contained in the motion for new trial consists of the video taped interview of Justin Sneed, a transcript of the interview, the financial records of the Best Budget Inns (Tulsa and Oklahoma City), and accompanying affidavits. This evidence does riot contain sufficient information to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize this evidence. See Rule 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006).

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

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

¶102 In the context of a capital sentencing proceeding, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

¶103 He first claims that counsel was ineffective for failing to utilize Justin Sneed's videotaped interview to impeach Sneed and Detective Bemo. Glossip points out that this Court, in our Opinion reversing Glossip's original conviction, stated that "[t]rial counsel's failure to utilize important impeachment evidence against Justin Sneed stands out as the most glaring deficiency in counsel's performance." *Glossip*, 29 P.3d at 601.

¶104 Onewould believe that if this Court stated an attorney was ineffective (to the point of requiring reversal) for failing to utilize one piece of evidence to impeach witnesses, the new attorneys on retrial would utilize the evidence. That is, unless counsel at the second trial is either banking on his ineffectiveness garnering his client another trial or he made a strategic decision not to introduce the tape and only question witnesses about the statements on the tape. The third possibility is that the failure to utilize this one piece of evidence is not the sole reason counsel was found to be ineffective during the first trial. This Court trusts that the first reason is invalid. Counsel's use of the contents of the tape to cross-examine witnesses, without introducing the

tape, was a valid strategy. Furthermore, the failure to utilize the tape during the first trial was one of many reasons why this Court found there was ineffective assistance of trial counsel during the first trial.[12] Even though these two trials encompass the same subject, similar strategic decisions occurring during both trials, might not result in the same conclusion by this Court.[13]

¶105 The videotaped interview was not introduced into evidence during this trial, thus it is not a part of the record. Glossip has filed a motion for an evidentiary hearing pursuant to Rule 3.11, *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006), in order to supplement the record.

¶106 Glossip admits that trial counsel cross-examined both Sneed and Bemo regarding the circumstances of the interview, statements made during the interview and discrepancies between current testimony and statements on the tape. Counsel was not ineffective for utilizing this strategy.

¶107 Glossip next argues that trial counsel failed to utilize readily available evidence (other than the video tape mentioned above) to cross-examine witnesses. Glossip clams that counsel was ineffective for failing to utilize financial records concerning the victim's Tulsa

---

[12] Trial counsel during the first trial was wholly unprepared for trial, had not formulated any reasonable defense theory, and failed to object to clearly inadmissible evidence. *See Glossip*, 2001 OK CR 21, ¶ 25, 29 P.3d at 603.

[13] During the first trial, trial counsel indicated he would use the tape to impeach Justin Sneed, but when the time came, "counsel failed to utilize the video tape at all." *Glossip*, 2001 OK CR 21, ¶¶ 16-17, 29 P.3d at 601. In this case, trial counsel questioned both Bemo and Sneed about inconsistencies between prior statements and current testimony.

motel to show that the "over $6,000.00 shortage" at the Oklahoma City motel was not unusual. Counsel did attempt to introduce this evidence, but the trial court ruled it inadmissible. Counsel did not try to impeach witnesses with the documents.

¶108 Part of the State's theory was that Glossip wanted Van Treese killed so he could take over the management of both motels: Oklahoma City and Tulsa. The State also presented evidence that Glossip was going to be confronted about the $6,000.00 shortage. Furthermore, evidence was presented that Glossip did not want Van Treese to discover the condition of the motel.

¶109 The shortages at the Tulsa motel, while relevant to show that the $6000.00 shortage was not unusual, was not relevant to show that Glossip intended to have Van Treese killed because he feared termination. His fear was based on the condition of the motel, the missing registration cards, and missing money at the Oklahoma City motel.

¶110 Glossip next claims that counsel was ineffective, because counsel failed to object to improper character evidence introduced by the State. This evidence concerned testimony about the character of Justin Sneed as a follower who would not have killed the victim unless someone put him up to it. When counsel did object, an objection was overruled and the State elicited testimony that Sneed "would have probably done anything for Glossip. He was that dependent on him."

¶111 Several witnesses observed Sneed and Glossip interact with each other. They testified that Sneed had no outside income and he appeared to be dependent on Glossip. This evidence was not character evidence. This was proper evidence presented so the jury

could understand why Glossip was able to employ Sneed to commit the murders.

¶112 Next, Glossip claims that counsel was ineffective for failing to object to the evidence complained about in proposition two. We found above that this evidence did not rise to the level of plain error; we further find that the failure to object did not amount to ineffective assistance, as this evidence did not affect the outcome of the case.

¶113 Next, Glossip claims that counsel was ineffective to object to instances of prosecutorial misconduct set forth in proposition four. Any misconduct that might have occurred did not affect the outcome of this case, so there can be no ineffective assistance of counsel.

VI: SECOND STAGE ISSUES

¶114 In proposition six, Glossip claims there was insufficient evidence to support the sole aggravating circumstance of murder for remuneration. Murder for remuneration, in this case, requires only that Glossip employed Sneed to commit the murder for payment or the promise of payment. 21 O.S.2001, § 701.12.

¶115 Here, Glossip claims that Sneed's self-serving testimony was insufficient to support this aggravating circumstance. Glossip claims that the murder was only a method to steal the money from Van Treese's car.

¶116 The flaw in Glossip's argument is that no murder needed to occur for Sneed and Glossip to retrieve the money from Van Treese's car. Because Glossip knew there would be money under the seat, a simple burglary of the automobile would have resulted in the fruits of their supposed desire. The fact is that Glossip was not after money, he wanted Van Treese dead and he was willing to pay Sneed to do the dirty work. He knew

that Sneed would do it for the mere promise of a large payoff. There was no evidence that Sneed had any independent knowledge of this money.

¶117 There is sufficient evidence that Glossip promised to pay Sneed for killing Van Treese.

¶118 In proposition seven, Glossip claims that the jury instructions defining the jury's role in determining punishment were flawed. Glossip first argues that the jury should have been instructed, as requested by trial counsel, that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt. He claims, relying on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that the failure to give this instruction resulted in a death sentence that is unconstitutional and unreliable. This Court has consistently rejected this argument, and Glossip has presented no new argument which would cause this Court to reconsider our previous decisions. *See Mitchell v. State*, 2006 OK CR 20, ¶ 81, 136 P.3d 671, 704.

¶119 Glossip next argues that the trial court's instruction which defines mitigating evidence as factors which "in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame" impermissibly narrows the characterization of mitigation. He claims this definition excludes evidence about a defendant that may warrant a sentence less than death, because the evidence may not lessen his moral culpability or blame. The trial court rejected trial counsel's requested instructions.

¶120 The trial court gave the uniform instructions on mitigating evidence, OUJI-CR 2d 4-78 and 4-79 (1996), as well as others, which included a list of mitigating evidence and additional instructions which allowed the jury to consider other mitigating circumstances if

found to exist. This Court has previously analyzed these instructions and determined that they are appropriate. *Rojem v. State*, 2006 OK CR 7, ¶ 57, 130 P.3d 287, 299. This Court will not revisit the issue here.

¶121 In proposition eight, Glossip claims that the State was allowed to introduce improper victim impact evidence. Oklahoma's desire to allow victims of violent crimes some type of influence in the sentencing of criminal defendants has led to different statutes. 22 O.S.2001, §§ 984 and 984.1 allows the use of "victim impact statements" and 21 O.S.2001, §701.10(C) allows the use of "victim impact evidence."

¶122 Title 21 O.S.2001, §701. 10(C) pertains only to capital sentencing proceedings. The State may present "victim impact evidence" about the victim and the impact of the murder on the family of the victim. The clear language of section 701.10(C) limits the type of victim impact evidence allowable in a capital sentencing procedure. This section is not as encompassing as 22 O.S.2001, §§ 984 and 984.1. Section 984 reads in part:

> "Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence;

Section 984.1 states that,

> Each victim, or members of the immediate family of each victim or person designated by the

> victim or by family members of the victim, may present a written victim impact statement or appear personally at the sentencing proceeding and present the statements orally. Provided, however, if a victim or any member of the immediate family or person designated by the victim or by family members of a victim wishes to appear personally, such person shall have the absolute right to do so.

22 O.S.2001, § 984.l(A). "Members of the immediate family" means the spouse, a child by birth or adoption, a stepchild, a parent, or a sibling of each victim. 22 O.S.2001, § 984.

¶123 This Court has stated that both "victim impact statements" and "victim impact evidence" are admissible in a capital sentencing procedure. This includes a victim's rendition of the "circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence." See 22 O.S.2001, § 984; *Dodd*, 2004 OK CR 31, ¶ 95, 100 P.3d at 1044.

¶124 However, evidence may be introduced that "is so unduly prejudicial that it renders the trial fundamentally unfair" thus implicating the Due Process Clause of the Fourteenth Amendment. *Lott*, 2004 OK CR 27, ¶ 109, 98 P.3d at 346, *quoting Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991).

¶125 During the second stage the State presented two witnesses. These two witnesses, the victim's daughter and the victim's widow, met the definition of "immediate family members." These two witnesses read their own statements and statements of other immediate family members. Glossip now claims that this procedure

violated our previous case law on victim impact evidence. Glossip argues that the State should have only been allowed to introduce testimony of immediate family members or present a representative to read all of the statements, not both. *See Lott v. State*, 2004 OK CR 27, ¶¶ 110-11, 98 P.3d 318, 347 (family members may testify or they may designate a family representative to testify in their behalf). Intermingled in this proposition are comments that Mrs. Van Treese's statement was more akin to a statement made by a family representative, rather than a personal statement addressing the impact of the death on her personally. Glossip argues that either her statement should have been admitted as a representative, or the State should have presented the personal testimony of immediate family members, not both.

¶126 The issue here is whether an immediate family member can both testify on their own behalf and represent other members of the immediate family. In *Lott*, two members of the immediate family testified — the victim's son and daughter. Another witness also testified — the victim's granddaughter who was a "representative." She testified about the impact of the death on the entire family (even though she was not a member of the "immediate family"), her father and her aunts and uncles. (Her father and one of her aunts were the two witnesses who also presented victim impact evidence).

¶127 Glossip also cites *Grant v. State*, 2003 OK CR 2, ¶ 59, 58 P.3d 783, 797, *judgment vacated on different grounds in Grant v. Oklahoma*, 540 U.S. 801, 124 S.Ct. 162, 157 L.Ed.2d 12 (2003)[14] where this Court held

[14] Opinion on remand, *Grant v. State*, 2004 OK CR 24, 95 P.3d 178, *cert. denied* 543 U.S. 964, 125 S.Ct. 418, 160 L.Ed.2d 332 (2004).

that it is error for one person to read the statement of another. This Court, in Grant stated,

> In *Ledbetter v. State*, 1997 OK CR 5, ¶¶ 37, 933 P.2d 880, 893, we recognized the fact that "a person designated by the victim or by family members of the victim" may present victim impact statements. However, we held that the legislature intended that the "person chosen to present the victim impact statement" should use his "own thoughts or observations to express the impact of a death on survivors of the victim." *Ledbetter*, 1997 OK CR 5, ¶ 38, 933 P.2d at 893. In *Ledbetter*, our holding allowed the chosen person to observe family members and to use those observations in the statement; however, that person may not receive aid in the composition of the statement from outside sources. *Ledbetter*, 1997 OK CR 5, ¶ 39, 933 P.2d at 893.

¶128 Nevertheless, in *Grant* we held that the error did not rise to the level of plain error as the evidence was presented in a more sterile manner than if each of the writers of the statements had taken the stand and read their own statements.

¶129 The State cites *Hooks v. State*, 2001 OK CR 1, ¶ 37, 19 P.3d 294, 313. In *Hooks*, this Court held that a representative, who is not an immediate family member, may be the representative, and if they give testimony about the impact of the murder on themselves, the testimony can be harmless where the testimony makes up a small part of the victim impact evidence. This Court went on to say that a family member can give victim impact testimony on behalf of several immediate family members, as long as that testimony is otherwise admissible.

¶130 Trial counsel objected to victim impact evidence in a pre-trial motion and hearing. During the second stage, an in camera hearing was held and the parties went through the statements. Defense counsel made objections to some of the language in some of the statements and the trial court redacted the statements. However, counsel specifically stated that he had no objection to the two witnesses reading the statements of the remaining "immediate family members." Therefore, any claim regarding the method of victim impact evidence presentation is waived, except that error which is plain error.

¶131 We find that Glossip was not harmed by the State's utilization of two family members to read the statements of five others. This Court will not second guess trial counsel's sound trial strategy. There is no plain error here.

VII:MANDATORY SENTENCE REVIEW

¶132 We found above that there was sufficient evidence to support the finding of the statutory aggravating circumstance of murder for remuneration.

After reviewing the entire record in this case, we find that the sentence of death was not imposed because of any arbitrary factor, passion, or prejudice. Glossip presented mitigating evidence, which was summarized and listed in an instruction to the jury:

1. The defendant did not have any significant history of prior criminal activity;
2. The defendant is 41 years of age;
3. The defendant's emotional and family history;
4. The defendant, since his arrest on January 9, 1997, has been incarcerated and has not posed a threat to other inmates or detention staff;

5. The defendant is amenable to a prison setting and will pose little risk in such a structured setting;
6. The defendant has a family who love him and value his life;
7. Has limited education and did not graduate from high school. He has average intelligence or above. He has received his G.E.D.;
8. After leaving school, the defendant had continuous, gainful employment from age 16 to his arrest on January 9, 1997;
9. The defendant could contribute to prison society and be an assistance to others;
10. Prior to his arrest, the defendant had no history of aggression;
11. The defendant was not present when Barry Van Treese was killed.
12. The defendant has no significant drug or alcohol abuse history.

¶133 In addition, the trial court instructed, that the jury could decide that other mitigating circumstances exist and they could consider them as well.

¶134 We can honestly say that the jury's verdict was not born under the influence of passion, prejudice or any other arbitrary factor, and the evidence supported the jury's findings of the aggravating circumstances. *See* 21 O.S.2001, § 701.13. Glossip's convictions and his sentences should be affirmed. We find no error warranting reversal of Glossip's conviction or sentence of death for first-degree murder, therefore, the Judgment and Sentence of the trial court is, hereby, **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY BEFORE THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

RICHARD EUGENE GLOSSIP, Appellant, was tried by jury for the crimes of Murder in the First Degree in Case No. CF-97-244 in the District Court of Oklahoma County before the Honorable Twyla Mason Gray, District Judge. Glossip was sentenced to death, and he perfected this appeal. Judgment and Sentence is **AFFIRMED**.

APPEARANCES AT TRIAL

SILAS R. LYMAN, II
WAYNE WOODYARD
CAPITAL TRIAL DIVISION
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEYS FOR DEFENDANT

CONNIE SMOTHERMON
GARY ACKLEY
ASSISTANT DISTRICT ATTORNEYS
OKLAHOMA COUNTY
505 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVE.
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

JANET CHESLEY
KATHLEEN M. SMITH
CAPITAL DIRECT APPEALS DIVISION
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEYS FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH B. BRANHAM
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: LEWIS, J.
LUMPKIN, P.J.: CONCURS IN RESULTS
C. JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: DISSENTS
A. JOHNSON, J.: DISSENTS

LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULT

¶1 I concur in the results reached by the Court and most of the analysis. However, I do disagree with the analysis on a couple of points.

¶2 First, the Court errs by citing as authority for the decision rendered cases from other states that are not valid precedent for this Court. The jurisprudence from this Court is more than sufficient to sustain the analysis and decision of the Court. Thus, that case law should be cited and not cases from irrelevant states.

¶3 Second, while I agree the trial court's failure to preserve the demonstrative aids for the record in this case was error, I cannot find error in the use of them in this case. These demonstrative aids, i.e. poster sheets with contemporaneous listing of accurate statements by witnesses, were nothing more than group note taking. And, this Court has pushed note taking with a missionary zeal. While individual note taking cannot be monitored for individual accuracy, this group note taking was monitored by the court and the accuracy ensured. The notes were not overly emphasized because as demonstrative aides, they were not allowed to be taken into the jury room.

CHAPEL, JUDGE, DISSENTING:

¶1 I dissent from today's decision because I disagree with the majority's treatment of Proposition III and the result reached on this claim. I also write to note that although I concur in the conclusion reached on Proposition I, I believe the majority overstates the strength of the accomplice corroboration evidence in this case, by confusing the narrow analysis of this question with Glossip's overall sufficiency of the evidence claim.

¶2 Regarding Proposition III, I find that the trial court's decision, over defense objection, to allow the State to post summaries of witness testimony throughout the courtroom and to leave these demonstrative exhibits visible to jurors and later witnesses, from the time they were first crafted until the conclusion of the first stage of Glossip's trial, was an abuse of discretion. I also find that the trial court's denial of defense counsel's clear and reasonable request to allow these exhibits to be either preserved intact or digitally photographed, for review by this Court, was likewise an abuse of discretion. The trial court's actions in this regard were totally unjustified and prejudiced Glossip's right to a fair trial and an informed consideration of his claims on appeal.

¶3 Two things occurred before the presentation of any evidence at Glossip's trial that seem noteworthy in light of his current claim. First, a jury panel venire member asked, during voir dire, if jurors would be allowed to take notes.[1] The trial court responded with a

[1] This Court addressed the practice of jurors taking notes in *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211 (per curiam). We held that it was not error to allow jurors who took notes during a trial to take their notes into the jury room with them during deliberations. *Id.* at ¶ 5, 942 P.2d at 213. Although *Cohee* did not require trial

lengthy explanation of the pitfalls of note-taking, particularly for those who did not do it regularly, and explained that witnesses would have to rely upon their "collective memories."[2] Hence juror note-taking was not permitted.[3]

¶4 The second noteworthy occurrence involved the rule of sequestration of witnesses. Glossip's counsel

---

judges to allow jurors to take notes, it recognized that note- taking has substantial potential benefits during a trial:

> Use of notes may aid the jury during their deliberations. We find that jurors may benefit from notes in several ways: (1) jurors may follow the proceedings more closely and pay more attention as they take notes for later use; (2) jurors' memories may be more easily and reliably refreshed during deliberations; (3) jurors may make fewer requests to have portions of a trial transcript read back during deliberations; and (4) the ability to use their notes may result in increased juror morale and satisfaction.

Id. at ¶ 4, 942 P.2d at 212. I would hope that trial courts considering whether to allow jurors to take notes would weigh these potential benefits against the potential risks from this practice.

[2] The court stated: "You know, note taking is a skill. If you're in a job or a student where you take notes every day, you get pretty proficient at it and you have a pretty good skill level at it. If it's been years since you've taken notes, you 're pretty lousy at it." The court then explained that jurors would not be able to interrupt witnesses and ask them to repeat testimony, in order to ensure the accuracy of their notes, and described a scenario where a juror's written notes conflicted with that juror's memory of what was said: "And then you're confused[,] is what I wrote down right or is it the way I remember it right."

[3] The trial judge noted that she would provide jurors with a log of what happened each day, which "really helps" jurors remember what they heard. The record contains a court exhibit with a log of witnesses who testified, with a general description of who they were, such as "girlfriend of defendant," which was given to Glossip's jury. Yet this log contains no summary or other substantive information regarding the actual testimony of the witnesses.

properly invoked "the rule" at the beginning of trial and also requested that Kenneth Van Treese, the brother of the victim, not be allowed to remain in the courtroom during the testimony of Donna Van Treese, the victim's wife. The trial court recognized that the rule had been invoked and even acceded to counsel's request regarding Kenneth Van Treese, over State objection, out of "an abundance of caution."[4] Unfortunately, the trial court's recognition that note-taking can sometimes be distracting and create problems during a trial, as well as the court's careful attention to respecting the rule of sequestration, did not remain consistent throughout Glossip's trial.

¶5 During the testimony of the State's first witness, Donna Van Treeese, the prosecutor got out an easel and started writing on a large paper pad placed upon it.[5] Although the record does not establish exactly what was written, the prosecutor's comments indicate that she recorded certain specific pieces of testimony on the pad, such as the time Glossip told Mrs. Van Treese

---

[4] The trial court ruled that since there was going to be some overlap between the testimony of these two persons, both of whom were immediate family members of the victim, the victim's brother would be asked to leave the courtroom during the testimony of the victim's wife. (Although the record reveals that Mrs. Van Treese remarried and changed her name in 2003, she is referred to herein, as she was at trial, as Donna Van Treese.)

[5] As addressed further *infra*, the record in this case does not contain either the actual paper exhibits at issue or any photographs of them. The parties seem to agree, however, that the paper pad, which was used to create the various demonstrative exhibits at issue herein, was approximately 2 feet by 3 feet in size.

that he had last seen her husband and when this statement was made. Defense counsel did not object.[6]

¶6 During Mrs. Van Treese's testimony the next day, the prosecutor again began writing on the pad, summarizing certain bits of testimony.[7] In particular, she recorded Mrs. Van Treese's testimony about Glossip telling her that he had seen her husband on the morning of January 7, 1997.[8] Later that day, during the testimony of Glossip's live-in girlfriend, D-Anna Wood, the prosecutor likewise recorded what Glossip told her after Justin Sneed woke them up during the "early morning

---

[6] The transcript in this trial sometimes reveals what was written down, because the prosecutor makes the statement "I have written … " and then (presumably) states exactly what was written. At other times the examining prosecutor indicates that he/she is recording certain testimony, but then fails to state what exactly he/she has recorded. And it is entirely possible that on some occasions statements were written down without the examining attorney mentioning it at all. Hence the transcript serves as a limited and fundamentally incomplete record of what was written on the large paper demonstrative exhibits at Glossip's trial. I strongly disagree with the majority opinion's suggestion that a careful review of the transcript is "the only way to determine what was on the posters, *in Toto* [sic]." The only way to determine the complete contents of the posters is to review the actual posters.

[7] For example, the prosecutor recorded that the hotel bookkeeping (during the second half of 2006) was "not up to par" and also apparently wrote "lifestyle decision not to fire Glossip during family turmoil" and "year-end totals and losses demand change." Although none of these remarks were actual quotes from the witness, these and similar statements that were apparently written down were reasonable summaries of witness testimony and were not challenged, in terms of content, either at trial or on appeal.

[8] The prosecutor apparently wrote, "Last time I saw Barry it was on the 7th in the morning between 7 and 7:30. He was leaving to go to the store and buy some supplies."

hours" of January 7, namely, that "two drunks broke a window" and that Glossip told Sneed "to clean it up."[9]

¶7 At the end of the day, after the jury had been dismissed, defense counsel objected to the State being allowed to post, in the courtroom, the large pieces of paper containing the State's notes summarizing particular witness testimony after the testifying witness had been excused, because it placed· unfair emphasis on the selected testimony.[10] The State responded that it had a right to make demonstrative exhibits and suggested that it was Glossip's own fault that the exhibits were necessary.[11] The trial court agreed and overruled

---

[9] The record suggests that at some point during the cross examination of Wood, defense counsel wrote on the paper pad as well, since he refers to "1-7," for January 7th, and explains to Wood that "BVT" stands for Barry Van Treese. Yet the transcript is totally unclear what else, if anything, defense counsel wrote down.

[10] Defense counsel stated:

> We want to make an objection for the record to the posting of demonstrative exhibits that are basically an accumulation of notes written by the prosecutors to remain throughout the course of the variety of witnesses.
>
> I understand the need sometimes for a demonstrative exhibit with a particular witness and then you bringing a demonstrative exhibit out with others, but basically all this does is emphasize the testimony of—it's only part of the testimony. And as a result of that we do object.

[11] The prosecutor asserted:

> Your Honor, we have a right to make a demonstrative exhibit. I have not and will not move to introduce those exhibits into evidence. This demonstrative exhibit is a running, continuing tally of the various spins that this Defendant has put on, you know, his version of the facts. It's his fault that there are so many of them, there are so many witnesses and people that he talked to.

the objection. The court did not specifically address defense counsel's objection to the posting of the exhibits or his "undue emphasis" complaint.[12]

¶8 During the testimony of Billye Hooper, who was the day clerk at the Oklahoma City Best Budget Inn, the prosecutor again began taking notes on the large pad of paper about numerous things Glossip said to her or in her presence: asking her to pay the hotel cable bill with her own money (so Van Treese would not find out it had been disconnected), that Van Treese got up early on the morning of January 7 and went to get breakfast and repair materials, that Barry Van Treese had rented Room 102 to a "couple of drunks," who had "busted out a window," and not to put that room on the housekeeping report, because Glossip and Sneed were going to clean it up themselves.[13] When this testimony began the prosecutor addressed the court saying, "Your Honor, this may take me a minute, but I'm going to try and write all this up here." As the witness testified, the prosecutor would repeatedly summarize and restate what had just been said, in order to get the witness's

---

[12] The State asserts on appeal that this Court should review Glossip's claim regarding the posting of the demonstrative exhibits only for "plain error," since Glossip's counsel did not re-raise his objection every time the prosecutor posted a new exhibit. Yet on-the-record comments made at the end of the first stage of Glossip's trial indicate that the issue of posting and also of preserving these exhibits may have been further addressed, off the record, at trial. Furthermore, the record indicates that the trial court was fully aware of Glossip's "undue emphasis" objection and had no intention of sustaining it. Hence I find that this claim was adequately preserved at trial.

[13] The prosecutor also attempted to record the approximate time at which each of these statements was made by Glossip.

agreement to the accuracy of the prosecutor's written summary of this same testimony.[14]

¶9 During the testimony of the next witness, William Bender, who had managed the Tulsa Best Budget Inn, the prosecutor announced that she was going to start writing down things that Glossip had said to Bender on January 8, after the victim had been found and Glossip had been interviewed. As Bender testified the prosecutor summarized his testimony and got his assent to various quotations of things Glossip had said, as she wrote them down.[15] In the middle of this note-taking process, the court interrupted and called the attorneys to the bench—apparently after the prosecutor wrote down something about Glossip telling Bender that he didn't kill the victim, but that he knew who did—and suggested that the prosecutor add a particular piece of information to her notes, "in the interest of fairness."[16]

---

[14] In the later part of Hooper's direct testimony, it becomes impossible to tell exactly what, if anything, is being written down, though the favorable nature of Hooper's testimony and the prosecutor's initial remark about wanting to write "all this up here" suggests that the prosecutor may have continued to summarize portions of Hooper's testimony on the paper pad.

[15] For example, she wrote down that Glossip described the victim, who had been found the previous evening, as "deader than a doornail," "cold as ice," and "beat to a bloody pulp." The prosecutor also apparently recorded some version of Glossip's remark to Bender that if the police hadn't told him to "stick around," he "would have already been gone."

