ATTACHMENT 37

Frederick Rideout, Jr.-Gray #255135
Oklahoma Department of Corrections
Oklahoma State Penitentiary
Post Office Box 97; O-Unit; 2 side; Cell #31
McAlester, Oklahoma 74502-0097

Attorney-At-Law
Mr. Mark Henricksen
600 North Walker Ave.
Okla. City, Okla. 73102

Friday · October 2nd, 2015

IN RE: Glossip v. State of Oklahoma, et al.,
Subject: Sworn Affidavit of offender, Frederick Gray.

Dear Mr. Henricksen:

Please find enclosed my sworn affidavit of what I know about the State of Oklahoma v. Justin Sneed and Richard Glossip. I have never met Mr. Glossip. However, I was at Joseph Harp Correctional Center in

Lexington, Oklahoma with Sneed and Scott. I am sending you an original and the copy of my affidavit. If I can be of any help to you or Mr. Glossip's legal team, feel free to call the facility with a message, or write me at the address listed above and below.

Most Sincerely

Frederick Rideout

Offender, Frederick Rideout Jr.-Org #255135
Oklahoma Department Of Corrections
Oklahoma State Penitentiary
Post Office Box 97, D-Unit, 2 side, Cell #31
McAlester, Oklahoma 74502-0097

SWORN AFFIDAVIT OF FREDERICK GRAY

Pittsburgh County } ss:
State of Oklahoma }

I, Offender, Frederick Gray #255135, who's currently housed at Oklahoma State Penitentiary at Post Office Box 97; D-Unit; 2 side; Cell #31; Do solemnly affirm the following to be true under penalty of perjury. Between July 22nd, 2008 and January 9th, 2009 I was employed in the Law Library and Liesure Library prospectively. As a Law Clerk my day to day duties were to assist inmates with legal research involving criminal cases that they were convicted of, and/or Civil lawsuits dealing with the conditions of confinement. While serving as the Law Clerk at Joseph Harp Correctional Center in Lexington, Oklahoma (16161 Maffate Road, Lexington, Oklahoma 73051 or Post Office Box 548, Lexington, Oklahoma 73051-0548) I met two guys who use to visit the Law

Library from time to time. I only knew them as Scott and Sneed. Everyone called Scott youngster. Sneed went by his last name Sneed. I never got his first name. As part of being jailhouse lawyers we share our cases as a meeting protocol. Sneed was seeking to have his sentence commuted. We spoke indepth about his case. He bragged about his crime as he didn't care for human life. He told me him and his fall partner who would be Mr. Richard Gibssip (he never gave me the name of his fall partner or the name of his victom) got payed by their boss. Sneed seen all the money his boss had and devised a sinister plan to just rob his boss. His fall partner left the job with his pay in hand to go home to his family. Later Sneed came back to rob his boss on his own account. Things got out of hand and Sneed killed his victom. He wanted to cover it up, but he needed help. His fall partner whom would be Mr. Gibssip would not come to his aid because Sneed

would not tell him the urgency of his call. So I asked him if he acted alone. He affirmed he indeed acted alone. So I asked him "how do you have a fall partner and where is he." I quote he said "since he wouldnt help me in my need, I'll see if I can get some revenge and I testified for the state for a L-WOP (life imprisonment without possibility of parole) against him; he got death." The killing thing about it is I told them he hired me to kill our boss which was a lie." "If he had any kind of attornys they would have only found my entire traces; They would have argued that he had an alibi, my drug addiction single life gave me motive and opprotunity; and my fall partner couldnt afford to pay me to kill someone." "To be completely honest I didnt want to kill my victom but he put up a fight for the money and things got out of hand." He didnt say he was sorry for his victom or his family. He was actually angry at the guy he lied on to get on death row.

Any further affaint saye th not at this time.

Frederick Robert Gray

Offender, Frederick Gray #255135
Oklahoma Department Of Corrections
Oklahoma State Penitentiary
Post Office Box 97, D-Unit, 2 side, #31
McAlester, Oklahoma 74502-0097

On this day October 2nd, 2015 the above swore the foregoing affidavit above.

Notary Signiture

13002552
Seal Number

3/15/17
Date Seal Expires

ATTACHMENT 38

AFFIDAVIT OF KRISTI CHRISTOPHER

STATE OF OKLAHOMA)
)
)
COUNTY OF OKLAHOMA)

I, Kristi Christopher, a person of lawful age, being duly sworn, under penalty of perjury do state as follows:

1. I am an attorney licensed by the State of Oklahoma.

2. I was retained by counsel for Richard Glossip in 2015 to assist in investigating his claim of innocence.

3. In 2015, I contacted Gina Walker, who used to work for the Oklahoma County Public Defender's Office and represented Justin Sneed in conjunction with the 1997 murder of Barry Van Treese, about this case. Ms. Walker and I were previously acquainted.

4. I asked Ms. Walker if she would be willing to provide materials from Sneed's case that were not privileged concerning, in particular, discovery that she may have received. She agreed to provide some materials.

5. However, when Ms. Walker attempted to locate her files, she stated that she was told that her office had shredded files from closed cases several years before because they did not want to pay the cost of storage. She told me that Mr. Sneed's file was among those that were destroyed.

6. I attempted again to contact Ms. Walker in 2020 but received no response.

7. Unfortunately, Ms. Walker passed away from cancer in late 2020.

I swear upon penalty of perjury that the statement in the foregoing page is true and accurate to the best of my knowledge and recollection.

Further, Affiant sayeth naught.

Kristi Christopher

LAURA POINTON GIBLIN NOTARY PUBLIC STATE OF OKLAHOMA # 18007034 EXP. 07/16/26

Subscribed and sworn before me on this 20th day of September, 2022.

Laura Pointon Giblin
09/20/2022

ATTACHMENT 39

DONALD R. KNIGHT
ATTORNEY AT LAW

MERI WRIGHT
PARALEGAL

October 8, 2020

David Prater
Oklahoma County District Attorney
Oklahoma County District Attorney's Office
320 Robert S. Kerr
Room 505
Oklahoma City, OK 73102

RE: Request for Interview Notes Taken Prior to Glossip Trials

Dear Mr. Pater,

As you recall, this firm is part of the legal team representing Richard Glossip on his innocence litigation, which investigation is ongoing in advance of an anticipated execution date. In support of this investigation, we have previously requested all documents contained in your files on this case, and that request has been denied. With this letter, we renew that request. However, in an attempt to more specifically tailor our request, we ask here that your office provide Mr. Glossip's defense team with access to the notes taken by prosecutors and any investigators or staff members working with them during interviews with witnesses in preparation for Mr. Glossip's 1998 and 2004 trials. We specifically request access to such notes for all witnesses interviewed, including those the prosecutors chose *not* to call at either trial. We do not make this request without cause to do so.

Based on the prior practices of the Oklahoma County District Attorney's office, we have reason to believe that during the time interviews were conducted with witnesses prior to both trials, prosecutors and investigators routinely took notes during such interviews, and the information gathered was not always provided fully and fairly to the defense. Should those notes contain any information that could be construed as exculpatory or impeaching (for the witness him or herself if he or she testified, or for any other witness), their disclosure is constitutionally mandated under *Brady v. Maryland*, 373 U.S. 83 (1983) and *Giglio v. United States,* 405 U.S. 150 (1972). If, in fact, the witness said

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only what the prosecutors had previously disclosed to Mr. Glossip's trial attorneys, then sharing these notes with Mr. Glossip's current defense team cannot possibly cause any problem for your office. Providing the notes will ensure that the process is, and appears to be, fair and will comply with one of the recommendations made by the bipartisan Oklahoma Death Penalty Review Commission in 2017.

By specific example of what we seek, and to avoid any thought that we are engaged in a "fishing expedition," Jackie Williams and her daughter, Kathryn Kay Timmons, were both interviewed by trial prosecutor Gary Ackley immediately prior to the 2004 trial. According to a typewritten document (attached hereto) that Mr. Ackley apparently provided to defense counsel Woodyard and Lyman on May 11, 2004 (i.e., the day trial began), on the evening of May 10, 2004, Mr. Ackley interviewed Kathryn Kay Timmons, who may have been an ear-witness to the murder. Ms. Timmons was *not* called to testify at trial. In the memo to the defense, Mr. Ackley reported Timmons' statements regarding her movements and observations on the night of the murder and the following day, which were largely consistent with the case that State prosecutors chose to put on in 2004. Also, at the time he interviewed Ms. Timmons, Mr. Ackley notes he spoke with Timmons' mother, Jackie Williams, who had been disclosed as a witness and did testify. The only information Mr. Ackley provided about this interview was an isolated statement that Ms. Williams now believed the statement she had previously given police in 1997 was mistaken, and her true recollection was instead consistent with the State's theory in 2004. The brief memo provided by Mr. Ackley is typewritten and dated the following day, indicating that it was not prepared contemporaneously with the interviews. We are asking for copies of the notes Mr. Ackley and/or any other prosecutor, investigator, or staff member took during these interviews, on which Mr. Ackley based the attached memo.

Our reason for believing such notes exist is that prior investigations of the Oklahoma County District Attorney's office's failures to disclose *Brady* material, both in federal court and by the State Bar, had revealed that it was indeed the practice for Assistant District Attorneys in that office during all times relevant hereto to take contemporaneous notes during witness interviews and that they did not consistently disclose those notes to defense counsel, even when they were clearly exculpatory. There are at least two documented instances of those in first-degree murder cases.

The first occurred in the 1995 and 1997 death penalty trials of Yancy Douglas and Paris Powell, under the leadership of Robert Macy while you were an Assistant District Attorney in his office. As Douglas's trial approached, one of the prosecutors from this office interviewed an ear-witness, who told him something contradictory to what the State's star witness was going to testify to. As summarized by the Oklahoma Supreme Court in that prosecutor's disciplinary proceedings, the prosecutor "left notes in his prosecutor's file that might have informed the defense at both the Douglas and Powell trials of the [witness] interview and corresponding evidence." *State of Oklahoma v. Robert Bradley Miller,* 2013 OK 49, at 17 (underlines added). Even though the office maintained an "open file" policy at that time, the prosecutor was *still* obligated to "expressly disclose the information to the defense," *id.,* and he had failed to do so.

The second incident, of which you are certainly aware, occurred in 2012 after you assumed office. One week before the first-degree murder trial of Billy Michael Thompson, two attorneys from your office interviewed an eyewitness they had previously been unable to find. Although he was inconsistent and, at times, incoherent during the interview, he told them an important fact about the crime that supported the defense and undercut the prosecution. As explained by the Oklahoma Supreme Court in their later disciplinary proceedings:

> "The notes taken by both respondents record that [the witness] stated the victims were stabbed in a driveway or at the end of a driveway. . . . Respondent Kimbrough's notes did reflect that [the witness] recalled the victim and others 'left and went toward 41st toward home.' The notes taken by the respondents were not intended to be complete recitations of [the witness]'s statements, but after realizing [the witness]'s story was full of inconsistencies, both Kimbrough and Miller stopped taking notes."

State ex rel. Oklahoma Bar Association v. Miller & Kimbrough, 2015 OK 69, at ¶¶ 10-11 (underlines added). The Court then went on to note, apparently based on testimony during the disciplinary proceedings, that the prosecutors had shown the witness crime scene photos and "tried to clarify" his statements, and he eventually "affirmed the facts he told the police detectives immediately after the stabbing, which facts were consistent with the State's case." They then exploited this witness's absence during trial and represented his testimony as consistent with his initial police statement. The Court

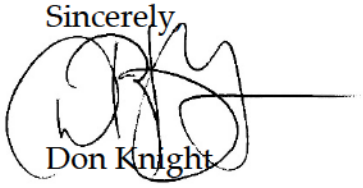
confirmed that the prosecutors "should have timely presented this to the defense." *Id.* at ¶ 28.

We are, of course, aware that you dismissed these two attorneys, but the proceedings confirmed what the Powell and Douglas cases had also shown: that during Robert Macy's tenure as Oklahoma County District Attorney, continuing through the time of Mr. Glossip's two trial in 1998 and 2004, and to as late as 2012, Oklahoma County Assistant District Attorneys, or their investigators or staff, routinely took notes during pretrial witness interviews. These proceedings also show that they did not always disclose the exculpatory or impeaching results of those interviews to the defense as they are required to do.

Considering this history, and the evidence we provide here that interviews were, in fact, conducted with witnesses prior to Mr. Glossip's second trial (the notes of which were never disclosed to the defense), we request that you review your file and disclose to Mr. Glossip's current defense team all such notes that were taken prior to both trials. Of course, if your review shows that these notes contain any information that could be construed as exculpatory or impeaching for another witness, their disclosure is constitutionally mandated under *Brady* and/or *Giglio*, even at this late date, as Mr. Glossip remains under a sentence of death. If your review of the notes is merely consistent with the information given to the defense in other documents, then there is simply no reason not to turn them over, in the interest of full disclosure, and again as recommended by the bipartisan Oklahoma Death Penalty Review Commission in 2017.

Thank you for your attention to this matter. I look forward to hearing from you soon.

Sincerely,



Don Knight

encl.
cc: Mike Hunter, Richard Glossip

ATTACHMENT 40

DONALD R. KNIGHT
ATTORNEY AT LAW

MERI WRIGHT
PARALEGAL

January 8, 2021

David Prater
Oklahoma County District Attorney
Oklahoma County District Attorney's Office
320 Robert S. Kerr
Room 505
Oklahoma City, OK 73102

RE: Request for all Discovery and Evidence on Richard Glossip and Justin Sneed

Dear Mr. Prater,

When I first began work on Mr. Glossip's innocence case in the spring of 2015, I discussed with you my need for all documents in your file. I recall you told me that you had Mr. Glossip's files brought into your office and that you would personally review them and decide whether you would provide me with the discovery in the case[1]. I never learned if you reviewed the documents, but you did tell me shortly thereafter that you would not release any documents from your file to me. You did not explain why.

Throughout the summer of 2015, Mr. Glossip's innocence team spoke with witnesses we were able to identify without the help of any documents from your files and, in our petition filed in September of that year, we made a compelling case for his innocence based upon this newly discovered evidence, such that 2 of the 5 judges on the OCCA voted to grant a hearing on the evidence we disclosed in our petition.

[1] When I make a reference to "discovery" in this case, I am referring to all documentation or evidence in your files that your office was required to turn over or make available to the lawyers representing Mr. Glossip at both trials pursuant to the terms of the Oklahoma Criminal Discovery Code (OCDC) OKLA. STAT. tit. 22 § 2001; see also *Dodd v. State*, 993 P.2d 778 (2000) (imposing specific discovery requirements on the government when using jailhouse informant testimony).

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Thankfully, the State of Oklahoma was unable to execute Rich that year and, on February 29, 2016, I sent a letter informing you that we were continuing our investigation into Mr. Glossip's innocence and renewed our request for all documents and evidence pertaining to his case. You never replied to that letter.

On October 8, 2020, I sent another letter to you for information. In addition to renewing our request for all discovery in general, we were very specific in requesting that you review your files and provide Mr. Glossip's innocence defense team copies of all notes taken during pre-trial witness interviews by attorneys at the Oklahoma County DAs office, their investigators, and/or staff, for both Mr. Glossip's 1998 and 2004 trials. Considering your office's documented history of wrongfully withholding such material[2], we stated in that letter,

> …if your review shows that these notes contain any information that could be construed as exculpatory or impeaching for another witness, their disclosure is constitutionally mandated under *Brady*[3] and/or *Giglio*[4], even at this late date, as Mr. Glossip remains under a sentence of death. If your review of the notes is merely consistent with the information given to the defense in other documents, then there is simply no reason not to turn them over, in the interest of full disclosure, and again as recommended by the bipartisan Oklahoma Death Penalty Review Commission in 2017.

You did not respond to this letter. Should it assist in your search, we believe, based on documents we do have, that pre-trial interviews for which you should have notes were conducted with Ricky Great in the jail by Bob Bemo on April 21 or 22, 1997; Donna Van Treese immediately following the murder and throughout the period leading up to trial in 1998; Cliff Everhart by Sgt. Tim Brown and/or Detectives Bemo and Cook on January 7, 1997, and by the DA's office on October 29, 2003; Donna Van Treese, Kenneth Van Treese, and Billye Hooper by the DA's office in the fall of 2003; Dr. Chai Choi by the DA's office on October 29, 2004; Kayla Pursley on October 30, 2003 by the DA's office; Bill Sunday on May 4, 2004 by the DA's office; Kathryn Kay Timmons and Jacqueline Williams on May 10, 2004 by the DA's office; and Justin Sneed, both

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[2] *State ex. Rel. Oklahoma Bar Association v. Miller & Kimbrough*, 2015 OK 69

[3] *Brady v. Maryland*, 373 U.S. 83 (1983) (prosecutors have an affirmative duty to disclose evidence favorable to the accused).

[4] *Giglio v. United States*, 405 US 150 (1972) (prosecutors must disclose matters that affect the credibility of prosecution witnesses).

prior to the first trial in 1998, and by ADAs Gary Ackley and Connie Pope Smothermon on October 21, 2003 and in April, 2004, including a "list" Smothermon referred to in her questioning of Mr. Sneed at trial. Of course, there may have been many more. For some of these, your office provided a summary of anticipated testimony, but that, of course, is not the same thing as all the information collected from the witness, as the prior cases finding *Brady* violations by prosecutors in Bob Macy's and your office make abundantly clear.

We write today not only to renew our previous requests for all discoverable evidence and documents in your files and the notes we specifically requested in our October letter, but also to make further *specific* requests for particular information to assist in our continuing work on Mr. Glossip's innocence case.

GENERAL DISCOVERY

We begin by noting that we have recently completed a review of every document contained in boxes that were in possession of the various lawyers that have represented Mr. Glossip over the years, at trial, on appeal, and during state and federal post-conviction proceedings. Our review shows that we have only 109 pages of police reports in our possession. We note that some of the pages reference additional pages we do not have, so it is clear the lawyers who represented Mr. Glossip at his two trials either never received or did not keep a complete set of discovery documents[5]. Therefore, we once again request that your office make available a full set of all documents (not only police reports) that were, or should have been, provided to the defense prior to trial pursuant to the OCDC (including that required by *Dodd v. State*), especially considering the findings of the Oklahoma Supreme Court in *State ex. Rel. Oklahoma Bar Association v. Miller & Kimbrough*, 2015 OK 69. If there is a cost to produce these documents, let us know, and we will pay it immediately.

[5] Per the OCDC, all law enforcement reports made in connection with this case were required to be made available to the defense attorneys at both trials. You may recall that the attorney for the first trial was so incompetent that the Oklahoma Court of Criminal Appeals threw out the conviction, considering his performance not to constitute the basic legal representation to which criminal defendants are constitutionally entitled. The lead attorney for the second trial was removed from the case right as trial began, and the case was left in the hands of his two subordinates, who were given six months to prepare the case but completely neglected it until the month before the trial. It appears that the departing attorney took most of his knowledge and information about the case with him. In any event, the files we have from these lawyers do not contain a complete set of the discovery that should legally have been made available to them.

DOCUMENTATION OF ALL POLYGRAPH EXAMINATIONS

In her questioning of Mr. Glossip in his clemency hearing in 2014, Pardon and Parole Board member Patricia High, a former assistant DA in the Oklahoma County DAs office during his 2004 trial, referred to Mr. Glossip having failed a polygraph in the days after this homicide. It appears that the allegation of a failed polygraph made an impression on the voting members of the Pardon and Parole Board that day as the members of the Board voted unanimously to deny clemency. Ms. High certainly considered it to be important enough to raise during the hearing.

While we are aware that Mr. Glossip was supposedly administered something alleged to be a polygraph in the days following the death of Barry Van Treese, no document we have ever seen supports such an examination—we have never seen any record of what biological indicators were used nor, crucially, what questions Mr. Glossip was asked nor what statements he made that were allegedly "untrue" or "deceptive."

There is support in the court record that some sort of examination may have taken place. At the April 23rd, 1997 preliminary hearing, Detective Bemo testified about a polygraph exam that was supposedly administered to Mr. Glossip, although it is clear that Bemo did not witness the exam. This is the testimony your office has brought up on several occasions in support of this allegedly failed polygraph. Detective Bemo discussed this polygraph again at a hearing (out of the presence of the jury) during trial on June 8, 1998. Mr. Glossip also testified about it during this hearing. Moreover, our review of notes in Mr. Glossip's file uncovered that in November 2000, an investigator for state post-conviction lawyers attempted to get polygraph materials from the City Attorney and the OCPD. This investigator talked to Warren Powers, an employee of the police department who conducted polygraph exams, who told her he administered a test to Mr. Glossip on January 9, 1997, but he retained nothing in his file that documented the test or the result.

At a hearing on January 10, 2003, Lynn Burch, who was Mr. Glossip's attorney at the time, stated that a motion he filed to produce all of Mr. Glossip's statements was intended to specifically include the questions asked during any polygraph and Rich's responses, and yet nothing was produced. In an email dated October 23, 2003 (attached

hereto as Exhibit A), Burch asked ADA Connie Smothermon to follow-up on the defense team's previous request to Fern Smith for the polygraph materials. There is no evidence she complied. Mark Henricksen, a lawyer representing Rich in federal habeas and clemency proceedings, also explicitly requested the materials from your office in a December 19, 2014 letter after prosecutor Gary Ackley had raised the issue in the clemency hearing (attached hereto as Exhibit B). Apparently, despite these repeated requests both before his second trial and after your office represented to the Board of Pardon and Parole that Rich had "flunked" a polygraph, no such materials were ever given to any defense lawyer.

Mr. Glossip's innocence defense team strongly suspects the absence of any charts, notes, or reports means that the "polygraph" referred to in the court proceedings and at the clemency hearing was not a legitimate truth-seeking examination conducted according to the rules and procedures required for a valid polygraph examination. The record shows that the police confronted Mr. Glossip after he left an attorney's office. When he arrived at the police station, he was told by Detective Bemo that if he agreed to take a polygraph exam and passed it, he would not be charged with this murder. Mr. Glossip was also told that, should he refuse to take the polygraph, he would be immediately put in jail. In direct contravention of the advice he was given by the attorney whose offices he had just left, given his two choices, Mr. Glossip agreed to talk to the police without an attorney present and take the polygraph. Mr. Glossip was then taken to Mr. Powers, and he recalls that Mr. Powers only placed a device that resembled a pulse oximeter on his finger and asked him some questions. Thereafter, Mr. Powers reported to Detectives Bemo and Cook that Mr. Glossip was not being truthful in response to his questions (whatever they may have been).

If this is true, there was no legitimate polygraph examination conducted, as there is far more that goes into a properly conducted polygraph examination than a pulse sensor placed on a finger. Therefore, this allegation of a failed polygraph is not an indication of guilt as has been portrayed, but instead was merely a ruse, a common interrogation technique and scare tactic used by police[6] in an attempt to persuade Rich

[6] *See, e.g.,* Fred Ibanu, John Reid et al., *Criminal Interrogation and Confessions,* 5th Ed. (2013) at 267.

to implicate himself in the murder of Barry Van Treese. It should be noted that Mr. Glossip never implicated himself and has maintained his innocence for more than 23 years. Mr. Glossip said to Mr. Powers and the detectives then, as he does now, that he had nothing to do with the death of Barry Van Treese.

Given how these alleged polygraph results were used against Mr. Glossip at the clemency hearing in 2014, were cited recently in a meeting with attorneys from the Oklahoma Attorney General's Office, and will undoubtedly be relied upon again, we request that you review your files and copy all documents that concern, in any way, any polygraph examination given to Mr. Glossip at any time after January 7, 1997. In addition, we request that you provide any materials pertaining to any polygraph examination(s) of witness D-Anna Wood who, according to Detective Bill Cook, also agreed to take such a test. In addition, if any polygraph or similar examination was administered to Justin Sneed, we request all documents regarding that, too, as his answers to police questioning is clearly discoverable to Mr. Glossip. If you conduct this review and find there are no such documents in your files or in any other files for any other agencies that may retain these documents (such as the OCPD), please let us know what efforts you made so we can verify the results of your search. If no such documents exist, we need to know this for future court filings and statements to the press.

THE SINCLAIR VIDEOTAPE

Room 102 of the Best Budget Inn is within view of what was then a Sinclair station that was open throughout the night of January 6-7, 1997. We know from a police report (see attached exhibit C) that there was a security video system in use at the Sinclair station at the time and that police seized a videotape from the station as evidence.

On the eve of the first trial, May 28, 1998, Mr. Glossip's attorney, Wayne Fournerat, filed a motion to produce this videotape (attached hereto as Exhibit D). At the hearing on this motion, ADA Fern Smith stated she had not watched it and that the prosecution did not believe it had any evidentiary value (attached hereto as Exhibit L). However, she went on to state that it was probably in the police property room and that

she would try to get it for him. Smith also reported to the court that Fournerat told her, about ten days earlier by phone, that if she wasn't going to use it, he didn't need it. Apparently, the issue was then dropped. This failure to obtain the Sinclair footage was included as part of the claim that Mr. Fournerat was ineffective, and it does not appear that any attempt was made to obtain the tape during the first appeal.

The existence of this tape surfaced again prior to the second trial. On January 13, 2003, at an inspection of the evidence by the defense team, Lynn Burch asked about missing items, including the Sinclair tape, as reflected in the attached transcript (attached hereto as Exhibit E). Then on October 23, 2003, Burch sent an email to ADA Connie Pope Smothermon (attached hereto as Exhibit F), asking again about the Sinclair video and any further information about evidence destruction. Ms. Pope Smothermon replied that she didn't know anything about the destruction of evidence and ignored the question about the video. Finally, on October 28, 2003, Burch asked Pope Smothermon again by email (attached hereto as Exhibit G) about the Sinclair tape and, despite the police report documenting its seizure, she stated she was unsure the police ever collected one. Notably, although the Oklahoma City Police documented their destruction of several items of evidence in this case after the first trial (attached hereto as Exhibit H), the Sinclair video was not among them. Thus, either it is still in evidence somewhere, or more evidence was destroyed than the destruction report shows.

As stated above, Room 102 of the Best Budget Inn was in full view of and only a short distance from the Sinclair station. Any interior or exterior footage on the tape may hold evidentiary value (it was taken into evidence that night by the police, so it appears that someone thought it could be of evidentiary value). For instance, in her testimony at trial, Kayla Pursley, the Sinclair station attendant, testified that Justin Sneed came into the Sinclair station to purchase cigarettes and snacks around 2:00-2:30 AM. If so, his appearance, actions, demeanor, and whether anyone else can be seen with him could be crucial to Mr. Glossip's defense, whether Fern Smith realized it or not. An ADA's conclusion—apparently unsupported by an actual review of the evidence—that the video had no evidentiary value says only that she did not find it useful in presenting the *State's* version of facts. This video could very well contain

information that, while not useful for supporting the *State's* theory that Rich was involved, supports a very different story about what actually happened that night.

We request that you search your files and any room where you keep evidence for this videotape and/or any documentation as to what might be contained on the tape and/or regarding its loss or destruction. We ask that your search include a search of all evidence held by the OCPD, Oklahoma City Attorney, and Oklahoma County Sheriff, or any other agency that could conceivably have this videotape or documentation about it, and to turn the results of your search over to Mr. Glossip's innocence defense team as soon as it is complete. If you conduct this review and do not find this videotape or any evidence documenting it and/or its loss or destruction, please let us know what efforts you made so we can verify your findings. If no such tape or document(s) exist, we need to know this for future court filings and statements to the press.

FINGERPRINT EVIDENCE

The trial record makes clear that fingerprints were taken from various places in Room 102 and the vehicle belonging to Barry Van Treese—and that some of them belonged to an unidentified person, not Mr. Glossip, Sneed, or Van Treese. While some prints were not of sufficient quality to be compared to known prints, some were "usable" or "had value." Of the usable fingerprints, the record shows they were only ever compared to the three people the police already believed were involved: Justin Sneed, Richard Glossip, and Barry Van Treese. Some were Sneed's; none belonged to Glossip or Van Treese, and some belonged to some unknown third party entirely, although the police apparently never investigated who this person was.

The trial testimony on fingerprints came from two prosecution witnesses. The first was John Fiely, a sergeant with the Oklahoma City Police Department, who collected the fingerprints from the crime scene. The second was Cindy Hutchcroft, also an OCPD employee, whose job it was to place the prints she received from Mr. Fiely into a computer database and to compare them to others. A transcript of their relevant testimony is attached (attached hereto as Exhibit I).

Of relevance to our request for information from your office, Mr. Fiely testified on May 4, 2004, that after he collected fingerprints from pieces of broken glass inside

Room 102, the print cards were "submitted to what we call AFIS, it's our girls there, they enter them into a computer, and they examine the fingerprints, and they compare them to any possible suspects." On cross, he confirmed these prints were obtained "for purposes of comparison."

Ms. Hutchcroft testified that part of her job is to scan all fingerprints brought to her by Mr. Fiely into the computer, which is how they determine if they can use AFIS to analyze them.[7] There should thus be a computer file of these fingerprints she evaluated in your office or that of the OCPD. Specifically, Ms. Hutchcroft testified Sgt. Fiely had given her five fingerprint cards from the broken glass found on the chair. Two matched prints of Justin Sneed's right thumb, two of the prints were not clear enough to use, and one was potentially useful for comparison—but was not from Sneed, Van Treese, or Glossip. She stated that although they sometimes compare latent prints to specific known individuals, they also "just enter them on the computer." Ms. Hutchcroft also explained that eight prints were also collected by another officer from inside Mr. Van Treese's car, and most of those prints were not usable. One had value for comparison purposes, but it did not match Sneed, Van Treese, or Glossip.

It appears from this testimony there were two prints that did not match anyone, that were entered into the AFIS computer, but were never compared to all the prints in the AFIS database in any attempt to discover who, outside of the people whom the police had already focused, might have left them. These prints have obvious evidentiary value, as they point to the presence of one or more third parties that may have been involved in this homicide or that should, at least, have been questioned as to how their prints ended up at a crime scene. By way of example, the prints from the broken glass and car were presented to the jury as proof that Justin Sneed was in the room and car. If Sneed's fingerprints are evidence of his involvement in this homicide, then the unidentified prints in the room and car are also of evidentiary value.

The State presented a case in which the only two people involved were Sneed and Glossip. This fingerprint evidence suggests otherwise. The fact that your office has never provided any documentation that these unidentified prints were run through the full AFIS database suggests they were not compared to anyone outside of Sneed, Van

[7] AFIS stands for 'Automated Fingerprint Identification System". AFIS is a statewide database that can search large collections of fingerprint images and is able to generate lists of most-likely donors.

Treese, and Glossip. If these prints were not run through the full AFIS database by the OCPD, they clearly should have been as part of any competent and complete investigation.

Furthermore, the technology for the examination of fingerprints has vastly improved since either 1998 or 2004, when these prints may have last been run through the AFIS database. For instance, in 2015, after an FBI AFIS upgrade, news outlets reported Oklahoma authorities running cold-case prints through the improved system—and finding hits. Therefore, running the prints from this case through the database now (to which you have access but, by law, we do not) may answer the question of who was in Room 102 and/or the car in addition to Justin Sneed on the night of the murder. Of course, if the unknown fingerprints *were* run through the AFIS database prior to either trial and any matches found, that is indisputably *Brady* material, as it is potentially exculpatory or impeaching and must be turned over to us immediately.

We request that you make available to us all reports and notes regarding all fingerprint evidence from any police or investigative source, including reports and notes from discussions with Mr. Fiely or Ms. Hutchcroft or any other witness by prosecutors, investigators, or staff, from the OCDA's office, and all fingerprint cards in your possession or in possession of the OCPD or any other agency that might house such evidence. We also ask that you consult with the OCPD about the records they created in AFIS of these fingerprints and any records they have regarding the status of these prints today when they were last run through the database and the results of that search. If this evidence has been lost or destroyed, please provide documentation that such destruction complied with the policies and procedures in place for the lawful destruction of evidence in a pending death penalty case.

INFORMATION ABOUT CASH FOUND IN THE TRUNK OF VAN TREESE'S CAR

Police reports we have in our possession show that more than $23,000 in cash was discovered in envelopes in the trunk of Barry Van Treese's car (attached hereto as Exhibit J). The reports make clear that there were at least sixteen $100 bills that had blue dye on them, which is what happens when a dye pack placed in a bag of cash taken during a bank robbery explodes. Therefore, it is almost certain that some of the bills found in Barry Van Treese's car were the ill-gotten goods of a bank robbery.

The purpose of a dye pack is to make the bills permanently unusable and, when such funds are discovered, their serial numbers can be traced back to the bank that was robbed. It is difficult to understand how $23,000 in cash found in the trunk of a murder victim's car, some permanently stained with blue dye from a bank robbery, would not be seen as suspicious on some level, thereby prompting a further investigation by the police. However, the information we have in our files shows that these bills were very quickly turned over to the Van Treese family. Indeed, it appears (based upon headers on our copies suggesting they were faxed to police by the Van Treese family days after the murder) that the envelopes in which these bills were found were also returned to the family before police copied them, even though they were covered in hand-written notations crucial to understanding the motel's finances, which were a central part of this case. We have never seen any documentation that police investigated these bills, before or after releasing them to the Van Treese family, to determine which robbery they might have come from and what evidence such an investigation may have produced.

For instance, we have information uncovered by our own investigation that this money may have been "bought" by Mr. Van Treese as part of an effort to "launder" this cash. The witness we talked to is a former police officer who related that Mr. Van Treese may at times have purchase dye-stained money for pennies-on-the-dollar and then run those in stacks of cash through counting machines at banks when he made his cash deposits. In this way, the money ended up in the bank's possession without any way to trace it back to anyone. If the serial numbers on the bills found in the trunk of his car were traced to a particular bank robbery, and suspects were arrested, we might have information to corroborate the testimony of this witness. This would also produce information on possible alternate suspects in this homicide, as these people might know Mr. Van Treese had large amounts of cash on him and could have informed others (such as Mr. Sneed) of this fact.

We hereby request all information from your files, or that of the OCPD or any other authorities, including federal authorities such as the FBI or the Secret Service, regarding the investigation of this cash with blue dye on it. If your review shows that no investigation into the money was ever conducted, and it was simply released to the Van Treese family, we request documentation of that fact.

ALL EVIDENCE COLLECTED REGARDING THE PROSECUTION OF JUSTIN SNEED

At the time of Barry Van Treese's murder, Justin Sneed was living in Room 217 of the Best Budget Inn. We have no information in our file regarding any police search of his room either during the week they were unable to locate him or after his arrest, and what was found and/or seized from his room. Obviously, any evidence of Sneed's drug use, which was debated at some length in both trials and in our petition with the OCCA in 2015, is relevant to Mr. Glossip's case. Any contents in the room may be evidence as to friends and associates of Mr. Sneed at the time and could reveal information about other witnesses that might shed light on Mr. Sneed's actions in the days leading up to this murder and his motivations for robbing and murdering Barry Van Treese.

Moreover, prior to his guilty plea, your office was building a murder case against Mr. Sneed, including filing witness lists and a bill of particulars. It is likely that at least some evidence the police and prosecutors thought would be most damning to Sneed could have been exculpatory to Rich Glossip. Evidence that Sneed had his own reasons for wanting to kill Van Treese, or that his reaction after the killing was more consistent with having planned it himself rather than being coerced by Mr. Glossip would be squarely within *Brady* and *Giglio*.

One example of such evidence would be statements by Fred McFadden, a county jail inmate with Sneed who reported in a letter hearing Sneed brag about the killing of Van Treese. We have one letter from Mr. McFadden to your office dated May 8, 1997 (attached hereto as Exhibit K) referencing these observations, but that letter makes clear there had been previous communications with the DA's office about possible testimony. McFadden was listed in early filings by the prosecution in Sneed's case as a witness the State apparently intended to call only against Mr. Sneed. Anything like this evidence from McFadden that police and prosecutors learned of in attempting to put together a murder case against Sneed should have been made available to the attorneys for Mr.

Glossip prior to both trials pursuant to the normal OCDC processes discussed above and must be turned over to Mr. Glossip's lawyers immediately.

We request that you search your files and any room where you keep evidence for all reports, notes, and physical evidence held by the OCPD, Oklahoma City Attorney, and Oklahoma County Sheriff, or any other agency that could conceivably have any information or evidence regarding Justin Sneed's case, and turn it over to Mr. Glossip's innocence defense team as soon as it is discovered. If you conduct this review and do not find any reports, documents, or physical evidence in your files or in any files for any other agency that may retain this evidence (such as the OCPD), please let us know what efforts you made so we can verify your findings. If this evidence was destroyed, please supply us with all documentation of its destruction pursuant to whatever document destruction policy was in place at the time of the destruction of the evidence. If no such evidence exists, we need to know this for future court filings and statements to the press.

ALL POLICIES OF ALL INVOLVED AGENCIES FOR DOCUMENT AND EVIDENCE DESTRUCTION IN THIS CASE

Mr. Glossip remains on death row and facing execution, quite possibly in 2021. All evidence that was collected that pertains to this case, or that of Mr. Sneed's, whether it was used against Mr. Glossip at trial or not, *should* still be available for review and use in any further potential court proceedings, including another trial if that were to be ordered. However, we know it is not.

According to a report from Janet Hogue-McNutt (attached hereto as Exhibit H), the shower curtain and duct tape that were taken from the inside the window in Room 102 immediately after this homicide, along with a box of documents (the description of which is unknown), an envelope with note (unknown subject), glasses, wallet, knives, keys, one deposit book, and two receipt books were destroyed prior to Mr. Glossip's second trial in 2004. In addition, all financial documents produced by Donna Van Treese in response to a subpoena issued during the first trial in 1998 were returned to Donna Van Treese and, according to the record, later lost or destroyed. None of these critically important documents or evidence were available for review or use by the defense in the second trial.

As stated above, there exists evidence and documents that were never released to any defense attorney in this case, at trial, on appeal, in post-conviction, or clemency, of the polygraph examination to which Mr. Glossip was allegedly subjected, the Sinclair video, the fingerprint evidence we outline, evidence regarding the money with blue dye on it, and evidence from the search of Sneed's room. There is also no information in our files that any such documents or evidence were destroyed at any time in this process. If any of this evidence that the record reflects once existed was destroyed, we request confirmation of the details of its destruction and under which policy it was so destroyed prior to the end of these death penalty proceedings.

To that end, in addition to the evidence and information requested in this letter, we also request copies of the policies and procedures for how evidence and documents pertaining to a homicide investigation are to be maintained, stored, and/or destroyed prior to the end of the case, or once a case is completed. This request is meant to cover policies and procedures for the Oklahoma County District Attorney's Office, the Oklahoma City Attorney's office, the Oklahoma City Police Department, the Oklahoma County Sheriff's office, and any other agency that in any way had a part in either the investigation of the death of Barry Van Treese or in the gathering and/or storing of evidence in this case.

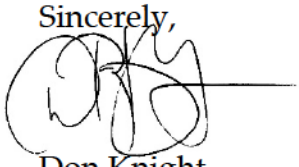
The information we request in this and the other letters we have sent to your office, to which you have not responded, is critical for the fate of Mr. Glossip and the Oklahoma system of criminal justice and capital punishment. Our investigation over the past five years has been the type of thorough investigation that should have been done by any competent defense attorney in a death penalty case. As a result, we have uncovered (and continue to uncover) a great deal of evidence that Richard Glossip has spent the last 23 years of his life on death row for a crime that he did *not* commit. Our meticulous review of the files we do have has confirmed that the police investigation in this case, where the ultimate sanction was sought by the State, was hasty and inadequate, and the state-provided defense attorneys failed to conduct any independent investigation of their own, which it was their responsibility to Mr. Glossip to do. These lawyers also failed to make timely demands from your office for the basic materials to which they were entitled to present an adequate defense and to meaningfully challenge the State's case on behalf of Mr. Glossip. Due to these systemic failures, the adversarial process on which our system relies to arrive at the truth utterly broke down for Mr. Glossip. This case shows precisely how innocent people can and do end up on death

row and are killed by the State. Ignoring this problem will undermine the public's confidence in the ability of the justice system in Oklahoma to get things right. This confidence is especially important as Oklahoma is seeking to revive its problem-plagued death penalty.

Mr. Glossip may be scheduled for execution in 2021. Undeniably, there has been a significant amount of evidence in this case that has been destroyed (even before the second trial), overlooked, lost, and/or never turned over to the defense, despite multiple requests over the last 23 years. If you are confident in your evidence and it is unassailable, as it should be to support the execution of a citizen of Oklahoma, there is nothing to be gained from refusing to reveal it now.

As time is becoming increasingly short for Mr. Glossip, I would appreciate a response to this letter within the next seven days.

Sincerely,



Don Knight

cc: Mike Hunter, Oklahoma Attorney General

ATTACHMENT 41

AFFIDAVIT OF SILAS R. LYMAN

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

I am Silas R. Lyman, a person of lawful age, being duly sworn, under penalty of perjury do state as follows:

1. I am an attorney licensed by the State of Oklahoma and was employed with the Oklahoma Indigent Defense System (OIDS) during the second re-trial of Richard Glossip which began on May 20, 2004. (CF-1997-244)

2. On or about November 4, 2003 a hearing was conducted before the Honorable Twyla Mason Gray. At that hearing, lead counsel, G. Lynn Burch for Mr. Glossip was conflicted out of representation of Mr. Glossip. I was named by Judge Gray as lead counsel and co-counsel L. Wayne Woodward was designated second chair. The jury trial was continued to May 20, 2004.

3. During Mr. Glossip's re-trial I conducted cross examination of Justin Sneed. Mr. Sneed was the primary witness for the State of Oklahoma in the murder case against Mr. Glossip.

4. At no time prior to trial do I believe I aware that Mr. Sneed had expressed wanting to either: recant his testimony or leverage his testimony in order to get a better deal. I do not recall the State Attorneys ever disclosing this information to the Glossip defense team.

5. I believe I would have wanted to have this information about the State's primary witness in the case either recanting his testimony or leverage his testimony for a better deal, as evidence for cross examination.

6. This information potentially could have been utilized to confront Mr. Sneed's credibility and reliability as a witness and could have been crucial information, particularly given the importance of Mr. Sneed's testimony to the State of Oklahoma's murder-for-hire case against Mr. Glossip.

7. If the State had disclosed this information to the defense before trial, I believe we could have used this information in our cross examination of Mr. Sneed and defense theory.

8. If the State had disclosed this information to the defense before trial, I believe we could have presented this information to the jury for them to evaluate as the fact-finder as to guilt or innocence of Mr. Glossip.

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

Further, Affiant sayeth naught.

Silas R. Lyman, OBA # 13165

STATE OF OKLAHOMA)
) **SS.**
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 26th day of August 2022.

KERI RATLIFF NOTARY # 15002833 EXP. 03/26/23 PUBLIC STATE OF OKLAHOMA

NOTARY PUBLIC

COMMISSION NO. _____
MY COMMSSION EXPIRES: _____

ATTACHMENT 42

AFFIDAVIT OF L. WAYNE WOODYARD

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

Mr. L. Wayne Woodyard, a person of lawful age, being duly sworn, under penalty of perjury do state as follows:

1. I am an attorney licensed by the state of Oklahoma since 1976. From approximately November 2000, I was employed by the Oklahoma Indigent Defense System (OIDS) as a capital trial attorney and appellate attorney assigned to the Sapulpa division until I retired at end of 2016.

2. I was originally assigned as an appellate attorney for the Glossip case. As I recall, the agency had started a policy of assigning appellate attorneys from a different division to sit in on trials to raise issues relevant to the appeal process, but not to investigate and prepare the case for trial.

3. After reviewing a transcript of the hearing held on November 4, 2003, it appears that lead counsel, Lynn Burch, was allowed to withdraw due to a conflict and Silas Lyman was appointed as lead counsel in his place. At that hearing, it was recognized that my role was changed from appellate counsel to second chair specifically to investigate and present any second stage trial that may be necessary. I later was assigned by Mr. Lyman to cross-examine certain first stage witnesses.

4. While there were occasions during trial when I objected to certain questions when Mr. Lyman did not raise an objection, Mr. Lyman was responsible for first stage trial strategy and witness examination, especially Justin Sneed.

5. To the best of my current recollection, I do not recall that I was informed before or during the trial that Mr. Sneed had recanted, attempted to recant his statement or attempted to renegotiate his deal with the State for his testimony. I believe that such information would have been helpful in challenging the credibility of Mr. Sneed who was the State's principal witness.

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

Further, Affiant sayeth naught.

L Wayne Woodyard

L. Wayne Woodyard

Subscribed and sworn before me on this 8 day of September, 2022.

Meredith Scott My commission expires April 29, 2023

MEREDITH SCOTT
NOTARY PUBLIC
Commission
Number
19004441
STATE OF OKLAHOMA

APPENDIX E

Excerpts of the Trial Transcript in *State v. Glossip*, No. CF-97-24418

MS. SMOTHERMON: I didn't know if you were married or something. Those family members that were involved in this, were they charged? Do you know if they were charged or...

PROSPECTIVE JUROR PATTERSON: I don't remember. It was my mom's boyfriend and I don't remember if he was charged or not.

MS. SMOTHERMON: Do you know if he was arrested?

PROSPECTIVE JUROR PATTERSON: They arrested both of us because we were both in the car.

MS. SMOTHERMON: Were you ever contacted to be a witness or --

PROSPECTIVE JUROR PATTERSON: No.

MS. SMOTHERMON: -- or were you ever interviewed by the police as a witness?

PROSPECTIVE JUROR PATTERSON: No, I never had any dealing with the car.

THE COURT: For the Defendant, do you have any questions for Ms. Patterson?

MR. LYMAN: No, Your Honor.

THE COURT: All right. Thank you very much. Ma'am.

(Thereupon, the following was had in open court.)

THE COURT: You may be seated.

Okay. Ms. Miles, did you have your hand raised?

PROSPECTIVE JUROR MILES: Yes, I want to do mine privately also.

THE COURT: Oh, okay.

Well, come back and join me, Counsel.

(Thereupon, the following was had at the bench.)

THE COURT: Can you tell me, please?

PROSPECTIVE JUROR MILES: Yes, I was coming from a rodeo and the guy that was riding with me had drugs on him. We got stopped and went to jail. But the case is over. It happened like two years ago. And they put a misdemeanor on my record and said I can get it expunged off.

THE COURT: Well, actually you pled guilty to Possession of CDS, Marijuana is what happened. They didn't put something on your record. You pled guilty to the misdemeanor.

PROSPECTIVE JUROR MILES: Okay. Well, see, I didn't -- that was my first time so I didn't even --

THE COURT: Well, no, ma'am, you had priors. I mean you have -- don't you have a '93 bogus check that was dismissed?

PROSPECTIVE JUROR MILES: After I paid it.

THE COURT: And a '97 bogus check that you had a three-year deferred sentence on, you had to make restitution?

PROSPECTIVE JUROR MILES: Yes.

probably wrong?
A. Yeah. I probably thought that. I also know --
Q. I'm sorry, go ahead.
A. I also know that I recall thinking that that's not what I really wanted to do.
Q. But not enough so much that it stopped you from doing it?
A. Yes.
Q. Had you ever done anything like this before?
A. No, ma'am, I had not.
Q. Have you ever done anything like this since?
A. No, I have not.
Q. Okay. You went to Sinclair, you went back to your room, you're breathing, you're pacing. You got a Coke. What did you do then?
A. I grabbed the baseball bat and my keys and walked over to room 102 and entered the room. And then when I opened the door, Mr. Van Treese got up out of the bed he was sleeping in and came around towards me. At that point I took one swing with the baseball bat. He pushed me back into a chair and when I tripped and fell in the chair the end of the baseball bat hit the window shattering the outside window, and he tried to make it to the door and I got up out of the chair and grabbed him by the back of his shirt, because I think he was sleeping in a nightshirt and

pulled him sideways so he tripped over my feet and his own feet and put him on the ground.

And then at one point -- at that point I tried to -- I took my knife out of my pocket and tried to force it through his chest but it didn't go, and then that caused him to roll over onto his stomach to where his back was facing the ceiling and then I hit him quite a few more times with the baseball bat.

Q. When you entered the room was it dark?

A. Yes, it was.

Q. You said he was in bed. Do you know whether he was asleep?

A. The only -- I don't know if he was actually physically asleep. You know, I don't know how long he had been in bed, because Mr. Glossip told me he had just got back and all that, and actually that's what helped me prolong a little bit of time before I did actually go over there. Because I wanted -- you know, if I was going to do it, I wanted to make sure he was asleep and all that.

Q. You wanted to kill him while he was asleep?

A. Yes.

Q. But he woke up?

A. Yes, ma'am.

Q. Mr. Van Treese wore glasses. Do you know if he had time to put --

Now, in January of 1997 there were really three big things that she didn't have that she really wanted: An engagement ring, a Camaro and breast enlargement surgery. Richard Glossip was wanting to give her all of those things, because as he told police, "I love that girl more than life."

What was happening with Justin Sneed? Well, Justin Sneed was a 19-year-old drifter. He didn't have any family support as his family had been a horrible situation growing up, and he had a stepbrother by the name of Wes Taylor, and they came up from Texas where he grew up, they came up here to Oklahoma City and they got a job, they were roofing, and they stayed at the Best Budget Inn in Oklahoma City.

Well, Wes Taylor figured out that life hanging out with Richard Glossip was a tad more easier than roofing and so that's what Wes Taylor and Justin Sneed did. They fell in with Richard Glossip. About that same time Wes Taylor was taken back to Texas on warrants for his arrest.

So there's Justin, 19 years old at the Best Budget Inn in Oklahoma City hanging out with Richard Glossip.

Now, Justin Sneed got for free a $23 a night room. And that's it. Now, he did some work at the motel. He did Richard Glossip's work at the motel. He worked part-time

housekeeper, part-time maintenance man, part-time go-for, whatever it is that Richard Glossip wanted Justin Sneed to do he would do, including some illegal activity. And he didn't get paid. He had no money for food.

You'll hear the evidence from Justin Sneed and from others who lived there and worked around the motel that Justin Sneed ate only when Richard Glossip would be so kind as to give him some food. And it wasn't every day. But it was easy. There were girls and drugs and other things that Justin Sneed had, and he had a 23-dollar a night room, so he stayed.

And Richard Glossip, he was nice to him and he fed him every once in a while and he had a video game and he let him play that and he talked to him. He talked to him probably more, Justin Sneed will tell you, than anybody else ever paid attention to him in his life. So Justin Sneed was pretty content just to be there and to do whatever it is that Richard Glossip wanted him to do.

Now, these three individuals come together in January, 6th of 1997. And on January 6th of 1997 there's some pretty significant events that occur that cause a really big problem for Richard Glossip in his lifestyle and his lifestyle with D-Anna Wood.

You see, Barry Van Treese, he'd taken quite a hiatus to be with his family, but he knew now it was time to

pretty close to the door, but Justin Sneed continues hitting and hits him repeatedly with the baseball bat at the bidding of Richard Glossip.

Barry Van Treese tries and tries to fight, but finally he's overwhelmed and he goes to the floor. He makes some noises while he's down and so Justin Sneed sits on a couch and he waits until Barry Van Treese is still and he leaves.

Now, where is Richard Glossip during this time? Well, you know, his hands didn't touch the baseball bat. There aren't any of his fingerprints on anything in that room. In fact, he even sets it up where there will be witnesses to prove that he wasn't in that room because he's in his room in the office. While he knows Justin Sneed is killing Barry Van Treese, Richard Glossip, the evidence will show you, is in his room creating an alibi. And he does that by having sex with D-Anna Wood at the same time he knows his employer is being killed.

Justin Sneed leaves Barry Van Treese's motel room. He walks by the office, where he knows Richard Glossip is, and he kind of taps on the window and the wall to wake him up and tell him the deed has been done. Justin Sneed goes back to his room and he changes his clothes and kind of washes up a little bit.

He comes back and he thinks it's very odd that

Richard Glossip isn't out there already. So he goes and he knocks on the door and Richard Glossip comes out. Justin has done -- all right, I've done this part, what next? Richard Glossip continues to give orders. Well, first, we've got to -- well, what happened during the struggle is Barry Van Treese's head hit the window and broke out the window. And Justin Sneed tells Richard Glossip that, we've got a problem, the window broke out. So Richard Glossip has to tell Justin Sneed what it is that Justin needs to be doing. So he tells him, "Well, we've got to get something to cover that window."