[16] The exchange at the bench was as follows:

> THE COURT: There's one other matter that I think in fairness should be listed up there, which is that he [Glossip] told them [sic] [Bender] that he was in fear for his life.
>
> MS. SMOTHERMON: Okay. I will.

The prosecutor then apparently recorded that Glossip said he did not tell the police who killed Van Treese because Glossip "was in fear for his life" and that Glossip warned Bender that he should probably leave even the Tulsa motel, because it was about to be "brought down."[17]

¶10 This same prosecutor continued taking notes on the paper pad during the testimony of

---

THE COURT: And in the interest of fairness, I want to make sure that-if you'll just fix that, please.

MS. SMOTHERMON: I will.

[17] Once again, however, the record does not reveal precisely what was written down.

Jacquelyn Williams,[18] Kayla Pursley,[19] and Michael Pursley,[20] as she questioned each one of them. During Michael Pursley's testimony, as the prosecutor attempted to confirm the accuracy of her notes-by repeating the testimony and asking Pursley to affirm what she had written—defense counsel objected that the prosecutor was "repeating and rehashing testimony that's already before the jury." The court overruled the objection without comment.

---

[18] Jacquelyn Williams was a housekeeper who lived in the Best Budget Inn rent-free, but who was not otherwise paid for her services. The transcript only clearly indicates one portion of her testimony that the prosecutor wrote down, namely, that Glossip told her to stay in her room when the owner came around. Yet the prosecutor's style of questioning, repeatedly clarifying particular pieces of information, suggests that she may have been taking notes on other testimony as well.

[19] Kayla Pursley worked the night shift at a gas station across from the Best Budget Inn. The transcript makes clear that the prosecutor wrote down that around 8:30 a.m., on January 7, Glossip told Pursley that "there was a fight between two drunks and they had thrown a footstool through the window, and that "one of the drunks was the strange guy that [Pursley] had seen earlier," and that Glossip and Sneed "threw the drunks out." The prosecutor later indicated that she was writing down other testimony "before I forget," which apparently included Glossip's statements to Pursley about the broken window in Room 102, *i.e.*, that he and Sneed "already cleaned that up" and that one of them "got cut." It is unclear whether the prosecutor wrote down other testimony from Kayla Pursley.

[20] Michael Pursley had been married to Kayla Pursley and was living with her and their children at the Best Budget Inn at the time. The transcript indicates that the prosecutor wrote down his testimony that around 8:30 a.m., on January 7, Glossip told him that he "knew the window (in Room 102] had been broken," that Glossip and Sneed had "been in the room," and that they knew "who had broken the window" and were "going to bill them for it."

¶11 Officer Timothy Brown, who assisted in the search for Barry Van Treese and who discovered his body in Room 102, was examined by the other prosecutor. It is not clear whether this prosecutor himself wrote any notes, but after questioning Brown for approximately twenty transcript pages, he asked the first prosecutor to come up and take notes for him. The transcript indicates that this first prosecutor then took notes, while the examining prosecutor continued to question Brown regarding numerous statements made by Glossip and Brown's investigation of Van Treese's disappearance. It is sometimes apparent in the record that the note-taking prosecutor is memorializing testimony-such as when the examining prosecutor asks, "Can we get that, Ms. Smothermon?"—but it is often impossible to tell how much or what exactly is being written down.[21]

¶12 Clifford Everhart, who did security work at the hotel and who participated in the search for Mr. Van Treese and was present when his body was discovered, was examined by the "note-taking prosecutor." The transcript indicates some specific occasions during this testimony that the prosecutor took notes summarizing what Glossip had said to Everhart and when it was said.[22] Once again, however, it remains entirely unclear,

---

[21] Sometimes the record is quite clear about what is being written, such as when the prosecutor quotes Glossip as saying to Brown, "Things keep getting turned around, I didn't say I saw Barry at 7:00 a.m." After getting confirmation of this quote from Brown, the examining prosecutor asks, "Now, did we get that, Ms. Smothermon?", and she responds, "Yes, sir." Yet on other occasions the examining prosecutor asks Brown to confirm "what Ms. Smotherman is writing" and that she "has it right," but fails to review what has been written.

[22] The transcript indicates that she wrote down Glossip's statements about Van Treese returning from Tulsa around 2:30 or 3:00

upon even a careful review of the transcript, whether this prosecutor wrote down other notes from Everhart's testimony, without verbally noting what she was doing.

¶13 After all the first-stage evidence had been presented and the jury had been excused, Glossip's counsel noted his earlier objections "to what has been labeled as demonstrative exhibits, which are basically the sheets of paper that have certain writings on them and have been taped to various places in the courtroom."[23] Defense counsel noted that he had earlier requested that these exhibits be included as part of the original record and that the trial court had asked for some authority on this issue. Counsel then cited *Anderson v. State*,[24] as being one of a number of cases establishing the defendant's duty to ensure that an adequate record is provided to the Court of Criminal Appeals, for the determination of claims on appeal. He added:

> If these don't go, then they will not really have an idea of what our concern was in the record. If

---

a.m. on the morning of January 7, that Glossip had last seen Van Treese around 7:00 a.m. that same morning, and that Glossip said he had rented Room 102 to "a couple of drunk cowboys," who had gotten into a fight and broken the window.

[23] The prosecutor did not challenge defense counsel's description of the paper demonstrative exhibits being "taped to various places in the courtroom." Glossip's appellate brief asserts that according to his trial counsel, "there were at least twelve of the State's posters plastered up across the front of the prosecutor's table, the trial bench, and any other available space in the courtroom." The current record, however, is inadequate to evaluate this specific claim.

[24] *See Anderson v. State*, 1985 OK CR 94, ¶ 4, 704 P.2d 499, 501 ("It is well established that counsel for a defendant has a duty to insure [sic] that a sufficient record is provided to this Court, so that we may determine the issues.") (citation omitted).

> it's too bulky to do that, we are willing to take some digital photographs of each-first of all, as these things appear in the courtroom and of each of these items to submit if that's an aid to the court reporter or to the Court or the Court of Criminal Appeals. But we do renew that request at this time.

¶14 The note-taking prosecutor responded that the record was already clear regarding "what these demonstrative aids entail," because she had "made sure that I put into the record what was being written." The prosecutor noted that "using the same size paper, the same marker, the Defense has made five demonstrative aids of their own of similar ilk, that had been displayed various lengths of time to the jury."[25] She also noted that defense counsel was free to use the demonstrative aids during closing arguments, but that they would not be sent to the jury or included with the record. The prosecutor concluded by again asserting that the record of what had been written down was already complete.[26]

¶15 The trial court noted that the actual demonstrative exhibits "would be somewhat bulky," indicated that the record was already "explicit as to what was being memorialized," and denied defense counsel's request. When defense counsel asked for "permission for our own

---

[25] In particular, the prosecutor described an exhibit recording a statement in which Sneed denied he had killed Van Treese, which was displayed during Sneed's testimony and that of others. Defense counsel did not dispute the prosecutor's assertion that he had created five demonstrative aids comparable to those made by the State.

[26] "I worked very hard to put everything that was written into the record and to make sure that all of their demonstrative aids were read into the record. And I believe the record to be complete."

purposes and for our own record to photograph" the challenged exhibits, in case they were later destroyed, the trial court got angry, and the following exchange occurred:

> THE COURT: You know what? What you're asking me to do is for permission to make your own record outside of the Court's record. Denied. The Court's record is what's going to stand. And if you want to look them up, you can do so. It's all in the transcript. There is nothing about this that has not been memorialized, and the transcript is the way that we make a record in Oklahoma courts.
>
> MR. WOODYARD: We think the better way to show actually how these things sit in the courtroom and exactly what's written would be to either have the documents or the digital photograph, so we're making that request and I understand the Court's denying our request.
>
> THE COURT: Your understanding is absolutely on target.

¶16 It seems to me that the preceding review of the transcript record in this case makes a few thing quite clear (though certainly not the contents of the challenged exhibits). The current record is *not* complete about what was written on the demonstrative exhibits; everything that was written down on these exhibits was *not* memorialized by being read into the record; and the transcripts alone are *not* adequate for a fair review of the current claim on appeal. Defense counsel's request to digitally photograph the demonstrative exhibits, as they appeared in the courtroom, and to either preserve intact or digitally photograph the individual exhibits was entirely reasonable. I conclude the trial court abused its

discretion in denying defense counsel's requests in this regard.

¶17 Defense counsel was more than diligent in attempting to provide this Court with an adequate record to review his Proposition III claim. Hence we certainly cannot fault Glossip for the inadequacy of the current record in this regard. In fact, the majority opinion acknowledges being "extremely troubled by the trial court's attitude toward defense counsel's attempt to preserve the demonstrative aides for appellate review." And I agree with the majority that "[t]he total recalcitrance of the trial court to allow a record to be made creates error in itself." Consequently, I cannot understand the majority's summary conclusion—made without attempting to review the actual exhibits at issue—that "[a]ny error in the utilization of these posters was harmless."

¶18 The State has represented to this Court that it still has the actual poster exhibits from Glossip's trial.[27] In his reply brief, Glossip requests that we order the State to supplement the record with these actual exhibits. In my view, if we are going to deny Glossip's claim, we should not do so without at least reviewing the actual demonstrative exhibits, if they are still available, particularly since Glossip's counsel diligently sought to have these exhibits included in the appellate record.

¶19 The rub, of course, is that Glossip does not (and did not) challenge the accuracy of the notes taken by the prosecutor at trial, nor does he raise a prosecutorial misconduct claim in this regard. Glossip's claim in

---

[27] Appellate counsel for Glossip, however, apparently does not possess the poster exhibits that were made by defense counsel at Glossip's trial.

Proposition III is that the posted exhibits of the prosecutor's notes from selected witness testimony (1) placed undue emphasis on the chosen testimony, (2) violated the rule of sequestration of witnesses, and (3) amounted to a "continuous closing argument." Reviewing the actual paper exhibits could potentially help us resolve these claims, but such a review might not be decisive, particularly since this Court still would not know how the various exhibits were displayed in the courtroom. I take up Glossip's claims in turn, based upon the limited record currently before the Court.

¶20 First, I agree that the manner m which the State was allowed to record and post selected witness testimony, in the context of Glossip's capital trial, placed undue emphasis upon this testimony. While this Court has repeatedly approved the use of demonstrative exhibits, including summaries of witness testimony, to aid the jury in its consideration of evidence, we have also recognized that demonstrative exhibits can be misleading and can be misused in the trial setting.[28] In *Moore*

---

[28] *See, e.g., Dunkle v. State*, 2006 OK CR 29, ¶ 64, 139 P.3d 228, 249 (finding that State's use of demonstrative exhibits, in the form of computer-generated animations or "reenactments," was "inappropriate and highly misleading"). This Court recognized in *Dunkle* that even though demonstrative exhibits "should not be made available for the jury during deliberations, as they have 'no independent evidentiary value,'" such demonstrative aids must nevertheless be authenticated and evaluated to determine whether they are relevant and whether their probative value is outweighed by the danger of unfair prejudice or by other trial considerations (confusion of the issues, undue delay, cumulative evidence, etc.). *Id.* at ¶¶ 53-54, 139 P.3d at 246-47 (citation omitted). Demonstrative exhibits that summarize witness testimony can be authenticated by demonstrating that the summary provided/created is consistent with the witness's testimony.

v. State,[29] we addressed a claim that the State's use of a written summary of an expert witness's testimony placed "undue emphasis" on the summarized evidence. We rejected the claim, based upon the fact that the jurors only had access to the summary during the time that the expert witness was actually testifying.[30] We also noted that the summary assisted the trier of fact, since it helped explain "the extensive fiber evidence in the case at bar."[31] The current case is distinguishable on its facts.

¶21 Glossip's jury was able to review the State's hand-written summaries of witness testimony long after the testifying witnesses left the stand, throughout the first stage of his trial. Furthermore, despite the State's desire to catalog and display its favorite testimony, such recording can hardly be described as "necessary" for the jury's understanding in this case. Although the trial was long and many witnesses testified, the evidence summarized did not relate to complex expert testimony or to concepts that were not readily accessible to average citizens. And even if the actual demonstrative exhibits are uncontroversial—and Glossip has never challenged the State's right to create them—there was absolutely no justification for allowing them to remain in the courtroom throughout the taking of first-stage evidence in Glossip's trial.[32] I conclude that the trial court's decision

[29] 1990 OK CR 5, 788 P.2d 387.

[30] *Id.* at ¶ 44, 788 P.2d at 398.

[31] *Id.*

[32] In *Lanning v. Brown*, 377 S.W.2d 590 (Ky. 1964), Kentucky's highest state court noted that although it was proper to display a chart summarizing an injured victim's testimony about her damages during that witness's testimony, "it is quite another thing to allow a particular segment of testimony to be advertised, bill-board fashion,

to allow the continuous posting of these exhibits, without any limitation and over defense objection, was an abuse of discretion, because it placed undue and unfair emphasis on the summarized testimony.

¶22 I also conclude that the posting of these hand-written summaries during the testimony of later witnesses violated the rule of sequestration of witnesses. This rule is codified at 12 O.S.2001, § 2615, and was properly invoked by defense counsel at trial.[33] The purpose of this rule is fairly obvious and is well established: "It exercises a restraint on witnesses tailoring their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid."[34] The State's argument that the posted exhibits did not violate the rule of sequestration because the later witnesses couldn't actually "hear" the testimony of earlier

---

after the living witness has vacated the stand," particularly if the exhibit "is not being used in connection with the subsequent testimony of other witnesses." *Id.* at 594. The *Lanning* court concluded that the trial court erred in allowing the damages demonstrative exhibit to remain visible in the courtroom, over objection, throughout the remainder of the trial. *Id.* Because the amount of damages was not in dispute, however, the court found that the error did not prejudice the defendants in that case and granted no relief. *Id.*

[33] See 12 O.S.2001, § 2615 ("At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."). This rule is also known as "the rule of exclusion" and is typically invoked at trial by referring simply to "the rule." While there are exceptions to this rule, both statutory and by common law, none are relevant in this case.

[34] *Clark v. Continental Tank Co.*, 1987 OK 93, ¶ 6, 744 P.2d 949, 951 (quoting *Geders v. United States*, 425 U.S. 80, 87, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592). The *Clark* opinion notes that the practice of sequestering witnesses, in order to seek the truth, goes "as far back as the days of Daniel and the story of Susanna." *Id.* at ¶ 5, 744 P.2d at 950–51.

witnesses—they would have to read it—is ridiculous in my view. It would certainly violate the rule of sequestration to provide a later witness with a transcript of an earlier witness's trial testimony, and what occurred in Glossip's trial was a limited version of this same phenomenon.

¶23 Furthermore, the possibility of a later witness learning about the testimony of earlier witnesses through these lingering exhibits was more than a theoretical danger in this case. The testimony of Kenneth Van Treese made quite clear that he was reading and responding to the posted testimony of the witnesses who preceded him.[35] Hence the posting of the demonstrative exhibits violated the rule of sequestration of witnesses as well.

¶24 I also agree that the overall effect of the posted summaries of the State's favorite testimony was akin to allowing the State to post its theory of the case and to make its closing argument throughout the first stage of Glossip's trial.[36] Hence I conclude that the trial court abused its discretion in allowing the State, over defense objection, to display the prosecutor's written

---

[35] When Kenneth Van Treese was asked what Glossip said to him on January 8, 1997, regarding the disappearance of Barry Van Treese, he responded: "He [Glossip] told me the same thing that these notes up here are about. About having seen Barry at 7:00, you know, blah, blah, and so forth." In other words, he told me the same lame story that he told the other witnesses, as we all can see from these posted summaries of their testimony.

[36] See, e.g., *Vanlandingham v. Gartman*, 236 Ark. 504, 367 S.W.2d 111, 114 (1963) ("[A]lthough an attorney might use a chart or blackboard to illustrate his argument, it would not be fair to place the illustration where it could be seen by the jury at times when the attorney was not using it in making his argument. If the jury could see it all day[,] it would be the same as arguing the case all day.").

summaries of selected witness testimony throughout the courtroom—and apparently visible to both jurors and testifying witnesses—without any limitation and throughout the evidentiary portion of the guilt stage of Glossip's trial. And I find merit in each of Glossip's three challenges to this decision. Although it is difficult to confidently evaluate the prejudice from this trial court error, I strongly dissent from the majority opinion's summary finding that any error in this regard was "harmless," particularly when we do not even seek to review the actual demonstrative exhibits at issue.

¶25 Regarding Proposition I, I strongly disagree with the majority opinion's treatment of Glossip's challenge to the accomplice corroboration evidence in this case. In *Pink v. State*,[37] a case that the majority opinion barely acknowledges, this Court recently summarized and clarified Oklahoma's corroboration requirement for cases involving accomplice testimony, found at 22 Okla.Stat. 2001, § 742.[38] As we noted in *Pink*, in cases where the State relies upon accomplice testimony, the defendant can only be convicted where the State also presents evidence that "standing alone, tends to link the defendant with the commission of the offense charged."[39] Hence the State must present "at least one material fact of independent evidence that tends to connect the defendant with the commission of the crime," which is

[37] 2004 OK CR 37, 104 P.3d 584.

[38] 22 O.S.2001, § 742 ("A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.").

[39] 2004 OK CR 37, ¶ 15, 104 P.3d at 590 (quoting *Cummings v. State*, 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830).

entirely separate from the accomplice testimony, but which corroborates some material aspect of that testimony.[40] We noted in *Pink* that this Court has in the past found the following independent evidence to be adequately corroborating: "evidence of stolen goods found in the defendant's possession, the testimony of non-accomplice associates of the defendant, [and] admissions by the defendant."[41] This Court has never found that evidence that a defendant had a motive to commit a particular crime or that he helped conceal a crime committed by another is enough, standing alone, to link that defendant with the actual commission of the crime at issue. Yet this is the "corroboration" evidence focused upon in today's majority opinion.[42]

¶26 The Court's opm10n initially notes that "[t]he State concedes that motive alone is not sufficient to corroborate an accomplice's testimony." Yet the opinion then attempts to demonstrate, by relying on cases from Texas, California, and Georgia, that evidence of a defendant's motive, as well as evidence about concealing the commission of a crime and attempted flight, can be adequate as corroborating evidence. These cases are

---

[40] *Id.* at ¶ 16, 104 P.3d at 590 (internal citations omitted). The State's brief quotes paragraphs 15 and 16 of *Pink* in their entirety.

[41] *Id.* at ¶ 20, 104 P.3d at 592 (citing cases).

[42] The opinion initially refers to "four … aspects of Glossip's involvement, … which point to his guilt: motive, concealment of the crime, intended flight, and … his control over Sneed." Yet after reviewing the evidence on these four issues, the opinion concludes that this evidence, "taken together," is not merely indicative of guilt under a traditional sufficiency-of-the-evidence analysis, it is adequate to "corroborate Sneed's story about Glossip's involvement in the murder" and "sufficiently ties Glossip to the commission of the offense."

entirely irrelevant to interpreting Oklahoma's very specific, accomplice corroboration statute.[43] And the majority opinion does not cite any Oklahoma authority for (or make a persuasive argument for) its assumption that non-accomplice evidence suggesting that a defendant had a motive to commit a crime, assisted the perpetrator in concealing a crime, or planned to leave the area afterward can qualify as adequate corroborating evidence linking a. defendant to the actual commission of the crime under 22 O.S.2001, § 742.[44]

¶27 In fact, this Court has specifically held that evidence implicating a defendant as an "accessory after the fact"—through his actions of helping dispose of the victim's body, lying to the police, and attempting to conceal a murder that he had directed others to commit—is *not* adequate to "independently connect him to the actual commission of [the] murder," under Oklahoma's accommodation requirement.[45] The facts of *Cummings* are quite similar to the current case. Cummings apparently directed both of his wives to kill his sister by shooting her, but was not present when the murder was committed by his second wife. When he returned home, he assisted in the disposal of his sister's body and lied to the police about it.[46] Despite the strong evidence of

---

[43] The State notes in its brief, correctly, that "Defendant's challenge to the accomplice testimony in this case rests on pure state law grounds."

[44] The opinion does not cite any authority for (or even fully develop) its contention that evidence of a defendant's "control" over the perpetrator can be adequate corroboration.

[45] *See Cummings v. State*, 1998 OK CR 45, ¶ 21, 968 P.2d 821, 830.

[46] *Id.* at ,¶¶ 2-11, 968 P.2d at 827-28.

Cummings's guilt, including the testimony of both of his (accomplice) wives, this Court reversed his conviction for murdering his sister based upon the accomplice corroboration rule.[47]

¶28 This Court's 2001 opinion in this case, in which we reversed Glossip's conviction based upon ineffective assistance of counsel,[48] emphasized the minimal nature of the corroborating evidence in this case. We stated: "The evidence at trial tending to corroborate Sneed's testimony was extremely weak."[49] We also characterized certain inadmissible double hearsay testimony as "arguably the only evidence presented at trial that tended to independently corroborate any portion of Justin Sneed's testimony implicating Appellant in the crime and establishing a motive."[50] We declined to reach the question of the adequacy of corroboration, however,

---

[47] *Id.* at ¶ 21, 968 P.2d at 830 ("As Appellant contends, outside of the testimony of Juanita and Sherry, the evidence only supports a finding that Appellant assisted his wives in lying to the police and in covering up the crime. It does not independently connect him to the actual commission of Judy Mayo's murder."). This Court upheld Cummings's conviction for the murder of his niece, however, because his second wife was not an accomplice to this separate murder; hence her testimony provided adequate independent evidence corroborating the testimony of Cummings's first wife (who was an accomplice) regarding the murder of their niece. *Id.* at ¶¶ 22-23, 968 P.2d at 830-31.

[48] *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

[49] *Id.* at ,¶ 8, 29 P.3d at 599. We also noted that "the only 'direct evidence' connecting Appellant to the murder was Sneed's trial testimony," and that "[n]o forensic evidence linked Appellant to [the] murder and no compelling evidence corroborated Sneed's testimony that Appellant was the mastermind behind the murder." *Id.* at ¶ 7, 29 P.3d at 599.

[50] *Id.* at ¶ 21, 29 P.3d at 602.

choosing instead to reverse on Glossip's ineffective assistance claim.[51]

¶29 The current opinion, after recognizing the corroboration requirement, takes a very different tone: "In this case, the State presented a compelling case which showed that Justin Sneed place himself in a position where he was totally dependent on Glossip." Of course that has nothing to do with independent evidence linking Glossip to the actual commission of the murder of Barry Van Treese. The opinion then discusses Sneed's accomplice testimony and the State's case as a whole. I believe that we must first focus upon the very narrow question of whether the State presented separate evidence, independent of the testimony of Sneed, that connects Glossip to the actual murder and that materially corroborates some aspect of Sneed's accomplice testimony.

¶30 Although the question is very close, I agree with the majority that "the most compelling corroborative evidence … is the discovery of the money in Glossip's possession." Unfortunately, this single, conclusory sentence represents the entirety of the Court's analysis on this critical issue. I offer the following as an alternative, more narrow resolution of this issue.

¶31 According to the record in this case, when Glossip was questioned and then arrested on January 9, 1997, he was carrying $1,757 in cash, approximately $1,200 of which could not be accounted for by Glossip.[52]

---

[51] *Id.* at ¶ 8, 29 P.3d at 599.

[52] On the evening of January 6, 1997, Van Treese paid Glossip for his work in December of 1996 with a check for $429.33. According to Glossip's girlfriend, she and Glossip paid a 10% fee to cash the check on January 7, which would have left them with $386.40. They

Such unaccounted-for cash, when not uniquely identified by serial number or some other marking, is not nearly as strongly corroborating as the presence of identifiable stolen goods that are found in the defendant's possession. Nevertheless, considering this case as a whole, including the State's evidence that Glossip was a person of very limited means, who was low on cash at the time, and the timing of his arrest, I agree that this evidence materially corroborated Sneed's testimony.[53] The evidence regarding Glossip's paycheck, sales, and purchases, which could not explain where he obtained approximately $1200 of the cash in his possession at the time of his arrest, materially corroborated Sneed's testimony that Glossip offered him money to kill Van Treese and then paid Sneed for accomplishing the murder, using half of the cash stolen from Van Treese's car, and then kept

---

then went shopping and spent $172 for a pair of glasses, $107.73 for an engagement ring for her, and $45 more at Wal-Mart. These purchases would have left Glossip with only $61.67 from his paycheck. It can be reasonably inferred from the evidence that Glossip was very low on cash before being paid, because earlier in the day on January 6, he took a $20 advance from the hotel against the paycheck he was about to receive, to get through the day. In addition, Glossip's girlfriend told an investigator that they lived paycheck to paycheck and that she did not think Glossip was able to save any money.

Glossip later stated, during an interview in June of 1998, that just before he was arrested in this case, he sold his TV and futon for $190, sold his vending machines for $200, and sold an aquarium for $100, for a total of $490. If Glossip still had all of this cash, plus the money leftover from his paycheck at the time of his arrest, he would have had approximately $552 in cash.

[53] The finding of "stolen goods" in the defendant's possession is one of the examples of independent corroborating evidence noted in *Pink* 2004 OK CR 37, ¶ 20, 104 P.3d at 592.

the remaining stolen money for himself.[54] As noted in *Pink*, this Court has "not required that the *quantity* of the independent evidence connecting the defendant to the crime be great, though we have insisted that the evidence raise more than a mere suspicion."[55] I conclude that the amount of unaccounted-for cash found in Glossip's possession two days after the murder does tend to directly link him to this murder-for-hire killing and adequately corroborates the testimony of his accomplice, Justin Sneed.

¶32 Although the issue is close, I conclude that the facts of this case are distinguishable from *Pink*, wherein we reversed the defendant's conviction for robbery with a dangerous weapon because the State did not present adequate independent evidence connecting Pink to the armed robbery at issue.[56] I also find the *Pink* case distinguishable because the prosecutor in that case argued to the jury, contrary to well-established Oklahoma

---

[54] The State presented evidence at trial that Bany Van Treese would have had $3500 to $4000 in cash in his possession, based on hotel receipts. Justin Sneed testified that the envelope he found under the front seat of Van Treese's car, where Glossip told him to look, contained approximately $4,000 in cash, which Glossip split evenly between Sneed and himself. When Sneed, who had no regular source of income, was apprehended one week later, he told investigators that he still had some of the money that he had been paid and where it could be found. When investigators searched the apartment to which Sneed directed them, they found a Crown Royal Bag containing $1,680 in cash in a drawer that Sneed was using while he stayed in the apartment.