And so they go into a motel room and Richard Glossip, of course, not wanting to get his fingerprints on anything, instructs Justin Sneed to take a shower curtain and some duct tape and they tape the inside of the window where Barry Van Treese is. And Richard Glossip instructs Justin to find the keys to the car, because he tells him that's where the money is, and he instructs him to get the money out of the car and tells him where the money will be and tells him to move the car so people will think when they wake up that Barry Van Treese has gone. And so Justin does.

And Richard Glossip tells Justin Sneed, "Now, if anybody asks what happened to the window, you tell them it's two drunks." And by the way, Richard Glossip says, "Your face, you've got some bruises on your eye and some

scratches, what happened?" And Justin Sneed tells him, you know, the man fought.

Richard Glossip says, "All right. Well, here's what you're going to say about this. You tell them that, you know, you hit it in the shower and that's how you got those marks." So Justin says, "Fine."

Now Justin Sneed after he moves the car, he's got this money. It turns out it's only the $4,000 of receipts, it's not 7. And he thinks it's his because Richard Glossip told him it was. Richard Glossip says, no, we're going to split it. And so they each take half. The next day Richard Glossip instructs Justin Sneed to get a little piece of plexiglass at the store to cover the window, and Justin Sneed does.

In the morning when people are starting to move around, Richard Glossip tells housekeeping, you know, the maid that nobody knew about, not to clean room 102. Donna Van Treese and Richard Glossip talk, because she's wondering where Barry is, and Richard Glossip tells her, Oh, he's gone to the store, or, I saw him this morning, he's fine, I'll have him call you later.

Well, about 6:30 that morning, Barry Van Treese's car is found at an adjoining business or a business nearby, at the Weokie Credit Union, and a search ensues for the owner of that car, a search that would last all day. A

Q. Did he take any clothes with him?
A. Yes, he always had extra clothes, either at the motel or in his car with him. He also had taken, this being January, an extra sweatshirt with him to wear also.
Q. Did he have a wallet or did he just carry cash in his pocket?
A. Oh, no, he always carried a wallet.
Q. How about jewelry? Did he wear a watch?
A. He always wore a watch and his wedding ring.
Q. And did he carry any -- his keys, did he carry them just a single key? Did he carry them on a key ring?
A. He carried them on a key ring. He had massive amounts of keys, you can understand.
Q. And did he have anything else that he carried? A comb, a pocketknife? Anything like that?
A. He normally always carried a comb and sometimes, normally always a pocketknife, you know.
Q. Now, ma'am, can you tell us what type of car that he drove?
A. Can I refer to my notes?
Q. Yes, you may.
A. Thank you.
It was a 1986 Buick LeSabre and it was gray.
Q. Okay. And do you know what the tag number was?
A. He had a specialty tag on that because he was a ham

A. Yes.
Q. Were they, likewise, contained within the wallet?
A. I believe so, yes.
Q. The two pocketknives?
A. I don't recall where they were found.
MR. LYMAN: May I approach, Your Honor?
THE COURT: You may.
Q. (BY MR. LYMAN) Did you prepare kind of a log of items collected at the crime scene?
A. Yes, I did.
Q. Where you numbered them one, two, three.
A. Yes.
Q. Their locations and disposition like if they went to property or serology?
A. Right.
Q. Do you recognize this?
A. Yes, I do.
Q. Okay. Is that your report on this case?
A. Yes, it is.
Q. On the last question I asked, where was the location found regarding the two pocketknives?
A. Personal items, pocketknives were in the blue jeans in the right rear pocket.
Q. And personal items also included the wallet?
A. Correct, credit cards, photos, two knives, lock and

three keys.
Q. Okay. Of the two pocketknives, they were folding type pocketknives?
A. I believe so.
Q. There would have to be some measure of human activity to open them up?
A. Yes.
Q. And that would be noteworthy to you, for example, if you had found a knife that was open at a crime scene, a pocketknife?
A. Yes, sir.
Q. I know you indicated before that you don't recall if they were closed or open on direct examination.
A. Correct.
Q. Would it be fair to conclude had they been opened, that would be more noteworthy and you would have noted that?
A. If they were open and that they were out in the room someplace, yes.
Q. These were not out in the room someplace?
A. Correct.
Q. They were in a place that people commonly carry them?
A. Yes.
Q. So the total number of pocketknives within this room would be three?
A. Yes, sir.

Q. There's been prior testimony that this had been recovered at the crime scene under the victim's head. Were you aware of that?
A. No, until you told me.
Q. And that it was located in its open condition as you see it today?
A. Right.
Q. Now, when you look at that exhibit and your photograph here and your diagram of measurements, is that knife a potential contributor to the injuries to this man's chest?
A. Yes.
Q. Is it a potential contributor to the injury to his left buttock?
A. Yes.
Q. As far as the cut by the sharp instrument on his right third finger, is that the type of sharp instrument that could have made that injury?
A. That I don't know. There's no way to -- it could. It could. It is possible.
Q. When we say "pattern," pattern is a way of becoming almost more certain about an instrument, isn't it?
A. Yeah, that's included.
Q. But when we -- so when we talk about the finger being cut by an instrument similar to a knife or a sharp instrument, you can't say what knife, but a knife is a

potential --
A. Yes.
Q. -- contributor?
A. Right.
Q. Same thing with the left elbow?
A. Yes.
Q. And the right hand, that's a defensive injury, potentially?
A. Likely. Likely.
Q. Likely on the left elbow?
A. Yes.
Q. And the chest area, I mean, you didn't see any of these kind of markings on his lower extremities other than his left buttocks, did you?
A. Yes. In addition to that there is a petechial contusion on the nipple line which I pointed, looked like it pressed down against some tear like this kind of instrument could have aimed it to the heart, because that's the left side of the heart area.
Q. Now, almost any knife injury can become a lethal knife injury if it's significant enough on a person's body, correct?
A. Yes.
Q. I mean, I could cut my wrist and it could be a real problem, right?

Q. Okay. Were the conversations the same or were they different?
A. They were kind of different into how to do it, when to do it, the amount to do it for, and stuff like that.
Q. Okay. Did Richard Glossip talk to you about how to do it?
A. Yes, he did.
Q. Okay. Do you remember how he said it should be done?
A. At one point when we was in the broiler room --
Q. Fixing the cable TV's?
A. Yeah, fixing the cable. He wanted me to knock him over the head with this hammer and at another point is when he wanted me to use a baseball bat.
Q. Okay. You said he talked to you about different amounts. What do you mean by that?
A. Amounts of money that he would pay me to do it for.
Q. So he wasn't asking for your help for free?
A. No.
Q. All right. What were the different amounts that he told you he would pay you?
A. It went from like 3,500 to 5,000 to the point where he told me he'd pay me 10,000 to do it.
Q. You told us the first time that he said it you didn't think he was serious or that he'd actually follow through.
A. Yeah.

asking you questions, prior to that, did Ms. Smith talk to you about your testimony?

A. No, she -- the only time I seen her was she come to the county along with Gina like one time and spent like five minutes there just, you know, go over the paperwork and make sure the agreement was straight and that was it.

Q. So you spent a few minutes with Ms. Smith about the agreement. You didn't talk about what your testimony would be?

A. No, ma'am.

Q. So then on June 8th of 1998, you give statements under oath; is that correct?

A. Yes, ma'am.

Q. And Ms. Smith asked you questions and Defense Counsel asked you questions?

A. Yes, ma'am.

Q. Then I think you said that -- you and I have met two times; is that correct?

A. Yes, ma'am.

Q. Other than meeting with me -- and one time Mr. Ackley was with me?

A. Oh, yes, ma'am.

Q. Okay. Other than that, have you talked to anyone else from the District Attorney's Office?

A. No, ma'am.

probably wrong?
A. Yeah. I probably thought that. I also know --
Q. I'm sorry, go ahead.
A. I also know that I recall thinking that that's not what I really wanted to do.
Q. But not enough so much that it stopped you from doing it?
A. Yes.
Q. Had you ever done anything like this before?
A. No, ma'am, I had not.
Q. Have you ever done anything like this since?
A. No, I have not.
Q. Okay. You went to Sinclair, you went back to your room, you're breathing, you're pacing. You got a Coke. What did you do then?
A. I grabbed the baseball bat and my keys and walked over to room 102 and entered the room. And then when I opened the door, Mr. Van Treese got up out of the bed he was sleeping in and came around towards me. At that point I took one swing with the baseball bat. He pushed me back into a chair and when I tripped and fell in the chair the end of the baseball bat hit the window shattering the outside window, and he tried to make it to the door and I got up out of the chair and grabbed him by the back of his shirt, because I think he was sleeping in a nightshirt and

pulled him sideways so he tripped over my feet and his own feet and put him on the ground.

And then at one point -- at that point I tried to -- I took my knife out of my pocket and tried to force it through his chest but it didn't go, and then that caused him to roll over onto his stomach to where his back was facing the ceiling and then I hit him quite a few more times with the baseball bat.

Q. When you entered the room was it dark?

A. Yes, it was.

Q. You said he was in bed. Do you know whether he was asleep?

A. The only -- I don't know if he was actually physically asleep. You know, I don't know how long he had been in bed, because Mr. Glossip told me he had just got back and all that, and actually that's what helped me prolong a little bit of time before I did actually go over there. Because I wanted -- you know, if I was going to do it, I wanted to make sure he was asleep and all that.

Q. You wanted to kill him while he was asleep?

A. Yes.

Q. But he woke up?

A. Yes, ma'am.

Q. Mr. Van Treese wore glasses. Do you know if he had time to put --

A. No, he didn't --
Q. -- his glasses on?
A. No, he did not.
Q. Did he have a weapon to defend himself?
A. No, he did not.
Q. When you swung the bat the first time, did you make contact with him?
A. Yes, I did.
Q. Where did you hit him?
A. I think I hit him on his forearms because when I swung it he threw his hand up.
Q. And he pushed you back?
A. Yeah.
Q. Was he fighting? Was he defending himself?
A. Well, when he pushed me back -- well, he threw his arms up when I swung the bat and then he lunged into me and pushed me and I tripped over and fell into the chair, like this, and the baseball bat hit the window and then he was just trying to get out the door.
Q. So he was trying to avoid being attacked?
A. Yes, ma'am.
Q. Did he actually make it to the door?
A. He made it to the door, but before he could get it open is when I grabbed the back of his shirt and pulled him to where he tripped over my feet.

Q. This knife that you took out, was it your knife?
A. Yes, ma'am.
Q. And where did you get the knife?
A. I think I found it in a room where somebody had, you know, already left and left it behind. I just come across it somewhere at the motel. I can't remember exactly how.
THE COURT: It's noon. You tell me where you want to stop.
MS. SMOTHERMON: This is as good as any.
We're going to continue after lunch, Mr. Sneed.
THE WITNESS: Okay.
THE COURT: Ladies and gentlemen, we're going to recess.
Would you take the witness out, please.
(Witness exits the courtroom.)
THE COURT: Ladies and gentlemen, we're going to recess until after lunch. So I'm going to admonish you and ask you to be back in the courtroom by 1:30.
Ms. Thornton, would you step to the bench, please.
(Thereupon, a recess was had, after which, with all parties present, the following was had in open court.)
out of the hearing of the jury.
THE COURT: We're back on the record. The jury has been excused. The Defendant and witness have also been excused. Counsel is at the bench.

MR. LYMAN: Your Honor, at this time we're going to move for a mistrial on the notice problem. We have never received information concerning Mr. Sneed testifying that he either forced or tried to force the knife into Mr. Van Treese's chest, ever, at any point.

In fact, the only information about this issue was in his very first interview where when he was asked the question did you end up stabbing him once with a knife he says, "No." He has always denied using the knife and this is the very first time --

THE COURT: Well, now, wait a minute. We've ever heard that.

MR. LYMAN: We've ever heard --

THE COURT: If that's the only statement he's made, he said that he didn't try to stab him. That doesn't mean that he's always denied using a knife. So those don't necessarily -- those are not necessarily consistent statements. So that's the only statement or notice that you have?

MR. LYMAN: That's right.

THE COURT: Okay.

MR. LYMAN: And anything in addition to that which we've heard today was the first time we've ever heard that. Coupled with the fact that we've also had Mrs. Van Treese come into court and testify that that was what she believed

was her husband's knife.

THE COURT: And we've had other testimony that both of the victim's knives were found in his pockets. So there's been, as it happens in every trial, a variety of testimony. You know, we had Charlene Cable testify that the motel was actually on Meridian and -- well, I didn't and the fact is that those things happen in trial and people misstate.

We've just had this witness refer to the mechanical room not as the boiler room but the broiler room. So we have a little bit of everything.

MR. LYMAN: Well --

THE COURT: Okay. The point is: You're saying you were not noticed.

Do you want to respond, Ms. Smothermon?

MS. SMOTHERMON: Mainly just for the record, Your Honor. I just wanted to point out that prior to these gentleman ever becoming counsel for the Defendant, that he had other counsel, Mr. Fournerat, who spent time with Mr. Sneed prior to his prior testimony in 1998 without Ms. Walker being present. I don't know what the content of that conversation was, but Mr. Sneed, as an Offer of Proof, would testify that he answered every question asked of him at that time truthfully.

Prior to my going and seeing Mr. Sneed last year,

Mr. Burch and I think an OIDS investigator went to see Mr. Sneed without Ms. Walker.

Again, I am not privy to that con- -- I do know parts of it, obviously, because we've had some pretrial discussions, but I don't know everything that was said in that conversation. As an Offer of Proof, though, Mr. Sneed would tell me that everything he did say -- he answered every question asked and that he answered truthfully.

I talked to Ms. Walker about five weeks ago when I went to see Mr. Sneed and asked her if these attorneys had been to see Mr. Sneed. She told me that they had not. That, I guess, Mr. Lyman had actually talked to her, I think it was Mr. Lyman, one of them had talked to her, not about the facts but about the posture and the procedure but that she was not asked if they could talk to Mr. Sneed.

I asked her if they made that request, would she allow it, would Mr. Sneed talk to them and she said, yes, as long as she was present. To my knowledge, that request has not been made.

I asked Mr. Sneed about this knife one time and that was last year. He told me that he had the knife open during the attack, that he did not stab Mr. Van Treese with it. I knew all the wounds to be blunt force trauma and so I didn't pursue it any further.

Yesterday after I heard the ME's questions. I

called Ms. Walker. She had a conversation with Mr. Sneed and conveyed to me that -- the same thing that I knew, that he had the knife open during the attack but that he did not stab him with it. The chest thing we're all hearing at the same time.

THE COURT: Okay.

MR. LYMAN: So as I understand it, you didn't know that he was going to say that he tried to force the knife into Mr. Van Treese's chest until just now?

MS. SMOTHERMON: No. In fact, I had given these pictures to Gina. She, I think showed the pictures to me --

THE COURT: Gina is also known as Ms. Walker.

MS. SMOTHERMON: Ms. Walker.

THE COURT: And that's fine here. I just want the record -- because we've referred to her in both ways.

MS. SMOTHERMON: Because the pictures seemed to indicate that it happened more than once and I thought that he had told me last year that he has just, you know, tried once to attack him with it. That's what he told Ms. Walker. I think that's what he's testified to, that he lunged once at him. So I think that's probably fertile ground for cross-examination because there's, obviously, more than one wound. But he, as far as I know, is only going to recall once.

So I don't believe there's a discovery violation.

We've been bent over backwards to try to say everything we could possibly think any witness would possibly know. I know that things come out at trial that, you know, no one is privy to or that, you know, we don't think is important until it's going through the trial. But I don't believe that there's been a discovery violation.

MR. LYMAN: So I understand, you provided Gina Walker the photographs?

MS. SMOTHERMON: Yes.

MR. LYMAN: And did she have them when she went and talked to Mr. Sneed?

MS. SMOTHERMON: I don't know that. I don't know that.

MR. LYMAN: Was she made aware --

THE COURT: Well, now, wait a minute. You want to talk to her, you don't need to be on the record to do that. The point is, is that you're asking for a mistrial, there's not a discovery violation. Your request is denied.

Now you guys talk among yourselves. Thank you.

(Thereupon, a recess was had, after which, with all parties present, the following was had in open court.)

THE COURT: Thank you. Please be seated.

All right. Ms. Smothermon, you may continue.

MS. SMOTHERMON: Thank you, Your Honor.

Q. (BY MS. SMOTHERMON) Mr. Sneed, did you and I talk over

I'm not mistaken, some of the questions if not all that we have listed within the text of the motions are some of the ones the Court of Criminal Appeals suggested in the footnote of the Fitzgerald case cited at the end of the document, 972 P.2d 1157. I'll check that and make sure because it's been quite a while since I wrote that, but I think that was the source for these.

THE COURT: Well, I'll take another look at it. I'll be happy to do that and let me just make a note that I will hold this in abeyance and strike my earlier ruling and we'll just take another look. Let's make sure.

MR. BURCH: Yes, ma'am, whatever the dictate is in -- the Court is in the Fitzgerald case.

THE COURT: If I can figure out what the law is, I'll be happy to follow it. Okay.

Motion Requesting Production Of All The Statements Of The Co-Defendant, Justin Sneed, is one of the motions that I have a notation that you all wish to be heard on. I do think that it's interesting that the State has responded that at this point they have given you all everything, that they have completely complied. What further needs to be discussed?

MR. BURCH: Your Honor, the primary basis of this request is that since this case has been remanded, we wanted to see if there was any other correspondence between the

witness and the State or anything of that nature. We do have receipt of the reports and the videotaped statement and of course we have the copy of the transcripted testimony that was previously admitted in the case. It's just to invoke the ongoing duty of discovery and that's why we mention it. I'm not saying that we haven't received anything.

THE COURT: Okay. I mean, you want to make sure that you've got it covered and you do and the State's absolutely going to comply with the law and I have every confidence about that, so we're in good shape.

I note that the motions were filed I think in June and the State's response was filed also in June. And I have no idea if there's been continuing conversations, but I know the State will continue to meet its obligation. So, I guess basically what I'm going to say is that that's already been accomplished.

The Motion Requesting Production Of All Statements Of The Accused.

MR. BURCH: Yes, ma'am, the only thing that comes to mind that I can identify that I don't think we've been given is that Mr. Glossip, while in custody, was given a polygraph examination during which questions were asked and answers were given and we would like to have the documentation dealing with that colloquy with the Defendant

getting into this a little bit, but I want the record to be real clear that because there are differences, I am not of the belief that that's a deliberate attempt to provide false or misleading evidence. Okay?

MR. BURCH: Your Honor, I will clarify that. I'm not saying -- I'm saying there's a danger that that's going to happen, given the way our notice is defined at this point.

THE COURT: Okay. Well, let's try to let Ms. Smith be heard. How about that?

MS. SMITH: Your Honor, to the best of my knowledge, Justin Sneed will be on the witness stand to testify.

THE COURT: Okay.

MS. SMITH: If he decides between now and the trial that he refuses to testify, then we'll have to go another route, but I believe that we can take that up at that time because I don't anticipate that that's going to be the situation.

THE COURT: Okay. If that were to be the situation, we'd have to have a hearing and determine whether or not the requirements are met and we'll argue about it at that time, but we have no reason to believe at this time that Mr. Sneed is not going to take the stand?

MS. SMITH: That's correct. As far as Mr. Sneed's

testimony, I can't tell you word-for-word what Mr. Sneed will testify to. I don't believe the evidence code requires me to do that. I believe it says that I have to give a summary of the substance of his testimony, which that's what I'm saying to the Defense that we will do. I anticipate that Mr. Sneed will testify truthfully, that there are some inconsistencies between the videotaped statement and the statement that he gave at the trial. And that's exactly why this case is back here now, because the Defense attorney did not utilize the videotape to impeach Mr. Sneed's testimony.

These attorneys have that opportunity to do that and I'm sure that they will do so. I've given them a copy of the videotape. They have Mr. Sneed's transcripts and they can utilize those. I'm sure that there are going to be some inconsistencies between those two statements and the time that he testifies at the next trial, because he can't remember as well as I can't remember word-for-word everything that was said and it has been, what, five years now since this event occurred? I don't know of any inconsistencies, but I'd be willing to suggest to the Court and to everyone that there are going to be some inconsistencies in everybody's testimony, not just Justin Sneed's, but that doesn't make them false or misleading.

THE COURT: Well, and there's no doubt that as time goes on, people do have inconsistencies and, again,

that's subject to cross-examination. And as I think I may have put in the order after the evidentiary hearing we did, Defense Counsel will attempt to impeach him and my guess is, the State will try to rehabilitate him. That's what lawyers do.

So, even though I found that there were inconsistencies which for the purposes of that evidentiary hearing I thought showed a lack of preparation and diligence by trial counsel, I don't believe that that means necessarily that he was not being truthful. The fact is, I don't think you could tell because it was not tested. So, is there anything else that we really need to talk about then in regard to Mr. Sneed's testimony?

MR. BURCH: I would just ask to clarify that we're going to proceed under the assumption that Mr. Sneed will be a live witness in the case.

THE COURT: That's the State's presumption and so we're all going with it until we know otherwise, at which time we'd have to have the appropriate hearing.

MR. BURCH: Very good. One moment.

I understand what our assumption is about how this is going to happen, however, I wonder if this is something we shouldn't try to address pretrial to make sure that this young man is going to testify, to guide us in how we're going to prepare. Because as you pointed out, and the Court

of Criminal Appeals pointed out, this case is all about what this young man says in this case. And if we're going to know that he's going to testify, it's going to guide us one way. If we're going to know that they're going to be trying to use prior testimony that's something else.

THE COURT: Well, Mr. Burch, if Mr. Sneed says, yeah, he'll testify, and he gets himself in here and he refuses to do so, there isn't anything anybody can do about that.

MR. BURCH: That's true.

THE COURT: At this point, as for every other witness in this trial, we're of the belief that they will appear under the subpoena and will testify truthfully. What else could you possibly want?

MR. LYMAN: May we have just a moment, Your Honor, just briefly?

THE COURT: Yes.

MR. BURCH: Your Honor, the reason that I'm inquiring about it is that in preparation for this several months ago, I spoke with this young man and interviewed him and he indicated to me at that time that he did not want to testify.

THE COURT: You know what, I would want to be in Malibu today, but instead of that I'm in court with you lovely folks. He may want to do a lot of things.

MR. BURCH: I just felt it was incumbent upon me to inform the Court --

THE COURT: How long ago was that?

MR. BURCH: Three and a half, four months ago, something of that nature.

THE COURT: Ms. Smith, have you had any kind of communication with Mr. Sneed since apparently Mr. Burch has?

MS. SMITH: No, Your Honor. I have an agreement with Mr. Sneed that was made in 1997, that he would testify truthfully in every situation that he was called to testify upon and that was made through his attorney, Ms. Gina Walker. And I assume that any communications that are had with Mr. Sneed concerning this case should go through her and that's exactly the way I proceed. That's the way I proceeded in the first trial. I never talked to Mr. Sneed without her being present and I will not do so now. I assume that he will live up to his agreement. And I assume that Gina Walker would talk to him before he makes any kind of a decision not to testify, because in his agreement there are some consequences if he decides not to do so and Ms. Walker is the one who needs to talk with him about those, not Mr. Burch.

THE COURT: Well, you know, there is a point to be made that Mr. Sneed may have formed opinions or may have desires but after reviewing the agreements that he's made,

he may have a whole different understanding of what his responsibilities are. And so I'm going to suggest to you that if you haven't already done so, that you get acquainted with Gina Walker who is a really top-notch defense lawyer in this building. And I'm sure she will be happy to explain to her client exactly what his responsibilities are and his choices and the consequences of whatever choices he would make. Okay?

Now, as it pertains to the particularities of your Motion In Limine, I'm overruling them, but I think we've had a thorough enough discussion to understand that if anyone is made aware that Mr. Sneed is refusing to keep the agreement that he made with the State of Oklahoma, everyone else has to be notified of that immediately. It would affect trial preparation, we would obviously need to have hearings and I want immediate notice of that.

MS. SMITH: And, Your Honor, I tell the Court that I have writted him from the penitentiary. I writted him for the original date for the 13th, so I anticipate he'll be here by Monday and I will talk with Ms. Walker and ask her to let us know what his feelings are at that time. I'll inform the Court as soon as I know.

THE COURT: That will be great. Thank you.

All right. We have the Defendant's Motion To Reveal All Deals and I understand that you are preserving

THE COURT: That would be April the 21st, as I understand you have Coddington. So, Mr. Glossip, we're going to go ahead and set this for August. We're going to see if there's something to be done about doing this earlier. If there's not, we're going with the August date. It's the only thing I know to do. I have been totally unsuccessful at manufacturing dates and sticking them in the calendar. So, that's what we'll do.

And I trust that you guys will visit shortly with Ms. Keith. And, Mr. Burch, I'm going to suggest that if you have not already gotten acquainted with Gina Walker that you do so and talk to her about getting the sample from Mr. Sneed. I find Ms. Walker to be extremely professional and if we need to have a hearing of some sort, we'll try to get you guys in here immediately. We'll call and find a time that is amenable.

MS. SMITH: Judge, I talked with Ms. Walker this morning concerning this case and gave her some police reports and things and she has informed me that Mr. Burch has been to the penitentiary and her words were, "pressured Mr. Sneed" concerning his testimony in this, not once but several times. And I believe that Mr. Burch needs to be cautioned that he should go through Ms. Walker. She has never given him permission to talk with him. She is still his attorney. Even though his case has been resolved, he is

MR. BURCH: Yes, Your Honor.

THE COURT: And, so, I'm going to tell you that I think that based on the evidence that we have, this Motion in Limine would be appropriate. I don't know what is to be determined from your DNA testing that somehow would be relevant to this, but I know you guys are doing a good job and I know you're working hard to represent your client so if there's some reason that I need to reconsider this, at the appropriate time you'll draw that to my attention. So, show the State's Motion in Limine regarding the alternate suspects as sustained.

Now, I don't have a copy of the Amended Bill of Particulars and, you know, if we need to make copies of anything we even have a little rinky dink copy machine in here if we turn off all the space heaters because it's 66 degrees, we can use it and not blow a fuse.

MS. POPE: Do you have a copy of the State's response to the Defendant's objection?