[55] 2004 OK CR 37, ¶ 16, 104 P.3d at 590 (emphasis in original). We also noted in *Pink* that "circumstantial evidence can be adequate to corroborate an accomplice's testimony." *Id.* at ¶ 16, 104 P.3d at 590-91.

[56] *See Pink*, 2004 OK CR 37, ¶¶ 17-20, 104 P.3d at 591-92.

law, that the jury was not required to find the existence of evidence, separate from the testimony of any accomplices, that tended to connect the defendant with the commission of the offense.[57] This argument prompted us to revise the language of OUJI-CR(2d) 9-32, upon which the prosecutor in *Pink* had based her argument.[58] Although Glossip's trial was conducted using the pre-*Pink* version of this instruction, the prosecutor in his case specifically acknowledged, during closing argument, that Glossip's jury was required to find adequate corroborating evidence in order to convict him of murder. Hence Glossip's jury was not misled in this regard.

¶33 It is important to distinguish the adequate corroboration requirement found in 22 Okla. Stat.2001, § 742, which applies only to cases involving accomplice testimony, from the general sufficiency of the evidence standard, which can be applied to any conviction. After the independent corroboration standard has been met for any accomplice testimony, this Court can and will consider all the evidence presented at trial, including accomplice testimony, to determine whether sufficient evidence was presented to convict the defendant.[59] In this regard, I agree with the majority that the State presented a strong circumstantial case against Glossip, which when combined with the testimony of Sneed

---

[57] *Id.* at ¶ 22, 104 P.3d at 592.

[58] *Id.* at ¶ 23, 104 P.3d at 593.

[59] Hence although I reject the majority opinion's suggestion that Glossip's failure to immediately disclose his knowledge of Van Treese's murder and his misleading of the investigation can serve as adequate corroborating evidence under § 742, I agree that this evidence can be considered as going to consciousness of guilt within our overall sufficiency of the evidence analysis, after adequate corroboration is established.

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

¶34 Nevertheless, I dissent from today's decision based upon my analysis of Glossip's Proposition III claim.

A. JOHNSON, JUDGE, DISSENTING:

¶1 I dissent for the reasons well expressed in Judge Chapel's dissenting opinion.

¶2 Providing visual aids for the jury is a common trial practice. Done right, it focuses the jurors' attention, enhances their understanding, and their memory. Done right, it is an important part of a fair and well run trial.

¶3 Here, in the image of an American courtroom plastered with poster-size trial notes taken by the prosecutor, we see the practice gone badly wrong.

¶4 The process allowed the prosecution, in effect, a continuous closing argument, and may well have violated the rule of sequestration of witnesses. This Court cannot judge the effect of the process on this defendant's right to a fair trial with any assurance because the trial court refused the defendant's request to have the posters and their placement in the courtroom made part of the appellate record. Under those circumstances, we should not assume this error was harmless.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. PCD-2004-978

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent

Filed June 11, 2007

ATTORNEYS FOR APPELLEE

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH S. BRANHAM, OBA # 18019
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
(405) 522-4534
(405) 521-6246 (FAX)

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

* * *

[15]

II.

TRIAL AND DIRECT APPEAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO PRESENT INFORMATION SET FORTH IN A 1997 COURT-ORDERED COMPETENCY EVALUATION REPORT FOR JUSTIN SNEED.

Citing a juror affidavit, Petitioner contends in his second ground for relief that had trial counsel cross-examined Justin Sneed with information contained in a 1997 court-ordered competency evaluation report in which he told a court-appointed psychologist that he had served one year's probation as a juvenile for burglary of a house and making a bomb threat, there would have been a reasonable likelihood of a different guilt-stage verdict. Petitioner also contends that appellate counsel were ineffective for failing to raise this claim on direct appeal. Petition at 37-39. As with Petitioner's first ground for relief, the State will review the merits of the instant appellate counsel in effectiveness claim. 22 O.S.2006, § 1089(D)(4)(b); *Gilbert*, 1998 OK CR 17, ¶ 2, 955 P.2d at 730.

First, Petitioner's citation to a juror affidavit to support his claim of a different verdict based on this proposed line of questioning is totally improper and must constitute no part of this Court's analysis. 12 O.S.Supp.2002, § 2606(B); *Wood v. State*, 2007 OK CR 17, ¶ 42 n. 29, __P.3d__. Second, assuming *arguendo* its admissibility under 12 O.S.2001, § 2404(B), *see Conover v. State*, 1997 OK CR 6, ¶¶ 25-27,933 P.2d 904, 922-23, the proffered evidence simply does not overcome the fact that "the State presented a compelling case which showed that Justin Sneed placed himself in a position

where he was totally dependent on [Petitioner]." *Glossip*, 2007 OK CR 12, ¶ 43, 157 P .3d at 152. The record shows that Justin Sneed testified that the sole reason he murdered the victim was because of pressure from Petitioner. The State presented evidence that Petitioner largely **[16]** controlled Sneed, an 18 year old, eighth-grade dropout who worked as a maintenance man for Petitioner at the motel (Tr. XII 47-48) and that Sneed's mental capacity and personality made it unlikely he would plan to kill anyone, let alone Van Treese, whom he barely knew.

One motel resident testified that, based on his limited observations, Sneed "didn't have a lot of mental presence" (Tr. VI 16). Bob Bemo, a retired homicide detective who interviewed Sneed, testified that Sneed did not appear very mature and had below average intelligence. He also testified that Petitioner appeared to be more aggressive and intelligent than Sneed. Bemo observed that Petitioner was "a very intelligent individual … a very manipulative individual … what he does with everything that he does is he's manipulating, using people" (Tr. XIV 46-48). Kayla Pursley, another motel resident, described Sneed as being "very childlike" (Tr. IX 17). Sneed assisted caring for her children when Pursley broke her foot. Pursley testified that Sneed played with her children "[m]ore as a peer … that he kind of fit in with my boys, you know, he played and he was real simple. He had a skateboard and that was his life … he didn't make a lot of decisions. You had to tell him sometimes what to do" (Tr. IX 17). Pursley described how Sneed would not eat unless someone told him to eat (Tr. IX 18).

Petitioner and Sneed were described as "very close" friends by people at the motel (Tr. VII 28). Sneed was largely dependent upon Petitioner for food and money

(Tr. VII 28; Tr. IX 21). Pursley testified that Sneed usually followed Petitioner when they were together, that you normally did not see one without the other and that "[Petitioner] would have to tell him what to do and how to do it" (Tr. IX 19-20, 23). Petitioner had control over Sneed because Sneed had no other place to go and no family in the area (Tr. IX 21 & 24). Pursley observed that "[y]ou almost had to tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal" (Tr. IX **[17]** 23). Cliff Everhart testified that Sneed was Petitioner's "puppet", that Sneed "was not self–motivated. [Petitioner] told him everything to do. [Petitioner] would tell him to do this, he'd do it … If he needed something, he'd come to [Petitioner]" (Tr. XI 185). Employees at the motel testified that Sneed did not know the victim very well (Tr. VII 34). This corroborated Sneed's testimony that he had only met the victim approximately three times prior to the murder during which time the pair had no real conversations (Tr. XII 76-77).

This evidence shows that Petitioner largely had control over Sneed's actions, that Sneed was dependent upon Petitioner and that Sneed's personality and mental capacity made it unlikely he would murder Barry Van Treese, practically a stranger, on his own volition. The evidence shows Sneed had the type of personality in January 1997 that allowed him to be easily influenced by Petitioner into committing the murder. In the words of the trial judge during a bench conference, Sneed was "an illiterate guy who's just one notch above a street person" (Tr. XIII 61).

This Court recognized this evidence on direct appeal, finding that:

> The State portrayed Sneed as a person with low intellectual ability, and a child like demeanor. They presented testimony about his background, and his growing up in a single parent home, having a child early in life, dropping out of school after the eighth grade, coming to Oklahoma City with a roofing crew, and quitting that to work at the motel in exchange for rent. This was all meant to show how he placed himself in a position to be dependent on Glossip.

Id., 2007 OK CR 12, ¶ 62, 157 P.3d at 154-55.

All things considered, there is no reasonable probability of a different verdict had Petitioner elicited at trial that Sneed had been convicted as a juvenile of a house burglary and making a bomb threat. Bare reference to these two purported incidences, without further factual development, does not contradict the compelling evidence marshaled by the State at trial that Sneed was totally **[18]** dependent upon, and under control of, Petitioner. Neither a house burglary, nor a bomb threat, necessarily require much in the way of planning or criminal sophistication.

Petitioner's bare references to these crimes also do not undermine evidence corroborating Sneed's testimony, which included: (1) evidence that Petitioner had overwhelming motive to murder the victim, *id.*, 2007 OK CR 12, ¶¶ 44-47, 157 P.3d at 152-53; (2) Petitioner's active concealment of the victim's body from investigators for seventeen hours, his lies to multiple individuals about the broken window as well as his multiple inconsistent statements regarding the last known sighting of the victim—all in an attempt to deflect attention from Room 102, *id.*, 2007 OK CR 12, ¶¶ 48-50,

157 P.3d at 153; (3) Petitioner's statement during his initial interview with police that he knew nothing about the murder or the body being in Room 102, *id.*, 2007 OK CR 12, ¶¶ 23 & 51,157 P.3d at 153 (Tr. XIV 5-7, 85; State's Exhibit 1; Court's Exhibit 1); (4) Petitioner's sale of his belongings the day after the murder, but before his second interview with police in which he admitted to actively concealing the victim's body and lying about Sneed telling him about killing the victim "not to protect Sneed, but because he felt like he 'was involved in it.'" *id.*, 2007 OK CR 12, ¶ 51, 157 P.3d at 153; (5) Petitioner's statement to Cliff Everhart that "he was going to be moving on", *id.*; (6) Petitioner's failure to show up voluntarily at the second police interview; *id.*; and (7) Petitioner's possession of around $1,200.00 cash in his possession when arrested by authorities, approximately half of the $4,000.00 taken from the victim's car by Sneed after the murder. *Id.*, 2007 OK CR 12, ¶ 43, 157 P.3d at 152. *See also id.*, 2007 OK CR 12, ¶¶ 30-31 & n. 54, 157 P.3d at 173-74 (Chapel, J., dissenting) (""[t]he evidence regarding [Petitioner's] paycheck, sales, and purchases, which could not explain where he obtained approximately $1200 of the cash in his possession at the time of his arrest, materially corroborated Sneed's testimony that [Petitioner] offered him money to kill Van **[19]** Treese and then paid Sneed for accomplishing the murder … "). In light of the State's "strong circumstantial case against [Petitioner], which when combined with the testimony of Sneed directly implicating [Petitioner], was more than adequate to sustain a conviction for the first-degree murder of Barry Van Treese", *id.*, 2007 OK CR 12, ¶ 33, 157 P.3d at 175 (Chapel, J., dissenting), along with the relatively weak probative force of the proffered evidence Petitioner now claims trial counsel should have elicited, there is no

reasonable probability of a different outcome at trial had this evidence been presented. Trial counsel were therefore not ineffective for failing to elicit this evidence on cross-examination of Sneed and direct appeal counsel were not ineffective for failing to advance this claim on direct appeal. *Robbins*, 528 U.S. at 285 (and cases cited therein); *Strickland*, 466 U.S. at 687; 22 O.S.Supp.2006, § 1089(D)(4); *Davis*, 2005 OK CR 21, ¶ 7, 123 P.3d at 246.

III.

TRIAL AND DIRECT APPEAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO ARGUE THAT ALLEGED JUDICIAL BIAS DENIED PETITIONER A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF DUE PROCESS.

Again citing juror affidavits, Petitioner contends that trial and appellate counsel were constitutionally ineffective for failing to argue that purported judicial bias denied him a fundamentally fair trial in violation of due process. Petitioner claims that "[a]t one or more times during the trial, Judge Gray expressed emotion, by crying or tearing up" and because "[h]er emotions could have influenced the jury by indicating her opinion as to the merits of the evidence or the credibility of a witness", a new trial is warranted. Petition at 39-41. As with Petitioner's previous grounds for relief, the State will review the merits of the instant appellate counsel

* * *

NOT FOR PUBLICATION

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case No. PCD-2004-978

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

Filed December 6, 2007

OPINION DENYING POST-CONVICTION RELIEF

LEWIS, JUDGE:

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

[1] The jury did not find the existence of the second alleged aggravating circumstance: the existence of the probability that the

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 is now before this Court with his original application for post-conviction relief. We ordered that the State respond to the application, and the State filed its response on June 11, 2007.

Pursuant to 22 O.S.Supp.2006, § 1089 (C), the only issues that may be raised in an application for post-conviction relief are those that were not and could not have been raised in a direct appeal; and support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent. On review, this Court must determine: "(l) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, (2) whether the applicant's grounds were or could have been previously raised, and (3) whether relief may be granted … ." 22 O.S.Supp.2006, § 1089(D). We will not treat the post-conviction process as a second appeal, and will apply the doctrines of *res judicata* and waiver where a claim either was, or could have been, raised in the petitioner's direct appeal. *Davis v. State*, 2005 OK CR 21, ¶ 2, 123 P.3d 243, 244; *Hooks v. State*, 2001 OK CR 7, ¶ 2, 22 P.3d 231, 232. In this original application for post-conviction relief, Glossip raises five grounds for relief.

Glossip claims in many instances that appellate counsel was ineffective for failing to raise issues or for not fully developing the issues counsel did raise on direct

---

defendant will commit criminal acts of violence that would constitute a continuing threat to society.

appeal. In order to prevail on these claims, Glossip must show that counsel's failure to raise arguments on direct appeal amounted to deficient performance which resulted in a prejudice that deprived him of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). If we find Glossip was not prejudiced by counsel's conduct, we will not find counsel was ineffective. *Harris v. State*, 2007 OK CR 32, ¶ 3, __ P.3d __. To prove prejudice, Glossip must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. We begin with a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct, and in order to overcome that presumption, Glossip must show that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Harris*, 2007 OK CR 32, ¶ 3.

Appellate counsel's failure to raise every non-frivolous argument on direct appeal does not constitute ineffective assistance, *per se*. *Hooks v. State*, 1995 OK CR 56, ¶ 6, 902 P.2d 1120, 1124; *also see Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Mailcoat v. Mullins*, 426 F.3d 1241, 1248-49 (10th Cir. 2005). The United States Supreme Court reaffirmed its stance on this issue in *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), by stating:

> In *Jones v. Eames*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to

> maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. See, *e.g.*, *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Robbins, 528 U.S. at 288, 120 S.Ct. at 765.

Likewise, claiming that direct appeal counsel was ineffective for presenting the same or similar issue in a different manner does not necessarily mean counsel was ineffective. *Trice v. State*, 1996 OK CR 10, ¶ 10, 912 P.2d 349, 353. Post-conviction review is not an avenue for defendants to reassert claims in hopes that further argument alone may change the outcome in different proceedings. *Id.* ¶ 11.

Glossip first claims, in proposition one, that he was denied a fair trial due to prosecutorial misconduct. He notes that a claim of prosecutorial misconduct was raised on direct appeal, but cites numerous other alleged instances of prosecutorial misconduct that were neither preserved at trial nor raised on direct appeal due to the ineffective assistance of trial and direct appeal counsel. Glossip now claims that the prosecutor committed misconduct by attempting to evoke the jury's emotion and sympathy, by demeaning mitigation evidence, by denigrating defense counsel, by misleading the jury and misrepresenting facts, by improper name calling, by invoking societal alarm, and by injecting personal opinion.

We note that these same essential claims were made on direct appeal. We find that Glossip's claims here are

an attempt to reargue, or expand on, claims already made by direct appeal counsel. The fact that direct appeal counsel did not utilize precious pages in the direct appeal brief to point out other instances that may have constituted misconduct does not indicate that counsel was ineffective. We find direct appeal counsel's argument on these issues does not fall below reasonable conduct under prevailing professional norms. Consequently, we conclude that this proposition is barred by *res judicata*.

In proposition two, Glossip makes an overarching claim that both trial and appellate counsel rendered ineffective assistance of counsel. Glossip argues that trial counsel was ineffective for failing to investigate Justin Sneed, who was the codefendant and the State's primary witness. Glossip now claims that evidence in the form of a psychiatric evaluation of Sneed, which shows that he served one year probation as a juvenile for burglary and a bomb threat, is relevant. The document was available to trial counsel, but Glossip claims the document was not used due to ineffective representation. Glossip asserts that this information shows that Sneed was not the type of subservient person as portrayed by the State during trial.

On appeal, Glossip did claim that trial counsel was ineffective in many aspects of this case, including the inadequacy of his cross-examination of and treatment of Sneed's testimony, and counsel's failure to object to testimony portraying Sneed's character as a follower. We find that this proposition is merely an attempt to expand on claims made on direct appeal; therefore the claim is barred. Even so, we find that both trial and direct appeal counsel were not ineffective for failing to use this information. We find the introduction of this information at trial or on direct appeal would not have changed the

outcome of this case. Rule 9.7(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007)

Glossip claims, in proposition three, that previous counsel were ineffective for failing to argue that judicial bias so infected the proceedings that he was denied his rights to a fair trial. This is a claim that was not raised on direct appeal, and none of the instances Glossip claims as showing judicial bias were preserved at trial. Glossip points to a time during trial when the trial court was emotional and was crying and she stated she explained the situation to the jury. Glossip does not show that the trial court's emotional state affected this trial by indicating a bias for or against any party. The extra-record documents do not show, by clear and convincing evidence there is a strong possibility that Glossip was prejudiced by the trial court's actions.

At no time during these events did counsel move for a mistrial or ask that the trial court recuse itself. There is nothing in this proposition that would overcome the presumption of judicial impartiality. *See Frederick v. State*, 2001 OK CR 34, ¶ 175, 37 P.3d 908, 951. Thus, Glossip cannot show that appellate counsel was ineffective for failing to raise this issue.

In proposition four, Glossip claims that he was denied a fair trial when the trial court failed to keep the jury sequestered during deliberations. Glossip claims that the jury was allowed to leave the courthouse to move their cars in violation of 22 O.S.2001, § 857. Without an affidavit from trial counsel, he claims that trial counsel would have objected had he known the trial court allowed this to occur.

Section 857 requires that, once deliberations have begun, the jurors must be kept "together in some

private and convenient place," and no person must be allowed to speak or communicate with them, unless by order of the court. It appears, from the extra-record information provided by Glossip, that the jurors were allowed to move their cars from the parking garage, and they were accompanied by officers of the court. There is no indication, from the affidavits, that the jurors were allowed to communicate with anyone.

Glossip has provided nothing from trial counsel to indicate whether he knew of this procedure or whether he was able to object. In *Warner v. State*, 2006 OK CR 40, ¶ 101, 144 P.3d 838, 875, this Court discussed this same issue, and after ordering an evidentiary hearing, concluded that this is a common practice in Oklahoma County due to the parking situation. The jurors were accompanied by court officers and did not have inappropriate conversations with others.

Absent an affidavit from trial counsel, Glossip cannot show, by clear and convincing evidence, that trial counsel was ineffective for knowing about the procedure and standing by without objecting or that counsel was unaware of this procedure. Furthermore, the extra-record information provided does not show by clear and convincing evidence that appellate counsel was ineffective for failing to raise this issue on appeal. There is no indication that the procedure was any different from that occurring in Warner. Therefore, this proposition must fail.

In proposition five, Glossip argues that the claims presented in his post-conviction application coupled with the errors raised on direct appeal and errors identified, but held harmless, should be viewed in a cumulative fashion. He claims that the cumulative effect of these errors warrant a new trial, or alternatively, a new

sentencing proceeding. We have determined that previous counsel was not ineffective and there is no cumulative error to consider. See *Harris*, 2007 OK CR 32, ¶ 20.[2]

CONCLUSION

After carefully reviewing Glossip's application for post-conviction relief, we conclude that Glossip is not entitled to relief. Accordingly, Glossip's Original Application for Post-Conviction Relief is **DENIED**, his application for an evidentiary hearing and discovery is also **DENIED**.

[2] In a separate motion, Glossip requests an evidentiary hearing and discovery. We have found the application and supporting affidavits do not meet the threshold showing necessitating an evidentiary hearing. Rule 9.7(0)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007). We further find discovery is not required in this post-conviction proceeding. *Mitchell*, 1997 OK CR 9, 934 P.2d 346, 351. Therefore, Glossip's requests are denied.

ATTORNEY FOR PETITONER:

WYNDI THOMAS HOBBS
APPELLATE DEFENSE COUNSEL
CAPITAL POST-CONVICTION DIVISION
INDIGENT DEFENSE SYSTEM
1623 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73069

ATTORNEYS FOR RESPONDENT:

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH S. BRANHAM
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105

OPINION BY: LEWIS, J.
LUMPKIN, P.J.: Concurs
C. JOHNSON, V.P.J.: Concurs
CHAPEL, J.: Concurs
A. JOHNSON, J.: Concurs

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case No. PCD-2015-820

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

Execution September 16, 2015
at 3:00 p.m.

RESPONSE TO PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION REVIEW, EMERGENCY REQUEST FOR STAY OF EXECUTION, MOTION FOR DISCOVERY, AND MOTION FOR EVIDENTIARY HEARING

COMES NOW the State of Oklahoma, by and through Jennifer B. Miller, Assistant Attorney General, and hereby provides the following response to Petitioner's Successive Application for Post-Conviction Review, Emergency Request for Stay of Execution, Motion for Discovery, and Motion for Evidentiary Hearing filed with this Court on September 15, 2015.

In June 2004, an Oklahoma jury convicted Petitioner of first degree murder and sentenced him to death.[1] The

[1] Petitioner was also convicted of first degree murder and sentenced to death in 1998. This Court reversed and remanded

state trial court sentenced Petitioner in accordance with the jury's recommendations. This Court affirmed Petitioner's murder conviction and death sentence on direct appeal, *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143, *cert. denied*, 552 U.S. 1167 (Jan. 22, 2008), and denied state post-conviction relief. *Glossip v. State*, No. PCD-2004-978, slip op. (Okla. Crim. App. Dec. 6, 2007) (unpublished).

On November 3, 2008, Petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254. The federal district court denied relief in an unpublished opinion. *Glossip v. Workman*, No. CIV-08-0326-HE, slip op. (W.D. Okla. Sept. 28, 2010) (unpublished). The Tenth Circuit thereafter affirmed the denial of habeas relief. *Glossip v. Trammell*, No. 10-6244, slip op. (10th Cir. Jul. 25, 2013) (unpublished). The Tenth Circuit also denied panel and *en banc* rehearing. *Glossip v. Trammell*, No. 10-6244, Order (10th Cir. Sept. 23, 2013) (unpublished). On May 5, 2014, the United States Supreme Court denied Petitioner's petition for writ of certiorari seeking review of the Tenth Circuit's ruling affirming the denial of federal habeas relief. *Glossip v. Trammell*, __U.S. __, 14 S. Ct. 2142, 188 L. Ed. 2d 1131 (May 5, 2014).

On July 8, 2015, this Court set Petitioner Richard Eugene Glossip's execution date for September 16, 2015, pursuant to 22 O.S.2001 § 1001.1(E). Prior execution dates of November 20, 2014 and January 29, 2015 had been previously set by this Court.[2] After the Supreme

---

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

[2] This Court set the November 20, 2014 execution date on May 28, 2014. At the State's request, the execution date was then moved to January 29, 2015. This Court set the January 29, 2015 execution date on October 24, 2014. However, on January 28, 2015, the United

Court issued its opinion in *Glossip v. Gross*, __ U.S.__, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (June 29, 2015), this Court set the current execution date.

Petitioner has now filed a second post-conviction application with this Court raising four allegations of error. Petitioner seeks a stay of his September 16, 2015 execution date to facilitate review of this application. In addition, Petitioner seeks discovery and an evidentiary hearing.

RESPONSE TO SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF AND EMERGENCY REQUEST FOR STAY OF EXECUTION

To obtain a stay of execution from this Court, Petitioner must show "that there exists a significant possibility of reversal of the defendant's conviction, or vacation of the defendant's sentence, and that irreparable harm will result if no stay is issued." 22O.S.2011, § 1001. 1(C). As this Court stated in *Lockett v. State*, 2014 OK CR 3, ¶ 3, 329 P.3d 755, 757-58:

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

Petitioner fails to show that he is entitled to a stay of execution as he has failed to show likely success and irreparable harm.

States Supreme Court, at the State's request, stayed Petitioner's execution in *Glossip v. Gross*, Case No. 14-7955.

Petitioner alleges that he has newly discovered evidence to support his claims. Rule 9. 7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), states that a subsequent post-conviction application shall not be considered unless the claims raised "have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable". Title 22, Section 1089(D) states, in pertinent part:

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

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or

b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

> evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Petitioner's allegations of error do not meet the requirements for filing a successive application. Further, Petitioner has failed to show that the evidence is sufficient to establish by clear and convincing evidence that, with this information, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death. Thus, Petitioner is not entitled to post-conviction relief or a stay of his execution.

Procedural Default

As noted above, before Petitioner may obtain review of the merits of any claim he raises in this successive application for post-conviction relief, he must present sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable. 22 O.S.2011, § 1089(0)(8). *See, e.g., Bland v. State*, 2007 OK CR 25, ¶ 2, 164 P.3d 1076, 1077; *Duvall v. Ward*, 1998 OK CR 16, ¶ 3-4, 957 P.2d 1190, 1191. Petitioner does not rely on a legal basis that was unavailable, but instead contends that his facts are newly discovered. To show that a factual basis was unavailable at the time of the prior post-conviction application, Petitioner must show that "the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date." 22 O.S.2011, § 1089(D)(8)(b)(1) .Additionally, Petitioner must show that "the facts underlying the

claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." *Id.*, § 1089(D)(8)(b)(2).

As will be shown, review of Petitioner's supporting documents confirms that the factual basis for the claims and issues raised here was available previously. There is no reason why these issues could not have been developed and presented in Petitioner's original application for post-conviction relief.

Petitioner, in his introduction (App. at 13-14), claims post-conviction counsel was ineffective. Petitioner does not include this allegation within any proposition of error nor adequately develop the claim. Thus, this allegation is waived. Rule 3.5, *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (Supp. 2014). Further, as will demonstrated his claims are without merit.

Petitioner's second application for post-conviction relief is therefore procedurally barred from review under§ 1089(D)(8) and/or Rule 9.7(G)(3).

Valdez Exception

Petitioner alleges that he is entitled to review of this application pursuant to *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703. Petitioner contends that a miscarriage of justice would arise were this Court to refuse to consider the merits of his procedurally barred claims. Pet. Appl. at 13.