THE COURT: No.

MS. POPE: That I will need a copy of, Your Honor.

THE COURT: If you'll just stick your head in and tell Tina that we need her to make a few copies.

(Brief pause in proceedings.)

MS. POPE: This is the Amended Bill Of Particulars and then there are two additional Most Definite And Certains

with that.

THE COURT: Okay.

MS. POPE: Then I think you have a copy of the Defense' objection that was filed Friday and so today we filed our response to their objection.

THE COURT: If we can then, if you you all will just give me one moment, let me go off the record and take a look at all of this.

(Brief pause in proceedings.)

THE COURT: I have read the Amended Bill Of Particulars as well as the two statements making it more Definite And Certain and a summary of witnesses in regard to that Amended Bill Of Particulars. I have also read the Defendant's Objection To The State's Amended Bill Of Particulars and the State's response. I do not want to revisit with great specificity what's contained in the written pleadings. If there are additional things that you think that the Court should be informed of I guess, Ms. Pope, let me start with you only, because your Amended Bill Of Particulars sort of triggered all of the pleadings that came after, I'll let you be heard first. Anything else that you want me to take a look at in ruling on this?

MS. POPE: I don't believe so, Your Honor, unless there are some particular issues or concerns that you have. There was a large portion of the Defendant's objection that

an answer and I'm bringing the jury over and that's it.

MS. POPE: We'll step out, Your Honor.

(Thereupon, court was adjourned for the evening recess. On November 4, 2003, with all counsel and the Defendant present, the following was had in open court.)

THE COURT: Thank you. Please be seated. All right. We are back on the record with counsel and the Defendant are present and we have not brought the jury in yet. We have several matters to take up.

First of all, Mr. Glossip, I gave you additional time to consider whether or not you were going to accept the State's offer and what is your decision?

THE DEFENDANT: No.

THE COURT: And you understand that that offer will not be extended to you again?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Now, we have a potential problem in regard to hearsay and I think we need to go ahead and put this on the record this morning. My understanding is that Defense Counsel went to whatever penitentiary to interview Justin Sneed, is that right?

MS. POPE: That's correct.

THE COURT: And for --

MR. BURCH: That's correct.

THE COURT: And for whatever reasons, only Mr.

Burch got in to see Mr. Sneed and Mr. Woodyard and Mr. Lyman were present, but outside of that hearing. Gina Walker, who has been Mr. Sneed's counsel seems to have a disagreement about whether or not she continued to represent Mr. Sneed at that time and she was not happy that she was not present at that meeting. Is that accurate?

MR. BURCH: Your Honor, the person that I actually received the communication from in the Public Defender's Office was not Ms. Walker but Tim Wilson.

THE COURT: Okay.

MS. POPE: Tim Wilson was lead counsel the first time.

THE COURT: Okay. The point being that they don't think that their representation ended and they did not think that you should see Mr. Sneed without counsel being present, is that correct?

MR. BURCH: That's correct.

THE COURT: Okay. So, part of the State's theory of this case is that Mr. Sneed was a pretty malleable guy who was influenced by Mr. Glossip to commit these crimes and, of course, because the Defense' theory of the case has been up to this point that Mr. Glossip didn't know about this until after the fact, you intend to cross-examine Mr. Sneed pretty ferociously, would that be accurate, Mr. Lyman?

MR. LYMAN: Yes, Your Honor.

THE COURT: And tell me, if you can, somebody, how you think that potentially Ms. Walker could be called as a witness in this case.

MS. POPE: Your Honor, we have listed her out of an abundance of caution and to meet the notice requirements that are set upon us by law. As we have told anyone who has asked, including Defense Counsel, we would not anticipate that she would be called as a case in chief witness in order to substantively prove the guilt of Richard Glossip. However, Justin Sneed is going to be called as a witness. Depending on how the cross-examination goes and/or the tenure and the questions that are asked or the impressions that are left, there may need to be some rehabilitation of some issues. I believe that's how Ms. Walker would come to be a witness.

I believe that there will be, could potentially be, again, I don't know how cross-examination is going to go, but I think there potentially could be an express or implied claim of fabrication, recent fabrication. I believe that she could be called under the law in order to rebut that. She has potentially, I believe, two areas in which she conceivably could be a witness. One is, with the making of the original agreement to testify truthfully and, again, I can't tell you specifically, what she would testify to

that because I don't know how the cross-examination would play out, but that's an area of which she has knowledge that might be important.

The other area would be the information that she believes as far as still representing Mr. Sneed that she wrote a letter to or her office wrote a letter to Mr. Glossip's counsel telling them not to talk to him again without representation.

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

That obviously was related to Ms. Walker. That would be hearsay but to what extent, again, that would come in as far as state of mind, I don't know.

At this time, I don't anticipate. Gina Walker has been on the witness list from the beginning because of her involvement with the plea agreement. It is my understanding in talking to Ms. Smith and I know there's disagreement

APPENDIX F

Excerpts of Pleadings Before the Trial Court in *State v. Glossip*, No. CF-97-24418

INFORMATION C- 9700244

IN THE DISTRICT COURT, IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA 1860/0293

THE STATE OF OKLAHOMA)
PLAINTIFF,)
VS.)
JUSTIN BLAYNE SNEED) INFORMATION
AKA JUSTIN TAYLOR)
DEFENDANT.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA, COMES NOW ROBERT H. MACY THE DULY ELECTED, QUALIFIED AND ACTING DISTRICT ATTORNEY IN AND FOR OKLAHOMA COUNTY, DISTRICT NO. 7, STATE OF OKLAHOMA, AND ON HIS OFFICIAL OATH INFORMS THE DISTRICT COURT THAT

COUNT 1: ON OR ABOUT THE 7TH DAY OF JANUARY, 1997, A.D., THE CRIME OF MURDER IN THE FIRST DEGREE WAS FELONIOUSLY COMMITTED IN OKLAHOMA COUNTY, OKLAHOMA, BY JUSTIN BLAYNE SNEED WHO WILFULLY, UNLAWFULLY AND WITH MALICE AFORETHOUGHT, KILLED BARRY ALAN VANTREESE BY BEATING HIM WITH A BLUNT OBJECT, INFLICTING MORTAL WOUNDS WHICH CAUSED HIS DEATH ON THE 7TH DAY OF JANUARY, 1997, CONTRARY TO THE PROVISIONS OF SECTION 701.7 OF TITLE 21 OF THE OKLAHOMA STATUTES, AND AGAINST THE PEACE AND DIGNITY OF THE STATE OF OKLAHOMA;

ROBERT H. MACY
DISTRICT ATTORNEY, DISTRICT NO. 7
OKLAHOMA COUNTY, OKLAHOMA

BY _____
ASSISTANT DISTRICT ATTORNEY

ld

STATE OF OKLAHOMA, OKLAHOMA COUNTY, SS:

I, D. Deason BEING DULY SWORN ON MY OATH, DECLARE THAT THE STATEMENTS SET FORTH IN THE ABOVE INFORMATION ARE TRUE.

BY _____

SUBSCRIBED AND SWORN TO BEFORE ME THIS 14 DAY OF JANUARY, 1997.

MY COMMISSION EXPIRES: 5/29/98

BY Laura K. Daniels
NOTARY PUBLIC

FILED
DISTRICT COURT
OKLAHOMA COUNTY, OK
1997 JAN 15 A 9:45
TOM KELSEY
COURT CLERK
BY _____ DEPUTY

ROBERT H. MACY
DISTRICT ATTORNEY, DISTRICT NO. 7
OKLAHOMA COUNTY, OKLAHOMA
BY _____
ASSISTANT DISTRICT ATTORNEY

66. **Justin Sneed** - Will testify consistent with his video taped interview with police and police reports. Defendant Sneed will testify he was given a sentence of Life Without Parole to testify truthfully against defendant Glossip. The Bill of Particulars was dismissed in exchange for his plea of Life Without Parole. Plea agreement was made September, 1997. Copy of agreement furnished to defense counsel.

Respectfully submitted,

ROBERT H. MACY
DISTRICT ATTORNEY

BY: Fern L. Smith
FERN L. SMITH, OBA #8347
Assistant District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served on the Honorable Judge Burkett and Julia Summers, Attorney for Defendant, by hand delivering a copy to the Oklahoma County Public Defender's Office, 6th Floor, Oklahoma County Office Building, this 16 day of September, 1997.

Fern L Smith
FERN L. SMITH
Assistant District Attorney

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,)
)
Appellant,)
v.) No. D 98-948
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

ORDER REMANDING TO THE PRESIDING JUDGE OF OKLAHOMA COUNTY FOR EVIDENTIARY HEARING ON CLAIMS OF JURY MISCONDUCT, INEFFECTIVE ASSISTANCE OF COUNSEL, AND PROSECUTORIAL MISCONDUCT; ORDER DIRECTING THE TRIAL COURT TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW; SETTING DUE DATES FOR PREPARATION OF RECORD AND SUPPLEMENTAL BRIEFS

Appellant is appealing from his Oklahoma County conviction for First Degree Murder in Case Number CF 97-244. The Brief of Appellant was filed on April 17, 2000. Simultaneously with the filing of Appellant's Brief, counsel filed an Application for Evidentiary Hearing on Jury Misconduct Claims, An Application for Evidentiary Hearing on Sixth Amendment Claims, and a Notice of Extra-Record Evidence Supporting Prosecutorial Misconduct and Violations of the Due Process Clauses of the Oklahoma and Federal Constitutions.

In the Application for Evidentiary Hearing on Jury Misconduct Claims, counsel for Appellant alleges (1) jurors were influenced by extraneous material during first stage deliberations - by the use of a Bible as a reference in deliberations and (2) one juror completely abandoned his responsibility to require the State to meet its burden of proof beyond a reasonable doubt by agreeing to vote for guilt in the first stage and abdicating his responsibility

during the second stage by placing the sentencing decision in the remaining jurors. The claims raised in the Application are supported by three affidavits - two from jurors and one from an investigator for the capital division of the Oklahoma Indigent Defense System.[1] Appellant requests this Court remand this case for an evidentiary hearing on the first allegation, pursuant to Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999), "to supplement the record on direct appeal with evidence regarding his claim that his conviction was a result of extraneous prejudicial information." No specific reason for an evidentiary hearing to develop the second allegation is given.

In his Application for Evidentiary Hearing on Sixth Amendment Claims, filed pursuant to Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999), Appellant raises several claims, including that his trial counsel failed to utilize crucial evidence available and known to counsel at the time of trial and that trial counsel failed to prepare and present a cogent defense theory, mitigation evidence, and second stage closing argument. Rule 3.11(B)(3) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to "utilize available evidence or adequately investigate to identify evidence which could have been made available during the course of trial. . . ." Once an application has been properly submitted along with supporting affidavits, this

[1] Attached to the Application are the Affidavits of jurors Casey Fine and Jere Osburn, and the

Court reviews the application to see if it contains "sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." *See* Rule 3.11(B)(3)(b)(i).

In the Notice of Extra-Record Evidence Supporting Prosecutorial Misconduct and Violations of the Due Process Clauses of the Oklahoma and Federal Constitutions, Appellant notes the ability of this Court to direct supplementation of the record when necessary for the determination of any issue pursuant to Rule 3.11(A) and submits the videotaped confession of the co-defendant, which was not utilized by trial counsel and which is referred to in the ineffective assistance of counsel claims, also illustrates the overreaching tactics of the prosecution in securing Appellant's conviction.[2] Appellant argues in the Notice, and in Proposition IV of his Brief, that the prosecutor engaged in improper bolstering and knowingly offered false and misleading testimony, and submits this issue cannot be fully examined without this Court's consideration of the extra-record evidence of the co-defendant's confession, which should have been utilized by trial counsel but was not and therefore is not part of the appeal record.

Affidavit of investigator Marcia Dawson.

[2] The videotape interview of the co-defendant, Justin Sneed, is offered as Exhibit 1 to the Notice. Transcription of the videotape is attached to the Notice as Exhibit 2. The affidavit of Amanda Chapman, the person who transcribed Sneed's confession, is attached to the Notice as Exhibit 3.

In response to these claims, the State of Oklahoma filed a "Notice of Procedurally Barred Application for Evidentiary Hearing." The State contends the claim of jury misconduct is barred from review, because Appellant did not file a motion for new trial pursuant to 22 O.S.1991, § 952(3) and *Ullery v. State*, 1999 OK CR 36, ¶ 30, 988 P.2d 332, 347.

Rule 3.11(A) states that

> [a]fter the Petition in Error has been timely filed in this Court, and upon notice from either party or upon this Court's own motion, the majority of the Court may, within its discretion, direct a supplementation of the record, when necessary, for a determination of any issue; or, when necessary, may direct the trial court to conduct an evidentiary hearing on the issue.

Proof of the allegations raised in the Application for Evidentiary Hearing on Jury Misconduct Claims, Proposition IV of Appellant's brief, and the Notice of Extra-Record Evidence Supporting Prosecutorial Misconduct require this Court to consider materials which were not admitted in the district court. These matters are not currently part of the appeal record. We find an evidentiary hearing on these issues is appropriate so that findings may be made and an appropriate record may be supplemented to the pending direct appeal. *See Gilbert v. State*, 1998 OK CR 17, ¶ 14, 955 P.2d 727, 732, n.3 (the vehicle for bringing extra-record materials to the attention of this Court is available to appellate counsel through the use of Rule 3.11); *Hain v. State*, 1998 OK CR 27, ¶ 6, 962 P.2d 649, 652 (extra-record claims which are not raised on direct appeal are waived on post-conviction "if facts contained in them were available

to his direct appeal attorney and thus could have been argued on direct appeal").

Furthermore, we find the allegations set forth in Proposition II of Appellant's Brief and set forth in the Application for Evidentiary Hearing on Sixth Amendment Claims show this Court "by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(i).

Accordingly, having considered the serious allegations contained within Appellant's various Applications, we hereby **FIND** the Applications for Evidentiary Hearings on Jury Misconduct, Sixth Amendment Claims, and Proseuctorial Misconduct should be, and are hereby, **GRANTED**. We reserve ruling on Appellee's claim of waiver.

This case is remanded to the Presiding Judge of Oklahoma County for an evidentiary hearing and findings of fact addressing the following claims relating to jury misconduct:

(1) whether extraneous materials, specifically a Bible, was physically brought by one or more jurors into the jury deliberation room; and,

(2) whether the same was/were referred to and utilized by jurors during their deliberations in the first or second stage of Appellant's jury trial.

The assigned judge should also hear evidence concerning the Sixth Amendment claims raised by Appellant, and enter appropriate findings of fact and conclusions of law which shall determine:

(1) the availability of the evidence or witness;

(2) the effect of the evidence or witness on the trial court proceedings;

(3) whether the failure to use a witness or item of evidence was trial strategy; and

(4) if such evidence or witness was cumulative or would have impacted the verdict rendered. *See* Rule 3.11(B)(3)(b)(iii).

Finally, the trial court shall give specific consideration to the videotape of the co-defendant's confession, which was not utilized by trial counsel, and determine whether the prosecutor in this case knowingly mislead the jury as to the contents of this confession.

The trial court is hereby ordered to conduct the evidentiary hearing within forty-five days from the date of this Order; the findings of fact and conclusions of law shall be prepared by the trial judge and filed in the district court and in this Court within thirty (30) days from the date the evidentiary hearing is held. A transcript of the hearing shall be prepared and filed in the district court and in this Court within thirty (30) days from the date the evidentiary hearing is held with copies provided to the parties.,

The parties shall have ten (10) days from the date the transcript is filed in which to file a supplemental brief, not to exceed ten (10) pages, addressing the claims considered by the trial court and the trial court's findings of fact and conclusions of law.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of December, 2000.

RETA M. STRUBHAR, Presiding Judge

Concur in Part / Dissent in Part

GARY L. LUMPKIN, Vice Presiding Judge

CHARLES A. JOHNSON, Judge

CHARLES S. CHAPEL, Judge

STEVE LILE, Judge

ATTEST:

Clerk

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP	)	
	)	
Appellant,	)	
	)	
-vs-	)	**Case No. D 98-948**
	)	**CF-1997-244**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AFTER EVIDENTIARY HEARING
ON REMAND FROM THE COURT OF CRIMINAL APPEALS

The Court of Criminal Appeals issued an Order Remanding for evidentiary hearing pursuant to Rule 3.11(A) and Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999) in the above-captioned case.

Acknowledging the difficulty of the issues to be considered, an extension of time to hold the evidentiary hearing was granted by order filed January 17, 2001. Pursuant to that scheduling order the evidentiary hearing was held March 5, 2001. The Appellant appeared personally and with counsel, Mr. G. Lynn Burch, III and Mr. Matthew Haire, Oklahoma Indigent Defense System. The State of Oklahoma appeared by counsel, Ms. Fern Smith and Ms. Sandra Elliott, Assistant District Attorneys for Oklahoma County. In its Order Remanding, the Appellate Court limited the scope of the hearing to the specific determinations as set forth below.

MATERIALS REVIEWED PRIOR TO HEARING

Prior to beginning the hearing, the assigned judge reviewed the following: 1) Preliminary Hearing transcripts; 2) Transcript of a pre-trial motion hearing held May 29, 1998; 3) The entire trial transcript (excluding voir dire); 4) All exhibits admitted into evidence during trial (which were withdrawn from the Appellate Court Clerk for the purpose of this hearing); 5) The entire District Court file; and 6) Pleadings from the Direct Appeal and all exhibits attached.

ISSUE I. JUROR MISCONDUCT

The Trial Court was instructed to make findings of fact addressing Appellant's claim of jury misconduct, specifically:

1) whether extraneous materials, specifically a Bible, was physically brought into the jury deliberation room by one or more jurors; and,

2) whether the Bible(s) was referred to and utilized by jurors during their deliberations in the first or second stage of Appellant's jury trial.

At the evidentiary hearing, nine of the jurors from the capital trial held in 1998 were called as witnesses.

The Court, having heard and carefully weighed the evidence presented makes the following findings of fact:

1. Juror Casey Fine testified under oath and carried with him a large black Bible. He stated that he brought a Bible with him into the jury deliberation room during deliberations, and that it was actually utilized during deliberations at the request of a male juror, whose name was unknown to him. He further testified that the male juror was

neither James Hardy nor Jere Osburn, whom he had seen in the courthouse hallway on March 5th.

2. Mr. Fine's testimony conflicted with his affidavit filed on April 17, 2000, as Exhibit 7 in Appellant's Application for Evidentiary hearing i.e.; "There was an hour or more of conversation about the Bible during the guilt or innocence part of deliberations." Nowhere in the affidavit does Fine say that he actually opened the Bible and used it during deliberations.

3. Juror James Hardy testified under oath that a Bible was present in the jury deliberation room during deliberations but it was not used during deliberations.

4. Juror Jere Osburn testified under oath that a Bible was present in the jury deliberation room, that it was used in deliberations; and that he believed it was used in Stage Two.

5. Juror Jonathan Cody Rodden testified under oath that he doesn't recall a Bible being in the jury deliberation room during deliberations.

6. Juror Nancy Brooks testified under oath that she doesn't recall a Bible being in the jury deliberation room during deliberations.

7. Juror Lisa Selensky testified under oath that she doesn't recall a Bible being in the jury deliberation room during deliberations.

8. Juror Bill McWilliams testified under oath that he was the jury Foreman, that he remembered a Bible being present in the room during deliberations, that he remembered one particular juror who consistently carried that Bible with him everywhere, and that the Bible was not opened or utilized during deliberations.

9. Juror Ray Scott Chappell testified under oath that he does not remember a Bible being present in the jury deliberation room during deliberations.

10. Juror William Armstrong testified under oath that he was not exactly sure if a Bible was present or not during deliberations.

11. Conflicting testimony was presented as to whether a Bible was actually utilized during deliberations. The affidavit of juror Casey Fine, who brought the Bible into the jury room, was that during deliberations there, "was about an hour or more of conversation about the Bible."—not that the Bible was actually opened and used during deliberations. Fine's testimony at the evidentiary hearing was that he actually opened the Bible and used it during deliberations.

12. Jurors Hardy and McWilliams acknowledged the Bible was present in the room but denied it was used in deliberations. Jurors Rodden, Brooks, Selensky, and Chappell don't remember the Bible being in the deliberation room during deliberations and Juror Armstrong is uncertain if it was in the room.

13. Seven of the nine witnesses have no recollection of the Bible being utilized during the deliberation process.

14. Considering all testimony given at the evidentiary hearing this Court finds there is credible evidence that a Bible was physically in the jury room during deliberations. Considering all the testimony and the appearance of the Bible, this Court finds credible evidence that the Bible was not actually utilized during deliberations.

ISSUE II. SIXTH AMENDMENT CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The Order Remanding instructed the trial court to hear evidence concerning the

Sixth Amendment claims raised by Appellant and enter appropriate findings of fact and conclusions of law, which shall determine:

1) the availability of the evidence or witness;
2) the effect of the evidence or witness on the trial court proceedings;
3) whether the failure to use a witness or item of evidence was trial strategy; and
4) if such evidence or witness was cumulative or would have impacted the verdict rendered pursuant to Rule 3.11(B)(3)(b)(iii).

Although the parties stipulated as to the authenticity of Dr. Edith King's report on Justin Sneed's competency, it was not admitted during the hearing as it would have been inadmissible at trial. OKLA. STAT. tit. 12, § 2503, "Physician and Psychotherapist-Patient Privilege", applies to Dr. King's report concerning Sneed's competency. Appellant alleges Sneed could have been impeached with some of Dr. King's conclusions or findings. This would have been improper. Sneed's statements to Dr. King were privileged and it is highly unlikely Sneed would have waived his privilege to be impeached. The report is not admissible for trial, nor to establish the claim of ineffective assistance of trial counsel.

After the Court's voir dire of Mr. Pat Ehlers, his testimony was found to be improper and not allowed. Ehlers was a public defender handling capital cases in the Oklahoma County Public Defender's Office and thus was in the same "law firm" as Sneed's defense attorneys, Gina Walker and Tim Wilson. Ehlers' "cursory knowledge"[1] of Richard Glossip's case came through his professional associations in the Public Defender's Office. Ehlers' loyalty is owed to Sneed. Since Glossip termed Sneed a liar and claimed Sneed perjured himself at trial, Ehlers had a conflict in providing legal

[1] In Appellant's Application for Evidentiary Hearing on Sixth Amendment Claims, Exhibit 5, Ehlers stated, "Having some cursory knowledge of the facts of the case..."

assistance to Glossip's attorney during the trial. The conflict continues as Glossip still asserts Sneed's testimony was perjured. Even though Ehlers presently works as a federal public defender his testimony and "opinion" regarding the effectiveness of Glossip's trial counsel is still prohibited. *See* OKLA. STAT. tit. 5, Chap. 1, Appendix 3-A, *Rules of Professional Conduct*, Rules 1.7, 1.9, 1.10 and 3.7.

The parties stipulated that Captain Charles Rexford was present and available to testify during the trial. Further, the parties stipulated to the authenticity of State's Exhibit # 4, the videotape of co-defendant Justin Sneed's interview with the Oklahoma City Police Department, and that the videotape was available at the time of trial. Because the Court reviewed the exhibit in preparation for the hearing it was not played again.

A. CAPTAIN CHARLES REXFORD

Having heard testimony from the witness, the Court makes the following findings of fact:

1. Captain Rexford was sworn and testified he has been a deputy sheriff in Washington County, (Fayetteville) Arkansas for the past 26 years.

2. Rexford was familiar with a homicide that occurred in 1984 within his jurisdiction. The victim was Orley Hooten, an elderly man known locally in their rural county. The murderers' motive was robbery and Hooten was bludgeoned to death. The most likely weapon, among several instruments found at the scene, was a bloody rock. A baseball bat was never found nor considered as a possible weapon.

3. Co-defendants Richard (Ricky) Paige and Steven Wilson were charged with Hooten's murder.

4. Trial counsel Fournerat sent a Freedom of Information request for law enforcement records on Glossip to Washington County, Arkansas. Rexford called Fournerat and told him no records were found for Glossip.

5. Fournerat then told Rexford he didn't want records on Glossip; he was really looking for records on Richard (Ricky) Paige.

6. Rexford knew Paige had been charged in Hooten's murder. He and Fournerat talked for about five minutes about the general facts of the Hooten case.

7. Fournerat never requested any of the Arkansas law enforcement reports on the Hooten murder.

8. Rexford was subpoenaed and appeared at Glossip's trial in 1998. Fournerat talked to Rexford "briefly, on the run at the end of a lunch session."

9. Rexford was dismissed after the judge had talked with the attorneys.

10. Fournerat's opening statement included the following:

> [Y]ou're going to hear the testimony of someone else, someone who has by power of writ of habeas corpus has to be writted back here to testify…he was there at 4:30 in the morning….Justin Sneed and him are boyfriend and boyfriend. Now, this particular person is mentioned in the police reports….when the police ran his background, they found out he was a convicted murderer from 1986 from Arkansas….Detective Cook's report said that it was a homicide in 1986 in Arkansas, a domestic dispute. It was a husband and wife, it was a woman killed….But Captain Rexford is going to testify that in 1986 Richard Paige committed a murder by beating someone to death. (Tr. III at 26, 27).

11. Following an objection that Fournerat could not tell the jury something he could not elicit from the witness, Fournerat told Judge Freeman, "It is ironic that this murder parallels the very same facts of the 1986 murder. It was done with a baseball bat." (Tr. III at 27).

12. Fournerat told Judge Freeman he was going to call Paige and Rexford to testify and would be able to prove that Richard Paige was the mastermind of the scheme to murder Van Treese.

> THE COURT: How are you going to do that?...If you want to offer that kind of evidence, you're going to have to show me some law on that before you call that witness (Tr. III 29).
>
> MR. FOURNERAT: Your Honor, I believe I'm entitled to bring up his criminal record...I'm going to call the Court Clerk of Oklahoma County to also verify his conviction.
>
> MS. SMITH: Who are we talking about?
>
> MR. FOURNERAT: The custodian of the records.
>
> MS. SMITH: Richard Paige? Judge, we know he's got the conviction. We gave the information to him.
>
> MR. FOURNERAT: That's an admission.
>
> THE COURT: [I] don't know how you can connect a witness to a case where he's not charged. ...You'll have to show me some law on that one.
>
> MR. FOURNERAT: I will. (Tr. III 30).