Petitioner's attempt to overcome the procedural default of his claims must fail. In *Valdez*, this Court held that it had "power to grant relief when an error

complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez*, 2002 OK CR 20, ¶ 28, 46 P.3d at 710. The cases cited by Petitioner invoking the miscarriage of justice exception differ substantially from his situation and illustrate *Valdez*'s limits. *Brown v. State*, No. PCD-2002-781 (Okl.Cr. Aug. 22, 2002), an unpublished case, involved supposed newly discovered evidence supporting ineffective assistance and *Brady* claims. In *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234, this Court addressed a substantive Eighth Amendment challenge to Oklahoma's lethal injection protocol that amounted to an attempt to prevent the setting of an execution date upon the exhaustion of all of Malicoat's regular state and federal appeals. *Malicoat*, 2006 OK CR 25, ¶ 2, 137 P.3d at 1235. That case arose from the nationwide flurry of challenges to lethal injection protocols launched by death row inmates and their attorneys and attempted to address an issue of first impression for the Oklahoma courts. Further, it addressed only the manner of carrying out Malicoat's death sentence and did not implicate the validity of his conviction or death sentence. *Id. See also Hill v. McDonough*, 547 U.S. 573, 579-81, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (distinguishing Eighth Amendment challenges to lethal injection protocol which do not impact conviction or death sentence from constitutional challenges seeking to permanently enjoin method of execution authorized by state law which may amount to challenges to the death sentence itself).

In *McCarty v. State*, 2005 OK CR 10, 114 P.3d 1089, the State waived any possibly applicable procedural default rules and requested an evidentiary hearing on the merits of the underlying claims. McCarty's successive post-conviction relief application was based

on the then-recent findings of the Oklahoma City Police Department regarding former police chemist Joyce Gilchrist. Simply put, the *Valdez* miscarriage of justice exception was not an issue in *McCarty*.

In *Torres v. State*, 2005 OK CR 17, 120 P.3d 1184, the case was remanded to the trial court on issues dealing with violation of Torres's Vienna Convention rights.

Petitioner's case does not involve issues approaching the magnitude of these type of claims. Petitioner's second post-conviction relief application does not involve newly discovered evidence or a situation where the State has waived the applicable procedural default rules. Nor does his case involve a substantial issue of first impression warranting this Court's attention. Thus, Petitioner's attempt to overcome Oklahoma's bar to claims not raised in an initial post-conviction application by invoking the miscarriage of justice exception from *Valdez* must fail.

Petitioner's attempt to gain post-conviction relief by asserting actual innocence must also fail. *Slaughter v. State*, 2005 OK CR 6, 108 P.3d 1052 involved review of a substantive actual innocence claim as a basis to disregard Oklahoma's bar to claims initially raised in a second or successive post-conviction application. *Slaughter* recognized that "this Court's rules and cases do not impede the raising of factual innocence claims *at any stage* of an appeal. We fully recognize innocence claims are the Post-Conviction Procedure Act's foundation." *Slaughter*, 2005 OK CR 6, ¶ 6, 108 P.3d at 1054 (emphasis in original). Here, Petitioner fails to show, by clear and convincing evidence, a showing of factual innocence that warrants merits review of his constitutional claims or any form of post-conviction relief. The following recitation of the facts, as well as

review of his specific allegations and evidence make this point abundantly clear.

PETITIONER IS NOT AN INNOCENT MAN

The evidence at trial revealed Petitioner's involvement in the murder of the victim, Barry Van Treese. This Court found sufficient evidence to corroborate Mr. Sneed's testimony revealing Petitioner's involvement in the murder. The State presented evidence showing Petitioner: (1) actively concealed the victim's body in Room 102 over a nearly seventeen hour period while civilians and law enforcement searched for the victim at and around the motel; (2) possessed proceeds from the $4,000.00 Mr. Sneed recovered from the victim's car after the murder; (3) had strong motive and opportunity to cause the victim's death; (4) had control over the actions of Mr. Sneed; and (5) began selling his possessions and stated his intention to leave the state.

A. Concealing the Murder. Petitioner admitted to Detective Bemo in his second interview on January 9, 1997 that he knew in the early morning hours of January 7, 1997 that Mr. Van Treese had been murdered and that the body was in Room 102. (State's Exhibit 2; Court's Exhibit 4 at 6).[3] However, Petitioner provided multiple conflicting versions of when he last saw Mr. Van Treese alive. Petitioner provided three different stories to Sgt. Tim Brown. Petitioner initially said he last saw the victim at 7:00 a.m. on January 7, 1997, walking across the

[3] References to Petitioner's 2004 trial transcripts will be designated as "Vol.__, Tr.__". References to Petitioner's 1998 trial transcripts will be designated as "1998 Vol.__, Tr.__". References to the original record in D-2004-877 will be designated as "O.R. __"). References to trial exhibits will be designated as presented at trial.

motel parking lot (Vol. 9, Tr. 193-95). Later, Petitioner told Sgt. Brown that he had last seen the victim at 4:30 a.m. on January 7 in the motel parking lot (Vol. 9, Tr. 206). Finally, Petitioner claimed he last saw the victim was at 8:00 p.m. the night before (Vol. 9, Tr. 209).

Petitioner also lied about seeing the victim to Billye Hooper,[4] Cliff Everhart, and the victim's wife. Petitioner told Billye Hooper that he had seen the victim around 8:00 a.m. He claimed that the victim had "got up early that morning and had gone to get breakfast and was going to go get some materials. They were going to start working on the motel." (Vol. 7, Tr. 62). Petitioner told Mr. Everhart that he last saw the victim leave the hotel at 7:00 a.m. (Vol. 11, Tr. 183-84). Petitioner told the victim's wife, during a telephone conversation sometime after 3:00 p.m., that the last time he had seen the victim was between 7:00 a.m. and 7:30 a.m. that morning. He advised Mrs. Van Treese that "[the victim] was going to buy supplies for the motel and he would be back later" (Vol. 4, Tr. 99).

Petitioner also told numerous lies about Room 102. Petitioner told Ms. Hooper that the victim had stayed in Room 108 (Vol. 7, Tr. 55). He also told Ms. Hooper not to put Room 102 on the housekeeping list. He stated he and Mr. Sneed would clean that room (Vol. 7, Tr. 64). He advised Jackie Williams, a housekeeper at the motel, not to clean any downstairs rooms. Ms. Williams had never been given that type of instruction before (Vol. 8, Tr. 122-23). Petitioner initially claimed that Mr. Sneed told him the window in Room 102 was broken by a couple of drunks (Vol. 9, Tr. 206). Petitioner told Mr. Everhart that he had rented Room 102 to a couple of drunk

[4] Ms. Hooper was the front desk clerk.

cowboys who broke the window (Vol 11, Tr. 188-90). He told Ms. Pursley, a motel resident, the same lie that the window in Room 102 had been broken by two drunks (Vol. 9, Tr. 45-48).

Additionally, Petitioner made it appear that he had searched the motel rooms for the victim. He searched the grounds with Mr. Everhart to make it appear as though he did not know the location or condition of the victim (Vol. 11, Tr. 185-87). Petitioner also provided false leads, telling Mr. Everhart and Sgt. Brown that he believed some people in an upstairs room may have been responsible for the murder because they left their property in the room and disappeared without checking out. As a result, Mr. Everhart and Sgt. Brown needlessly searched the room.

After the body was found, Petitioner continued lying. In his first interview with the police, on January 8, 1997, Petitioner lied to the detectives claiming that he knew nothing about the murder or the body being in Room 102 (State's Exhibit l; Court's Exhibit 3 at 10-11). In the second interview, after being asked why he lied, Petitioner said it wasn't to protect Sneed. Rather, Petitioner said he initially lied to detectives because when Mr. Sneed told him about the murder, he felt like he "was involved in it, I should have done something right then" and that he did not want to lose his girlfriend over it (State's Exhibit 2; Court's Exhibit 4 at 16-17).

B. Proceeds from Murder. At Petitioner's book-in, the police recovered approximately $1,757.00 from Petitioner (Vol. 12, Tr. 5-13). Mr. Sneed testified that he obtained approximately $4,000.00 from the victim's vehicle after committing the murder. Mr. Sneed testified that Petitioner told him where the money was located. He testified that the money was split with

Petitioner (Vol. 12, Tr. 124-30). The evidence showed that Petitioner had no legitimate source for the money that was recovered. On January 6, 1997, Petitioner received a paycheck for $429.33 (Vol. 14, Tr. 42; Vol. 15, Tr. 17). Petitioner spent all but approximately $60.00 of that paycheck on January 7, 1997 (Vol. 14, Tr. 42-43). Petitioner received, at most, approximately $500.00 for furniture, a vending machine, and an aquarium he sold prior to his arrest (Vol. 15, Tr. 16-17). Petitioner had no savings according to his girlfriend, D-Anna Woods. Ms. Woods told the police that the two were living paycheck to paycheck and "she didn't think [Petitioner] could save any money." (Vol. 14, Tr. 44). This Court found this to be "[t]he most compelling corroborative evidence" noting there was "no evidence that Sneed had independent knowledge of the money under the seat of the car." *Glossip*, 2007 OK CR 12, ¶ 43, 157 P.3d 143, 152.

C. Motive. The evidence established that the victim was planning to confront Petitioner on January 6 or January 7, 1997, about shortages on the motel books (Vol. 11, Tr. 169-70, 172-77, 201). Mr. Everhart had previously told the victim he believed Petitioner "was probably pocketing a couple hundred a week extra" from the motel cash receipts during the last two or three months of 1996 (Vol. 11, Tr. 172-73). In December 1996, Billye Hooper had also shared her concerns about Petitioner's management of the motel with Mr. Van Treese, who told her he "knew things had to be taken care" of regarding Petitioner's management of the motel. Mr. Van Treese advised he would take care of it after Christmas (Vol. 7, Tr. 37-40; Vol. 8, Tr. 32-34). Donna Van Treese testified that by the end of December 1996, she and the victim discovered shortages from the motel accounts receivables totaling $6,101.92 and that the victim intended to confront Petitioner about these

shortages on January 6, 1997. Mr. Van Treese told his wife that he would also audit the Oklahoma City motel and perform a room-to-room inspection of the motel at that time (Vol. 4, Tr. 62-66, 70-72).

William Bender testified that the victim "was all puffed up. He was upset. He was mad ... He was all red in the face" when the victim arrived at the Tulsa motel just before midnight on January 6, 1997 (Vol. 8, Tr. 63-64). During Van Treese's brief visit to the motel, he told Bender that there were a number of registration cards missing at the Oklahoma City motel, that weekend receipt money was missing and that Petitioner was falsifying the motel daily reports by allowing people to stay in rooms that were not registered (Vol. 8, Tr. 80-82). Van Treese said that he gave Petitioner until he returned to Oklahoma City "to come up with the weekend's receipts that were missing and if he came up with that, he was going to give him another week to come up with the registration cards and get all the year-end receipts together." Otherwise, Van Treese told Bender he was going to call the police (Vol. 8, Tr. 82).

Evidence was presented that the condition of the Oklahoma City motel on January 7, 1997 was deplorable. Kenneth Van Treese, the victim's brother, assumed control of the motel immediately after the murder. He discovered that only around 24 of the rooms at the motel were in habitable condition. Twelve rooms had no working heat. Other problems included keys that did not fit room doors, broken or dirty plumbing fixtures and broken telephone systems (Vol. 11, Tr. 116-18). Kenneth Van Treese testified that "the main thing that was wrong with the motel was it was filthy ... absolutely filthy" (Vol. 11, Tr. 119). The jury could easily infer that the victim was unaware of these deteriorating conditions

because he made only four overnight trips to the motel during the last half of 1996 (Vol. 4, Tr. 36-40, 42, 58-59).

This evidence corroborates Mr. Sneed's testimony that Petitioner feared being fired the morning of January 7, 1997 because of Petitioner's mismanagement at the motel and provides strong motive for the murder. Petitioner's motive to murder Mr. Van Treese explains why Petitioner's active concealment of the body for seventeen hours is inconsistent with either Petitioner's innocence or mere culpability as an accessory. The jury could infer that Petitioner wanted the victim murdered so he would not lose his job and not be prosecuted for embezzlement.

D. Control Over Mr. Sneed. Justin Sneed testified that the sole reason he murdered the victim was because of pressure from Petitioner. The State presented extensive evidence that Petitioner largely controlled Mr. Sneed, an 18 year old, eighth-grade dropout who worked as a maintenance man for Petitioner at the motel (Vol. 12, Tr. 47-48) and that Mr. Sneed's mental capacity and personality made it unlikely he would plan to kill anyone, let alone Van Treese, whom he barely knew. One motel resident testified that, based on his limited observations, Mr. Sneed "didn't have a lot of mental presence." (Vol. 6, Tr. 16). Bob Bemo, a retired homicide detective who interviewed Mr. Sneed, testified that Mr. Sneed did not appear very mature and had below average intelligence. He also testified that Petitioner appeared more aggressive and intelligent than Mr. Sneed. Bemo observed that Petitioner was "a very intelligent individual ... a very manipulative individual ... what he does with everything that he does is he's manipulating, using people." (Vol. 14, Tr. 46-48). Kayla Pursley described Mr. Sneed as being "very childlike" (Vol. 9, Tr. 17). Mr. Sneed assisted caring for

her children when Ms. Pursley broke her foot. Ms. Pursley testified that Mr. Sneed played with her children "[m]ore as a peer ... [that] he fit kind of in with my boys, you know, he played and he was real simple. He had a skateboard and that was his life ... he didn't make a lot of decisions. You had to tell him sometimes what to do." (Vol. 9, Tr. 17). Ms. Pursley described how Mr. Sneed would not eat unless someone told him to eat (Vol. 9, Tr. 18).

Petitioner and Mr. Sneed were described as "very close" friends by Billye Hooper (Vol. 7, Tr. 28). Mr. Sneed was largely dependent upon Petitioner for food and money (Vol. 7, Tr. 28; Vol. 9, Tr. 21). Ms. Pursley testified that Mr. Sneed usually followed Petitioner when they were together, that you normally did not see one without the other and that "[Petitioner] would have to tell him what to do and how to do it." (Vol. 9, Tr. 19-20, 23). Petitioner had control over Mr. Sneed because Mr. Sneed had no other place to go and no family in the area (Vol. 9, Tr. 21, 24). Ms. Pursley observed that "[y]ou had to almost tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal." (Vol. 9, Tr. 23). Cliff Everhart testified that Mr. Sneed was Petitioner's "puppet", that Mr. Sneed "was not self-motivated. [Petitioner] told him everything to do. [Petitioner] would tell him to do this, he'd do it ... If he needed something, he'd come to [Petitioner]." (Vol. 11, Tr. 185). Billye Hooper testified that Mr. Sneed did not know the victim very well (Vol. 7, Tr. 34). This corroborated Mr. Sneed's testimony that he had only met the victim approximately three times prior to the murder during which time the pair had no real conversations (Vol. 12, Tr. 76-77). Witnesses who knew both Petitioner and Mr. Sneed testified that, based on Sneed's personality, they did not believe Mr. Sneed

would commit a murder on his own (Vol. 7, Tr. 34; Vol. 9, Tr. 25).

This evidence shows that Petitioner largely had control over Mr. Sneed's actions, that Mr. Sneed was dependent upon Petitioner and that Mr. Sneed's personality and mental capacity made it unlikely that he would murder Mr. Van Treese on his own volition. The evidence shows Mr. Sneed had the type of personality in January 1997 that allowed him to be easily influenced by Petitioner into committing the murder. In the words of the trial judge during a bench conference, Mr. Sneed was "an illiterate guy who's just one notch above a street person" (Vol. 13, Tr. 61). Evidence of Mr. Sneed's personality- and mental capacity and Petitioner's control over him, combined with evidence that Petitioner: (1) turned up with a large sum of cash shortly after the murder; (2) actively concealed the body in Room 102 for practically an entire day by misleading investigators and others who were searching for the victim at the motel; and (3) had strong motive to kill the victim, connects Petitioner with the murder in this case.

E. Stated Intent to Flee. After being interviewed by detectives, Petitioner began the process of selling all of his possessions. He told Cliff Everhart that "he was going to be moving on" (Vol. 11, Tr. 199-200). When homicide detectives got word of Petitioner's stated intention to leave Oklahoma, they put police surveillance on him (Vol. 14, Tr. 23). On January 9, 1997, Petitioner failed to appear for a previously scheduled meeting with homicide detectives at police headquarters. Petitioner was eventually intercepted and taken downtown to meet with homicide detectives where he eventually gave a second interview (Vol. 12, Tr. 6-9). Evidence that Petitioner sold his possessions shortly after his initial contact with homicide detectives

(but before he admitted in the second interview to actively concealing the victim's body in Room 102) represents evidence tending to connect Petitioner with the murder of the victim. Evidence that Petitioner was preparing to leave the state demonstrates a consciousness of guilt which, combined with the additional circumstantial evidence discussed above, corroborates Mr. Sneed's testimony by connecting Petitioner with the murder.

Summary. Based on the above evidence, this Court concluded Justin Sneed's testimony was sufficiently corroborated to support Petitioner's first degree murder conviction. *Glossip*, 2007 OK CR 12, ¶¶ 43 - 53, 157 P.3d at 151-54. In summary, this Court held:

> In this case, the State presented a compelling case which showed that Justin Sneed placed himself in a position where he was totally dependent on Glossip. Sneed testified that it was Glossip's idea that he kill Van Treese. Sneed testified that Glossip promised him large sums of cash if he would kill Barry Van Treese. Sneed testified that, on the evening before the murder, Glossip offered him $10,000 dollars if he would kill Van Treese when he returned from Tulsa. After the murder, Glossip told Sneed that the money he was looking for was under the seat of Van Treese's car. Sneed took an envelope containing about $4,000.00 from Van Treese's car. Glossip told Sneed that he would split the money with him, and Sneed complied. Later, the police recovered about $1,200.00 from Glossip and about $1,700.00 from Sneed. The most compelling corroborative evidence, in a light most favorable to the State, is the discovery of the money in Glossip's possession.

> There was no evidence that Sneed had independent knowledge of the money under the seat of the car.

Id. 2007 OK CR 12, ¶ 43, 157 P.3d at 152. This Court also concluded:

> Glossip's motive, along with evidence that he actively concealed Van Treese's body from discovery, as well as his plans to "move on," connect him with the commission of this crime. Evidence that a defendant attempted to conceal a crime and evidence of attempted flight supports an inference of consciousness of guilt, either of which can corroborate an accomplice's testimony.

Id. 2007 OK CR 12,¶ 47, 157 P.3d at 153. In response to Petitioner's claim that the State's evidence showed merely that he was an accessory after the fact, the OCCA wrote: "[d]espite this claim, a defendant's actions after a crime can prove him guilty of the offense. Evidence showing a consciousness of guilt has been used many times." *Id.*

In a separate opinion, Judge Charles Chapel stated: "I agree with the majority that the State presented a strong circumstantial case against Glossip, which when combined with the testimony of Sneed directly implicating Glossip, was more than adequate to sustain his conviction for the first-degree murder of Barry Van Treese." *Id.* 2007 OK CR 12, ¶ 44, 157 P.3d at 175 (J. Chapel, dissenting).

Petitioner has repeatedly attempted to undermine the reliability of Mr. Sneed's testimony. As shown above, Mr. Sneed's testimony was sufficiently corroborated. It was also highly credible as found by the

trial judge, the late Twyla Mason Gray. Judge Gray, during an *in camera* conference, noted:

> ... I've also had an opportunity to observe the witnesses and it is fascinating to me to see the difference that it makes to observe the witnesses on the stand.
>
> Some of the opinions that I had based on reading the first transcripts I, frankly, had very different opinions after listening to the testimony as it was presented and observing the witnesses. **And I've got to tell you that one of those observations was about Justin Sneed. And I did find him to be a credible witness on the stand.**

(Vol. 15, Tr. 45) (emphasis added).

ARGUMENT AND AUTHORITY

I.

PETITIONER'S EIGHTH AMENDMENT CLAIM IS PROCEDURALLY BARRED FROM REVIEW.

In his initial proposition of error, Petitioner claims his entire case rested on the testimony of Justin Sneed. As shown above, this Court, in Petitioner's direct appeal from his 2004 jury trial, specifically found the evidence was sufficient to support Petitioner's conviction as sufficient evidence was presented to "first, corroborate Sneed's story about [Petitioner's] involvement in the murder, and, second, the evidence sufficiently ties [Petitioner] to the commission of the offense, so that the conviction is supported." Glossip, 2007 OK CR 12, ¶ 53, 157 P.3d at 153-54. Petitioner claims newly discovered evidence supports his claim that he is innocent and, thus, that his execution would violate the Eighth Amendment.

Petitioner claims his "new evidence" includes (1) expert opinions that Mr. Sneed was interrogated in a manner to produce false and unreliable information; (2) evidence that Mr. Sneed, while in prison, bragged about lying about Petitioner and that Petitioner was not involved; and (3) evidence that Mr. Sneed was a "severe, thieving, methamphetamine addict". Most of this "new evidence", is not truly new, as it could have been discovered over ten years ago. Accordingly, Petitioner is not entitled to any relief.

Opinions regarding interrogation of Mr. Sneed.

Petitioner claims the opinion of Richard A. Leo, Ph.D., J.D. is new evidence which reveals that interrogation techniques used during Mr. Sneed's interrogation were improper and increased the risk of obtaining false statements.[5] None of this information is new evidence that could not have been discovered with reasonable diligence. 22 O.S.2011, § 1089(D)(8)(b)(1). Mr. Sneed was interviewed by the police only days after the crime in 1997. With reasonable diligence, Petitioner could have investigated this claim, prior to his first trial, second trial, direct appeals, and initial post-conviction. In fact, it is evident from Dr. Leo's report that the study of interrogation techniques has been researched and documented since at least 1998 when Dr. Leo published his article entitled "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation." *The Journal of Criminal Law and Criminology*, Vol. 88,

[5] Petitioner also footnotes defense counsel's version of the statements provided by Mr. Sneed and a letter written to Governor Mary Fallin. Attachments D and E.

No. 2. See Attachment B, footnote 4.[6] This evidence cannot support a claim of newly discovered evidence. *Sellers v. State*, 1999 OK CR 6, ¶ 5, 973 P.2d 894, 895 (Sellers's alleged newly discovered evidence was available and could have been investigated at the time of his trial, thus, it cannot support a claim of new evidence) . Thus, the proposition must be denied.

Further, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. See 22 O. S.2011, § 1089(D)(8)(b)(2). Dr. Leo concludes that the interrogation techniques **"could have caused"** Mr. Sneed to make a false statement. Although Petitioner provides this Court with select portions of Mr. Sneed's interview, Petitioner has failed to provide a complete copy. Mr. Sneed's interview was not admitted at his trial and, thus, is not before this Court. The record reveals that Mr. Sneed, like most individuals accused of a crime, including Petitioner, began by minimizing his involvement and then finally admitting his own involvement and the involvement of Petitioner in the murder. Although Mr. Sneed may have continued adding facts, even during Petitioner's second trial, Mr. Sneed was consistent in his statement that Petitioner was the mastermind behind the murder. Further, trial counsel effectively cross-examined Mr. Sneed on the evolution of his statement from denial to admission of guilt and his withholding of information. (Vol. 12, Tr. 205-213; Vol. 13, Tr. 6-50). In addition, the record shows Mr. Sneed was not promised anything, nor had he

[6] Respondent notes that Dr. Leo also cites to a 1986 interrogation training manual. Attachment B, footnote 8.

spoken to anyone from the District Attorney's office prior to giving his statement (Vol. 12, Tr. 54-55). Thus, the statement was not given to receive a plea agreement.[7] The opinion of Dr. Leo does not support a claim of innocence nor support a finding that no reasonable fact finder would have found Petitioner guilty or would have rendered the penalty of death.

Unsworn Affidavit of Michael Scott

Petitioner also relies on an unsworn and undated affidavit by Michael G. Scott in support of his successive application for post-conviction relief. To summarize, Mr. Scott allegedly writes in his affidavit that, from 2006 to 2007, he was incarcerated at Joseph Harp Correctional Facility and was housed across from Mr. Sneed's cell. Attachment Fat ¶¶ 4, 5. Mr. Scott claims that he heard Mr. Sneed, on multiple occasions, say that he "set Richard Glossip up" and that "Richard Glossip didn't do anything." *Id.* at ,¶ 7. Mr. Scott states that he never told anyone about Mr. Sneed's statements until he "saw the Dr. Phil show" about Petitioner, after which he called defense counsel. *Id.* at ¶ 11. Petitioner also attaches a September 9, 2015, affidavit by private investigator Quinn O'Brien, who states that he witnessed Mr. Scott read, initial, and sign Mr. Scott's affidavit on September 5, 2015. Attachment Fat ¶¶ 1-2. Mr. O'Brien's affidavit notes that "[n]o notary was available at the time Mr. Scott signed the affidavit." *Id.* at ¶ 4.

As an initial matter, Mr. Scott's affidavit is not properly before this Court because it is both undated and unsworn. Mr. O'Brien's affidavit does not explain where Mr. Scott's affidavit was allegedly signed or why

[7] The docket of Oklahoma County Case No. CF-1997-244 reveals that Mr. Sneed's plea agreement was made on June 18, 1998.

a notary was unavailable at this location. Petitioner even indicates in his Motion for Discovery that Mr. Scott is no longer imprisoned, so it is unclear why Mr. Scott could not sign his affidavit in front of a notary. Motion for Discovery at 1. In any event, even if Mr. Scott's affidavit is properly before this Court, Petitioner has not demonstrated that his claim in Proposition One, to the extent that it is based on Mr. Scott's affidavit, meets the requirements of 22 O.S.2011, § 1089(D)(8)(b)(l) and (2).

First, Petitioner has not set forth sufficient specific facts showing that this evidence of Mr. Sneed's bragging about "setting up" Petitioner was unavailable through the exercise of reasonable diligence at the time of his first application for post-conviction relief filed in October 2006. *See* 22 O.S.2011, § 1089(D)(8)(b)(l); Attachment A at 1. Mr. Scott states that during his incarceration with Petitioner beginning in 2006, it was "common knowledge" among the inmates that "Justin Sneed lied and sold Richard Glossip up the river." Attachment Fat ¶ 4. Indeed ,Mr. Scott notes that he learned within a month or two of his arrival at Joseph Harp that "Justin Sneed had snitched on a guy who didn't do anything." *Id.* ¶ 9. Thus, even assuming that Mr. Scott did not come forward with his claim until after viewing the Dr. Phil segment on Petitioner, this evidence was discoverable as early as 2006.

Petitioner does not even allege that a reasonable investigation would not have uncovered this evidence prior to his first post-conviction application, let alone provide "sufficient *specific facts* establishing that the current claim[] ... could not have been presented previously ... because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence ... ." *See* 22 O.S.2011, § 1089(D)(8)(b)(l) (emphasis added). Put simply, it is

irrelevant under the statute when Mr. Scott came forward with his claims-instead, the statute focuses on when the factual basis for Petitioner's claim became ascertainable through the exercise of reasonable diligence. Here, Petitioner does not explain what investigation was undertaken prior to his original post-conviction application or provide sufficient specific facts to demonstrate that evidence of Mr. Sneed's bragging about "setting up" Petitioner was earlier unascertainable.

Second, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b)(2). For starters, it is apparent that Mr. Scott's affidavit offers little more than inadmissible hearsay. *See Matthews v. State*, Case No. PCD-2010-1193, slip op., at 7-9 (Okla. Crim. App. Jan. 7, 2011)[8] (unpublished) (holding that affidavit provided neither sufficient support for post-conviction relief or required an evidentiary hearing in part because the affidavit contained inadmissible hearsay). Thus, Petitioner has not shown that Mr. Scott can offer any admissible testimony in light of which no reasonable fact finder would have found him guilty. To the extent that Petitioner seeks relief based on Mr. Scott's affidavit, relief may be denied on this ground.[9]

---

[8] Pursuant to Rule 3.5(C)(3), Title 22, Ch. 18, App. (Supp. 2014), this unpublished summary opinion in Matthews is attached hereto as Exhibit A because no published opinion would serve as well the purpose for which it is being cited.

[9] Petitioner again relies on hearsay for his claim that Mr. Sneed wished to recant his testimony. Petitioner appends to this

Further, this Court has explained that affidavits such as Mr. Scott's, made within days of a scheduled execution date, are "inherently suspect." *Matthews*, slip op., at 7. Jeffrey Matthews, who was set to be executed on January 11, 2011, presented with his third application for post-conviction relief an affidavit by the surviving victim's brother dated October 21, 2010. *Matthews*, slip op., at 2, 4, 6. In the affidavit, the brother claimed that the surviving victim told him that *Matthews* was not inside the house at the time of the murder. *Matthews*, slip op., at 4, 6. Similarly here, Petitioner has produced an affidavit that was allegedly signed by Mr. Scott on September 5, 2015, less than two weeks before Petitioner's scheduled execution date, and has presented the affidavit to this Court less than 24 hours prior to the scheduled execution. Accordingly, this

---

application an affidavit from Crystal Martinez, Attachment H, that claims she spoke to Ryan Justine Sneed and communicated with her through e-mail "[j]ust before [Petitioner's] clemency hearing October 2015". Clearly, Ms. Martinez meant October, 2014. Thus, this information has been available for more than 60 days and cannot be considered by this Court. Rule 9.7(G)(3), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2011). Nonetheless, Ms. Martinez claims that Ms. Sneed stated her father had lied about Petitioner's involvement to avoid the death penalty. Ms. Martinez claims to have received a "rough draft" of a letter written by Ms. Sneed and swears that she has "the e-mail traffic saved." However, attached to Ms. Martinez's affidavit is neither "the e-mail traffic" or a copy of the actual letter she have received from Ms. Sneed. There is absolutely nothing to indicate that what is attached to Ms. Martinez's affidavit is from Ms. Sneed. Contrary to Ms. Martinez's claims, Mr. Sneed has spoken on the issue and has denied recanting. *See* Exhibit D attached hereto. After reading the article attached as Exhibit D, Respondent sought records showing recent visitations with Mr. Sneed. Attached is an affidavit from Warden Carl Bear showing recent visitations with Mr. Sneed. *See* Exhibit E. Due to time constraints, Respondent is unable to attach the original affidavit. The original can be provided at a later date.

"inherently suspect" affidavit, containing only inadmissible hearsay, falls far short of clear and convincing evidence of actual innocence that demonstrates that no reasonable fact finder would have found Petitioner guilty.

Mr. Scott's affidavit further lacks credibility because it was generated around eight years after Mr. Scott claims he heard Mr. Sneed make the alleged statements in 2006 and 2007. Mr. Scott's affidavit does not provide a convincing explanation for why he did not come forward with his allegations concerning Mr. Sneed's statements until the eve of Petitioner's execution. Mr. Scott claims he "realized just how important this information was" only when he viewed a Dr. Phil segment on Petitioner. However, this explanation is inconsistent with Mr. Scott's claim that, among the Joseph Harp inmates, "it was common knowledge that Justin Sneed lied and sold Richard Glossip up the river" and that Mr. Sneed repeatedly bragged about "selling Richard Glossip out." In other words, Mr. Scott understood at the time of Mr. Sneed's statements the implications of Mr. Sneed's alleged perjury for Petitioner, and Mr. Scott does not explain what new information he learned during the Dr. Phil segment that in any way changed his understanding of Mr. Sneed's statements or their implications for Petitioner. Accordingly, Mr. Scott's affidavit is not credible on its face and is insufficient to warrant post-conviction relief or an evidentiary hearing.

In sum, to the extent that Petitioner relies on Mr. Scott's affidavit, he has not demonstrated that the factual basis supporting this proposition (a) could not have been earlier discovered through reasonable diligence and (b) shows that no reasonable fact finder would have found him guilty. In particular, Mr. Scott's

affidavit is unsworn and undated, consists of inadmissible hearsay, and lacks credibility.

Affidavit of Richard Barrett

Likewise, the affidavit of Richard Barrett is not new evidence that could not have been ascertained with reasonable diligence prior to trial, direct appeal, or initial post-conviction. Richard Barrett was known to Petitioner at the time of his first trial as Mr. Barrett was listed as a potential witness on May 21, 1998 (O.R. 183). This list was incorporated by counsel in his second trial (O.R. 1084, ¶ 14). Thus, any information from Mr. Barrett could have been discovered through reasonable diligence.

Further, the affidavit of Mr. Barrett does not support a finding that no reasonable fact finder would have found Petitioner guilty or would have rendered the penalty of death. The affidavit merely discusses his unlawful actions with Bobby Glossip and Mr. Sneed. He claims that Mr. Sneed was a drug user. This information was known at Petitioner's trial as Mr. Sneed testified to his use of marijuana and crank (Vol. 12, Tr. 4 7). The record also reveals, contrary to the affidavit of Mr. Barrett, that Mr. Sneed admitted during Petitioner's first trial to using methamphetamine, however, Mr. Sneed testified that he snorted it, rather than shooting it in his arm (1998 Vol. 6, Tr. 111-112).

Further, Mr. Barrett's affidavit is highly suspect because contrary to trial testimony,[10] Mr. Barrett claims

[10] Petitioner and Justin Sneed were described as "very close" friends by Billye Hooper, the front desk clerk at the motel (Vol. 12, Tr. 28). Mr. Sneed was largely dependent upon Petitioner for food and money (Vol. 9, Tr. 21; Vol. 12, Tr. 28). Kayla Pursley testified that Mr. Sneed usually followed Petitioner when they were together, that you normally did not see one without the other and

he "saw nothing to make me think that Justin Sneed was controlled by Richard Glossip". Attachment G. However, Mr. Barrett also states that he met Petitioner when "he would come to Rule 102" to see his brother and tell them to quiet down. He also states he "never saw Richard come to the room when Justin Sneed was there." Attachment G at ¶ 10. Thus, it is unclear how Mr. Barrett would know whether Mr. Sneed was controlled by Petitioner unlike others who dealt with Petitioner and Mr. Sneed on a continuous basis. Mr. Barrett's untimely affidavit does not support a finding that there exists a significant possibility of reversal of Petitioner's conviction or vacation of his death sentence.

Opinion of Dr. Pablo Stewart

Petitioner asserts that the opinion of Dr. Stewart supports a finding that Mr. Sneed acted alone. Like the affidavit of Mr. Barrett, the opinion of Dr. Stewart was ascertainable at the time of trial. Further, it does not support a finding of innocence as the findings of Dr. Stewart are based on speculation that Mr. Sneed was a methamphetamine addict and that he used it intravenously over a period of time. Attachment J. As noted above, Mr. Sneed testified specifically that he used marijuana and "a little bit of crank" (Vol. 12, Tr. 47). He

---

that "[Petitioner] would have to tell him what to do and how to do it." (Vol. 9, Tr. 19-20, 23). Petitioner had control over Mr. Sneed because Mr. Sneed had no other place to go and no family in the area (Vol. 9, Tr. 21, 24). Ms. Pursley observed that "[y]ou had to almost tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal." (Vol. 9, Tr. 23). Cliff Everhart testified that Mr. Sneed was Petitioner's "puppet", that Mr. Sneed "was not self-motivated. [Petitioner] told him everything to do. [Petitioner] would tell him to do this, he'd do it ... If he needed something, he'd come to [Petitioner]." (Vol. 11, Tr. 185).

also testified that he snorted it, rather than injecting it intravenously (1998 Vol. 6, Tr. 111-12). Further, testimony of the motel staff did not support a finding that Mr. Sneed's behavior showed "extreme agitation, rapid cycling of thoughts, and significantly impaired executive functioning." Attachment J at 2. Even Petitioner does not describe Mr. Sneed's behavior on the night of the murder as fitting the behavior described by Dr. Stewart of an individual on methamphetamine.

Further, Dr. Stewart based his opinion on information that he received stating that Mr. Sneed was prescribed lithium upon his arrest. However, records submitted by Petitioner in his original application for post-conviction relief, No. PCD-2004-978, reveals that Petitioner was not prescribed lithium until March, 1997 after having a tooth pulled. *See* Appendix 4 attached to original application for post-conviction. (A copy is attached as Exhibit B). Thus, Dr. Stewart's opinion is based on unreliable and false information. Accordingly, Petitioner is not entitled to relief.

Conclusion

The Petitioner has not provided this Court with any reliable facts supporting his claim that could not have been presented previously in Petitioner's direct appeal or original post conviction application. Further, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b). Petitioner cannot show there exists a significant possibility of reversal of Petitioner's conviction or vacation of Petitioner's sentence based on the evidence submitted in his second post-conviction

application or that irreparable harm will result if no stay is issued. Nor has he shown that a miscarriage of justice will occur if his execution is carried out. This is because Petitioner's evidence in no way calls into question the evidence contained in the existing appellate record, evidence which, as previously found by this Court, shows Petitioner's significant involvement in the murder. *Glossip v. State*, 2007 OK CR 12, ¶ 37-53, 157 P.3d 143, 151-54. He is therefore not entitled to post-conviction relief or a stay of execution.

II.

PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE PROCEDURALLY BARRED FROM REVIEW.

In this application, Petitioner raises two claims of ineffective assistance. This Court has found that "[a] claim of ineffective assistance of trial counsel is appropriate for post-conviction review if it has a factual basis that could not have been ascertained through the exercise of reasonable diligence on or before the time of direct appeal" or, in the case of a successive application, in his initial postconviction application. *Coddington v. State*, 2011 OK CR 21, ,i 3, 259 P.3d 833, 835.

Petitioner, in his second proposition of error, contends that his trial counsel was ineffective in failing to attack Mr. Sneed's credibility by attacking (a) the alleged improper interrogation techniques, and (b) Mr. Sneed's "modus operandi" of breaking into cars and motel rooms to support his drug addiction. In his fourth proposition of error, Petitioner contends trial counsel was ineffective in failing to adequately cross-examine Dr. Chai Choi's testimony. As shown above, and as will be shown below in discussing the testimony of Dr. Choi, Petitioner's claims of ineffective assistance rely on facts

that have been available and could have been considered in his prior post-conviction application. Further, these claims do not in any way advance a claim that Petitioner is innocent. Thus, Petitioner is not entitled to any relief. 22 O.S.2011, § 1089(0)(8).

Proposition Two

Petitioner alleges trial counsel was ineffective in failing to investigate and attack the credibility of Mr. Sneed. In Petitioner's initial application for postconviction relief, Petitioner also asserted that trial counsel was ineffective in failing to investigate Mr. Sneed and adequately cross-examine him. *Glossip v. Oklahoma*, Case No. PCD-2004-978, Proposition II. In responding to his claim, this Court found that on direct appeal Petitioner claimed ineffective assistance of trial counsel in failing to adequately cross-examine Mr. Sneed and object to testimony portraying Mr. Sneed as a follower. This Court found that the proposition filed in his original application was "merely an attempt to expand on claims made on direct appeal; therefore the claim is barred." *Glossip v. State*, No. PCD-2004-978, slip op. at 6 (Okla. Crim. App. Dec. 6, 2007) (unpublished). This Court then went further and found the claim without merit, finding that the "introduction of this information at trial or on direct appeal would not have changed the outcome of this case." *Id.* Accordingly, Petitioner's claim raised in Proposition Two is barred for two reasons. First, to the extent that the claim is not the same as raised on direct appeal and post-conviction, Petitioner has not provided this Court with any reliable facts supporting his claim that could not have been presented previously in Petitioner's direct appeal or original post conviction application. Further, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be

sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b). Second, to the extent that the claim is merely a further extension of the claim raised on direct appeal and in Petitioner's initial application, it is barred by *res judicata*. *See Smith v. State*, 2010 OK CR 24, ¸i 38, 245 P.3d 1233, 1243 (issues raised and decided are barred by *res judicata* from further consideration).

Proposition Four

Petitioner's claim of ineffective assistance in Proposition Four is based on the trial testimony of Dr. Choi. Evidence obtained over eleven years after trial which is used merely to impeach or discredit the trial testimony of an expert cannot be considered new evidence that could not have been discovered with reasonable diligence. With reasonable diligence, this alleged impeachment evidence could have been discovered prior to Petitioner's initial post-conviction.[11] Accordingly, Petitioner is not entitled to relief on this claim. *Coddington*, 2011 OK CR 21, ¶ 3, 259 P.3d at 835.

Further, Petitioner cannot show, based on these opinions merely challenging Dr. Choi's testimony that no reasonable fact finder would have found Petitioner

[11] Additionally, this Court has held that "newly discovered evidence" which merely goes to impeach a witness is not sufficient to warrant a new trial. *Bowen v. State*, 1984 OK CR 105, ¶ 28, 715 P.2d 1093, 1101-02. To the extent Petitioner is seeking a new trial, he cannot succeed. *See also U.S. v. Trujillo*, 136 F.3d 1388, 1394 (10th Cir. 1998) (a motion for new trial based on newly discovered evidence must be "(1) more than impeaching or cumulative, (2) material to the issues involved, (3) such that it would probably produce an acquittal, and (4) such that it could not have been discovered with reasonable diligence and produced at trial.").

guilty of murder or would have rendered the penalty of death. Dr. Choi testified, consistent with her report, that the cause of death was "multiple blunt force injury, mainly on the head." (Vol. 11, Tr. 55).[12] She explained that due to the blunt force injury, the victim bled to death due to hemorrhages on top of the bone surface (Vol. 11, Tr. 48-50). She opined that it would take hours, not minutes for the victim to die, but she could not "pin down the number of hours" (Vol. 11, Tr. 56). Whether it took Mr. Van Treese hours to die or only minutes does not impact Petitioner's guilt, nor the aggravating circumstance found in this case—that the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration. Petitioner is not entitled to any relief.

Conclusion

Once again, Petitioner has failed to provide this Court with any reliable facts supporting his claim that could not have been presented previously in Petitioner's original post conviction application. Further, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b). Petitioner cannot show there exists a significant

---

[12] Even were this Court to review this claim under the two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), Petitioner cannot show prejudice as the evidence does not support a finding that but for counsel's alleged errors, there is a reasonable probability that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

possibility of reversal of Petitioner's conviction or vacation of Petitioner's sentence based on the evidence submitted in his second post-conviction application or that irreparable harm will result if no stay is issued. Nor has he shown that a miscarriage of justice will occur if his execution is carried out. This is because Petitioner's evidence in no way calls into question the evidence contained in the existing appellate record, evidence which, as previously found by this Court, shows Petitioner's involvement in the murder. *Glossip v. State*, 2007 OK CR 12, '1137-53, 157 P.3d 143, 151-54. He is therefore not entitled to post-conviction relief or a stay of execution.

III.

PETITIONER'S DOUBLE JEOPARDY ALLEGATION IS PROCEDURALLY BARRED.

In Proposition Three, Petitioner argues that the evidence at his first trial was insufficient to support his conviction and therefore his retrial violated double jeopardy. Petitioner does not present any newly discovered evidence in support of this Proposition and instead primarily attacks the reliability of the evidence presented at his first trial.

As an initial matter, Petitioner has waived his double jeopardy argument by failing to offer any relevant authority or meaningful argument in support. Although Petitioner extensively argues the law concerning sufficiency-of-the evidence claims and the evidence presented at his first trial, he offers a mere two sentences about double jeopardy and cites zero supporting authority. Specifically, while Petitioner notes that double jeopardy would prohibit the retrial of a defendant if the evidence were insufficient at the defendant's first trial, he cites no case law or other

authority in support of this proposition. Petitioner further fails to mention "double jeopardy' in his statement of the issue for Proposition Three. Petitioner's statement of the issue instead states simply that the evidence at his trial was insufficient to support his conviction.[13]

This Court's Rules state that arguments must be supported by citations to the authorities and statutes and that "[m]erely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal." Rule 3.S(A)(S), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2014); *see also* Rule 9.7(A)(3)(g), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2014) (providing that post-conviction applications shall contain argument and authority in the same manner as direct appeal briefs). Moreover, "[f]ailure to list an issue pursuant to these requirements constitutes waiver of alleged error." *Id.* Thus, Petitioner's reference to double jeopardy only in passing, without citation to authority or the development of meaningful argument concerning the double jeopardy aspect of Proposition Three, constitutes a waiver of this issue.

---

[13] To the extent that Petitioner attempts to bring a free-standing claim of insufficient evidence concerning his *first trial* (absent a double jeopardy drum), such a drum does not warrant relief because Petitioner is in custody pursuant to the conviction resulting from his *retrial*, not his first trial. To the extent that Petitioner attempts to challenge the sufficiency of the evidence at his retrial, this claim would be *res judicata* because Petitioner raised this drum on direct appeal from his retrial and this Court denied relief. *See Slaughter v. State*, 2005 OK CR 2, ¶ 4, 105 P.3d 832, 833; *Glossip v. State*, 2007 OK CR 12, ¶ 53, 157 P.3d 143, 153-54.

Alternatively, even assuming that this Court determines that Petitioner has sufficiently raised this issue in his current successive application, Proposition Three is nonetheless procedurally barred because Petitioner waived the issue by failing to earlier raise it. As this Court has repeatedly stated, the Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Slaughter v. State*, 2005 OK CR 2, ,i 4, 105 P.3d 832, 833. Therefore, claims that could have been raised in previous appeals but were not are generally waived. *Id.*

As background, m Petitioner's first direct appeal, this Court reversed Petitioner's conviction based on a finding of ineffective assistance of counsel and remanded for a new trial. *Glossip v. State*, 2001 OK CR 21, ¶ ¶ 8, 36-37, 29 P .3d 597, 599, 605. This Court stated that, in light of its finding of ineffective assistance, it need not reach Petitioner's claim based on the sufficiency of the evidence. *Glossip v. State*, 2001 OK CR 21, ¶ 8, 29 P.3d 597,599. Petitioner then filed a petition for rehearing arguing that the evidence in his first trial was insufficient to support his conviction and that therefore his retrial would violate double jeopardy. Petitioner thus urged this Court to review the merits of his insufficiency-of-the-evidence claim, reverse his conviction on that basis, and remand with instructions to dismiss the murder count. In denying Petitioner's petition for rehearing, this Court concluded that it had not overlooked Petitioner's insufficiency-of-the-evidence claim and that Petitioner had not presented any persuasive reason or case law requiring this Court to reconsider the claim when reversal was warranted on other grounds.

Although this Court declined to consider the merits of Petitioner's double jeopardy claim when raised in his

petition for rehearing, Petitioner has had, at a minimum, two additional opportunities to raise this claim at prior stages of his case. Accordingly, Petitioner has waived his double jeopardy claim by failing to raise it at these times.

First, Petitioner could have, but did not, file a petition for writ of prohibition or mandamus with this Court prior to his retrial to prevent the retrial on grounds of double jeopardy. This Court has recognized that petitions for writ of prohibition are appropriate vehicles for asserting that a retrial violates double jeopardy. *See, e.g., Todd v. Lansdown*, 1987 OK CR 167, ¶ ¶ 7-8, 747 P.2d 312, 315 (granting writ of prohibition to prohibit murder trial in violation of double jeopardy); *Sussman v. Dist. Court of Oklahoma Cnty.*, 1969 OK CR 185, ¶ 48, 455 P.2d 724, 735 (granting writ of prohibition to prevent trial court from retrying petitioner on the same charge in violation of double jeopardy).

Second, Petitioner failed to raise the claim that his retrial violated double jeopardy in his second direct appeal. Specifically, in his second direct appeal, Petitioner argued that the State presented insufficient evidence to convict him of first-degree murder because Mr. Sneed's testimony was not sufficiently corroborated and the State's evidence regarding motive was flawed. *Glossip v. State*, 2007 OK CR 12, ¶ 37, 157 P.3d 143, 151. However, Petitioner did not raise any claim or suggestion that his retrial violated double jeopardy. Such a claim could properly have been raised in Petitioner's second direct appeal. *See, e.g., Lambert v. State*, 1999 OK CR 17, ¶ ¶ 7-18, 984 P.2d 221, 226-29 (considering the merits of defendant's argument that his retrial, held upon the reversal by this Court of his original convictions, was barred by double jeopardy because of his first trial). In sum, Petitioner has waived

the double jeopardy claim underlying Proposition Three by failing to raise the claim in either a petition for writ of prohibition or his second direct appeal.

In any event, even assuming that Proposition Three were not procedurally barred because of Petitioner's waiver, Proposition Three is barred by 22O.S.2011, § 1089(D)(8)(a). Pursuant to that provision, this Court may not consider the merits of or grant relief based on a subsequent application for post-conviction relief unless "the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, *because the legal basis for the claim was unavailable*." 22 O.S.2011, § 1089(D)(8)(a) (emphasis added). The statute further provides that a legal basis is unavailable if it (a) either was not previously recognized or could not have been reasonably formulated from a decision of an enumerated appellate court, or (b) is a new rule of constitutional law given retroactive effect by an enumerated appellate court. 22 O.S.2011, § 1089(0)(9).

In this case, Petitioner does not cite any authority providing the legal basis for his double jeopardy argument and certainly does not identify a new legal basis or rule of constitutional law that was previously unavailable. Moreover, although Petitioner cites a number of cases concerning his sufficiency-of-the-evidence arguments, none of these cases-ranging in date from 1913 to 1998—was decided after Petitioner's original post-conviction application was filed in October 2006. Because Petitioner has failed to show that Proposition Three could not have been presented in his original post-conviction application, this Court may not consider the merits of or grant relief based on this claim. *See Duvall v. Ward*, 1998 OK CR 16, ¶ 6, 957 P.2d 1190,

1191 (holding that Petitioner failed to establish that claims could not have been presented in a previously considered application for post-conviction relief where he did not show that the legal basis of each claim was not recognized by or could not have been reasonably formulated from a final decision of an enumerated appellate court or that the claims relied on a new rule of constitutional law given retroactive effect).

As a final matter, even if the merits of Proposition Three were considered, this claim does not warrant relief because the claim is without merit. This Court has explained that "double jeopardy bars retrial only where a conviction is reversed on appeal for insufficient evidence." *LaFevers v. State*, 1995 OK CR 26, ¶ 16, 897 P.2d 292, 302. In Petitioner's first direct appeal, however, this Court reversed based on a finding of ineffective assistance of counsel, not based on the insufficiency of the evidence. *Glossip*, 2001 OK CR 21, ¶ ¶ 8, 36-37, 29 P.3d 597, 599, 605. Indeed, this Court expressly declined to reach Petitioner's claim based on the sufficiency of the evidence and certainly did not make a determination that the evidence was insufficient. *See Glossip*, 2001 OK CR 21, ¶ 8, 29 P.3d 597, 599. Because this Court did not reverse Petitioner's original conviction because of insufficient evidence, double jeopardy did not bar his retrial. *See Cannon v. State*, 1995 OK CR 45, ¶ 16, 904 P.2d 89, 98 (rejecting defendant's claim that his original convictions barred future prosecution because this Court's reversal of those convictions, while ostensibly a reversal and remand for a separate trial from defendant's accomplice, was actually a reversal based on insufficiency of the evidence).

In conclusion, Proposition Three warrants neither post-conviction relief nor an evidentiary hearing

because it is not properly raised in the current successive application, is procedurally barred because it is waived, is foreclosed by § 1089(D), and fails on the merits.

UNREASONABLE DELAY IN REQUESTING STAY OF EXECUTION

In *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006), the United States Supreme Court underscored its opinion in Nelson v. *Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004), that a stay of execution is an equitable remedy and that "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the[] courts." *Hill*, 547 U.S. at 584, quoting *Nelson*, 541 U.S. at 649-50. Further, "[t]he last-minute nature of an application to stay execution" bears on the propriety of granting relief. *Gomez v. U.S. Dist. Court for N. Dist. Of Cal.*, 503 U.S. 653, 654, 112 S. Ct. 1652, 1653, 118 L. Ed. 2d 293 (1992) (per curiam).

Petitioner has been extremely dilatory in bringing his claims to this Court. The claims could have brought more than a decade ago as most of the challenged evidence has been available since the time of Petitioner's trial. The Petitioner has not offered a reason for the delay, clearly because there is no good reason for this abusive delay.

MOTION FOR DISCOVERY AND EVIDENTIARY HEARING

Petitioner has filed, separately from his second application for post-conviction relief, motions for discovery and an evidentiary hearing. Both motions should be denied. First, Petitioner's request for discovery is nothing more than a fishing expedition and

is insufficient to satisfy this Court's rules. Petitioner supports his discovery requests to this Court with an unsworn affidavit of Michael Scott[14]. This is his sole basis for his request for "identifying information for all inmates who have been released or transferred from this prison who were in Snead's [sic] 'pod' since he has been imprisoned." Petitioner also claims he needs "access to all inmates currently housed near Sneed on the *chance* that one of them will speak the truth regarding Mr. Sneed." This Court has "never allowed unfettered discovery in post-conviction proceedings" and Petitioner must present facts, not speculation, to be entitled to discovery. *See Bland v. State*, 1999 OK CR 45, ¶ ¶ 6-8, 991 P.2d 1039, 1041-1042.