Richard Paige was never writted or subpoenaed to testify at trial. Fournerat never provided Judge Freeman with any law to establish his claimed right to elicit information from Captain Rexford. He failed to interview Captain Rexford about the facts of the Hooten murder. In fact, Fournerat's first contact with Rexford was based on Fournerat's mistaken Freedom of Information request concerning *Glossip* not Paige. Only when Rexford replied, "no information found" did Fournerat tell him the inquiry *should* have been made for Richard Paige.

Fournerat's stated defense was that there were three real culprits. The pillar of his theory—that one of the culprits had previously committed a murder—was based on a five-minute phone conversation. He then put it before the jury without a comprehensive

interview with Rexford, before reading any investigative reports of the Hooten murder, without arranging to have Richard Paige testify, and without reviewing pertinent Oklahoma law regarding the admissibility of such testimony.

Fournerat argued to the judge the facts in Hooten's murder were identical to the facts in Van Treese's murder, which is clearly erroneous. Within a few minutes of this argument to the court[2] Fournerat then told the jury that Richard Paige murdered Hooten in 1986, even though the murder occurred in 1984. He told the jury the victim was a female when it was a male; and he told the jury it was a 'domestic' matter when the motive was robbery. In that short span of time, Fournerat could not keep the facts straight.

Captain Rexford's testimony goes to show that the theory of defense Fournerat put before the jury was ill-conceived and unsupportable. Having a theory of defense is very important. It cannot be trial strategy to misstate the facts to the judge and jury.

Fournerat failed to research the law. Oklahoma law clearly requires, "[T]hat evidence offered to show that some other person committed the crime charged must connect such other person with the fact; that is some overt act on the part of another towards the commission of the crime itself." *Romano v. State*, 1993 OK CR 8 ¶45, 847 P.2d 368.

Often during trial, issues arise that are unforeseeable and require research on a point of law. Here, at the very beginning of the trial, counsel was not prepared to even know if he could present testimony that was essential to his defense theory. Fournerat was ill-prepared, impacting his performance at all stages of the trial.

[2] The entire matter is contained in Trial Transcript Volume III, Pages 26-30.

The Oklahoma Bar Association sponsored a seminar March 2, 2001, entitled "Criminal Defense for Dummies." Experienced criminal defense attorneys from across the state presented training on various aspects of criminal defense. Scott Adams presented the portion of the program on opening statements. Advice included in his written materials included the following: "The defense attorney should enter every trial knowing the facts and law better than anyone else in the courtroom...you should come to the courtroom with a 'prepared' theory of your case....*Jurors should feel they can trust what you say about the case....**DON'T** promise more than you can deliver.*" (emphasis added).

If Fournerat had any credibility with the jury at the beginning of the trial, it quickly eroded.

B. JUSTIN SNEED'S VIDEOTAPED CONFESSION

On January 7, 1997, Sneed murdered Barry Van Treese. He confessed to his crime on January 14, 1997, during a videotaped interview with Oklahoma City Police Homicide Detectives Bemo and Cook. Defense counsel had a copy of the taped confession and was somewhat familiar with its contents. Fournerat apparently wanted to offer a portion of the tape to impeach Detective Bemo. (Tr.VI 55). Offering it for admission, he never was able to articulate exactly what he was doing and meeting resistance from the Judge, he eventually withdrew his request and told the Judge he would move to admit the videotape during Sneed's testimony. He never did so.

1. The videotape was admissible to impeach Detective Bemo if a proper foundation had been laid.

Fournerat did attempt to impeach Detective Bemo, however he "paraphrased" Bemo's out-of-court statements, making it impossible to know if his testimony was inconsistent. A cardinal rule of cross-examination is specificity in comparing in-court testimony with previous statements. Virtually everyone will be inconsistent about *something*. No one will ever know if Detective Bemo could have been impeached with the videotaped interview because of Fournerat's bungled cross-examination.

2. The videotape was admissible to impeach Sneed if the proper foundation had been laid.

Fournerat never confronted Sneed with the discrepancies between his testimony during trial and his videotaped confession. Sneed testified at trial on several points inconsistently with his videotaped confession:

a. Glossip called Sneed to tell him the victim was at the motel (Tr. VI 88). On the videotape Sneed said that Glossip came and woke him up.

b. Sneed struck Van Treese 10-15 times (Tr. VI 92). On the videotape, Sneed said he "really just meant to knock him out and just tapped" Van Treese two to three times.

c. Sneed knocked on Glossip's wall after the murder (Tr. VI 93, 114). On the videotape Sneed said he "[R]ang the buzzer and Glossip come (sic) up there."

d. Sneed moved Van Treese's car and called Glossip (Tr. VI 95-96). On the videotape Sneed said Glossip walked around with him

when he got the money out of Van Treese's car and then he moved the car at Glossip's direction.

e. Sneed said Glossip wanted Van Treese murdered because Glossip was going to get fired and Sneed wouldn't have a room (Tr. VI 90-91). On the videotape Sneed said Glossip wanted to run the motel without Van Treese being the boss.

f. Sneed testified he and Glossip were in room 102 with the body for about twenty minutes. On the videotape, Sneed said they just peeked in the door to see if Van Treese got up or anything. He later said he and Glossip had actually gone into the room.

g. Sneed testified Glossip just watched and did not help tape a shower curtain over a broken window in room 102. On the videotape Sneed said that Glossip helped tape the shower curtain up over the inside of the window.

At trial, Sneed testified for the first time that:

h. "Every time that Mr. Van Treese showed up, he (Glossip) was wanting me to kill him." (Tr. VI 89).

i. "Mr. Glossip also informed me to pick up some trash bags, a hack saw and I believe some acid that you call muriatic acid…He was wanting to pour the acid upon the body and then saw up the rest of the body and put it in trash bags to be able to move it out of the room." (Tr. VI 96-97).

j. "Q: Did you first tell him (Glossip) that two drunks had broke out a window in room 102?

A: No, that's the story that he wanted us to tell everybody at the motel that questioned about how the window got broke." (Tr. VI 115).

k. "[A]fter me and Glossip had already been in there…he asked me when he was coming out to break the key off in the lock." (Tr. VI 120).

l. "Mr. Glossip come to me and was telling me that I needed to leave, that I needed to leave the motel because all the cops were looking for Mr. Van Treese….[L]ater he calls back down to my room telling me I need to leave again. So I just grabbed my jacket and walked down Reno towards Rockwell." (Tr. VI 100)

Hearing all of this testimony from Sneed, Fournerat's cross-examination is found in a scant 18 pages of the record. He confronted Sneed only about his statement that Glossip told Sneed to break off the key in the lock of room 102. Sneed admitted he had not previously told Police Homicide Detectives Bemo or Cook about this detail, "Because I didn't feel it had no significance on me breaking a key off in the lock and the whole guts coming out of it," (Tr.VI 120). After that exchange Fournerat failed to move for admission of the videotape.

A prior inconsistent statement may be admitted if a proper foundation is laid OKLA. STAT. tit.12 § 2613. In *Rogers v. State*, 1986 OK CR 96 ¶9, 721 P.2d 805, the Court of Criminal Appeals instructs that a witness must first be asked about a prior

inconsistent statement, given an opportunity to explain, affirm or deny, and the prior statement must be identified as to the time and place and to whom it was made.

With a proper foundation, the videotape, or a portion of the videotape, would have been admissible to impeach Sneed. Fournerat could have also moved to admit the videotape arguing that Sneed's previously omitted statements were sufficient to allow impeachment under § 2613. The law in Oklahoma is not specific but appears to require a contradiction in plain terms for § 2613 to apply.[3] A prior inconsistent statement "[M]ay also consist of the omission from a prior statement of a matter which would reasonably be expected to have been mentioned in the statement if true." LEO H. WHINERY, OKLAHOMA EVIDENCE, COMMENTARY ON THE LAW OF EVIDENCE, VOLUME 3 § 47.26, at 371 (1994).

Even if the omitted statements would not support the admission of the videotape, Fournerat missed multiple opportunities to test Sneed before the jury. Undoubtedly, the State would have attempted to rehabilitate Sneed, but no one can gauge what effect this would have had on the trier of fact. The jury is the exclusive judge of the weight of the evidence and the credibility of the witnesses' testimony. *Romano v. State*, 1993 OK CR 8 ¶38, 847 P.2d 368.

Sneed was the State's star witness in the case against Richard Glossip. No forensic evidence linked Glossip to the murder. Glossip's own statements implicated him as an accessory after the fact, but Glossip could not have been charged with Murder in the First Degree without Sneed's testimony.

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[3] *Grayson v. State*, 1987 OK CR 277, ¶12, 747 P.2d 971, the Appellate Court ruled that a witness at trial could not be impeached with her preliminary hearing testimony because she had not been asked the specific questions at the preliminary hearing. Herein, Sneed's statement to homicide detectives was not limited to answering questions.

An analysis of the ineffective assistance of counsel claim begins with the presumption that trial counsel was competent and thus Appellant must meet both prongs of *Strickland v. Washington*, 466 U.S.668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). The first prong is that counsel's representation was unreasonable under prevailing professional norms and not considered sound trial strategy. *Id.* at 688-89. For counsel's performance to be constitutionally ineffective it must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy. *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999).

In the present case, Appellant has met the first prong of *Strickland.*

1. Fournerat failed to adequately prepare for trial.

Fournerat stated to the jury that there were three individuals who conspired to murder Van Treese. Although Richard Paige's prior murder conviction was central to his defense theory he spent a whopping five minutes on the phone with Captain Rexford researching the facts. Without reading law enforcement reports, reviewing court files, or any information about the Hooten murder, he formulated his "three culprits" defense theory. Fournerat couldn't even send out a request for information from law enforcement agencies without making a mistake. Including Glossip's name instead of 'Richard Paige' got him a 'no response' from Washington County, Arkansas. Only because Captain Rexford called him, was Fournerat made aware of his error and able to give Captain Rexford Richard Paige's name.

Fournerat's preparation was such that he argued to Judge Freeman that the facts in the Hooten murder were the same as in the present case, while just moments earlier he had told the jury the Hooten victim was a woman who was killed in a domestic dispute.

Still not getting it right, Fournerat claimed Paige murdered Hooten in 1986, when the murder had occurred in 1984.

Fournerat told Judge Freeman he intended to call the Court Clerk of Oklahoma County as the custodian of the records to verify Richard Paige's Arkansas murder conviction. Thankfully, the Oklahoma County Court Clerk is responsible only for the official records of the 7th Judicial District, the State of Oklahoma. When Ms. Smith, understandably puzzled, stated: "Judge, we know he's (Richard Paige) got the conviction. We gave the information to him (Fournerat)." Fournerat replied, "That's an admission." (Tr. III 30).

2. Fournerat's mistakes were not part of any trial strategy.

It would be a tremendous stretch that defense counsel used any strategy whatsoever. This Court cannot infer such from the record. Had Fournerat seriously contemplated his defense with the skill of any criminal practitioner, he would have researched the law to know if he could go behind the Judgment and Sentence in the Hooten case. Richard Paige was not a witness in the Glossip trial. His testimony most likely would have been inadmissible, but Fournerat believed it to be crucial. Even so, Fournerat failed to subpoena or writ the witness even though Paige was in the Oklahoma County Detention Center when the trial began.[4]

No possible trial strategy could embrace a lack of knowledge—of the facts or the law—improper argument to the trial judge, and a failure to secure the witness around whom you have built your defense.

---

[4]On June 9th the following exchange took place: "COURT: Did you intend to call Mr. Paige? FOURNERAT: Mr. Paige has disappeared, Your Honor. I hate it when that happens." (Tr. VII 77). Oklahoma County Detention records show Paige was incarcerated from April 30, 1998 to June 4, 1998.

Strickland's second prong requires an appellant to establish that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Counsel's errors must be so serious as to deprive the defendant of a trial that was reliable. *Strickland*, 446 U.S. at 694. When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Bland v. State*, 2000 OK CR 11, ¶113, 4 P.3d 702.

In the case at bar, Appellant has shown by clear and convincing evidence that he was prejudiced by the ineffectiveness of counsel and that this Court cannot have confidence in the outcome of the trial. Thus, *Strickland's* second prong is also met.

The entire theory of the State's case in chief was that Sneed was a pathetic creature who killed Van Treese only because Glossip suggested, coached, and encouraged him to do so. Sneed testified that without Glossip he would not have murdered Van Treese. (Tr. VI 101).

If the State were successful in painting Sneed as being so malleable, it is logical to inquire, 'how malleable is he?" The plain-as-the-nose-on-your-face defense strategy would be to create a question in the jury's mind: Could Sneed have been influenced by the standard interrogation techniques used by Detectives Bemo and Cook? The opportunity to raise this before the jury was squandered.

It was during Detective Bemo's testimony that Fournerat offered the videotape (Tr. VI 55). Fournerat's awkward cross-examination of Detective Bemo was not deliberate. His inability to explain the limited purpose for which the videotape would be used, was secondary to his inability to lay an evidentiary foundation.

Fournerat had the unenviable task of defending a client whose purported accomplice, Sneed, agreed to testify to escape the death penalty. Glossip's conduct was incriminating and his confessed knowledge corroborated Sneed's testimony to some extent. Failing to properly prepare for trial, formulate a viable theory of defense, or attempt to impeach the witnesses with prior inconsistent statements or omissions, clearly was prejudicial and undermines the confidence of this Court in the trial's outcome.

ISSUE III. ISSUE OF PROSECUTORIAL MISCONDUCT

This Court was ordered to determine whether the prosecutor knowingly mislead the jury as to the contents of Sneed's videotaped confession made to Oklahoma City Police Detectives. Knowingly is defined as "with knowledge; consciously; intelligently; willfully; intentionally." BLACK'S LAW DICTIONARY 451 (5th ed. 1983). After carefully considering all the evidence, this Court finds that Ms. Smith did not knowingly mislead the jury as to the contents of Sneed's confession.

In support of his claim of prosecutorial misconduct, Appellant argues that Sneed testified untruthfully at trial and that the prosecutor knew the testimony was untruthful because Sneed's videotaped confession was State's exhibit 4.

Ms. Smith was licensed to practice law in 1981 or 1982. Starting as a public defender in Oklahoma County, she went to work in the District Attorney's Office in 1983. She has helped prosecute somewhere between 20 to 25 capital cases. Currently, Ms. Smith is one of the prosecutors in two capital cases: The State v. Terry Nichols; and the case of State v. Bigler Jobe Stouffer, II. Ms. Smith is unquestionably a competent and capable prosecutor.

Sneed gave his videotaped confession January 14, 1997. His preliminary hearing was held October 1, 1997, which was the last time Ms. Smith viewed the videotape prior to Glossip's trial that began around June 1st, 1998. The videotape was marked as State's Exhibit #4 but was not admitted at trial and thus was not played in open court.

The State had entered into a plea agreement that required Sneed to testify truthfully in exchange for a sentence of life without parole. Ms. Smith briefly interviewed Sneed in anticipation of trial. The interview lasted less than 30 minutes and they did not review Sneed's testimony. Ms. Smith fully expected Sneed's trial testimony to be more detailed than his statement made to homicide detectives when he was still attempting to diminish the horror of his crime.

At the close of her direct examination of Sneed, is the following exchange beginning at Tr. VI 101:

> MS. SMITH: Did you tell the police basically everything that you told the jury today?
>
> SNEED: Yes, ma'am.
>
> MS. SMITH: Did you answer all of Detective Bemo's questions when he asked you?
>
> SNEED: Yes, ma'am.

Fournerat's cross-examination of Sneed failed to point out any prior inconsistent statements—material or not—to Ms. Smith or anyone else. In fact, Fournerat only confronted Sneed with his previously omitted statement that Glossip told him to break his key off in the lock to the room where Van Treese lay mortally wounded, and Sneed explained why he hadn't told that detail to the detectives.

It is understandable that Ms. Smith's focus would not be on the content of the videotape. She had no need to impeach her own witness. She mistakenly believed that defense counsel would impeach Sneed wherever possible. She did not have the luxury of a transcript of trial testimony or a transcription of Snead's confession to compare line by line before making her closing argument. She asked Sneed if he had basically told the same story, to detectives and he stated he had.

Ms. Smith was also focused on the many inconsistent stories Glossip had told to a number of witnesses and to the police in two separate interviews. When she told the jury that Sneed had always told "basically" the same story she was properly arguing the evidence that had been placed before the jury.

Justin Sneed testified June 8, 1998, in Appellant's trial. Jury instructions were settled June 10, 1998. OUJI-CR 9-20 was jury instruction number 18, referring to the prior inconsistent statements of Glossip and witness, D. Anna Wood (Glossip's girlfriend). Assuming a proper foundation is laid, OKLA. STAT. tit.12 § 2316 allows extrinsic evidence to be admitted of a prior inconsistent statement. Because these statements are usually hearsay, the trial court is to extemporaneously give a limiting instruction to the jury. OUJI-CR 9-20 repeats the limiting instruction, "You may not consider this impeachment evidence as proof of innocence or guilt. You may consider this impeachment evidence only to the extent that you determine it affects the credibility of the defendant/witness, if at all." Comments following OUJI-CR 9-20 include, "Many Oklahoma cases place the onus on the trial court of clearly informing the jury as to the restricted permissible use of impeachment evidence."[5]

[5] The commentary to OUJI-CR 9-20 continues, "The Commission is of the opinion that this limiting instruction should be given on the court's own motion in every instance of impeachment, particularly

In the present case, Sneed was not listed in OUJI-CR 9-20 because no one ever heard *any* testimony from him resembling a prior inconsistent statement.

The record doesn't reflect that Fournerat ever requested OUJI-CR 9-20 include Sneed – it wasn't considered and rejected, or even discussed. In her closing argument, Ms. Smith states several times that Sneed's testimony had been consistent. She points out to the jury that instruction number 18 (Tr. VIII 18) can be relied upon: "[T]he Judge tells you that evidence has been presented that on some prior occasion the Defendant, Richard Glossip, and the witness, D. Anna Wood, made statements inconsistent with their testimony in this case, you don't see Justin Sneed's name in there. That's because Justin Sneed's testimony has always remained consistent. His testimony and his statements to the police have always remained consistent." Jury instruction number 18 was properly given including Glossip and D. Anna Wood because Ms. Smith had properly impeached their testimony.

Ms. Smith further told the jury at Tr. VIII 20, "Justin Sneed's testimony, I submit to you, was unimpeached." She told the truth; Sneed's testimony was not impeached. Ms. Smith further told the jury that if Sneed were going to lie he could have told the police that, "Glossip did it by himself, but Justin Sneed didn't do that because, I submit to you, he told the police what he knew on January the 16th (sic)[6] of 1997, and Justin Sneed accepted the blame and the responsibility for his role in the murder of Mr. Van Treese and he has never changed his statement." (Tr. VIII 20, 21).

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where the impeachment evidence consists of substantively inadmissible statements of the defendant admitted for the limited purpose of affecting his credibility under the rule of *Harris v. New York*, 401 U.S. 222 (1971).

[6] Sneed was arrested and confessed January 14, 1997.

Capital cases are exhausting for all parties—attorneys, judges, witnesses, and victims. No experienced prosecutor would seek to have error in a capital case; the only thing worse than trying the case the first time is trying the case for the second time. Experienced capital litigators know that a million eyes will scrutinize every line in the record of a death penalty case. It is against all logic that Ms. Smith would have willingly misled the jury.

Under the best of circumstances, honest mistakes happen in trials. As noted in the previous paragraph, Ms. Smith mixed up the date of Sneed's confession in her closing argument. In the course of this evidentiary hearing we discovered a mistake in a motion hearing transcript that was filed in 1998, the Court accidentally altered a copy of the videotape, and Appellant's counsel, at the evidentiary hearing, wrongly argued that the State requested Dr. King's competency evaluation of Sneed (Tr. 3-5-01 108). Ms. Elliott quickly corrected the record or that might have gone unnoticed at the time. None of this was done consciously.

The evidence does not support a finding that the prosecutor knowingly acted to mislead the jury.

Therefore, for the reasons stated above, the trial court finds the following:

Issue I. Juror Misconduct - There is competent evidence to support a finding that a Bible was brought into the jury deliberation room during deliberations but was not actually utilized during deliberations;

Issue II. Ineffective Assistance of Counsel – By clear and convincing evidence Appellant has proven a violation of his Sixth Amendment Right to the effective assistance of trial counsel; and

Issue III. Prosecutorial Misconduct - The Prosecutor did not knowingly mislead the jury as to the content of Sneed's confession.

Dated this 9th day of March, 2001.

TWYLA MASON GRAY
DISTRICT JUDGE

counsel and that this Court cannot have confidence in the outcome of the trial."

¶15 As noted above, Appellant made six claims relating to ineffective counsel. Two claims - trial counsel's failure to engage in meaningful cross-examination or utilize potent impeachment evidence and his failure to adequately prepare for trial by familiarizing himself with discovery obtained from the State - required fact-finding outside the appeal record and were addressed at the evidentiary hearing. Prior to the hearing, Judge Gray[7] reviewed the entire trial transcript, including the testimony of Justin Sneed, and watched the videotaped interview of Justin Sneed conducted on January 14, 1997, by Oklahoma City police Detectives Bemo and Cook.[8]

¶16 Trial counsel's failure to utilize important impeachment evidence against Justin Sneed stands out as the most glaring deficiency in counsel's performance.[9] Evidence of counsel's failure to utilize the videotape of Justin Sneed is also apparent from the trial record. This interview was repeatedly referred to by trial counsel and by the State. During first stage deliberations,

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[7] We take this opportunity to commend Judge Gray for her serious and studied handling of this matter on remand. The details of her Findings of Fact and Conclusions of Law are excellent. The Judge put in many hours to complete her task. She is complimented for making a hard decision and not taking the easy way out by condoning trial counsel's conduct.

[8] At trial, this videotape was identified as State's Exhibit 4 and was not admitted at trial; the videotape was attached to the Application for Evidentiary Hearing on Sixth Amendment Claims as Exhibit 1. A transcription of the videotape is attached to the Application as Exhibit 2.

[9] In this subclaim, Appellant contends counsel should have utilized the Sneed videotape and Dr. King's report on competency to impeach Sneed.

the jury requested to view the videotape of Justin Sneed even though it was not admitted into evidence. At trial, trial counsel attempted to impeach Detective Bemo with portions of the videotape, but was unable to lay an appropriate foundation. Judge Freeman talked trial counsel out of using the videotape to impeach Detective Bemo; trial counsel indicated he would use the tape to impeach Justin Sneed. However, when the time came to impeach Sneed, trial counsel failed to utilize the videotape at all.

¶17 At the evidentiary hearing, Judge Gray determined the videotape was available and could have been used as impeachment evidence against both Detective Bemo *and more importantly* against Justin Sneed, but trial counsel never laid a proper foundation for its use against Detective Bemo and did not even attempt to confront Sneed with the discrepancies and inconsistencies on the tape. Judge Gray noted the numerous inconsistencies between Sneed's trial testimony and his videotaped confession. She identified at least seven material inconsistencies and noted at least five things in Sneed's trial testimony that he had completely omitted from his videotaped statement. The most obvious and prejudicial of these omitted statements was Sneed's revelation that Appellant told him "to pick up some trash bags, a hack saw and I believe some ... muriatic acid ... He was wanting to pour the acid upon the body and then saw up the rest of the body and put it in trash bags to be able to move it out of the room." Trial counsel did not impeach Sneed by pointing out that he had never mentioned that obviously material fact on the videotape.

Judge Gray observed that trial counsel "missed multiple opportunities to test Sneed before the jury." Noting the State's star witness was Justin Sneed, the gist of Judge Gray's findings was that no reasonable trial strategy could have supported a decision not to utilize this impeachment evidence against him.

¶18 Judge Gray considered the testimony of Captain Charles Rexford on Appellant's claim that his counsel was obviously ill-prepared and had no cogent defense theory. After hearing Rexford's testimony, Judge Gray found trial counsel presented an ill-prepared, incomprehensible defense that other individuals committed the murder based upon a five-minute telephone conversation with Rexford about a murder that occurred in 1984. She noted trial counsel did not review the State's investigative reports on the 1984 murder, did not arrange to have the other "suspect" testify, and had clearly not reviewed the law applicable to the trial court's determination whether Rexford's testimony would even be admissible. Ultimately, Judge Gray determined that Rexford's testimony showed the theory of defense put forth by trial counsel was "ill-conceived and unsupportable (sic). Having a theory of defense is very important. It cannot be trial strategy to misstate the facts to the judge and jury." She found trial counsel had not adequately researched the law and his ill-preparedness impacted his performance at all stages of trial.[10]

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[10] As to counsel's failure to utilize Dr. Edith King's report on Sneed's competency, Judge Gray found the report would not have been admissible at trial and it would have been improper to attempt to impeach Sneed with it. Judge Gray also found Pat Ehler's testimony on trial counsel's ill-preparedness for second stage was inadmissible and prohibited Ehler's from testifying at the evidentiary hearing under Rules 1.7, 1.9, 1.10 and 3.7, *Rules of Professional Conduct*, 5 O.S.Supp.2000, Ch.1, App. 3-A.

¶19 Judge Gray found trial counsel failed to adequately prepare for trial and the trial mistakes (addressed at the evidentiary hearing) were not part of any trial strategy. His failure to utilize available impeachment evidence against Justin Sneed, upon whose testimony the State's entire case relied, was deficient performance and was clearly prejudicial. She ultimately concluded Appellant met both prongs of *Strickland*.

¶20 This Court will give the trial court's findings strong deference if supported by the record, but we shall determine the ultimate issue of whether trial counsel was ineffective. Rule 3.11(B)(3)(b)(iv), *Rules of the Court of Criminal Appeals*, Title 22, Ch.18, App. (2001). After careful review and consideration of the record, we find the trial court's findings and conclusions are supported by the record and we shall address Appellant's remaining ineffective assistance of counsel claims in accordance therewith.

¶21 Although we find the claim that trial counsel did not conduct proper voir dire unpersuasive,[11] the remaining claims demonstrate trial counsel's ineffectiveness. There was no excuse for trial counsel's failure to object to inadmissible double hearsay - Detective Bemo's testimony that he talked to William Bender who said that Van Treese said he was going to move Glossip out of the motel. This testimony was inadmissible hearsay, was offered for no other reason than to prove the truth of the matter asserted, and was extremely prejudicial. It was arguably the only evidence presented at trial that tended to

[11] This claim was raised in Proposition Ten of Appellant's Brief.