He makes numerous other requests without explaining the significance or relevance of these requests. For instance, Petitioner seeks discovery of medical records at the time of his arrest so that Petitioner can "explore" Sneed's mental health during the interrogation and seeks details of alleged "psychiatric treatment" Sneed received prior to trial. Petitioner alleges details of Sneed's psychiatric treatment show he was treated with lithium during his pre-trial incarceration and that such information is filed under seal in federal court. Petitioner states he needs this file to be unsealed. A review of Petitioner's federal pleadings do in fact show a "Determination of Competency to Stand Trial, Psychiatric Evaluation of Justin B. Sneed, by Edith King, Ph.D., dated July 1, 1997" was filed under seal in Petitioner's federal habeas corpus action, Case No. CIV-08-326-HE. However, this

[14] Although Petitioner claims to this Court that Mr. Scott "swears under oath," as shown above, the affidavit is undated, and is not notarized.

exact document was appended to Petitioner's Original Application for Post Conviction Relief, appendix 4, and attached hereto as Exhibit B. Clearly, discovery is not warranted for information Petitioner already has in his possession.

Petitioner also speculates "police may have found and confiscated needles and drug paraphernalia from Sneed's room at the motel" and that he needs access to those alleged police reports. Again, these requests are based on pure speculation as to what might be discovered.

In paragraph 4 of his motion for discovery, Petitioner seeks assistance in obtaining "actual polygraph charts," claiming they have determined that certain information discussed during Petitioner's clemency was "highly suspect" and refers this Court to a report from Charles R. Honts, Ph.D. that he claims he attached to this successive application for post-conviction relief. First, there is no such report attached. Second, "polygraph tests are not admissible for any purpose." *Matthews v. State*, 1998 OK CR 3, ¶ 18,953 P.2d 336, 343. Finally, although not admissible, the evidence that Petitioner took a polygraph test and failed it was testified to during Petitioner's preliminary hearing on April 22, 1997. See Exhibit C attached hereto. Thus, this information has been available for years, such that Petitioner cannot show reasonable diligence in attempting to obtain this information.

Finally, Petitioner again speculates that further investigation of jurors is necessary to determine if jurors were in fact swayed by the medical examiner's testimony regarding the time it took for Mr. Van Treese

to die. As discussed above, Petitioner has had this information available for years and was not diligent.[15]

Petitioner's discovery and evidentiary hearing requests are intended to explore the meritless allegations set forth in the post-conviction relief application. Petitioner's complaints in this application were available and could have been pursued at Petitioner's first and second trials and raised in his previous appeals. *Cf Slaughter v. State*, 2005 OK CR 2, ¶ 18, 105 P.3d 832, 836. As shown above, Petitioner's alleged new evidence is not new. Regardless, it fails to show by clear and convincing evidence that he is actually innocent of the murder of Mr. Van Treese. Thus, there is no basis for an evidentiary hearing or discovery to further explore these claims. These motions reflect Petitioner's desire to retry his case on collateral review, not any legitimate need for post-conviction discovery or an evidentiary hearing. There is no question that the State complied with discovery requirements at the time of both trials, thus that cannot be a basis for discovery. *See* Rule 9.7(D)(3) & (4) *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011); *Browning v. State*, 2006 OK CR 37, ¶ 3, 144 P.3d 155, 157. Petitioner's claims contained in the instant application are procedurally barred as they do not rely on new evidence and fail to show actual innocence. Further, Petitioner fails to show by clear and convincing evidence that the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an

[15] Petitioner also makes general discovery requests of the District Attorney's file, including the Investigator's file. However, Petitioner does not claim he did not receive full discovery during trial. As such, this discovery request, like some of the above, 1s redundant as Petitioner should already have access to the documents requested.

allegation raised in the second application for post-conviction relief. *Id.*

Petitioner's motion for discovery and evidentiary hearing should therefore be denied.

CONCLUSION

Based upon the foregoing, Petitioner's successive application for postconviction relief, request for a stay of execution, motion for discovery, and motion for evidentiary hearing should be denied.

Respectfully submitted,

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
[Signature]

JENNIFER B. MILLER,
OBA# 12074
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 FAX

ATTORNEYS FOR THE RESPONDENT

NOT FOR PUBLICATION

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case No. PCD-2015-820

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

Filed September 28, 2015

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

LEWIS, JUDGE:

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

punishment at death.[1] Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

This Court affirmed Glossip's murder conviction and sentence of death in *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143. Glossip, thereafter, filed an initial application for post-conviction relief, which was denied in an unpublished opinion. *Glossip v. State*, Oklahoma Court of Criminal Appeals Case No. PCD-2004-978 (Dec. 6, 2007). Glossip filed a successive application for post-conviction relief, a motion for evidentiary hearing, a motion for discovery, and an emergency request for stay of execution within twenty-four hours of his scheduled execution.[2]

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

---

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

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

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

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

> 8. … if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent … application unless:
>
> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
>
> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
>
> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying

> offense or would have rendered the penalty of death.

22 O.S.2011, § 1089(D)(8). "No subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2015). In order to overcome procedural bars, Glossip argues, citing *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11, that this Court has the power to grant relief any time an error "has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

After reviewing Glossip's "successive application" and related motions, we find that the law favors the legal principle of finality of judgment. *Spom v. State*, 2006 OK CR 30, ¶ 6, 139 P.3d 953, 954, *Malicoat v. State*, 2006 OK CR 26, ¶ 3, 137 P.3d 1234, 1235, *Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 1693, 155 L.Ed.2d 714 (2003). Moreover, Glossip has not shown that failure of this Court to review his claims would create a miscarriage of justice. The claims do not fall within the guidelines of the post-conviction procedure act allowing this Court to consider the merits or grant relief.

In this subsequent application for post-conviction relief Glossip raises several propositions which have an overarching claim of ineffective assistance of counsel relating to the actions of trial counsel, direct appeal counsel, and previous post-conviction counsel. In his initial claim he argues that it would violate the Eighth and Fourteenth Amendments to the United States Constitution to continue with the execution of sentence based

solely on the testimony of codefendant Justin Sneed, especially based on new evidence he now claims casts more doubt on Sneed's credibility. In proposition two, his overarching ineffective assistance of counsel claim, he argues counsel's omissions to discover this evidence violated the provisions of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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

First, this Court must determine whether the evidence is "newly discovered" and whether the facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have … rendered the penalty of death." *See* 22 O.S.2011, § 1089(D)(8).

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

ineffective assistance of counsel presented in this application is barred. *See* 22 O.S.2011, § 1089.

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

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

In his third proposition, Glossip claims that the evidence was insufficient to convict him in the first trial because no rational trier of fact could find that Glossip aided and abetted Sneed, thus the second trial was prohibited by double jeopardy. Glossip cites no authority for the proposition that a second trial after an initial conviction is reversed on legal grounds is subject to double jeopardy if the State presented insufficient evidence in the first trial[4].

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

In his final proposition, Glossip claims that counsel was ineffective for failing to adequately investigate and prepare for the testimony of the medical examiner, which he now claims was false, or at least misleading. He presents affidavits to rebut the medical examiner's conclusions. Glossip has never raised claims attacking the credibility of the medical examiner's testimony with this Court. This is a claim that could have been raised much earlier on direct appeal or in a timely original application

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

through the exercise of reasonable diligence. Furthermore, we find that the facts underlying this claim are not sufficient when viewed in light of the evidence as a whole to show that no reasonable fact finder would have found Glossip guilty or would have rendered the penalty of death. Moreover, Glossip has not suffered a miscarriage of justice based on this claim.

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

CONCLUSION

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

ATTORNEYS FOR PETITIONER:

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

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

DONALD KNIGHT
DONALD R. KNIGHT
LAW FIRM
7852 S. ELATI ST.
SUITE 201
LI'ITLETON, CO 80120

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

ATTORNEYS FOR RESPONDENT:

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

OPINION BY: LEWIS, J.

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

SMITH, PRESIDING JUDGE, DISSENTING:

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

I further dissent to any preemptive denial of relief.

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

LUMPKIN, VICE PRESIDING JUDGE: SPECIALLY CONCURRING

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

JOHNSON, JUDGE, DISSENTING:

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

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

HUDSON, JUDGE: SPECIALLY CONCUR

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

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

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

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

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

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

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

Glossip's allegations of error do not meet the requirements for filing a successive application as set forth in 22 O.S.2011, § 1089(D)(8). Glossip's claims are waived as they either were or could have been previously presented. *See Patton v. State*, 1999 OK OR 25, ¶ 2, 989 P.2d 983, 985. Moreover, with regard to Glossip's proffered "newly discovered evidence", Glossip has failed to show this evidence is sufficient to establish by clear and convincing evidence that—with this information—no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death. 22 O.S.2011, § 1089(D)(8)(b)(2). Glossip is therefore not entitled to post-conviction relief.

Glossip's first proposition of error is twofold: (1) his execution would violate the Eighth Amendment because there was insufficient evidence of his guilt; and (2) a death sentence cannot be predicated solely on the testimony of a murderer whose stories changed. As to his first contention, the assertion is barred as the claim of insufficient evidence was raised and rejected in Glossip's second direct appeal. To the extent that Glossip is suggesting a new slant on his original evidentiary sufficiency claim, such claim is waived. As to his second contention, this claim also could have been raised and is thus barred. With regard to the proffered "new evidence" cited in support of this contention, Glossip fails to explain why this information could not have been developed with due diligence earlier. Moreover, pursuant to § 1089(D)(8)(b)(2), Glossip has failed to show by clear and convincing evidence that with this information no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

In his second proposition of error, Glossip argues that trial counsel was ineffective for failing to attack

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

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

Finally, as to his fourth proposition of error, Glossip contends counsel were ineffective for failing to deal with aspects of the Medical Examiner's testimony. This claim could have been raised earlier and is waived. With regard to the proffered "new evidence", Glossip has failed to demonstrate that this information could not have been discovered earlier with due diligence. Additionally, this information does not demonstrate—by clear and convincing evidence—"that, but for the alleged error, no reasonable factfinder would have found … Glossip] guilty or would have rendered the death penalty." 22 O.S.2011, § 1089(D)(8)(b)(2).

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

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

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Case Nos.
D-2005-310
D-2000-653
D-2004-1260

RICHARD EUGENE GLOSSIP,
JOHN MARION GRANT, and,
BENJAMIN ROBERT COLE,
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

Filed October 2, 2015

ORDER ISSUING STAY

On October 1, 2015, the State of Oklahoma, by and through the Office of the Attorney General, filed its Notice and Request for Stay of Execution Dates in the above styled cases. Citing to the events on September 30, 2015 which led to Governor Mary Fallin issuing a stay and rescheduling Richard Eugene Glossip's execution, the State requests that this Court enter an order staying the scheduled executions of Glossip, John Marion Grant, and Benjamin Robert Cole for an indefinite period of time.

The State asserts that the Oklahoma Department of Corrections received potassium acetate rather than potassium chloride, the third drug utilized in the

Department of Correction's execution protocol. The State further asserts that an indefinite period of time is necessary to evaluate the events that transpired on September 30, 2015, the Department of Correction's acquisition of a drug contrary to the written protocol, and the Department of Correction's internal procedures relative to the protocol.

Having fully considered the State's request, we find for good cause shown, the executions set for October 7, 2015—Benjamin Robert Cole; October 28, 2015—John Marion Grant; and November 6, 2015—Richard Eugene Glossip are indefinitely stayed. The State is directed to keep this Court advised as to the status of each case, including any proposed adjustments to the execution protocol, through the filing of a status report every thirty (30) days during such time as this stay remains in effect. This order takes precedence over any other order issued in the above styled cases and the stay shall remain in effect until this Court sets a new execution date pursuant to 22 O.S.2011, § 1001.1 in each respective case.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of October, 2015.

[Signature]
CLANCY SMITH, Presiding Judge
[Signature]
GARY L. LUMPKIN, Vice Presiding Judge
[Signature]
ARLENE JOHNSON, Judge
[Signature]
DAVID B. LEWIS, Judge
[Signature]
ROBERT HUDSON, Judge

TRANSCRIPT OF INTERVIEW
OF
JUSTIN SNEED
FROM VIDEOTAPE
ON
JANUARY 14, 1997

[2] BY MR. COOK: Justin, this is my partner Detective Bemo.

BY MR. BEMO: How are you doing?

BY MR. SNEED: Good. How are you doing?

BY MR. BEMO: All right.

BY MR. COOK: What time have you got, Bob?

BY MR. BEMO: I have 7:50 to be exact.

BY MR. COOK: Justin, you're how old?

BY MR. SNEED: 19, sir.

BY MR. COOK: And your date of birth is what?

BY MR. SNEED: 9-22-77.

BY MR. COOK: And your Social Security number?

BY MR. SNEED: 453-83-1415.

BY MR. COOK: Are you about 6 foot, 140 still, brown hair and hazle eyes?

BY MR. SNEED: No. I've got like a red tint in my hair.

BY MR. COOK: Can I see?

BY MR. BEMO: Well, that's just a **[3]** small red tint.

BY MR. COOK: Did you do that on purpose?

BY MR. SNEED: No. My mom has got really red hair.

BY MR. COOK: Really?

BY MR. BEMO: Oh, it's natural then?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Justin, what we want to do is talk with you about this thing. I'm sure these officers told you what you were being brought down here.

BY MR. SNEED: Yes, sir.

BY MR. COOK: What did they tell you?

BY MR. SNEED: They said I was being arrested for murder one, I think.

BY MR. COOK: Uh-huh. And so you're technically under arrest right now. And we want to talk to you about this deal, okay? But before we do, my partner, he's—he's going to advise you of what we call the Miranda warning. He's got a card. He's going to read your rights to you to make sure you understand **[4]** those, okay?

BY MR. BEMO: And before you make up your mind on anything, I want you to hear some of the things that we've got to say to you and before we talk. But at any rate let me read your rights to you.

You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have him present with you while you are being questioned.

If you cannot afford to hire an attorney one will be appointed to represent you before any questioning if you

wish one. If you do decide to make a statement, you may stop at any time.

Now do you understand these rights I have read to you?

BY MR. SNEED: Yes, sir.

BY MR. BEMO: Okay. Do you want to discuss this incident with us?

BY MR. SNEED: I believe so.

BY MR. BEMO: I'm sorry?

BY MR. SNEED: Yes, sir.

[5] BY MR. BEMO: Okay. The thing about it is, Justin, we think—we know that this involves more than just you, okay? We've got witnesses and we've got other people and we most likely have physical evidence. You know what I am saying, on this thing.

And right now the best thing you can do is to just be straightforward with us about this thing and talk to us about it and tell us what happened and who all was involved, because I personally don't think you're the only one.

Everybody that we talked to they're putting it on you, okay? They're putting the whole thing on you and they're going to leave you holding the bag.

In other words, if you just said you don't want to talk to us and you want to talk to an attorney we would march you down to the jail and we would book you in for this charge and you would be facing this thing on your own. And I don't think it's just you.

I think there are more people involved and you can straighten out a lot of things. And I just don' t think you should take **[6]** the whole thing.

BY MR. COOK: Now that gentleman that we talked with, I say we, the cops, when we were out there, is his last name Brassfield?

BY MR. SNEED: Yeah, Brassfield.

BY MR. COOK: Yes. Well, Mr. Brassfield, of course, doesn't know what we know about this, Justin, and he likes you. All righty? And it's my understanding that you worked for him when you came up from Texas here, how long ago was that?

BY MR. SNEED: It was like July 3rd when we come up here during the summer. That was the day before—

BY MR. COOK: Okay. Fourth of July?

BY MR. BEMO: Who came up here with you? One of your brothers?

BY MR. SNEED: Yes. My brother, Wes Taylor.

BY MR. BEMO: Wes Taylor came?

BY MR. SNEED: He's got a different last name than I do. He's my stepbrother.

BY MR. BEMO: Half brother?

[7] BY MR. SNEED: Well, my mom married his dad.

BY MR. BEMO: Oh, I see. Okay. So he's not even a half brother. He's just a stepbrother?

BY MR. SNEED: Yes.

BY MR. BEMO: Okay. So why did you leave the construction crew?

BY MR. SNEED: Because me and my brother were working for this construction crew down there, and we were going to try to—try to make it here in Oklahoma

City, you know, to build up a life here and everything and so we got to talking to the manager at the motel there.

BY MR. BEMO: Who is?

BY MR. SNEED: Rich. I don't really know his last name.

BY MR. COOK: Okay. Would you know it if you heard it?

BY MR SNEED: I think it starts with a G.

BY MR. COOK: Glossip?

BY MR. SNEED: Yeas, I think. That kind of sounds right. I knew it was some **[8]** weird name.

And anyway, we got to talking to him about working with him for like the room, just doing maintenance and doing the housekeeping and everything, just strictly for the room.

And so we started doing that for a little while and then my brother was like wanted out of Tarrant County, or he was up here on probation from Tarrant County, and his dad tracked him down to that motel and talked him into going in and turning himself in, so I stayed there for a while.

And then one of the bosses because there was like two bosses and this Rob Brassfield, which is like the main boss that gives us our payroll and everything like that and then his brother, Mark Brassfield.

Anyway, Mark came by the motel one time like a couple of weeks before Christmas and told me that as long as I was in Oklahoma City or as long as they were in Oklahoma City or I could find them that if they were doing work that I was more than welcome to come back

to work and then—but he told me he was going **[9]** to California for a couple of weeks.

BY MR. COOK: How did he know you were at the motel?

BY MR. SNEED: Because he knew I was—or he knew that me and Wes were—had quit them to work for this motel because we still had one roommate named Jesse. I can't even think of his last name. He was a Mexican guy that was living with us when we quit him. And he was still working for these guys, and he knew that we was working for the motel.

And so he just came by cruising by one day and I happened to be outside and he stopped and I talked to him and everything.

BY MR. BEMO: What kind of work does he do? I mean, what kind of work do you do for him?

BY MR. SNEED: For the Brassfields?

BY MR. BEMO: Yeah.

BY MR. SNEED: Roofing.

BY MR. BEMO: Roofing? Are they just—

BY MR. SNEED: They contract from like All American—or out of Oklahoma City.

[10] BY MR. BEMO: Do they have a lot of work here in Oklahoma City?

BY MR. SNEED: Yes. They have been pretty busy since July 4th.

BY MR. BEMO: So they just never had gone back to—where did you come from out of Texas up to here?

BY MR. SNEED: From Eastland County.

BY MR. BEMO: Cisco?

BY MR. SNEED: Yeah, Cisco.

BY MR. BEMO: Okay. Is that where the main company is?

BY MR. SNEED: That's where they're from. That's where they usually roof from. And then they're kind of like I guess you could call us stormtroopers, wherever there is a heavy storm at they know, you know, quite a few people or quite a few companies that they can go contract from whenever there's a good storm at.

BY MR. COOK: I see. Well, this is kind of a bad time of the year, isn't it? I mean, as cold as it's been?

BY MR. SNEED: Yeah. Well, they **[11]** still got quite a bit of business doing like, when this cold spell hit. They have been just working like four or five hours a day, you know, putting on about 10 square a day and then quitting for the day instead of having everybody out in the cold all day long.

BY MR. COOK: Man, I bet that' s rough.

BY MR. SNEED: Yeah, it is. We have been off. We took off the last two or three days except for today. We went and put a 15 squares (inaudible) on.

BY MR. BEMO: It's hard work, isn't it?

BY MR. SNEED: No kidding.

BY MR. BEMO: Well, how did you get—how did you get fixed up at the motel as far as, you know, your job there?

BY MR. SNEED: Well, I really just kind of popped into it. It was more my brother and the manager taking

about working for the room, but my brother was saying me and him would work for the room but I know that they conversed it, and I just started working for the motel and doing the maid service and **[12]** everything.

BY MR. COOK: You got your room?

BY MR. SNEED: Yeah. And then he would buy me supper like every other night or so, you know, just whenever that is, he had a little spare money to buy me supper with.

BY MR. BEMO: Is this the manager?

BY MR. SNEED: Yes.

BY MR. BEMO: Rich?

BY MR. SNEED: Yes.

BY MR. COOK: I' m sorry, you said every other night or so he would buy your supper or every night?

BY MR. SNEED: Well, there was a couple of nights that, you know, I didn't—he didn't buy me nothing to eat or nothing.

BY MR. COOK: That's kind of rough, isn't it?

BY MR. SNEED: Yes. It was pretty rough. That's why I went ahead and decided to go back to work for the roofing company.

BY MR. BEMO: Does it pay pretty good?

BY MR. SNEED: They pay me $5 an hour but we—during the summertime we can get **[13]** like 15-16 hours a day because we get started a little bit before sunrise because we can do a lot tearing off without, you know, any sunlight and then during the summertime it don't get dark until like 9:30, so, you know.

BY MR. BEMO: (Inaudible)

BY MR. SNEED: Yeah. Pretty much we work all day, every day, and that's how we were working when I first come up here. It was all day every day. But any day they didn't get a chance to work without it being really, really cold then they'll work, even Sundays.

BY MR. BEMO: So you've been in town since July the 3rd?

BY MR. SNEED: Yeah.

BY MR. BEMO: Have you gone back home for any reason since then?

BY MR. SNEED: No, sir.

BY MR. BEMO: Are you from Cisco, Texas?

BY MR. SNEED: No. I'm from—I was born in Artesia but I have lived in Cisco since I was four years old.

BY MR. BEMO: Oh, have you?

BY MR. SNEED: So you can **[14]** basically say that I was from Cisco, I guess.

BY MR. BEMO: Is that where your parents are?

BY MR. SNEED: My mother lived in Cisco, but I think she's recently moved to Breckenridge since I've been up here, which is just like 35 miles away from Cisco. It's like Stevens County.

BY MR. COOK: Okay. Are your mom and mother together? I mean, your dad and mom together or are they—

BY MR. SNEED: No. My dad still lives in New Mexico, that I know of. I haven't talked to him in several years. And my mom was dating a guy name Jose Reyes

that worked at Crestridge which is a mobile home factory in Breckenridge.

BY MR. BEMO: Okay. So that's where she's at now?

BY MR. SNEED: Yes.

BY MR. BEMO: Do you maintain pretty close ties to your mom?

BY MR. SNEED: I haven't called her in a while.

BY MR. BEMO: I see. Now, do you **[15]** have another brother besides Wes?

BY MR. SNEED: Yes. His name is Jeremy.

BY MR. BEMO: Jeremy?

BY MR. SNEED: He's my real brother. He's like a year old other than I am.

BY MR. BEMO: He's a year older than you are?

BY MR. SNEED: Yeah.

BY MR. BEMO: Is he in Breckenridge or where's he at?

BY MR. SNEED: Yes. He works at that mobile home factory.

BY MR. BEMO: Oh, he does?

BY MR. SNEED: Or the last I knew of he did. I don' t know if he still does, but he did when I come up here.

BY MR. BEMO: Okay. Have you maintained any contact with him?

BY MR. SNEED: No. I haven't talked to him in a while either.

BY MR. BEMO: Okay. So who were some of your friends up here?

BY MR. SNEED: The only people I really knew was like—when the people that **[16]** popped in and out of the motel I just talked to them for a little while if they were in that motel and then when they moved out I didn't really didn't never hear from them.

BY MR. BEMO: I see. So you—

BY MR. SNEED: So I didn't really—the only person I mainly associated with was the manager.

BY MR. BEMO: Okay. I understand you all were pretty good friends.

BY MR. SNEED: Oh, we got along. We got along pretty good. I had no problems with him or nothing.

BY MR. BEMO: Well, do you want to—let's get down to—to business here.

Do you want to tell us what happened out there, how this all got started and run it down to us?

BY MR. SNEED: Huh-uh.

BY MR. BEMO: You don't want to tell us about it?

BY MR. SNEED: I don't really know what to say about it.

BY MR. BEMO: Well, let me tell you, there's—there's a lot of people, you **[17]** know, when something like this happens everybody tried to save themselves.

BY MR. SNEED: Uh-huh.

BY MR. BEMO: And everybody wants to make themselves look as good as they can, you know, to the—to the police. Because then all of a sudden, you know, the

cat's out of the bag and everybody knows what's going on.

Well, they've made you the scapegoat in this. You know, everybody is saying you're the one that did this and you did it by yourself and I don't believe that.

You know Rich is under arrest, don't you?

BY MR. SNEED: No. I didn't know that.

BY MR. BEMO: Yeah. He's under arrest, too.

BY MR. SNEED: Okay.

BY MR. BEMO: So he's the one—he's putting it on you the worst.

Now, I think that there's more to this than just you being by yourself and I would like for you to tell me what—how this got started and what happened, and—

[18] BY MR. SNEED: Well, I think one time when my brother went and turned himself in he had said something you know; about setting it up some way to where the place looked like it got robbed or something like that.

And then—then he went and, you; know, went and turned himself back into Tarrant County for violating his probation and that's all that, you know, I pretty much knew about that.

BY MR. BEMO: Well, now I'm not talking about—now you're talking about maybe setting up a robbery at the motel and then having Rich give a bad description and split the money?

BY MR. SNEED: Yeah, I guess, something like that. I really don't know what they—

BY MR. BEMO: Well, Rich told us you came to him with that idea.

BY MR. SNEED: No. You see, like my brother came to him with like that idea. And then, after my brother went and turned himself in, Rich had told me that Wes had said something like that to him.

[19] BY MR. BEMO: Was he trying to proposition you with that idea?

BY MR. SNEED: I guess.

BY MR. COOK: Well, basically what he's saying, Justin, is that Rich told us that you're the one that came to him with that idea.

BY MR. BEMO: He's putting it off on you, Justin. That's what he told us.

BY MR. SNEED: No. I don't understand that.

BY MR. BEMO: And now Rich is trying to save himself by saying that you're in this by yourself, that it was all your doing and you're the one that—that did the homicide, it was you, that you came to him and told him about it; is that true?

BY MR. SNEED: (Shakes head)

BY MR. COOK: Okay. Why don't you straighten this out then.

BY MR. BEMO: Tell us what happened.

BY MR. SNEED: All I know is that, like I said, that he told me that my brother had told him that, you know, came up to him and tried to proposition and things like that which **[20]** I didn't know—I didn't even know that my brother was going to go, you know, because my brother didn't even say nothing to me about it. And then, you know, after he turned himself in Rich had said something to me that Wes had said something like that to him, but it didn't really go no further than that.