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

ORIGINAL

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	FILED IN THE DISTRICT COURT
vs.	)	**Case No. CF-97-244** OKLAHOMA COUNTY, OKLA.
	)	
RICHARD EUGENE GLOSSIP,	)	JUN 17 2002
	)	
Defendant.	)	PATRICIA PRESLEY, COURT CLERK by _____ Deputy

MOTION REQUESTING PRODUCTION OF ALL STATEMENTS OF CO-DEFENDANT JUSTIN SNEED

Comes now the Defendant, Richard Eugene Glossip, by and through his counsel undersigned below, and moves the Court to enter an order directing the State of Oklahoma, by and through the Oklahoma County District Attorney's office, to disclose any and all statements made by Justin Blayne Sneed, whether the State intends to utilize said statements at trial pursuant to 22 O.S. Subs. 2002 (A)(1)(c). Specifically, the Defendant requests that the State produce the following, to wit;

1. Any written or recorded statements and the substance of any oral statement the State has knowledge whether the State intends to offer said statements at trial.

2. Identify by name, address, social security number, date of birth or any other identifying descriptions the person(s) who obtained said statements whether oral or written.

3. Identify the time, place and circumstances of obtaining the statements.

4. Identify any and all law enforcement officer/agent who obtained or facilitated the obtaining any and all statements of the accused.

5. Identify and produce any and all statements made by Justin Blayne Sneed to law enforcement and/or the Oklahoma County District Attorney's office.

WHEREFORE premises considered the Defendant respectfully requests this Court to order the State of Oklahoma to produce any and all statements of the Justin Blayne Sneed.

Respectfully submitted,
RICHARD EUGENE GLOSSIP

By: _____

G. LYNN BURCH, III
Oklahoma Bar Assoc. No. 14986
Capital Defense Counsel

SILAS LYMAN
Oklahoma Bar Association No 13165
Capital Defense Counsel

L. WAYNE WOODYARD
Oklahoma Bar Association No. 9879
Capital Defense Counsel

Capital Trial Division - Tulsa
Oklahoma Indigent Defense System
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-0802

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on the date of filing the above and foregoing instrument, a true and correct copy of the same was mailed to the Oklahoma County District Attorney's Office.

_____
G. LYNN BURCH, III

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No. CF-97-244**
	)	
RICHARD EUGENE GLOSSIP,	)	
	)	
Defendant.	)	

MOTION IN LIMINE REGARDING TESTIMONY OF JUSTIN SNEED

Comes now the Defendant, Richard Eugene Glossip, by and through his counsel undersigned below, and moves the Court to enter an order prohibiting the State of Oklahoma, by and through the Oklahoma County District Attorney's office, from offering false or misleading evidence via chief prosecution witness Justin Blayne Sneed. In support of this motion, Defendant offers the following.

In the witness list previously filed in this case on September 16, 1997, the State provided the following summary for the testimony to be given by Justin Sneed:

> **66. Justin Sneed** – Will testify consistent with his video taped interview with police and police reports. Defendant Sneed will testify he was given a sentence of Life Without Parole to testify truthfully against the defendant Glossip. The Bill of Particulars was dismissed in exchange for his plea of Life Without Parole. Plea agreement was made September, 1997. Copy of agreement furnished to defense counsel.

This summary, however, does not accurately summarize the testimony given by Sneed in the prior trial of this case. As noted by this Court in its Findings of Fact and Conclusions of Law following the remanded evidentiary hearing, as well as by the Court of Criminal Appeals in its decision reversing Mr. Glossip's conviction,

there were in fact "numerous inconsistencies between Sneed's trial testimony and his videotaped confession." *Glossip v. State*, 29 P.3d 597, 601 (Okl. Cr. 2001). The Court of Criminal Appeals noted that this Court

> [I]dentified at least seven material inconsistencies and noted at least five things in Sneed's trial testimony that he had completely omitted from his videotaped statement. The most obvious and prejudicial of these omitted statements was Sneed's revelation that Appellant told him "to pick up some trash bags, a hack saw and I believe some ... muriatic acid ... He was wanting to pour the acid upon the body and then saw up the rest of the body and put it in trash bags to be able to move it out of the room."

Glossip, 29 P.3d at 601.

The record thus far in this case makes clear that the testimony of Justin Sneed, "upon whose testimony the State's entire case relied" as characterized by the Court of Criminal Appeals, will almost assuredly be false or misleading if again offered in the State's case against Mr. Glossip. At the evidentiary hearing conducted before this Court, the prosecutor opined that Sneed had in fact testified truthfully and consistent with the statement he gave to the police, recorded on videotape:

> MS. SMITH: ... I believe that Justin Sneed told the truth when he testified and I believe that he told the truth when he talked to police on the video tape. I do not believe that there are any material inconsistencies between his video tape and trial testimony. I believe that they were truthful.

(Evidentiary Hearing, March 5, 2001, Tr. 154) The fact of the matter is that Sneed did not in fact testify truthfully or consistently, and while the State may not have had notice of this reality at the first trial, it most certainly does now. The matter has been adjudicated by this Court and the high criminal court of the State of Oklahoma. The State is now undeniably on notice now that, if his prior sworn testimony is any indication, Justin Sneed will **not** testify consistent with his videotaped interview and

police reports.

A prosecutor's use of evidence known to be false or misleading violates due process. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Omalza v. State*, 911 P.2d 286, 307 (Okl. Cr. 1995); *McCarty v. State*, 765 P.2d 1215, 1219 (Okl.Cr. 1988). The Defendant maintains that Justin Sneed's testimony, if offered again, will by definition violate this constitutional prohibition. Accordingly, the Defendant moves that it be precluded from admission against him on retrial dues to its indisputably false and misleading nature.

In the alternative, the Defendant requests an updated and accurate summary of Sneed's anticipated trial testimony, at the time prescribed by this Court, of what the Defendant can expect in terms of what version of events Sneed can be expected to give next time. The summary currently on file is either deficient, or Sneed will be testifying in marked departure from his prior sworn testimony.

Accordingly, The Defendant moves the Court to preclude the proffered testimony of Justin Sneed, or in the alternative, require the State to give timely and adequate notice as to what the witness will testify to in this proceeding.

Respectfully submitted,
RICHARD EUGENE GLOSSIP

By: _____

G. LYNN BURCH, III
Oklahoma Bar Assoc. No. 14986
Capital Defense Counsel

SILAS LYMAN
Oklahoma Bar Association No 13165
Capital Defense Counsel

L. WAYNE WOODYARD
Oklahoma Bar Association No. 9879
Capital Defense Counsel

Capital Trial Division - Tulsa
Oklahoma Indigent Defense System
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-0802

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on the date of filing the above and foregoing instrument, a true and correct copy of the same was mailed to the Oklahoma County District Attorney's Office.

G. LYNN BURCH, III

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUN 26 2002

PATRICIA WESLEY, COURT CLERK
BY _____ Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. CF-97-244
	)	
RICHARD EUGENE GLOSSIP,	)	
	)	
Defendant.	)	

STATE'S RESPONSE TO DEFENDANT'S MOTION REQUESTING PRODUCTION OF ALL STATEMENTS OF CO-DEFENDANT JUSTIN SNEED

COMES NOW the State of Oklahoma, by and through C. Wesley Lane II, District Attorney for Oklahoma County and moves this Honorable Court to declare Defendant's Motion moot.

The State intends to utilize the testimony of Justin Sneed's testimony elicited at the defendant's prior trial which has been transcribed by a qualified court reporter, and all of his previous statements previously disclosed to defendant including State's exhibit #4 (video tape).

The State has complied with 22 O.S. 2002(A)(1)(c) regarding the statements of Justin Sneed.

For the above and foregoing reasons, the State prays this Honorable Court rule defendant's motion is moot.

Respectfully submitted,

C. WESLEY LANE II
DISTRICT ATTORNEY

BY: Fern L. Smith
FERN L. SMITH, OBA # 8347

2618/3286 95

SHERIFF'S RETURN
OUT OF COUNTY TRAVEL

STATE OF OKLAHOMA
SS:
OKLAHOMA COUNTY

I received this writ of Ad Test from the District Court of Oklahoma County this 9 day of January 2003, ~~M~~, and executed the same on the 9 day of January 2003, ~~M~~, by transporting the within named defendant from lexington (Joe Harp) to the Oklahoma County Jail, Oklahoma City, Oklahoma, as ordered herein.

SHERIFF'S FEES

EXECUTING ORDER	$ 1.00
DEPUTY _____ hours @ $10.00 per hour	
GUARD FEE	
TOLL FEE	
MEALS	
LODGING	
MILEAGE _____ miles @ .28 per mile	
TOTAL	$ 1.00

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JAN 27 2003
PATTI ... COURT CLERK
BY ... DEPUTY

JOHN WHETSEL, SHERIFF
BY Ronald Wanden #163
DEPUTY

SHERIFF'S RETURN
OUT OF COUNTY TRAVEL

STATE OF OKLAHOMA
SS:
OKLAHOMA COUNTY

I received this writ of Ad Test from the District Court of Oklahoma County this 23 day of January 2003 ~~M~~, and executed the same on the 23 day of January 2003, ~~M~~ by transporting the within named defendant from the Oklahoma County Jail, Oklahoma City, Oklahoma to lexington (Joe Harp) delivering him/her into the custody of the D.O.C., as ordered herein.

SHERIFF'S FEES

EXECUTING ORDER	$ 1.00
DEPUTY _____ hours @ $10.00 per hour	
GUARD FEE	
TOLL FEE	
MEALS	
LODGING	
MILEAGE _____ miles @ .28 per mile	
TOTAL	1.00

JOHN WHETSEL, SHERIFF
BY Ronald Wanden #163
DEPUTY

FOCSO-94 = i:\grpdata\common\forms\return.ooc

DISTRICT COURT SUBPOENA - Crim [redacted] [redacted] FOR Jury Trial

CASE#: CF97000244

STATE OF OKLAHOMA
vs
RICHARD EUGENE GLOSSIP

CHARGE: MURDER I
1 COUNT(S)

IN THE NAME OF THE STATE OF OKLAHOMA

TO: GINA WALKER
OK CO OFC BLDG, 320 ROBERT S KERR AVE
Room # 600
OKLAHOMA CITY OK, 73102

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
SEP 30 2003
PATRICIA PRESLEY, COURT CLERK
by [signature] Deputy

9-29, 03
served the same by mailing a copy to each witness listed at the address shown.
[signature]
Subpoena Clerk

PROSECUTOR District Attorney's Office
CONNIE POPE

You are hereby COMMANDED to appear before the Presiding Criminal Judge on 11/03/2003 08:30 AM by reporting to Room 211 of the Oklahoma County Office Building, 320 Robert S. Kerr, Oklahoma City, Oklahoma, to testify as a witness on behalf of the State of Oklahoma, and remain in attendance and on call of said Court, from day to day and term to term, until lawfully discharged as a witness for the State of Oklahoma.

Failure to appear is punishable by law.

WHEN YOU RECEIVE THIS SUBPOENA, YOU MUST IMMEDIATELY CALL THE DISTRICT ATTORNEY'S OFFICE.
Please call: (405) 713-1639
Between 8:30 a.m and 5:00 p.m.
Issued: 09/26/2003 09:54 am
If your address or phone number changes, Please call.

C. WESLEY LANE II
District Attorney, Oklahoma County, Oklahoma
By: [signature]
Authorized Subpoena Clerk

226664

2003, the trial date was continued by agreement of the parties from that date (January 27, 2003) to August 25, 2003.

6) The Sneed money items were returned to the OKCPD Lab by forensic examiner Tom Ekis in March, 2003.

7) Due to a mistrial occurring in another capital murder trial before this Court and the reassignment of counsel for the State, Defense counsel agreed at a meeting held in the Court's chambers on or about June 12, 2003, to a further continuance of the trial date until November 3, 2003. This agreement was made after assurances were given by counsel for the State that the case against Mr. Glossip would be re-evaluated with an eye toward possible reduction in charge. At that time, it was unclear who would be prosecuting the case on behalf of the State, but assurances were given that the defense would be contacted as soon as possible about the re-evaluation of the case.

8) At the Court's request, on August 15, 2003, counsel for Defendant met with newly assigned prosecutor Connie Pope and investigator Larry Andrews regarding possible disposition of the case. During that discussion, defense counsel inquired about the status of the Oklahoma City Police Laboratory's serological testing of the Sneed money, which by that time it had in its possession for many months. Ms. Pope indicated at that meeting that she would promptly check on the status of the testing and report back to defense counsel the next week to allow time for further defense testing, if needed.

victim made it their practice to fire any mangers who were incapable of managing the financial affairs of the motel.

Kenneth Van Treese will testify that the victim purchased the motel as a financial asset for his family. Mr. Van Treese will testify to the deplorable condition of the motel upon inspection after the victim's death, including non operable locks, faulty plumbing, filthy conditions, broken furniture, nonworking television sets, missing lighting and nonworking laundry equipment. . Mr. Van Treese will testify to the financial records and enormous repair costs to bring the motel back into a financial asset after the victim's death.

Justin Sneed will testify that the defendant came to this motel room in the early morning hours of January 7, 1997 and offered Mr. Sneed $7,000.00 to kill the victim. Mr. Sneed killed the victim at the defendant's instructions. The defendant instructed Mr. Sneed to wait until the evening of January 7th to move the body. The defendant had offered to pay Mr. Sneed on numerous occasions to kill the victim. The defendant told Mr. Sneed that if the victim was not killed that Mr. Sneed and the defendant would get kicked out of the motel. The defendant told Mr. Sneed that the defendant might be able to con the victim's wife into letting the defendant run two motels after the murder.

William Howard Bender will testify that he saw the victim on the evening of his death. The victim was visibly upset at the conditions at the Oklahoma

IN THE DISTRICT COURT OF OKALHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff, vs. RICHARD EUGENE GLOSSIP, AKA: Rich Defendant	)))))))	Case No: CF 97-244

ADDITIONAL LIST OF WITNESSES PURSUANT TO CONSTITUTION OF OKLAHOMA ARTICLE 2 § 20
FIRST STAGE AND SECOND STAGE

Pursuant to Art. 2 § 20 of the Constitution of the State of Oklahoma the prosecution herewith provides the defendant a list of witnesses, with their post office address, some or all of whom, will be called in chief in the first stage of the proceedings herein (guilt determining stage) to prove the allegations of the Information, as to each count, and to prove the allegations of the Bill of Particulars demanding imposition of the death penalty:

1. **Ron Shipman** - State of Oklahoma DOC, P.O. Box 606, Guthrie, OK 73044

2. **Gina Walker** - Oklahoma County Public Defender's Office, 320 Robert S. Kerr, 6th Floor, Oklahoma City, OK 73102

Respectfully submitted,

C. WESLEY LANE II
DISTRICT ATTORNEY

Connie S. Pope
Connie S. Pope
Assistant District Attorney

IN THE DISTRICT COURT OF OKALHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	Case No: CF 97-244
RICHARD EUGENE GLOSSIP, AKA: Rich Defendant	)	

ADDITIONAL SUMMARY OF WITNESS TESTIMONY

1. **Ron Shipman** – Probation and Parole - Will testify to the contents of his report.

2. **Matt Steadman** – In addition to previously outlined testimony, will testify to obtaining the buccal swabs from the defendant and Mr. Sneed and delivering them to the OCPD forensic lab.

3. **Ken Van Treese** – In adition to previously outlined testimony, will testify to the financial records of the motel, the condition of the motel at the time of the victim's death and to the financial habits of the victim.

4. **Gina Walker** - Will testify to gaining information that Mr. Sneed was visited by the defendant's attorneys in an attempt to prevent him from testifying.

In addition, all witnesses testifying at the previous trial will testify consistent with their trial testimony. That testimony has been transcribed and made available to the defendant.

Respectfully submitted,

C. WESLEY LANE II
DISTRICT ATTORNEY

Connie S. Pope

Connie S. Pope
Assistant District Attorney

1

IN THE DISTRICT COURT OF OKALHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff, vs. RICHARD EUGENE GLOSSIP, AKA: Rich Defendant	)))))))	Case No: CF 97-244

ADDITIONAL MORE DEFINITE AND CERTAIN STATEMENT AND ADDITIONAL SUMMARY OF WITNESS TESTIMONY

COMES NOW the State of Oklahoma, by and through C. Wesley Lane II, District Attorney, District No. 7 , Oklahoma County, in the above styled and numbered cause and gives notice that in addition to the More Definite and Certain and the Additional More Definite and Certain previously filed in this case, the State gives notice of the following:

The third allegation in the Bill of Particulars alleges 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.

As to the third allegation, the State will present evidence in the form of testimony from Justin Sneed that the defendant was always acting like the victim was going to fire him. It was important to the defendant not to get fired. Mr. Sneed saw the defendant mad and afraid of being fired. One time around the end of November, first part of December, 1996, the defendant

came to Mr. Sneed's room and woke him up in the middle of the night. The defendant and Mr. Sneed conducted an inspection of all the unoccupied rooms because the defendant said the victim was coming to do an inspection and the defendant was nervous about the outcome.

Further, Mr. Sneed will testify that starting approximately two months prior to the murder, the defendant began talking about killing the victim. The defendant offered Mr. Sneed money in increasing increments to kill the victim. On one occasion, the defendant, Mr. Sneed and the victim were working on a television feed line. The defendant was putting a lot of pressure on Mr. Sneed to get something and hit the victim over the head with it. The defendant was wearing gloves and cautioned Mr. Sneed to get a pair of gloves for himself. After the defendant offered to pay Mr. Sneed to kill the victim on more than one occasion, Mr. Sneed realized the defendant was serious in his request. Mr. Sneed will testify that the defendant told him he could talk the victim's wife into letting him manage both motels after the victim was dead.

Respectfully submitted,

C. WESLEY LANE II
DISTRICT ATTORNEY

Connie S. Pope

Connie S. Pope
Assistant District Attorney

2

ISSUE: Original + 8 copies with

JUDGE: Twyla Mason Gray

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	CF-1997-24
RICHARD EUGENE GLOSSIP Defendant.	)	

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

OCT 31 2003

PATRICIA PRESLEY, COURT CLERK
by _____ Deputy

APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

COMES NOW, C. WESLEY LANE, II, the duly elected, qualified and acting District Attorney of the Seventh District, Oklahoma County, State of Oklahoma, and petitions this Honorable Court for a Writ of Habeas Corpus Ad Testificandum to bring **JUSTIN BLAYNE SNEED, DOC#265681, DOB: 09-22-77, W/M** from the Department of Corrections, to testify at the **JURY TRIAL** of the above named defendant in the above styled and numbered case in the District Court of Oklahoma County, State of Oklahoma, wherein the defendant is charged with the crime of **MURDER IN THE FIRST DEGREE**. The said **JUSTIN BLAYNE SNEED** is currently incarcerated in the custody of the Department of Corrections, as the result of a conviction of a felony in the State of Oklahoma. The above styled and numbered case is set for **NOVEMBER 10, 2003 at 9:00 a.m..**

C. WESLEY LANE, II
DISTRICT ATTORNEY

BY: Connie Pope
CONNIE POPE, OBA#16598
ASSISTANT DISTRICT ATTORNEY

Justin Sneed
Joe Hemp
3780/3780
ORIGINAL

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)
Plaintiff,)
vs.) CF-97-0244
)
RICHARD EUGENE GLOSSIP,)
Defendant.)

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

THE STATE OF OKLAHOMA TO:
JOHN WHETSEL, Sheriff, Oklahoma County, State of Oklahoma:
And
DEPARTMENT OF CORRECTIONS, State of Oklahoma

GREETINGS:

Upon Application for a Writ of Habeas Corpus Ad Testificandum filed in this court by C. Wesley Lane II, the duly appointed, qualified and acting District Attorney of the Seventh District Oklahoma County, State of Oklahoma, having duly considered the same on this 9th day of October, 2003 and being otherwise well and duly informed in the premises and upon due consideration thereof, finds that the above styled and numbered case, in which the defendant is charged with the crime of MURDER IN THE FIRST DEGREE is presently set for JURY TRIAL in this Court on NOVEMBER 3, 2003 and that JUSTIN BLAYNE SNEED, DOC# 265681, DOB: 09-22-77, W/M, who is endorsed as a witness on the Information therein, is now incarcerated in the custody of the Department of Corrections, and that the Writ of Habeas Corpus Ad Testificandum prayed for by C. Wesley Lane II, District Attorney of Oklahoma County, Seventh District, State of Oklahoma should be granted.

The Court, therefore, finds that John Whetsel, Sheriff of Oklahoma County, State of Oklahoma, should be directed and authorized by this court to proceed to the

Department of Corrections, and receive the body of the said JUSTIN BLAYNE SNEED and to return the said JUSTIN BLAYNE SNEED to the County Jail of Oklahoma County, Oklahoma City, Oklahoma, thereto retain the said JUSTIN BLAYNE SNEED pending and during the JURY TRIAL in this case upon the charged aforesaid, in which the said JUSTIN BLAYNE SNEED is a witness.

The Court further finds that upon termination of this case, after the said JUSTIN BLAYNE SNEED shall have testified and shall have been discharged as a witness therein, the body of the said JUSTIN BLAYNE SNEED should be, by the Sheriff of Oklahoma County, State of Oklahoma, returned to the custody of the Department of Corrections to finish serving such sentence as may have heretofore been imposed upon the said JUSTIN BLAYNE SNEED for which he is now incarcerated in the custody of the said Department of Corrections.

The Court further finds that the said Department of Corrections should be directed and authorized by this Court to do and perform such acts as are proper and appropriate to effect delivery of the body of the said JUSTIN BLAYNE SNEED herein into the custody of the Sheriff of Oklahoma County, Oklahoma, for the purpose hereinabove set forth.

IT IS BY THE COURT SO ORDERED. DATED: 10-10-03

TWYLA MASON GRAY
JUDGE OF THE DISTRICT COURT

OK:
SANDRA HOWELL-ELLIOTT, OBA# 11175
ASSISTANT DISTRICT ATTORNEY

ISSUED THIS 17 DAY OF 10, 2003
IN OKLA. COUNTY, OKLA.
PATRICIA PRESLEY, COURT CLERK
By _____
Deputy

Sheriff's Return
Out of County Travel

State of Oklahoma
SS:
Oklahoma County

I received this writ of Ad Test from the District Court of Oklahoma County this 30 day of October, 2003, and executed the same on the 30 day of October, 2003, by transporting the within named defendant from Lexington to the Oklahoma County Jail, Oklahoma City, Oklahoma, as ordered herein.

Sheriff's Fees

Deputy _____ hours @ $20.00 per hour _____
Guard Fee _____
Toll Fee _____
Meals _____
Lodging _____
Mileage _____ miles @ .36 per mile _____
Writ Execution Fee

Total $30.00

John Whetsel, Sheriff
By: _____ 163
Deputy

Sheriff's Return
Out of County Travel

State of Oklahoma
SS:
Oklahoma County

I received this writ of AD Test from the District Court of Oklahoma County this 31 day of Oct, 2003, and executed the same on the 31 day of Oct, 2003, by transporting the within named defendant from the Oklahoma County Jail, Oklahoma City, Oklahoma to Joe Harp delivering him/her into the custody of the Doc, as ordered herein.

Sheriff's Fees

Deputy _____ hours @ $20.00 per hour _____
Guard Fee _____
Toll Fee _____
Meals _____
Lodging _____
Mileage _____ miles @ .36 per mile _____

Total 30.00

John Whetsel, Sheriff
By: _____ #123
Deputy

SHERIFF'S RETURN

STATE OF OKLAHOMA)
)
OKLAHOMA COUNTY)

Criminal Warrant # CF 1997-244

I received this Writ this 31 **day of** Oct, **20**03, ~~**and executed the**~~

same on the 4 **day of** Nov, **20**03, ~~**by arresting said**~~

Writ Recalled By ASA D.A. Gary Ackley -

~~**and brought him/her before said Court as commanded.**~~

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

DEC 02 2003

PATRICIA PEPPLEY, COURT CLERK
By _____ Deputy

JOHN WHETSEL, SHERIFF

By: _____
Deputy Sheriff

SHERIFF'S FEES

Mileage (miles driven _____ ***) x $0.36 Per Mile*** _____
Criminal Arrest _____ ~~$30.00~~

TOTAL ~~0~~

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	CASE NO. CF-1997-0244
RICHARD EUGENE GLOSSIP, Defendant.	)	

JUDGMENT AND SENTENCE

NOW on this 27th day of August, 2004, the same being one of the regular judicial days of the District Court of Oklahoma County, State of Oklahoma, this cause came on for Judgment and Sentence, and the defendant, RICHARD EUGENE GLOSSIP, being present in person and by his counsel, Silas R. Lyman II, Chief, Capital Trial Division, OIDS, and L. Wayne Woodyard, Capital Trial Division, OIDS, in open Court, and the plaintiff, the State of Oklahoma, being being represented by Connie Smothermon, Assistant District Attorney, and Gary L. Ackley, Assistant District Attorney, Oklahoma County, State of Oklahoma, and the said defendant, RICHARD EUGENE GLOSSIP, having been duly presented and arraigned and having pleaded "Not Guilty" to the offense of MURDER IN THE FIRST DEGREE, as charged in the Information filed herein, and having been duly and regularly tried and convicted of said offense in Oklahoma County, State of Oklahoma.