BY MR. BEMO: Okay. Fine. How about the man, the owner of the motel, that's what I want you to tell me about.

BY MR. SNEED: I met him a couple of times, but I never knew when he was at the motel or nothing, but I met him a couple of times when we were trying to fix the TVs, we'd say we had like some problem with the amplifier or something like that that would reduce the power to the lines and that's why—I mean, and I think we only messed with it like twice and then went and bought a whole brand new system and put it in. And that was the only time I really ran in to him was when we were trying to fix the TVs.

BY MR. BEMO: Okay. Are you saying that you didn't kill him?

BY MR. SNEED: Yes, sir.

[21] BY MR. BEMO: Well, that ain't going to a get it. They're putting it all off on you. That's what I'm trying to tell you.

BY MR. COOK: You know, Justin, I suppose I'm not so sure if I wasn't in your shoes I wouldn't say the same thing you're saying.

But we've gone through a lot of trouble, we've gone to a lot of work, investigation. And what you're saying there doesn't add up with everything else that we have discovered, not only with our technical investigation but also you told some folks some things. Okay?

BY MR. SNEED: What do you mean?

BY MR. COOK: Well, what I mean is according to Rich, you told him…

BY MR. BEMO: That you killed the man, the owner of the hotel.

BY MR. COOK: And what we want you to do is try to do the manly thing here and get this thing straightened out. We want to hear your side of it.

If it's just—if it went bad or you didn't mean to do it you need to tell us **[22]** that and that's what we'll tell the District Attorney's office. But you need to get straight with us and tell us what's going on here.

And this stuff about gee, you know, I replaced a speaker system in a TV and that's the only time I've ever run into him. That ain't going to cut it, man. It's gone too far for that.

BY MR. BEMO: It's gone way too far. There's too many other witnesses that have come forward that will testify against you.

BY MR. COOK: Okay.

BY MR. BEMO: And if you don't—if you don't try to get it straightened out with us when you go into court like that—

BY MR. COOK: Okay. Now we're not—we're not bad people. We're not trying to bully you or pressure you, but we're telling you, this is not going to get it.

You're going to have to get straight with us, you're going to have to get straight with yourself, and mainly you have to get it straight with the Almighty. But you **[23]** need to do that now. All right?

BY MR. BEMO: You need to tell us how this all started.

BY MR. COOK: I mean, buddy, let me tell you. I can certainly understand your predicament. I don't

know how in the world you managed to work just for your room. I do not understand that.

BY MR. SNEED: All I basically did was. I was comped out, according to what I was told by Rich I was—I was being comped out on my room.

BY MR. COOK: Well, I'm amazed. I'm impressed that you were able to do that, but my gosh, you were probably starving to death.

BY MR. SNEED: Well, like I told you that every now and then he would buy me some food.

BY MR. COOK: But still, I mean, I would hate to have to live on that. I'm feeling sorry for you is what I'm saying here.

BY MR. SNEED: Yeah.

BY MR. COOK: I can appreciate the bad situation you're in even to the point of **[24]** where you're feeling desperate. I think maybe I would feel desperate in that situation, but I need you to get straight with us now and tell us what's going on, because we've been doing this for a lot of years.

And on this particular situation we have worked on it ever since it's happened and I think we know what has happened. Some stuff I know we know, some stuff we think we know, and we would like for you to straighten us out for sure.

And anything you tell us we're going to go tell the District Attorney. I mean, if it's a situation where you didn't mean to do this, got carried away, and you're sincere and you're telling the truth, we'll go tell the man that.

BY MR. BEMO: But we want to know whose—whose idea it was.

BY MR. COOK: Is it all your idea, the whole thing?

BY MR. SNEED: No, sir.

BY MR. COOK: Well, okay, tell me.

BY MR. BEMO: You need to tell us about it.

[25] BY MR. SNEED: Okay. Rich told me that he would split what money we could get out of Barry. I think that's—his name was Barry.

BY MR. COOK: Right.

BY MR. SNEED: That's what I was told his name was anyway. And we come and woke me up like at three o'clock in the morning and told me that Barry had just got there. And that—he told me that he knew where the money was and that he was sitting on like $7,000. And so we went into the room.

BY MR. BEMO: Did you use a key to get in?

BY MR. SNEED: Yes, sir.

BY MR. BEMO: Okay.

BY MR. COOK: Was it a situation where you both go into the room or is it just you going into the room?

BY MR. SNEED: I just went in (inaudible) with a set of keys.

BY MR. BEMO: How you were going in—

BY MR. SNEED: Barry had a set of keys.

[26] BY MR. BEMO: With a set of keys?

BY MR. SNEED: Yeah.

BY MR. BEMO: Okay. Did Rich give you the key to the room?

BY MR. SNEED: No. I had a set of master keys that I walked around with because if I did like open the laundry and I had a master key to most of the rooms in the motel except back there was eight or nine odd ball doorknobs which I would have to go to the office and get a key for if I was to get in those rooms.

BY MR. BEMO: Okay. Continue. Go ahead.

BY MR. SNEED: Anyway, Barry was like there that night and he called me and told me that Barry was here, you know, and that to be in my room if anybody called for complaints like for extra towels or if their heater didn't work or if they needed their TV adjusted or something like that because he calls me when he's not usually there telling me to be in the room and he was going to call me and use the phone and I came in there so if he needs to find me right there, so...

[27] BY MR. BEMO: Especially if the owner is there, sure.

BY MR. SNEED: Yeah. So I came to take care of it right quick and everything and …

BY MR. COOK: About what time was this when he told you that?

BY MR. SNEED: It was kind of—about four or five o'clock in the afternoon.

BY MR. COOK: Okay. So it's still—still early evening, okay?

BY MR. SNEED: And then he called me back and told me that Barry was going like to Tulsa which, you know, like another motel in Tulsa or something like that.

And then he come and woke me up at three o'clock in the morning and said that he had just seen his car pull in.

And he said he was going back up to the front desk and for me to go in and get his car keys because he said he would know where the money was and everything.

BY MR. COOK: Now, I'm sorry, tell me that part again. He wanted you to go in and get his car keys because—because what?

BY MR. SNEED: Because I guess the **[28]** money was—

BY MR. COOK: Was in the car?

BY MR. SNEED: Right. Yeah.

BY MR. COOK: Where did Berry keep his car?

BY MR. SNEED: Right there in front of the door.

BY MR. COOK: Right there under the awning, right by the office door?

BY MR. SNEED: And after everything kind of got out of control we transported the car over to the back parking lot.

BY MR. BEMO: Well, now wait a minute. I want you to go ahead and detail about after you—you go in, you go into the room. Go back to that and tell us what happens.

BY MR. SNEED: After he woke up?

BY MR. COOK: Go ahead. He was in bed asleep?

BY MR. SNEED: Yeah.

BY MR. COOK: Okay.

BY MR. SNEED: And then I just really meant just to knock him out, you know.

[29] BY MR. BEMO: What did he say to you?

BY MR. SNEED: He just kind of jumped out of his bed, you know. He really didn't never—never say anything.

BY MR. COOK: Was there a light on inside or was it dark?

BY MR. SNEED: No, no. It was dark.

BY MR. COOK: Could you see well enough?

BY MR. SNEED: Yeah, from like the outside light that was shining through the blinds.

BY MR. COOK: So the blinds were open and there was some—some outside light coming through?

BY MR. SNEED: The blinds in that room are kind of like warped. I don't know how they got warped but they were kind of—a few of them were bent out of shape.

BY MR. BEMO: Sure. The light could get through there?

BY MR. COOK: So there was enough light coming through where you could see what **[30]** was going on and he was in bed when you went in?

BY MR. SNEED: (Nods head)

BY MR. COOK: Okay.

BY MR. BEMO: So he jumps up and then what happens?

BY MR. COOK: You said you meant to knock him out. Did you hit him with something?

BY MR. SNEED: Yes.

BY MR. COOK: What ?

BY MR. SNEED: A baseball bat.

BY MR. COOK: Really. And where did you get this bat?

BY MR. SNEED: I found it in a room when I was cleaning some rooms. It was like we had this big fat black dude working for us at one time when I first started working there. He was already working there and when he quit and moved out when I cleaned his room and everything I found it.

BY MR. COOK: Where is this bat now, man?

BY MR. SNEED: I put it in the dumpster.

[31] BY MR. COOK: In the dumpster?

BY MR. SNEED: Yeah.

BY MR. COOK: Okay. And so anyway how many times would you estimate, you know, now correct me if I'm wrong here, is Barry kind of stout? I mean, he's—he's an older man but he's kind of stout; is he not?

BY MR. SNEED: I would—I would say he's pretty stout.

BY MR. COOK: When—when you tried to knock him out did that take some of the stoutness out of him? Do you understand what I'm saying?

BY MR. SNEED: I just only like hit him two or three times. I figured I would just knock him out.

BY MR. COOK: Sure. Did it work?

BY MR. SNEED: Yes.

BY MR. BEMO: Did he hit you in the eye?

BY MR. SNEED: Something collisioned me in the eye. I don't know what it was but …

BY MR. COOK: So …

BY MR. SNEED: I don't know what **[32]** it was, if it was like his elbow or—

BY MR. BEMO: Well, there must have been some kind of struggle because the window got broke out.

BY MR. SNEED: Oh, that's because I hit it with the baseball bat. The baseball bat tagged it.

BY MR. BEMO: Well, there's blood on the window, though.

BY MR. SNEED: I don't know where that came from.

BY MR. BEMO: How did you cut your ear?

BY MR. SNEED: I don't know how that little scratch got there. I really don't.

BY MR. COOK: Don't you think it came from this encounter that you had?

BY MR. SNEED: Yes, possibly.

BY MR. COOK: Well, did Barry put up a fight, Justin?

BY MR. SNEED: Yeah. He danced around a little bit and then I kind of knocked him to where he was down on the floor and then I tapped him a couple more times and when he quit moving I kind of left him alone because I **[33]** figured he was knocked out.

BY MR. COOK: Then what, did you get the keys?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Where were they?

BY MR. SNEED: They were in his pants pockets.

BY MR. COOK: Now when you say keys are we talking just a key, several keys?

BY MR. SNEED: It was like a set of keys. I couldn't tell you how many keys. It was probably 25 keys on there.

BY MR. BEMO: Were they on—were they on just like a key ring?

BY MR. SNEED: I think it was—some of them were on a bigger key ring and then there was two or three of them on a smaller key ring.

BY MR. BEMO: Was there something holding them together?

BY MR. SNEED: The were locked, the key rings were like interlocked, interlocked.

BY MR. COOK: Oh, like—like **[34]** this?

BY MR. SNEED: Yes.

BY MR. BEMO: Oh, okay. What about his car keys?

BY MR. SNEED: They were on there.

BY MR. COOK: I see. Anything unusual about the car keys? Were they on one of the rings or were they on—

BY MR. SNEED: Yes. They were on one of the rings.

BY MR. BEMO: What was the idea of taking the car where you took it?

BY MR. SNEED: That's after we found out that he wasn't going to get back up.

BY MR. BEMO: That what?

BY MR. SNEED: That was after we found out that he wasn't going to get back up.

BY MR. BEMO: Okay. Well, tell us about all that. You knock—you think you've knocked him out, right?

BY MR. SNEED: Yeah.

BY MR. BEMO: Okay.

BY MR, SNEED: Then we got the money out of the car and we went back—

BY MR. COOK: Well, wait, wait, **[35]** wait. Let's back up just a little bit. I'm sorry to stop you, but I want to make sure I understand.

Let's go back to the point where he' s laying there on the floor, you said you tapped him two or three more times, you get the keys, where were they? were they in his pants pocket? Were they laying there?

BY MR. SNEED: They were like on the—on the little couch deal that was in the room.

BY MR. COOK: Just laying there on the couch deal?

BY MR. SNEED: Yes, his pants were. And then I just kind of felt in his pants and felt the keys, then—

BY MR. COOK: I see. You get the keys out, then what?

BY MR. SNEED: And then Rich told me after I got the keys to come back up to the office, so I went back up to the office.

BY MR. COOK: Did you shut the door to the motel room?

BY MR. SNEED: Yes.

BY MR. COOK: And what room is **[36]** this?

BY MR. SNEED: I think it was 102.

BY MR. COOK: Okay. So you shut the door behind you?

BY MR. SNEED: Yes.

BY MR. COOK: You go back to the office?

BY MR. SNEED: Yes.

BY MR. COOK: Do you have any idea what time it was now, man?

BY MR. SNEED: I don't know. It was like three o'clock when Rich woke me up and told me that he was back.

BY MR. COOK: So it's after three?

BY MR. SNEED: Yes.

BY MR. COOK: If you were guessing you would say?

BY MR. SNEED: It would probably be like 4:30 or 5 o'clock at the most.

BY MR. COOK: Okay. So at 4:30 or 5:00 you go back to the office and Rich is still—is it office unlocked?

BY MR. SNEED: Well, no. He made me lock it and I just rang the buzzer and he come up there. And then we went and got the **[37]** money out of the car and went and took it back to my room so that I guess like his girlfriend wouldn't know nothing or nothing like that and we split the money.

BY MR. BEMO: How much money did you get?

BY MR. SNEED: Like about $1900. I mean, he told me that the guy was sitting on like 7,000 but it only come up to being a little less than five, I think.

BY MR. BEMO: 5,000?

BY MR. SNEED: No. A little less than four, right at four.

BY MR. BEMO: Right at 4,000. So did you count the money there to see how much was in the—that he had there and then split it up equally?

BY MR. SNEED: No. We just kind of tossed like—like a—like a grand here and then we tossed a grand there and then we just kind of divided it like into two piles and never really counted it.

BY MR. BEMO: So you got close to 2,000 a piece?

BY MR. SNEED: Yes.

[38] BY MR. BEMO: How much money of that—how much of that money do you have left?

BY MR. SNEED: Like 1700.

BY MR, BEMO: Where is it at?

BY MR. SNEED: It's at the apartment that I was at.

BY MR. BEMO: Is it back still up in the apartment?

BY MR. SNEED: No. It's at the apartment I was recently at.

BY MR. BEMO: Oh, just recently at?

BY MR. COOK: You mean you felt safe to leave it there?

BY MR. SNEED: No. I just left it there when my boss showed up and told me to come up here.

BY MR. BEMO: Oh. Okay, now—

BY MR. COOK: Excuse me just a minute before you ask anything else. This money, is it with somebody or—

BY MR. SNEED: No.

BY MR. BEMO: That's what I was going to ask.

[39] BY MR. SNEED: No. It's in a drawer that—that has some—like a couple of old pairs of my socks and a couple—

BY MR. COOK: Which apartments are you staying at?

BY MR. SNEED: Oh, it's like, I don't know the name of the complex but like Buffalo is right here and then you got 23rd and then Council is right here and there's like a Quick Shop right here and like a mini-mart over here and mini-mart right there and then there's a little road that goes back and there's a complex right there ..

BY MR. COOK: Okay.

BY MR. SNEED: And it's like around back. And when you come to the back—the end of the driveway you like hit the stoppers.

BY MR. COOK: Is this an apartment?

BY MR. SNEED: Yes. It's a whole apartment complex.

BY MR. COOK: What's the name of it?

BY MR. SNEED: I don't know the **[40]** name of the complex.

BY MR. COOK: How in the world did you find it? Is there somebody sharing that apartment with you?

BY MR. SNEED: Yes. Some of the other roofing crew is staying there.

BY MR. COOK: But you feel pretty—pretty sure that your money is safe there?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Do you have—you say it's—did I understand you to say is there a sock or in some socks there?

BY MR. SNEED: Well, it' s in like one of those round Crown Royal bags.

BY MR. COOK: Yeah.

BY MR. SNEED: But I have like some socks and some underwear.

BY MR. COOK: Kind of on top of it to cover it ?

BY MR. SNEED: Yeah. It's like in a drawer.

BY MR. COOK: Do you have—is that drawer yours?

BY MR. SNEED: Yes. They told me that I could use those drawers for my clothes **[41]** and everything.

BY MR. COOK: Cool. Cool.

BY MR. SNEED: And I kind of didn't grab all of my socks and underwear. They told me to bring some of my clothes up here.

BY MR. COOK: Okay. Now let me ask you, let me go back just a little bit here. Okay?

Now you mentioned that you went up to the office and you took the keys up there. Now then, when you got to the office you rang the bell and you rang the bell as opposed to knocking on the door?

BY MR. SNEED: Yes. There's a little door bell there.

BY MR. COOK: And where is this doorbell? Is it over on the—on the east side, west side? Is it on the side over by where Council Road is or on the other end?

BY MR. SNEED: Well, the office door faces the—the Council Road.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And the doors are back here. And then like on the side of the **[42]** brick and everything there's a little buzzer.

BY MR. COOK: So you just hit the buzzer?

BY MR. SNEED: And then he come and answered the door. He presumed it was me seeing how he woke me up just a few minutes or…

BY MR. COOK: So he's kind of waiting on you?

BY MR. SNEED: Yeah.

BY MR. COOK: And so did he let you in or did he come outside?

BY MR. SNEED: No. He came and unlocked the door and then told me that he would meet me over there at my motel room and then I went up to my—my room and then—

BY MR. COOK: Which is room number what?

BY MR. SNEED: 117.

BY MR. COOK: Okay. So you went around there to your room?

BY MR. SNEED: Yeah.

BY MR. COOK: And then he met you there?

BY MR. SNEED: Yes.

[43] BY MR. COOK: Okay. And—

BY MR. SNEED: Then we got the money and split it.

BY MR. COOK: Wait. You're going a little fast for me. You haven't looked in the car yet, right?

BY MR. SNEED: Right.

BY MR. COOK: Okay. So you're up in your room with him? You two guys then decide to go down and look through his car?

BY MR. SNEED: No. He knew where the money was.

BY MR. COOK: Okay. So did you just give him the key?

BY MR. SNEED: No. I went and got the money.

BY MR. COOK: Oh, you went and got the money?

BY MR. SNEED: Yes.

BY MR. COOK: Where was it exactly?

BY MR. SNEED: It was under the car seat.

BY MR. COOK: Under the car seat? And it was in what?

[44] BY MR. SNEED: Like a brown envelope, just a regular envelope but it was brown.

BY MR. COOK: I see. Just one envelope?

BY MR. SNEED: Yes.

BY MR. COOK: And all that money was in just one envelope?

BY MR. SNEED: Yes.

BY MR. COOK: You got the money?

BY MR. SNEED: Yes.

BY MR. COOK: Did you take—and where was he when you got the money?

BY MR. SNEED: Well, he walked around there with me but I unlocked the door and everything and Rich's in there.

BY MR. COOK: I see. And then what? Did you guys go back up to the motel room?

BY MR. SNEED: We went back to my room and then we went and checked on Barry and then I transported the car.

BY MR. COOK: Okay. Now wait, wait. After you get the money you go back up to 117, correct? You split the money up when **[45]** you're up in 117 right then?

BY MR. SNEED: (Nods head)

BY MR. COOK: Okay. And then the two of you go back downstairs and you say to check on Barry?

BY MR. SNEED: Yeah. We went and peeked the door open to see if he got up or anything.

BY MR. COOK: Did both of you or just you or just him or were you both together?

BY MR. SNEED: Yes.

BY MR. COOK: What about the broken glass from the window? I'm sure there was some laying out on the sidewalk, wasn't there?

BY MR. SNEED: Yeah. I picked it up real quick.

BY MR. COOK: And what did you do with it?

BY MR. SNEED: That's when we pretty much found out that he wasn't going to move again. I just kind of chunked it inside the doorway and then we had me go pick up a piece of—piece of Plexiglas to put over the window there.

[46] BY MR. COOK: What about Barry?

BY MR. SNEED: We just kind of let him alone.

BY MR. COOK: Well, did you do anything to Barry?

BY MR. SNEED: Actually, Rich asked me to kill Barry and that' s what he'd done, yes.

BY MR. COOK: Rich asked you to kill Barry?

BY MR. SNEED: Yes. So that he could run the motel without him being the boss.

BY MR. COOK: And in exchange for doing this?

BY MR. SNEED: I would get seven grand and (inaudible).

BY MR. COOK: You get all of it or you just split it?

BY MR. SNEED: Well, he told me that he would give me all of it, but after it happened he decided he wanted to split it. And then from then on out he said he was going to rent rooms off the books and keep money back and everything and slide me some on the side.

BY MR. COOK: So in addition **[47]** you're going to get—feather your nest, so to speak?

BY MR. SNEED: Yeah.

BY MR. COOK: I see. Okay. So when you leave your room from splitting up the money you go down and you check on Barry; is that correct?

BY MR. SNEED: (Nods head)

BY MR. COOK: Now you both "check on Barry?

BY MR. SNEED: (Nods head)

BY MR. COOK: You need to answer me.

BY MR. SNEED: Yes. We both went in the room and found out that he was completely dead.

BY MR. COOK: And what about the bed clothes, the sheets, the blankets?

BY MR. SNEED: Well, I kind of pulled those off of there and I kind of pulled those off of there and tried to put them over him.

BY MR. COOK: That's what I'm getting at.

BY MR. SNEED: Yeah. We put them **[48]** ,over—

BY MR. COOK: We did, both of you did or is it just you—or not that it makes any difference.

BY MR. SNEED: I know I grabbed them and kind of tossed them over his body a little bit.

BY MR. COOK: Why did you do that? What was the idea?

BY MR. SNEED: Just to cover him up a little bit.

BY MR. COOK: Okay. Is that—is that right after you picked up the broken glass and put it in there?

BY MR. SNEED: I can't recall if it was after or before or during.

BY MR. COOK: But was it during that same visit that you covered him up and put the glass in there?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. Was there anything else you did?

BY MR. SNEED: Moved the car to the back parking lot.

BY MR. COOK: Okay. Now then—

[49] BY MR. SNEED: He asked me to move it to the back parking lot. He told me after that day he was going to go get rid of it and everything and have me follow him in his car and pick him up wherever he dropped it off at.

BY MR. COOK: I see. So the back parking lot is just a temporary drop-off, supposedly. He's going to go get rid of it later?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. So what happened then as far as—does he wait in the office while you get rid of the car?

BY MR. SNEED: Yes. He made frequent trips to the office and then he said he was trying to make it look like to where his girlfriend or wife or whoever she is, I don't know if they were married or not married, but wouldn't think nothing because she's the one that told him that she had just seen Barry's car pull back in when they were still in the office at 3:00 that morning or 2:30 or whatever it was. I don't know exactly when it was.

BY MR. COOK: Deanna—

BY MR. SNEED: Yeah.

[50] BY MR. COOK: —told Rich that she saw Barry's car pull back in at 3:00 or 3:30, whenever it was?

BY MR. SNEED: Yes. 2:30 or 3:00.

BY MR. COOK: How do you know that ?

BY MR. SNEED: Because he told me that. Because they were sitting up at the office, the room in the office because the office doors like—he keeps them open until he's about ready to go to bed.

And then I guess she was up like at the front desk, you know, just standing up there taking care of a customer or whatever.

And, then she said she—she went and told Rich that she just saw Barry pull back in and; that's when Rich jumped up and come running down and woke me up and told me he was back.

BY MR. COOK: Do you know or not if Barry had already checked into 102?

BY MR. SNEED: From what I understand he took the key with him before he went to Tulsa so Rich wouldn't rent that room so he would have that room for the night.

[51] BY MR. COOK: Okay. Now then tell me about this piece of Plexiglas.

BY MR. SNEED: He asked me to go down to Payless and get a piece of Plexiglas so we could cover that hole that was broke so like none of the little kids that run around there would go digging their hands in it and everything and maybe get cut or something like that.

BY MR. COOK: So that morning did you go to Payless and get some Plexiglas?

BY MR. SNEED: Yes.

BY MR. COOK: And what time did you go? It must have been awful early?

BY MR. SNEED: It was like right when they opened.

BY MR. COOK: Okay. Do you have any idea when that is?

BY MR. SNEED: About 8:30 or nine o'clock.

BY MR. COOK: Did you pay cash for the Plexiglas or what?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. So you brought the Plexiglas back and what did you do?

[52] BY MR. SNEED; And we siliconed it around the—the other window.

BY MR. COOK: You say we, you and Rich both did?

BY MR. SNEED: Yes.

BY MR. COOK: Okay. What else did you do?

BY MR. SNEED: Before we even did that we taped a shower curtain up over the inside of the window while we was there, yeah.

BY MR. COOK: Both of you or just you, just him?

BY MR. SNEED: Yes. We both taped it up there.

BY MR. COOK: Let me ask you, how were you dressed that particular night or early that morning ?

BY MR. SNEED: Just a pair of jeans and a shirt.

BY MR. COOK: Where—where is that shirt and that pair of jeans?

BY MR. SNEED: In the laundry room on the top shelf because I didn't—I still had them in my room when the cops found Barry's car sitting in the back parking lot.

[53] BY MR. COOK: Uh-huh.

BY MR. SNEED: And I walked them to the laundry room and stuck them up on the top shelf underneath like some old curtains and stuff so that they think it's all curtains that are up there.

BY MR. COOK: Help me out just a little bit here. This is the laundry room. Here I think is the door. Don't you come in like right here? Over here is maybe the washer and dryer?

BY MR. SNEED: Okay. Here's the double doors and you come in and right there are two like home washers sitting right here.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And then there is like a third cycle washer there and this is the front door.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And there's just another little doorway, you got two dryers sitting here with a t able in the front.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And there's this other little doorway which opens up to a room **[54]** that has just get a shelf in here and a shelf in here and a shelf in here. That's got like 1, 2, 3, 4—like 4 or 5 shelves, but anyway …

BY MR. COOK: Where are the shelves? On this wall?

BY MR. SNEED: Yes. There are shelves on all the walls. They're just all built around.

BY MR. COOK: Uh-huh.

BY MR. SNEED: And as you walk in the door on the left side there's a bunch of curtains on the top shelf and I kind of had—

BY MR. COOK: The top shelf on this wall?

BY MR. SNEED: Yeah. I kind of had them in like a canister that had a bunch of popcorn and had like a spacer like popcorn and like different flavored popcorn. It's like all different flavored popcorn. They had caramel corn and some other type of popcorn. I don't remember.

BY MR. COOK: You mean they are just empty canisters?

BY MR. SNEED: Yes.

[55] BY MR. COOK: And that's what you put your clothes down in?

BY MR. SNEED: Yes. A big empty canister like a (inaudible) canister and I had all the things down here and I threw them and a pair of shoes that I had underneath all those curtains.

BY MR. COOK: So they're all still there?

BY MR. SNEED: Yes. They all should be still there.

BY MR. COOK: Okay.