THEREUPON, defendant, RICHARD EUGENE GLOSSIP, having been asked by the Court whether he had any legal cause to show why Judgment and Sentence should not be pronounced against him, in conformity with the verdict of the jury, and the defendant, RICHARD EUGENE GLOSSIP, giving no good reason why said Judgment and Sentence should not be pronounced, and none appearing to the Court; the Court does hereby adjudge and sentence the

said defendant, RICHARD EUGENE GLOSSIP, for the offense by him committed, in conformity with the verdict of the jury.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the said defendant, RICHARD EUGENE GLOSSIP, be conveyed from the Bar of this Court to the County Jail of Oklahoma County, State of Oklahoma, and within ten (10) days thereafter be by the Sheriff of Oklahoma County, State of Oklahoma, transported to the Oklahoma State Penitentiary, Department of Corrections, located at McAlester, Oklahoma, where the Warden of the said Penitentiary, or his successor in office, is hereby directed to confine the said RICHARD EUGENE GLOSSIP until he is transferred to any other place of incarceration as designated by the Department of Corrections, State of Oklahoma and on the 17th day of November, 2004, the Warden of the place of incarceration designated by the Department of Corrections is commanded on that day to put the said RICHARD EUGENE GLOSSIP to death by continuous intravenous administration of a lethal quantity of an ultra-shortacting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice, or in any other manner that may be designated by the laws of the State of Oklahoma, in all respects as provided by law for such execution; and the Clerk of this Court is commanded to deliver to said Sheriff of Oklahoma County, State of Oklahoma, a certified copy of this Judgment and Sentence, together with the Death Warrant which will be sufficient warrant and authority to the said Sheriff of Oklahoma County, State of Oklahoma and Warden of the said Center, or his successor in office, and Department of Corrections, or any place of confinement of the Department of Corrections,

State of Oklahoma, for the execution of the Judgment and Sentence as herein provided; return of this proceedings hereunder to be endorsed thereon and filed as provided by law.

THEREUPON, the defendant, RICHARD EUGENE GLOSSIP, by his counsel, in open Court, gave notice of his intention to appeal from the Judgment and Sentence herein pronounced, and for good cause shown.

IT IS THEREFORE, the judgment and order of the Court that the defendant, RICHARD EUGENE GLOSSIP, be allowed and he is hereby granted the time allowed by law in which to make, prepare and serve the transcript herein, to all of which proceedings the defendant, RICHARD EUGENE GLOSSIP, excepted and exceptions duly allowed.

Twyla Mason Gray
DISTRICT JUDGE

ATTEST: (SEAL)

PATRICIA PRESLEY, COURT CLERK
Oklahoma County, Oklahoma

APPENDIX G

State's Response to Application for Post-Conviction Relief in *Glossip v. State*, No. PCD-2022-819

ORIGINAL

DEATH PENALTY CASE

No. PCD-2022-819

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD GLOSSIP,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

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

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA

JOSHUA L. LOCKETT, OBA #31134
JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEYS GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)

ATTORNEYS FOR RESPONDENT

OCTOBER 10, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

RICHARD GLOSSIP,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	**Case No. PCD-2022-819**
	)	
THE STATE OF OKLAHOMA,	)	**DEATH PENALTY CASE**
	)	
Respondent.	)	

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

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

STATEMENT OF THE CASE

In June 2004, an Oklahoma jury convicted Petitioner of First Degree Murder and sentenced him to death upon the finding of one aggravating circumstance: that the murder was committed for remuneration.[1] Petitioner's conviction and sentence have since survived a litany of challenges. *See Glossip v. State*, 2007 OK CR 12, 157 P.3d 143, *cert. denied*, 552 U.S. 1167 (2008) (direct appeal); *Glossip v. State*, No. PCD-2004-978, slip op. (Okla. Cr. App. Dec. 6, 2007) (unpublished) (first post-conviction); *Glossip v. Workman*, No. CIV-08-0326-HE, slip op. (W.D. Okla. Sept. 28, 2010) (unpublished) (federal habeas petition); *Glossip v. Trammell*, No. 10-6244, slip op. (10th Cir. July 25, 2013) (unpublished) (habeas appeal); *Glossip*

[1] Petitioner was also convicted of First-Degree Murder and sentenced to death in 1998. This Court reversed and remanded Petitioner's conviction for a new trial. *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

v. Trammell, 572 U.S. 1104 (2014) (certiorari petition from habeas); *Glossip v. State*, No. PCD-2015-820, slip op. (Okla. Cr. App. Sept. 28, 2015) (unpublished) (second post-conviction).

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

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

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

STATEMENT OF THE FACTS

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

> ¶ 3 In January of 1997, Richard Glossip worked as the manager of the Best Budget Inn in Oklahoma City, and he lived on the premises with his girlfriend D–Anna Wood. Justin Sneed, who admitted killing Barry Van Treese, was hired by Glossip to do maintenance work at the motel.
>
> ¶ 4 Barry Van Treese, the murder victim, owned this Best Budget Inn and one in Tulsa. He periodically drove from his home in

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

[3] Reed Smith has unequivocally stated that it is committed to "[f]ighting the death penalty" and the firm regularly assists anti-death penalty organizations such as Amicus and Reprieve in their legal representation of those facing the death penalty. *See* Reed Smith Report for Europe, the Middle East and Asia 2017/18 (https://reedsmithpublications.com/responsible-business-2017-18/r4/files/assets/common/downloads/publication.pdf?uni=51babe43d96880c5a2b682a7808c8be5 at 14) (last accessed August 5, 2022).

Lawton, Oklahoma to both motels. The Van Treese family had a series of tragedies during the last six months of 1996, so Mr. Van Treese was only able to make overnight visits to the motel four times in that time span. His usual habit was to visit the motel every two weeks to pickup the receipts, inspect the motel, and make payroll.

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

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

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

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

¶ 8 Van Treese arrived at the Best Budget Inn in Oklahoma City on January 6, 1997, around 5:30 p.m. Around 8:00 or 9:00 p.m., Van Treese left Oklahoma City to go to the Tulsa Best Budget Inn to make payroll and collect deposits and receipts. Hooper testified Van Treese was not upset with Glossip and did not say anything to her about shortages before he left for Tulsa. Van Treese did tell Hooper he planned to stay for a week to help remodel rooms.

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

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

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

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

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

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

¶ 15 After Sneed killed Van Treese he went to the office and told Glossip he had killed Van Treese. He also told him about the broken window. Sneed said that he and Glossip went to room 102 to make sure Van Treese was dead. Glossip took a $100 bill from Van Treese's wallet.

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

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

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

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

¶ 20 The next morning, Billye Hooper arrived at work and was surprised to see that Glossip was awake. She also noticed that Mr. Van Treese's car was gone. She asked Glossip about the car, and Glossip told her that Mr. Van Treese had left to get supplies for remodeling rooms. A housekeeper testified that Glossip told her to

clean the upstairs rooms, and he and Sneed would take care of the downstairs, where room 102 was located.

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

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

¶ 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.

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

PRELIMINARY MATTERS

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

The State strongly believes that most, if not all, of the claims raised in this *fourth* post-conviction application were previously available and are therefore waived pursuant to 22 O.S.2021, § 1089(G). However, Petitioner's attorney and others are waging a public relations

campaign in which they (falsely) argue both that he is innocent, and that the State engaged in egregious misconduct. Petitioner's attorney held a press conference on the day he filed his fourth application in which he thoroughly discussed the allegations therein.[4]

This media campaign is an attempt to place pressure on numerous State entities, including this Court, the Governor, the Oklahoma Attorney General, and the Oklahoma Pardon and Parole Board, with a one-sided and inaccurate narrative. One member of the Legislature has even vowed to eliminate the death penalty in Oklahoma if Petitioner is executed.[5] This Court is the only proper entity to address the allegations raised as it has the ability to review the entire record and make a complete and impartial determination on Petitioner's claim of actual innocence. The State is concerned that, if this Court does not address the merits of these claims, the damage will be done. Accordingly, and with reluctance, the State waives its right to argue the claims within this fourth post-conviction application are waived because they could have been raised previously.[6] The State further respectfully requests that this Court fully adjudicate those claims.[7]

The State needs to make three additional observations, related to the foregoing paragraphs, before addressing Petitioner's claims. First, Petitioner's seventy-seven page application (which has a 172 page appendix) repeatedly and expressly incorporates wholesale his third post-conviction application. 9/22/2022 Successive Application for Post-Conviction Relief ("Pet. 4th

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

[5] https://www.mcalesternews.com/news/state/lawmaker-claims-new-report-clears-death-row-inmate/article_aa103709-5d45-5136-96f6-e7d70527b78c.html

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

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

PC") at 55, 70 n.22, 68, 72 n.23, 76. The third application was 122 pages long and was accompanied by a 1,114 page appendix; and it was supplemented twice. Because the third application and the State's response thereto address Petitioner's claim of factual innocence—which is related to the prejudice he will have to show in order to obtain relief for the propositions of error raised in the fourth application—the State asks that, if this Court considers matters from Petitioner's third post-conviction proceeding, it will also consider the argument and evidence provided by the State.

Second, Petitioner announces his intention to file *yet another* post-conviction application in the future. Pet. 4th PC at 42. To this, the State strenuously objects. Petitioner's current attorney has been investigating his case since 2015. *See, e.g.*, Pet. PC Appx. 4, Att. 15 at 6, Att. 22 at 9. The Reed Smith law firm has been investigating since February of 2022, and it has been four months since they issued their "final" report. 7/1/2022 Successive Application for Post-Conviction Relief ("Pet. 3rd PC") Appx. 1, Att. 3 at Bates 1, 9. The State has permitted Petitioner to review all non-privileged materials from the files of the Oklahoma County District Attorney's Office. Enough is enough. The State will raise all procedural defenses going forward.

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

> detail[ed Kenneth Van Treese's] version of the events of the previous two days [in which Petitioner's second trial was supposed to begin], prefaced by, "PLEASE CHECK FOR ACCURACY. YOUR MOMMA SHOULD BE PROUD!" Attachment 27. Although Van Treese does not say why he was so pleased with Pope [Smothermon], when the long-awaited trial for his brother's murder had just been cancelled, in context, it appears the State did not want to proceed with the trial at that time (first the sweetened offer and

> agreement to postpone trial by a day to try to negotiate it, then raising at the last minute the issue that would require disqualification [of Petitioner's lead counsel Lynn Burch] that could have been addressed the week before, or at any time in the preceding year).

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

As will be discussed in more detail below, Petitioner's former trial attorney Lynn Burch twice visited Justin Sneed after Petitioner's conviction was reversed and remanded for a new trial. Mr. Burch attempted to persuade Mr. Sneed not to testify at the retrial, assuring him that the State could not lawfully punish him for this refusal (11/3/2003 Tr. 9). On November 4, 2003, although jury selection was supposed to have begun, Petitioner was given an extra day to consider whether to accept a plea agreement (11/3/2003 Tr. 6).[8] After Petitioner refused, the State notified the court that it may need to make a pretrial ruling on the admissibility of hearsay evidence through Mr.

statement that the State did not want to proceed is wholly inaccurate. In fact, the same memo

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

relied upon by Petitioner indicates Ms. Pope Smothermon was "visibly upset (her hair was on fire)" over the development. Pet. 4th PC Att. 27.

testify at the second trial; they are the ones who pressured him not to. This proposition is without merit.

A. Standard of Review

A criminal defendant may be entitled to relief if the State fails to disclose to the defense favorable information within the control of the prosecutor or law enforcement. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, the undisclosed evidence must be material. *Id.* That is, there

must be a reasonable probability that, if not for the State's failure to disclose, the result of the trial would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

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

[9] Petitioner relies upon two Tenth Circuit cases that are not binding on this Court and are, respectfully, incorrect. Pet. 4th PC at 49 (citing *Fontenot v. Crow*, 4 F.4th 982, 1066 (10th Cir. 2021); *Banks v. Reynolds*, 54 F.3d 1508, 1516-17 (10th Cir. 1995)). The Tenth Circuit recognized that "many of [its] sister circuits" have held that *Brady* does not apply where evidence was available to the defense. *Fontenot*, 4 F.4th at 1066. *See Jalowiec v. Bradshaw*, 657 F.3d 293, 311 (6th Cir. 2011) (*Brady* is not violated when the defendant could have discovered the evidence "with minimal investigation"); *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007) (evidence is not suppressed if the defense could have discovered it through due diligence); *Leka*, 257 F.3d at 100; *Yearby v. State*, 997 A.2d 144, 153 (Md. Ct. App. 2010) (there is no *Brady* violation if the defense could have discovered the evidence through a reasonable investigation). Further, while *Fontenot* did not consider the defendant's knowledge to assess the issue of suppression, it did note that the defendant's knowledge of the allegedly withheld evidence would factor into the materiality analysis. *Fontenot*, 4 F.4th at 1066 ("[I]f the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." (citing *Banks*, 54 F.3d at 1517) (internal quotations omitted)). Regardless of where the analysis concerning Petitioner's knowledge occurs, as will be shown, the result remains: this was no *Brady* violation.

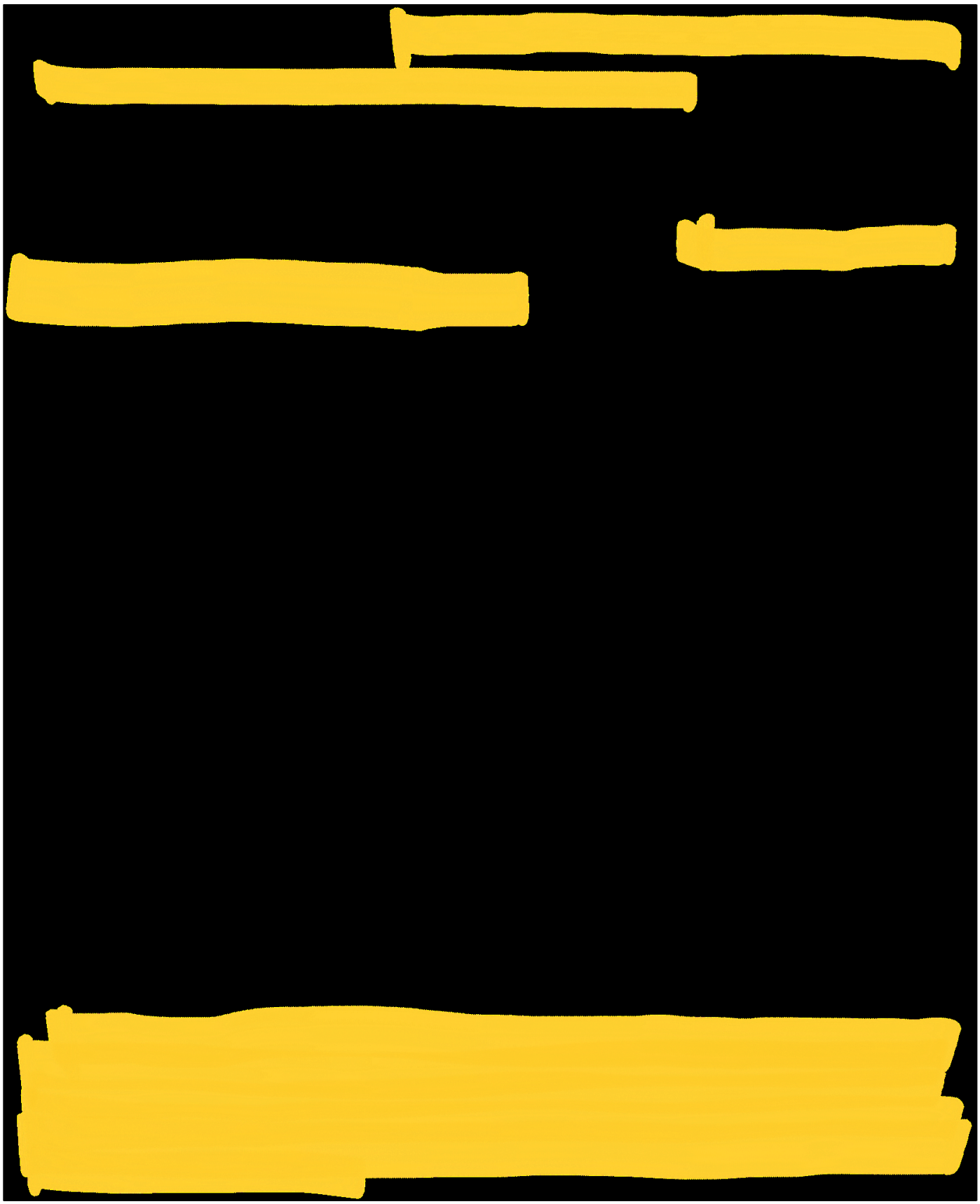
B. Argument and Authority

Petitioner claims the State knew, and failed to inform the defense, that when Petitioner's conviction was remanded for a new trial, Mr. Sneed either: 1) planned to recant (*i.e.*, affirmatively disavow or materially change) his testimony from the first trial or 2) sought to obtain further consideration in exchange for testifying again. The State will show that the bulk of Petitioner's

being able to go home would be if I recanted the story about everything that I already had happened

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

[sic] which is really impossible because I told the truth."). While Mr. Sneed did not want to testify



> The combination of Sneed's correspondence (newly available), the record surrounding Pope's actions after meeting with him and heading into trial, and Sneed's recent statements to investigators (newly available) establish that in at least one meeting with prosecutor Connie Pope [Smothermon], Justin Sneed stated that he did not intend to testify in the second trial as he had in the first, and that he continued to indicate an unwillingness to provide the same testimony he had previously provided right up until the start of the second trial. The record is mixed about whether he planned affirmatively to recant his testimony, or whether he was intending to withhold his testimony in hopes of leveraging a more favorable deal than the one he already had.

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

The truth is that there is *no* evidence that Mr. Sneed "planned affirmatively to recant his

perfect sense that Mr. Sneed might think about contacting Petitioner's attorneys to obtain assistance with his own sentence. As noted above, the State has provided the transcripts of Mr. Sneed's interviews with the State and Reed Smith so that this Court will have all the relevant evidence at its disposal. *See* Attachments 1-4.

Appx., Att. 32, ¶¶ 8-9. Petitioner's affiant even admits that. "During the August 15, and August 26, 2022 interviews, Sneed denied he told an Assistant District Attorney that he wanted to substantively change his testimony regarding Glossip's urging Sneed to murder Barry Van

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

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

> During the August 26, 2022[,] interview, when asked when the police were mentioning Glossip multiple times did Sneed feel they were focusing or signaling they wanted to hear about Glossip, Sneed responded as follows: "what I was thinking that it was going into my mind that they already knew that he had something to do with that. They wanted to pin down where/when/how he had something to do with *it or if their thoughts were wrong, could I clarify why they're having the wrong thoughts*. But to me they already knew he was in on it somewhere, they couldn't pinpoint the whole storyline, *they wanted to give full the whole storyline or truth to have clarity and understanding why this man just lost his life*."

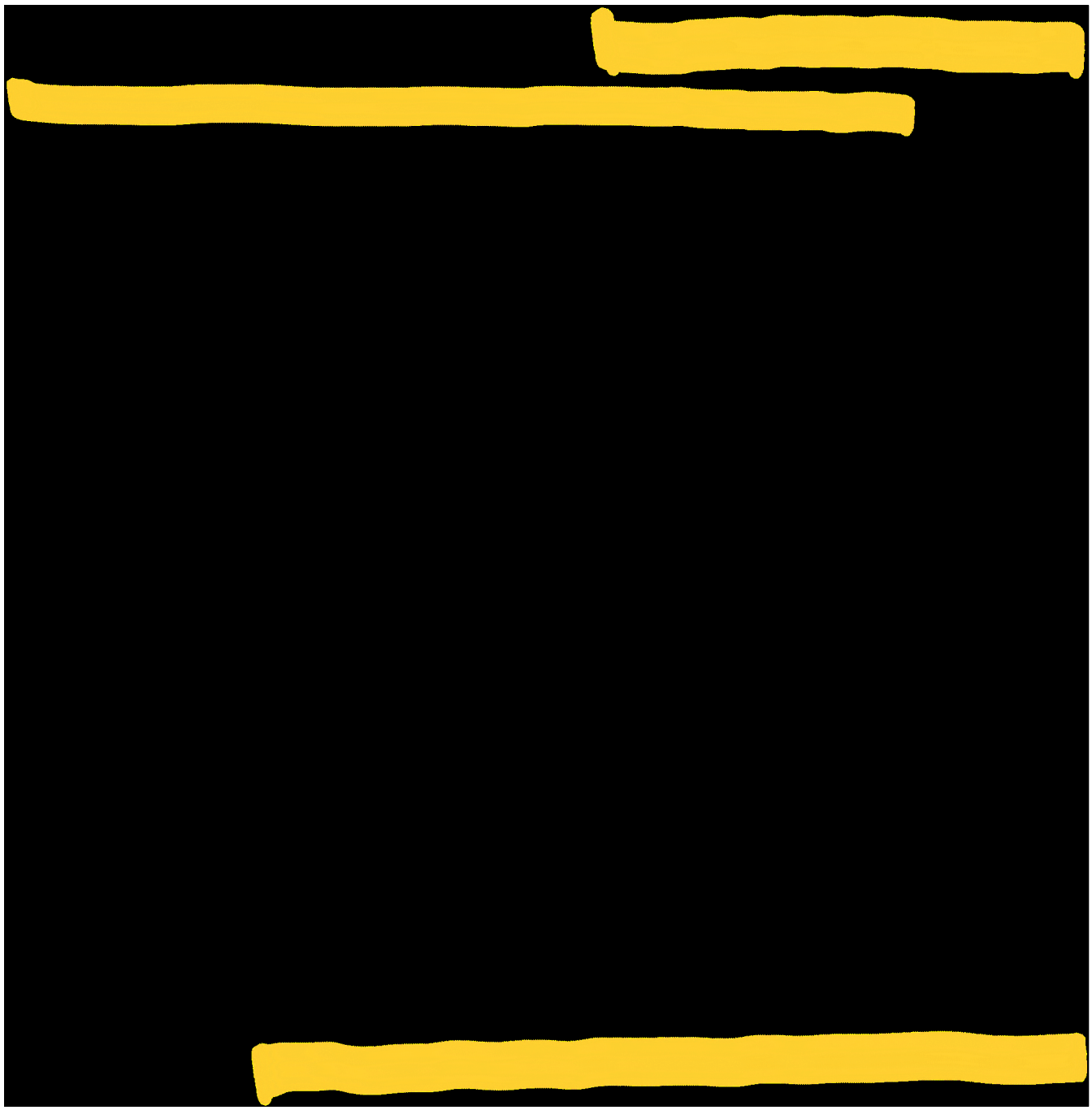
Pet. 4th PC, Appx., Att. 32, ¶ 26 (emphasis added).

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

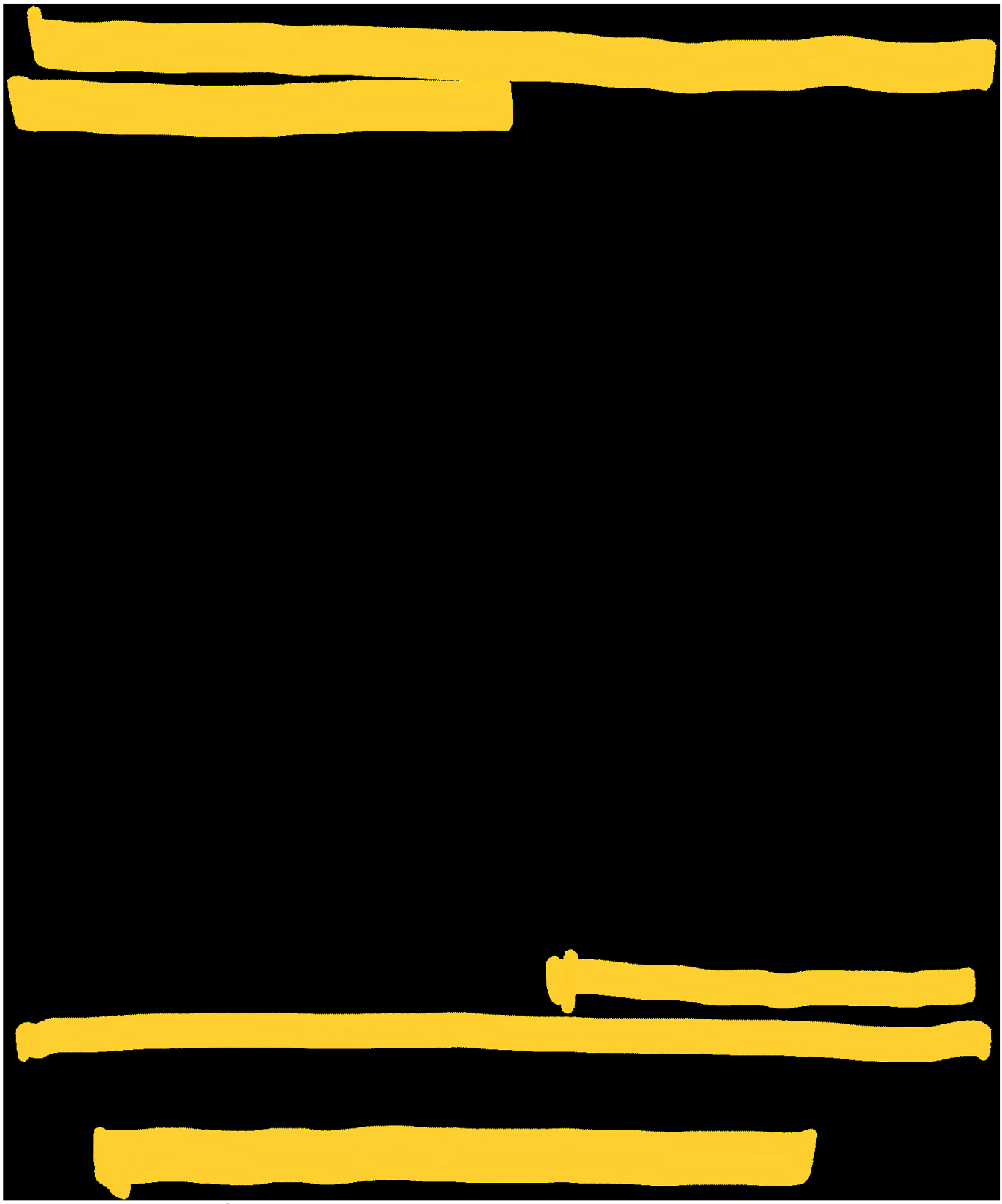
Petitioner's trial attorneys were well aware that Mr. Sneed wished to either avoid testifying

anything exculpatory, it would have been in Ms. Hobbs' affidavit.

Indeed, in May of 2001, Mr. Sneed wrote Ms. Hobbs a letter requesting a copy of his plea agreement and other information. Pet. 4th PC, Appx., Att. 11, ¶ 12; 8/20/2022 Reed Smith Second Supplemental Report ("RS 2nd Supp."), Exhibit C. Mr. Sneed expressed his appreciation that Ms. Hobbs let him know about the potential for a new trial and asked her to keep him informed. Pet.