BY MR. SNEED: That's where I put them and I left them on top.

BY MR. COOK: Were you wearing a hat?

BY MR. SNEED: No.

BY MR. COOK: What about your coat?

BY MR. SNEED: I wasn't wearing a coat.

BY MR. COOK: What kind of a shirt was it?

BY MR. SNEED: I think I had two shirts on. I think I had a long-sleeved shirt **[56]** which was black and then I think I had a—well, it was a black T-shirt until I bleached it and it was kind of like a tanish beige. I bleached it.

BY MR. COOK: And then your jeans and your shoes? And they are all in those empty canisters?

BY MR. SNEED: It should all be in that one canister. It's like a gallon canister, a five gallon or something like that, two and a half gallon.

BY MR. COOK: And you put them there when the cops discovered Barry' s car over at the credit union?

BY MR. SNEED: Yeah. I put them there while they were all over there. I walked and threw them in the laundry room—under the laundry room and I shoved them up in there and left the motel.

BY MR. COOK: I see. You know, you had two or three people hit you up, ask you if you had been in a fight or what you done to your eye.

BY MR. SNEED: Yeah. I told them I hit my soap dish while I was taking a **[57]** shower.

BY MR. COOK: Who all—who all hit you up?

BY MR. SNEED: I know Deanna did. Billye, I don't—I don't think she ever asked me about it. And I know the two maids that—the black couple that was working for their room also, which I don't think Barry knew that they were working there also.

BY MR. COOK: What about Kayla, do you remember her asking you?

BY MR. SNEED: She might have asked me. I know who you're talking about.

BY MR. COOK: Okay.

BY MR. SNEED: But that's the story me and Rich conjured up to tell them about my black eye.

BY MR. COOK: So when is it you cut out then?

BY MR. SNEED: When I left the motel?

BY MR. COOK: Yes.

BY MR. SNEED: When the cops were over there messing with the car I guess 2:00 or 3:00 that afternoon, that next day.

[58] BY MR. COOK: Is that when you left?

BY MR. SNEED: Yes.

BY MR. COOK: What did you do? Did you just take out on foot?

BY MR. SNEED: Yes. And then I went right down Reno. Between Reno and Rockwell there's a stop sign that turns into that company where the bridge is at, there's like a bridge there. I kind of stashed under that bridge until dark.

And then I didn't really expect them roofers to still be in town when I was crossing—I was in there using the pay phone. And when I got to Rockwell I seen that somebody was on that pay phone, so when I was crossing over that bridge I saw some of the workers that I used to work with that was like the boss' son-in-law. And I seen them cross over the bridge so I went ahead and walked down to that trailer park and I asked them if

they still were looking for a hand because that one boss had been by like a couple of weeks before Christmas telling me they might be back, that he was going to go to California and everything **[59]** and get some work built up, but if they had enough work to stay in Oklahoma City that they would still be working there. And I didn't really figure that they would be there and so I went back to work with them.

BY MR. COOK: One other thing I need to ask you that I didn't.

Now you were wearing those two shirts, a long-sleeved one and a bleached out black one that was kind of beige looking and your blue jeans. Were you wearing a belt?

BY MR. SNEED: Yes.

BY MR. COOK: When you were in that scuffle did it get broken?

BY MR. SNEED: Yeah. I think the little clasp came off of it.

BY MR. COOK: The little metal clasp ?

BY MR. SNEED: It wasn't on there real good.

BY MR. COOK: Is that belt, is it with your clothes?

BY MR. SNEED: No. I think I chunked it in the trash with the baseball bat.

BY MR. COOK: How come you chunked **[60]** it? How come you didn't just chunk all of the clothes?

BY MR. SNEED: Well, I had planned on doing that, but I don' t know why I didn't.

BY MR. COOK: But the belt you threw away along with the baseball bat?

BY MR. SNEED: Yes.

BY MR. COOK: Well, let me ask you this. I found kind of a pocketknife in that room. Is that yours ?

BY MR. SNEED: Yeah. I found it in a—in a room, one room that I had been cleaning before. And I usually carried it around because he didn't have the—he lost his master key to like 107 and I would use it to pop the lock on 107.

We'd have to get in and clean it because we only had like one key and usually the people he rented that room to would like leave the key in the room and I had to have some way of getting into that room. So I would just kind of stick it in there and the door didn't really shut good on 107 so it was really easy to pop.

BY MR. COOK: Well—

[61] BY MR. SNEED: He told me to do that until he could get another—another lock for it.

BY MR. COOK: When you—when you and Barry were struggling, okay, I was in that room for quite a while. Okay? They teach me to be able to look at certain things like maybe a little bit of blood on the wall and it kind of tells me a story of what happened in that room.

And I spent so much time in there that quite frankly, Justin, there was a hell of a fight in there. That's the way I look at it. I mean, that's what I'm thinking.

Is that what you—would you agree with that?

BY MR. SNEED: Well, we struggled for a little bit but there wasn't that much of a fight.

BY MR. COOK: Did you end up stabbing him once with that knife?

BY MR. SNEED: Huh-uh.

BY MR. COOK: Do you remember losing the knife? Did you have it out?

BY MR. SNEED: I recall dropping **[62]** it after I left the room because I knew I didn't have it on me no more.

BY MR. COOK: Okay. Was—was he moving around or making any kind of noise at all when you left?

BY MR. SNEED: Huh-uh.

BY MR. COOK: And you don't remember how you cut your eye?

BY MR. SNEED: No.

BY MR. COOK: Or blacked it?

BY MR. SNEED: I don't remember how that happened.

BY MR. COOK: Take off your hat.

It kind of shades you, let me see it. That's okay. You don't need to bend over. Just—you've got a few little nicks and cuts on your face here, too, don't you?

BY MR. SNEED: Yeah.

BY MR. COOK: And you got a little nick on your ear. Let me see the other side.

BY MR. SNEED: (Complies)

BY MR. COOK: Well, you were in a little bit of a fight there, weren't you?

BY MR. SNEED: Yes, a little bit of a struggle.

[63] BY MR. COOK: But you have thrown the ball bat away?

BY MR. SNEED: Yes.

BY MR. COOK: You're absolutely sure you threw it away?

BY MR. SNEED: Yes. I put it in the dumpster.

BY MR. COOK: Which dumpster?

BY MR. SNEED: That dumpster, the dumpster right there the next day or that following Wednesday. I think it was Tuesday morning, I guess.

BY MR. BEMO: When all this happened?

BY MR. SNEED: It was like three o'clock in the morning when he woke me up, so it would be Tuesday morning. Then that Tuesday I put it in the dumpster and it would have left out that Wednesday morning like nine o'clock.

BY MR. COOK: Was the dumpster right there at the motel?

BY MR. SNEED: Yes. It was right there at the motel.

BY MR. COOK: The motel dumpster?

BY MR. SNEED: Yeah.

[64] BY MR. COOK: Do you have any—do you mind signing a search waiver so that we can go get—get that money?

BY MR. SNEED: No. I don't know how they would look at it, but yeah.

BY MR. COOK: How who would look at it?

BY MR, SNEED: The people who live there.

BY MR. COOK: Well, we'll talk to them and explain the situation. Okay?

What about—what about your motel room, would you sign a search waiver to let us look in there?

BY MR. SNEED: Yeah. There ain't nothing in there, but yeah.

BY MR. COOK: Okay. Is there anything else—

BY MR. SNEED: No belongings in there.

BY MR. COOK: Is there anything else about this deal that you need to tell me about? Have you been—have you been truthful with me about it?

BY MR. SNEED: Yeah, pretty much.

[65] BY MR. COOK: Pretty much?

BY MR. SNEED: Well, all that I can think of.

BY MR. COOK: Was Rick Page involved in this in any way?

BY MR. SNEED: Is he the guy that drove the motorcycle?

BY MR. COOK: Uh-huh.

BY MR. SNEED: No.

BY MR. COOK: The one who kept his dog?

BY MR. SNEED: Yeah. There wasn't nobody else involved.

BY MR. COOK: Nobody else involved?

BY MR. SNEED: He just stayed there—he stayed there for like two or three weeks in the motel and then they checked out, him and his wife, and they just like his two kids.

And one day he showed back up there at the motel and he conned Rich into giving him a room for free that

night. And before he left he kind of conned me into watching his dog.

[66] But he told me he was going to be for like maybe two days because all he had was his motorcycle and he said he would be back in his vehicle to get his dog. And it took me like a week to finally get him to come get his dog.

Because he called me and told me that this was the number that he was at and that he'd be by in a day or so to get his dog. And I waited for like a week and then called him back and he came by like twice while I had his dog.

And after he brought some dog food over and all that I kind of figured he was trying to just pawn his dog off to me so I called him and told him to come and get it or I was going to turn it loose.

BY MR. COOK: Okay. I will be back in just a minute. Okay?

(Bemo and Cook leave the room and then return)

BY MR. COOK: Justin, would you like a cup of coffee?

BY MR. SNEED: Yes, sir. Thank you.

[67] BY MR. COOK: Do you drink it black?

BY MR. SNEED: Yeah. That would be fine.

BY MR. COOK: Okay. I'm going to go get you one. Okay?

BY MR. SNEED: Okay.

BY MR. BEMO: Let me get you to stand up here. Let me get you to take your ball cap off and your coat. Kind of look, yeah, just like that.

(Bemo is taking Polaroid photographs of Sneed)

BY MR. BEMO: Let's see your hands.

BY MR. SNEED: Like this?

BY MR. BEMO: Yes.

BY MR. SNEED: Those are like just roofing marks.

BY MR. BEMO: Yes. Can you turn that just a little there. No, that one. This one, yeah, there you go.

(Bemo is taking Polaroid photographs of Sneed)

BY MR. BEMO: Do you have any **[68]** marks on your arms?

BY MR. SNEED: No.

BY MR. BEMO: How about on your body?

BY MR. SNEED: Well, I got some tattoos, but I ain't got no marks, (inaudible).

BY MR. BEMO: Turn around and let me see your back there.

BY MR. SNEED: (Inaudible)

(Bemo is taking Polaroid photographs of Sneed)

BY MR. BEMO: I don't need a picture of that.

BY MR. SNEED: (Inaudible), The other two I got are two crosses like that.

BY MR. BEMO: Okay. Tell me something I'm just curious about, how come you would hide your clothes up there in the laundry room and then throw the bat away with the belt? Why would you do that?

BY MR. SNEED: Because I took off the belt after I figured out that it broke. And I had the bat with it and I went to the dumpster and threw that in the dumpster

and I just kind a chunked the belt while I had it in **[69]** there.

And then I went to my room and take off my clothes real quick and jumped in the shower and rinsed off and everything. And I then put on some fresh clothes and I put them all in the canister and I still had them in my room for some reason. I don't know. I was going to put them in the dumpster but Rich said no, let's burn them. And I knew the trash was leaving the next day.

And then they found the car I still had them and I didn't want them to see me carrying them to the dumpster, so I went and put them in the laundry room real quick.

BY MR. COOK: I see. Okay. What we—what we would like to do at this point is we have a piece of paper, we call it a waiver, a search waiver. And we'd like for you to sign the search waiver.

What it is we want to look inside not only room 117, your room there at the motel, but we would like to go to the apartment where the money is and look in there, also.

BY MR. SNEED: Well, I can give you the right to go directly in and get the **[70]** money but I can't give you the right to search the whole apartment.

BY MR. BEMO: That's okay. We'll—we'll speak with the other gentlemen.

BY MR. COOK: Are the other guys there at the apartment now?

BY MR. SNEED: Oh, they should be.

BY MR. BEMO: How many guys do you share that apartment with?

BY MR. SNEED: There's two guys and then there's a women, one of them is married and the other one just has a girlfriend.

BY MR. COOK: Oh, is the women stay there with them?

BY MR. SNEED: Yeah.

BY MR. COOK: What are their names?

BY MR. SNEED: David Jackson, I think. I think that's his last name is David Jackson. And Kim, which is Rob Brassfield' s daughter-in-law, I guess. It's like his wife' s daughter and they are married and they got a little baby.

BY MR. COOK: Okay. Who's **[71]** apartment actually—

BY MR. SNEED: It's under their name. I don't know.

BY MR. COOK: Under David Jackson's?

BY MR. SNEED: Yeah. I supposed it would be under his name.

BY MR. BEMO: What motel is this at?

BY MR. SNEED: I don't know the name of the complex.

BY MR. BEMO: It's an apartment complex?

BY MR. SNEED: Yes. I know I can kind of—kind of graph it out for you.

BY MR. BEMO: Well, we're going to take you out there and you can show us where it's at.

BY MR. SNEED: Oh, all right.

BY MR. COOK: Is that okay?

BY MR. SNEED: Yeah. That's fine. I'll go out and help you and everything.

BY MR. COOK: Did you copy that?

BY MR. BEMO: Yes. He's copying that for me now.

[72] BY MR. COOK: Oh, okay. I'll get it for you.

BY MR. BEMO: You said—oh, you got some coffee there?

BY MR. SNEED: So is this going to help me out any at all by telling you all this?

BY MR. COOK: Well, we'll just have to wait and see. This is definitely going to be better for you this way then it would be if you didn't say anything.

BY MR. SNEED: Well, what's the maximum sentence for murder one?

BY MR. COOK: Murder one? Well, the maximum is death.

BY MR. SNEED: I guess I should have suspected that.

BY MR. BEMO: But there's also two other charges. It could be life without parole or life.

BY MR. COOK: Are you guys ready? We'll go down here.

BY MR. BEMO: Why don' t you just bring them in here and let's sign them in here.

We went to the jail and he'll bring them back—he's going to bring them back here.

[73] BY MR, COOK: All right.

BY MR. SNEED: Suppose it's life, do you get parole?

BY MR. BEMO: Yeah. Well, it seems like you can after about a third of your sentence. They will figure it's—45 years is a life term. There's all kind of things that can happen in this and it's really kind of premature for—

BY MR. SNEED: Well, I should look forward to the next 40 years of sitting in a cell?

BY MR. BEMO: Oh, well, I don't know. But I'm going to tell you this, your old bud, Rich, was planning on letting you hang by yourself for this.

BY MR. SNEED: Well, I ain't going to hang by myself. I'm telling you all the truth.

So you all are going to search this whole apartment?

BY MR. BEMO: No. We just want—we just want you to sign a waiver so that we can go in—you said you had just a couple of drawers in the apartment that are yours?

[74] BY MR. SNEED: Yes.

BY MR. BEMO: Or one or whatever it is. I don't know. All we want is to go in there and—and look in your drawer and get that money out. That' s all we want. We don' t want to search the whole apartment. And we're not interested in what they're doing or what they have or anything like that.

Okay. Now, this is a consent to search waiver form, okay. Let me read it to you. Look at this here. While I'm reading it you read along with me. It has a blank spot up there that I will have you print your name in.

And it says after having been advised of my right not to have a search made of my premises hereinafter mentioned without a search warrant that my right to

refuse to consent to such a certain hereby authorizing Inspector Bemo and Inspector cook, officers of the Oklahoma City Police Department to conduct a complete search of my premises located and we'll get the address of that apartment complex out there, in Oklahoma City, Oklahoma.

These office are authorized by me to take from my premises any letters, papers, **[75]** materials or property which they may desire. This written permission is being given by me to the above-named officers voluntarily and without any threats or promises of any kind. Okay?

Now want I want you to do is I want you to print your name up here.

BY MR. SNEED: Full name?

BY MR. BEMO: Yes.

BY MR. SNEED: (Complies)

BY MR. BEMO: Okay. Now I want you to sign your signature there.

BY MR. SNEED: (Complies). Okay.

BY MR. BEMO: I'll have them sign it out there.

BY MR. COOK: Okay. And we'll need one for 117.

BY MR. BEMO: 117?

BY MR. COOK: Yes. sir.

BY MR. BEMO: Okay. That's—okay. This same thing applies to your room out there on Council at the Best Budget.

Did you not see the news tonight or anything?

BY MR. SNEED: Yeah. I was **[76]** sitting there watching it while I was waiting for the officers to come pick me up.

BY MR. COOK: Okay. You knew they were coming?

BY MR. SNEED: Yes. They showed up at my boss' house. My boss said that he would go get me and bring me back to his trailer and then they didn't pick me up there and then they came along. You come out without any trouble.

BY MR. COOK: Ready?

BY MR. BEMO: Okay. Grab your smokes there and come with us.

(End of interview)

[77]

C E R T I F I C A T E

STATE OF OKLAHOMA
SS :
COUNTY OF CLEVELAND

I, LARRY L. SHALBERG, a Certified and Registered Court Reporter in and for the State of Oklahoma, do hereby certify that the foregoing videotaped interview was taken by means of a computer-aided stenograph machine and that such proceedings have been correctly transcribed and reduced to writing under my supervision and is fully and accurately set forth in the preceding pages.

I FURTHER CERTIFY that said proceedings as above set forth constitutes a true record of the proceedings.

[Signature]
LARRY L. SHALBERG,
CSR-RPR
CERTIFIED &
REGISTERED COURT
REPORTER
CSR No. 00366

Oklahoma County
Crisis Intervention Center
[Filed July 17, 1997]
[Letter]

July 1, 1997

THE HONORABLE JUDGE Richard Freeman
Oklahoma County District Court
321 West Park Avenue
Oklahoma City, OK. 73102

RE: Justin B. Sneed
Case No: CF-97-0244

Dear Judge: Richard Freeman

Enclosed, please find the Psychiatric Evaluation for the Determination of Competency to Stand Trial on.

Respectfully submitted,

/s/ Edith King, Ph.D.
Edith King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern. L Smith, Assistant District Attorney
George Miskovsky III, Assistant Public Defender

DETERMINATION OF
COMPETENCY TO STAND
TRIAL PSYCHIATRIC EVALUATION

DATE: July 1, 1997

RE: Justin B. Sneed
CF: 97-0244

By order of the Oklahoma County District Court, Judge Richard Freeman, under Oklahoma Statute Section 1175.3 dated April 22, 1997 and received in this office April 24, 1997. Justin B. Sneed was examined at the Oklahoma County Jail July 1, 1997.

The following statutory questions are responded to accordingly, and a more detailed psychiatric summary is attached.

1. Is this person able to appreciate the nature of the charges against him or her?

Yes. Mr. Sneed said he is in jail on a "Murder I" charge which he said is "for killing somebody." He explained "If I'm found guilty it means the death penalty." He also said "It (Murder I) carries life, life without parole." Asked about his options, he said "after what I've said to some people going home is probably not possible." He indicated that the alleged crime was in connection with a burglary but that he does not carry a charge of burglary. His history includes some "hot checks" in Texas but, he said, "that doesn't matter."

2. Is this person able to consult with his or her lawyer and rationally assist in the preparation of his or her defense?

Yes. Mr. Sneed correctly identified his lawyer by name and said he has seen him one time. He also identified an investigator he has talked to. He said he has also been

assigned another lawyer in addition to the first. In his appraisal, he said his only hope to get out of the death penalty is to plead guilty. He also said that if his only possibility is either life without parole or death he would not plead guilty, since he does not want to spend the rest of his life in prison. He explained that if he received life without parole he would get tired of it—it would be depressing, with no sunlight and no air. He understands other terms such as probation, and said he had a year's probation as a juvenile for burglary of a house and a bomb threat. He is very aware of how limited his options are at this point.

3. If the answer to question 1 or 2 is "no", can the person attain competency within a reasonable time if provided with a course of treatment, therapy or training?

N/A.

4. Is the person a mentally ill person or a person requiring treatment as defined by Oklahoma Statute Title 43A, Section 3?

Yes. Mr. Sneed denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling. He was apparently married and said his wife used to tell him she thought he had "problems.· She thought he had trouble "paying attention" and may have had ADHD (Attention Deficit Hyperactivity Disorder). He admits to using a variety of drugs including marijuana, crank, cocaine, and acid. He said he drank alcohol for one summer but didn't like it.

He is currently taking lithium at the jail and said it was administered after his tooth was pulled. He was not on lithium before coming to the jail and was started on it in

March. He does not think he has any serious mental problems although he said he has "deja vu" sometimes. When he first came to the jail he said he had a strong feeling the pod was familiar. He now has this sensation once or twice a month. The lithium helps him "not to feel so angry" and he used to get angry quite often. He said he used to "yell at teachers and reject everyone and get into fights." It sounds as if he may well have had ADDHD and mood instability which lithium may help. He denies auditory or visual hallucinations but said he sometimes gets a ringing in his ears.

At this time Mr. Sneed gives an impression of being depressed to a moderate degree. He is able to communicate quite well for the most part, but his affect is flat and sad. Medication is probably helpful.

5. If the person were released without treatment, therapy, or training, would he or she pose a significant threat to the life or safety of himself/herself or others?

Yes. This is answered in the affirmative only because he has a violent history, a history of polysubstance abuse, and is facing charges on a violent crime. He does not give an impression of being a violent person. He was calm and quiet and cooperative. He answered questions fully and did not seem to conceal anything. He was not at all threatening in manner.

Summary of Psychiatric Examination

Justin B. Sneed is a 19 year old Caucasian male who was born on September 22, 1977. He stated that he was born in New Mexico and lived in both Texas and Oklahoma after that. He lived with his mother and stepfather because his parents divorced when he was four and she remarried. He has one stepbrother and one full brother. He has two sisters. He said he was the "baby" until recently when his mother had a baby.

He said he was kicked out of school in the 8th grade for fighting other students and teachers. He was described as "a trouble maker.·

He was married when he was 17 years old to a girl he had been with from the age of 16. She became pregnant and they are still married but separated. He and his wife have two daughters who are with his mother.

Mr. Sneed said he used to "reject authority" and grew up as a boy who often got into trouble. He had "plenty of spankings" and was especially hateful toward his stepfather. He said he and his mother have always gotten along "just great" and his wife referred to him as a "momma's boy."

It may well be that Mr. Sneed has had an atypical mood swing disorder in his past characterized by "ups and downs" including anger outburst. His hyperactivity would be consistent with that picture. His present medication is probably helping him control his moods.

Mr. Sneed is able to assist an attorney and communicate satisfactorily regarding his legal situation. He is in touch with reality and positive in his attitude toward his lawyers. It is recommended that he be considered competent to stand trial.

[Signature]

Edith G. King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern L. Smith, Assistant District Attorney
George Miskovsky Ill, Assistant Public Defender

STATE OF ARKANSAS
SS:
COUNTY OF SEBASTIAN

AFFIDAVIT OF
D-ANNA WOOD

D-Anna Wood, a person of lawful age, being duly sworn, deposes and states as follows:

1. I first met Richard Glossip in Rock Island, Illinois about 1992. Richard was the manager of a Dominoes Pizza Restaurant and D-Anna started working there. Richard was the only child from a family of sixteen siblings that made a career for himself as a manager.

2. Richard Glossip ran away from his own home to get away from the turmoil that was a constant in his home. An Illinois police office had found Richard sleeping on a park bench and helped him locate gainful work. Richard is a intelligent and diligent worker who applied himself to get away from his family setting.

3. After the death of Berry Vantirce I learned that all of my work at the Best Budget Motel, cleaning rooms, catching calls at the desk, etc. were done at no salary. Richard Glossip would allow me to purchase clothing and basic household items for their living. I believed I was a prat of the staff, however, after Berry's death I was told different by the Vantrice family. I was not married to Richard, I believed the check that Richard Glossip received from the motel contained wages that were due to me. After the arrest of Richard Glossip I had no job, no place to stay, no place to move to. This is when Jim Gainey came my aid.

4. I was at the Continental Inn Motel in Oklahoma City, Cliff Everheart was working there as a security officer. On one occasion Cliff went to a room where many juveniles were staying. In the room was a great quantity of illegal drugs. Cliff Everheart took the drugs and allowed all the juveniles to leave without charging any of them. Cliff Everheart left the area with the drugs in his possession.

5. Jim Gainey was was a good person. He was a friend of the Vantrice family. The Vantrice family was of the opinion that D-Anna's boyfriend, Richard, had just killed Berry and it was time that D-Anna moved out. For two or three weeks after Berry's death, D-Anna was allowed to work at the motel, answering calls, taking care of the front desk. In turn, D-Anna was allowed to receive collect telephone calls from Richard Glossip at the desk. These calls were then deducted from her salary. This was arranged by Jim Gainey. Since I did not drive at that time, Jim would drive me to the county jail where I would visit Richard Glossip. Jim, would wait on me, but was not present for my visits nor did he visit Richard.

6. I did not know about any money belonging to Richard Glossip being hidden in the room we shared. There was a cookie jar being in the pantry of our room, however, I never knew of any money being in this jar. In our room were the receipts and collections from the motel. At times there was many thousands of dollars in the cabinet waiting on Berry Vantrice to come and collect it. Richard and I were paid well for their managing the motel.

7. The evening of the crime, I did hear a scraping noise that was similar to a stick on the side of our room. Richard got up put on is 49's jacket and slippers to

answer the door. Richard, said to her that it was Justin reporting that two drunks had broke a window. Richard told Justin to clean it up. After hearing about this I went back to sleep. The next day on seeing Justin she I the bruise on his eye that he said came from a fall in the shower into the soap dish.

8. On the next day, after Berry was missing, Cliff Everheart took me and Richard to the motel rooms to look for the body of Berry. This was after Justin had made a check of the rooms, and after Berry's car was found. Cliff went directly to Room 102 and found Berry. I looked inside the room from the door and saw the covered body of Berry on the floor with his arms out.

9. After Justin Taylor was arrested I saw that Justin had changed his hair color from dark brown to an orange-blond.

10. After Richard was brought in for questioning by the Oklahoma City Police Department, we begin to sell all of our furniture, and vending machines in order to pay the attorney fee of Wayne Fournarat.

11. I was allowed to sleep before I took a polygraph examination by the Oklahoma City Police Department. Richard Glossip, was not allowed to sleep before he took his examination, he was very tired and had be questioned by the investigators before the examination was offered.

12. After the crime Jim Gainey did help me acquire an automobile, a 1990's, Chevrolet Cavalier to aid me in earning a living. Jim put the car in his name and made the initial down payment and insured it. I just did not make sufficient salary to maintain the car so it was allowed to return to the mortgage holder.

13. Justin Taylor was having a problem with Berry Vantrice. Justin would work for the motel and all he ever got out of it was a free room. Berry did not pay any salary to Justin, this was difficult for Justin to deal with.

FURTHER AFFIANT SAYETH NOT.

[Signature]
D-Anna Wood

Subscribed and sworn to before me this 7 day of February, by 2001.

[Signature]
Notary Public

My commission expires: June 25, 2004