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

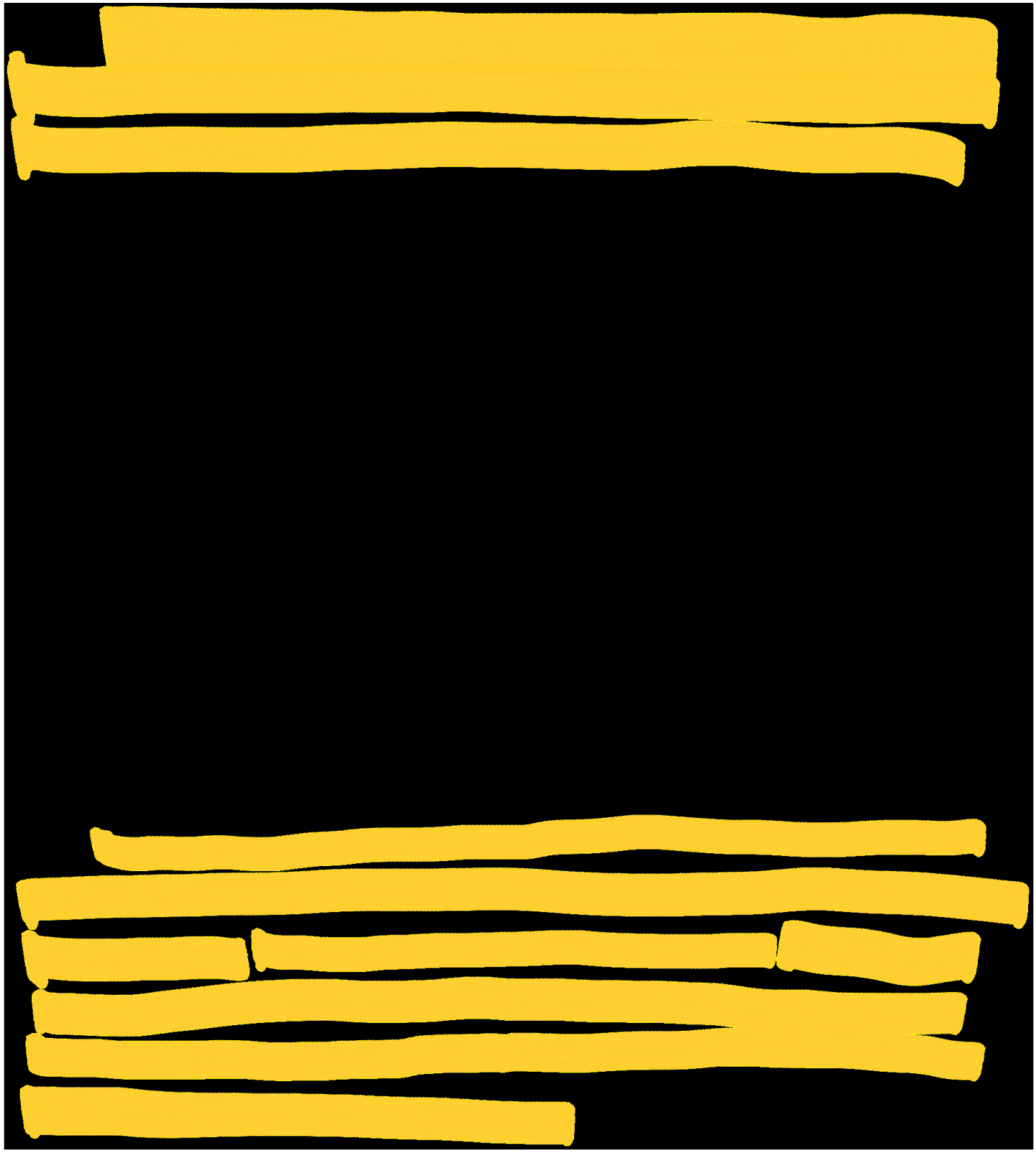


with Mr. Burch. In fact, they were at the prison during one of Mr. Burch's visits, although they were not allowed into the room with Mr. Sneed. (11/3/2003 Tr. 14). Further, it is likely that Mr. Lyman and Mr. Woodyard would have been aware of Ms. Hobbs' and Ms. Cooper's communications with Mr. Sneed.

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

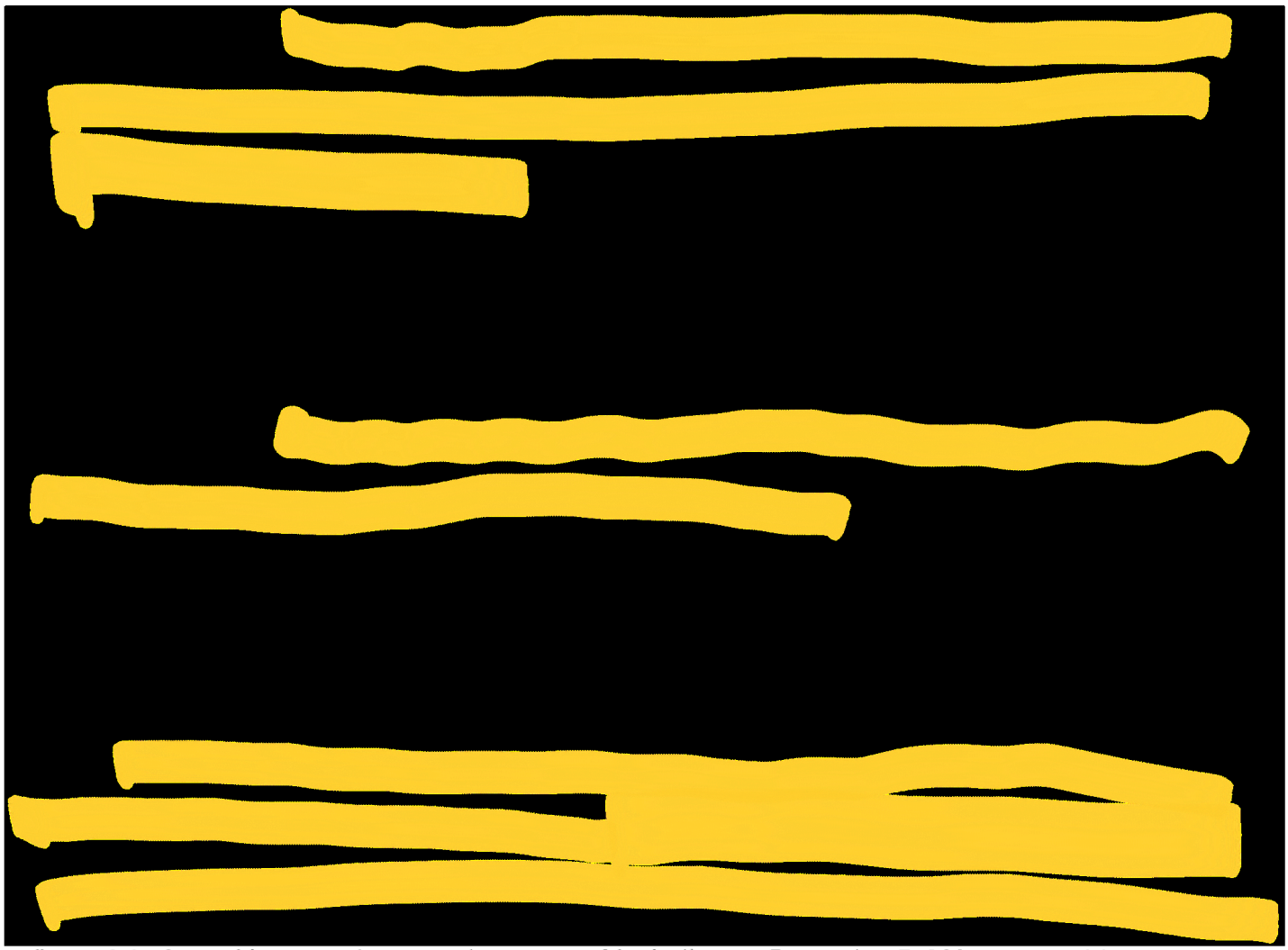
[20] This explains why Mr. Sneed would say, in a 2007 letter to Ms. Walker, that he might approach Petitioner's attorneys over his concern that "it was a mistake reliving this." Pet. 4th PC at 48. Contrary to Petitioner's assertion, this could very well represent a form of "buyer's remorse" rather than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

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



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

Evidence of a plea agreement, or even a tacit expectation of leniency, is favorable to a defendant because it may establish a motive to testify, and possibly testify falsely. *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009). However, when there is no actual expectation of a benefit, there is no material suppression of evidence.[22] *Fuston v. State*, 2020 OK CR 4, ¶ 60,



Instead, he has said over and over again, up to and including on September 7, 2022, that Petitioner induced him to murder Mr. Van Treese. Attachment 3 at 134-58. While it is clear that Mr. Sneed strongly wished to either not testify at all in the second trial, or receive further consideration for

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

that testimony, it is equally clear that Mr. Sneed has asserted Mr. Glossip's guilt at all times for the last twenty-five years.

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

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

In his second proposition of error, Petitioner argues the prosecutor violated the rule of sequestration when she spoke with Ms. Walker to find out whether Mr. Sneed attempted to stab Mr. Van Treese. The rule of sequestration does not apply to attorneys who are trying a case. There was no error.

A. Standard of Review

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

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

However, [redacted] On direct examination, Mr. Sneed testified that he tried to stab Mr. Van Treese in the chest (2004 Tr. XII 102).[24] Petitioner objected that they did not have notice of this testimony (2004 Tr. XII 105). Ms. Pope Smothermon explained that:

> Yesterday after I heard the M[edical] E[xaminer]'s questions[,] I called Ms. Walker. She had a conversation with Mr. Sneed and conveyed to me that -- the same thing that I knew, that he had the knife open during the attack but that he did not stab him with it. The chest thing we're all hearing at the same time.

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

B. Argument and Authority

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

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

[25] While the memo is addressed to Ms. Walker, it does not appear that Ms. Pope Smothermon delivered it to Ms. Walker. As Petitioner admits, it appears that Ms. Pope Smothermon made notes on this paper. Pet. 4th PC at 31. This is consistent with Ms. Pope Smothermon's statement during

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

The reason no one has batted an eye until now is that the prosecutor did nothing wrong.

In fact, there is no error at all. For purposes of this case, Oklahoma's rule of sequestration is functionally identical to the federal rule. Oklahoma's rule provides that: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." 12 O.S.2001, § 2615. The federal rule states: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." Fed. R. Evid. 615. This Court should, therefore, find federal cases "highly persuasive". *See State v. Thomason*, 1975 OK CR 148, ¶ 14, 538 P.2d 1080, 1086 (stating federal cases interpreting the Fifth Amendment

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trial that, after hearing the Medical Examiner's testimony, she spoke with Ms. Walker on the telephone, and then spoke with Ms. Walker again after Ms. Walker spoke with Mr. Sneed.

are "highly persuasive"); *accord Murphy v. State*, 2012 OK CR 8, ¶ 42, 281 P.3d 1283, 1294 (this Court interprets Oklahoma's ex post facto provision consistent with federal cases).

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

> In short, the Government's position requires the implication that by discussing prior trial testimony with Corwin Alexander, Mr. Scofield necessarily coached Alexander or made it likely that Alexander would commit perjury. To the contrary, we must trust and rely on lawyers' abilities to discharge their ethical obligations, including their duty of candor to the court, without being policed by overbroad sequestration orders.

Id. at 320; *accord United States v. Guthrie*, 557 F.3d 243, 247-49 (6th Cir. 2009) (finding no error where the prosecutor was permitted to speak with the victim during an overnight recess taken during defense counsel's cross-examination of the victim: "the district court clearly and correctly articulated the limits of the prosecutor's permitted interaction with the witness by stating: '[The

prosecutor] may have conversations with his witness. He may not coach the witness.'" (alteration adopted)); *United States v. Teman*, 465 F. Supp. 3d 277, 323-25 (S.D.N.Y. 2020) (finding no violation of Rule 615 where the prosecutor and case agent spoke with a witness during an overnight recess taken during the witness's testimony and collecting cases to reject the defendant's argument that the court should "embrace[] a broader interpretation of the rule that restricts witness communication of any kind (including outside of the courtroom) for the duration of trial"); *id.* at 325 ("the purpose of the call was the familiar one in which trial counsel alerts a witness to possible inconsistencies in his testimony so as to prepare for cross examination"); *People v. Villalobos*, 159 P.3d 624, 628-29 (Colo. App. 2006) (finding no violation of the rule of sequestration where the prosecutor discussed the testimony of a prior witness with a prospective witness: "Defendant argues that an attorney's discussion of one witness's testimony with a prospective witness violates [Colorado's equivalent rule]. We are not persuaded."); 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 615.06 (Joseph M. McLaughlin ed., 2d ed. 2006) (noting that sequestration orders "usually permit the witnesses to discuss their own or other witnesses' testimony with counsel for either side").

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

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

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

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

In his third proposition of error, Petitioner claims the State knowingly presented perjured testimony when Mr. Sneed testified that he used a knife in the assault on Mr. Van Treese. Petitioner even goes so far as to accuse the prosecutor of "herself devis[ing]" Mr. Sneed's testimony. Pet. 4th PC at 70. There is no evidence that Mr. Sneed's testimony was false, or that the State knew it to be false, much less that the State told Mr. Sneed what to say. This claim is without merit.

A. Standard of Review

Due process is violated if the State knowingly introduces false testimony or fails to correct testimony it knows to be false. *Napue* v. *People of State of Ill.*, 360 U.S. 264, 269 (1959). This Court has established a three-part test for alleged *Napue* violations: 1) the State intentionally concealed an element affecting the credibility of key evidence; 2) the prosecutor knew or had reason to know the evidence was false but did not bring that fact to the trial court's attention; and

3) the concealment caused the fact-finder to be unable to properly evaluate the case. *Runnels v. State*, 1977 OK CR 146, ¶ 30, 562 P.2d 932, 936.

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

B. Argument and Authority

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

Petitioner claims Dr. Chai Choi's testimony about possible knife wounds "presented unexpected evidentiary support for a co-conspirator participating in the killing inside Room

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

102."[27] 4th PC at 70. Thus, Petitioner accuses Ms. Pope Smothermon of telling Mr. Sneed what to say to explain Dr. Choi's testimony.

least five times. He did not. Rather, Mr. Sneed testified that he tried to stab Mr. Van Treese one time (2004 Tr. XII 112, 211).

Thus, defense counsel was able to use this inconsistency to challenge Mr. Sneed's credibility: "He puts this knife, tries to stab him in the left chest one time. The guy can't even lie right now. One time." (2004 Tr. XV 141); (2004 Tr. XV 142 ("He can't even lie right when he decides to change his story to get it [to] fit so he can keep his deal."). Petitioner's allegation that Ms. Pope Smothermon induced Mr. Sneed to tell a lie that is contradicted by the very evidence she was allegedly trying to explain is nonsensical.

Petitioner cannot satisfy any of the three elements of a *Napue* claim. First, he has failed to prove that Mr. Sneed's testimony was false. Mr. Sneed admitted he tried to stab Mr. Van Treese, [redacted] someone tried to stab Mr. Van Treese, but argues "Fancy" did it. *There is not one scintilla of evidence that "Fancy" tried to stab Mr. Van Treese or that "Fancy" was even in the room.*

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

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

Petitioner has also failed to prove the prosecution knew Mr. Sneed's testimony that *he* tried to stab Mr. Van Treese was false. Petitioner has pointed to absolutely no evidence that the State knew "Fancy" even existed, much less that she allegedly stabbed Mr. Van Treese.

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

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

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

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

A. Standard of Review

A criminal defendant may be entitled to relief if the State fails to disclose to the defense favorable information within the control of the prosecutor or law enforcement. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, the undisclosed evidence must be material. *Id.* That is, there

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

must be a reasonable probability that, if not for the State's failure to disclose, the result of the trial would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

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

B. Argument and Authority

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

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

> And last week was the first time he ever said he tried to use this knife in any way on Mr. Van Treese.
>
> After the deal. This is what we call a big fact. He puts this knife, tries to stab him in the left chest one time. The guy can't even lie right now. One time. Medical Examiner, Defendant's Exhibit No.

> 18, there are four patterned marks on this man's chest consistent with the end of this knife. By way of demonstration she put it on her own hand. Not one, but four, and another one of the same pattern on his -- Mr. Van Treese's back side. Is it a coincidence that his testimony and revelation for the very first time about this knife occurred after the Medical Examiner testified in this courtroom?

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

Petitioner was aware of the fact of the communication. *See Dennis*, 834 F.3d at 292; *Leka*, 257 F.3d at 100; *Wilson*, 901 F.2d at 380; *Williams*, 7 A.3d at 1050 ("The cases are legion" that

withheld favorable, material evidence. For the reasons given in Propositions II and III, this claim fails.

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

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

A. Standard of Review

A defendant may be entitled to relief if several errors occurred, the combined effect of which deprived him of a fair trial. *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263.

"A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal." *Id.*

B. Argument and Authority

The State has shown, both throughout this response and in its response to Petitioner's third post-conviction application, that no errors occurred. Petitioner is not actually innocent, the remainder of the claims in his third post-conviction application are waived, and the State did not violate *Brady*, *Napue*, or the rule of sequestration. *See Al-Mosawi v. State*, 1998 OK CR 18, ¶ 9, 956 P.2d 906, 910 ("Because we have found that the claims raised in this application are either waived, procedurally barred, or without merit, we find no cumulative error that warrants relief.").

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

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

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

Attached to this response are letters Petitioner wrote after he was convicted in 1998.[30] In one letter, to a former cellmate named "Steve", Petitioner wrote: "I may need you to testify for me about that letter if you would and maybe Jenny to [sic] for a new trial on new evidence on that letter I wrote." Attachment 8A at 2. In another letter, Petitioner asked Steve to

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

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

Some time around 1:00 a.m. on January 7, Petitioner got into the bathtub where he stayed until approximately 3:00 a.m. Attachment 8F at 3. He went to the living room and found Ms.

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

Wood fully clothed and wearing boots. Attachment 8F at 3. Ms. Wood was acting very nervous, but she said she had been at the front desk with a customer. Attachment 8F at 3. The couple went to sleep at about 3:45 a.m. Attachment 8F at 3.

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

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

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[31] According to a memo apparently written by Lynn Burch, who represented Petitioner prior to his 2004 trial, Petitioner told Mr. Burch that Petitioner's brother, Bobby Glossip, was "one of the real killers." Attachment 6 at 67-68. The State recently made a request to Petitioner's counsel for any documents contained within Petitioner's trial files since Petitioner waived the attorney-client privilege by providing those documents to Reed Smith. Attachment 23. Petitioner also signed waivers of the privilege. *See* Attachment 6 at 189-91. Petitioner's counsel agreed he would provide access to the files *if* the State agreed to a number of conditions, including providing the State's files to Reed Smith. Attachment 23. The State is unwilling to provide its files to a third party who has no direct involvement in these proceedings. However, the discussion of this memo in Petitioner's interview with Reed Smith suggests there may be other inculpatory information within those files. In fact, as described in Proposition I, the State suspects Petitioner's files may contain memos which prove Mr. Sneed confirmed to Lynn Burch that Petitioner was involved in the murder.

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

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

For instance, Petitioner told Reed Smith not only that he did not tell Donna Van Treese that he saw Mr. Van Treese the morning of January 7 (after he was already dead), but he said, "I didn't even talk to Donna Van Treese after the murder, no." Attachment 6 at 87. Yet, at his 2014 clemency hearing, Petitioner admitted that he told Ms. Van Treese that he saw Mr. Van Treese that morning. Attachment 10 at 8:39-10:00.

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

Petitioner told Reed Smith the motel was sold out every night under his management. Attachment 6 at 30, 87. ("we sold out every day. Everybody stayed in that motel."). This is *far*

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

Petitioner also claimed that he cleaned the motel up: "here's what they showed to say it was run down, a couple of syringes out in the parking lot after I was already arrested. This took place afterwards. . . . and one room that had air – something was wrong with the air conditioner . . .that motel wasn't in bad shape. That motel was in the best shape it had ever been in." Attachment 6 at 80-81. However, the testimony of Kenneth Van Treese at Petitioner's trial painted an entirely different picture, with the vast majority of the rooms being in pitiful condition (2004 Tr. XI 116-21). Rooms were filthy and several were not rentable due to a lack of heat, a functioning room key, adequate plumbing, or busted telephones (2004 Tr. XI 116-19). A memo prepared by Kenneth Van Treese following his assumption as manager of the motel after Mr. Van Treese's murder and recounting the motel's operations between January and March of 1997 further documented the disrepair of the motel. Attachment 11. In addition to the trial testimony of Kenneth Van Treese, the memo discusses television sets not working, inadequate towels and linens throughout the motel, broken furniture in rooms, curtains falling off the walls, ceilings with missing tiles, exposed studs in bathroom areas, faulty laundry equipment, poor lighting around the motel, a dangerous boiler room, and more general overall dirtiness around the premises. Attachment 11. The well-documented dilapidation of the motel stands in stark contrast to Petitioner's recollection of the excellent job he was doing as manager.

Relatedly, Petitioner claimed he "kicked the hookers out of that motel." Attachment 6 at 50. However, Reed Smith admits "that the Oklahoma City Best Budget Inn was a constant source of calls for drugs, prostitution", etc. Pet. 3rd PC, Appx. 1, Att. 3 at Bates 163. Kenneth Van Treese also testified that the "motel looked more like a whorehouse than a motel" when he arrived in January 1997 (2004 Tr. XI 131). And Stephanie Garcia said in her affidavit that Petitioner did not like the women from the club staying at the motel, but that they *did* stay there. Pet. 3rd PC, Appx. 4, Att. 12, ¶¶ 2-3, 10, 16. Further, Petitioner admitted his own brother was bringing "'dope hoes'" and "doing a lot of shady stuff in that hotel." Attachment 6 at 63, 66, 254.

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

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

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

that this incident occurred shortly before Mr. Van Treese's murder or that she fled the club thereafter. Pet. 3rd PC, Appx. 4, Att. 12, ¶ 33.

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

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

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

> [Ms. Garcia]: Yeah. We all thought we were going to go to jail and get wrapped up in a murder trial. So [Fancy] said she -- the last thing then said she said to me was thinking of going down to Fort Lauderdale.
>
> [Question]: Let me just read you -- this might refresh your recollection. So it says, "Later that night [this refers to the last night Ms. Garcia spent in Oklahoma City *after* Mr. Van Treese's murder], Fancy drove up to the motel" –
>
> [Ms. Garcia]: She called her other sugar daddy to come and get her, and he came and got her. And from what I hear, she was hysterical, anyway, and -- this is what I was just told, that she had her -- her sugar daddy come and get her. And when she got in the car with him, she had -- it was said that he said that there was blood splattered on her, and when he took her to the other hotel, she was scared and wouldn't even get out of the car. She made him go in and get the room and everything and brought her some clothes.

> [Question]: So you didn't personally observe her, you know, being in the back of the car?
>
> [Ms. Garcia]: No. That was just what everybody was saying, she was in the back of the car and wanting to get to her box. I don't know where the box went or what was in it or anything, but from the sugar daddy's point of view, she had a little blood on her shirt and was completely hysterical and just wouldn't even go in and get -- and he had taken her to a completely different hotel and she wouldn't even get out of the car. And when she did, he said that she was scared to death. He was kind of wanting to know what the hell had happened, so that's why we heard about it.

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

Ms. Garcia's affidavit asserts that "Justin Sneed was involved in a relationship with Fancy." Pet. 3rd PC, Appx. 4, Att. 12, ¶ 27. In her interview with Reed Smith, Ms. Garcia said there was a woman with whom Mr. Sneed acted like he was in a relationship, but she does not indicate this was "Fancy." Attachment 13. That is a pretty important detail to omit if Mr. Sneed in fact used his girlfriend "Fancy" to lure Mr. Van Treese to his death.

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

In his third post-conviction application, Petitioner alleged that the Oklahoma County District Attorney's Office ordered the destruction of evidence during the pendency of Petitioner's

first direct appeal. While a box of evidence was destroyed, neither Petitioner's post-conviction application nor the Reed Smith report acknowledge key problems with their version of events.

First, as discussed in the State's response to Petitioner's third post-conviction application, the form which the District Attorney's Office filled out indicates only that the evidence was "for return to the property room . . . ." Pet. 3rd PC, Appx. 4, Att. 39 at 5. The form says nothing about the evidence being destroyed. This is consistent with the report prepared by former Inspector Janet Hogue McNutt, the officer who marked the evidence for destruction. Her report begins, "On 10-28-99, this detective was assigned to transfer property from the Okla. County DA's office back to the OCPD property room." Pet. 3rd PC, Appx. 4, Att. 18. The last sentence of the report indicates the evidence was "marked for destroy", but not why it was marked for destruction or who said it should be destroyed. Pet. 3rd PC, Appx. 4, Att. 18.

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

However, Petitioner failed to inform this Court that *three* other police officers contradicted Inspector Hogue. Detective John Fiely told Reed Smith that he had never heard of the District Attorney's Office ordering the destruction of evidence. Attachment 16 at 3:00. Lieutenant Bob Horn confirmed that the District Attorney's Office "never" instructed the police department to destroy evidence. Attachment 17 at 22:30. Finally, Officer Michael O'Leary, who was a transport

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

officer at the time of this murder but later served in a supervisory role over the property management unit, told Reed Smith that, typically, evidence in homicide cases was kept indefinitely, but when evidence in a homicide case was destroyed, it was typically the property management unit initiating those decisions. Attachment 18A at 19:30, 22:00. Officer O'Leary theorized that the District Attorney's Office gave the evidence to Inspector Hogue for return to the property room and she marked it for destruction, for unknown reasons. Attachment 18A at 26:00, 31:00, 32:00. And former Assistant District Attorney Gary Ackley told Reed Smith that the destruction of evidence was never ordered by the District Attorney's Office; it was an administrative matter that was handled by the police department. Attachment 19 at 79:00.

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

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

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

- Petitioner told Reed Smith that he did not believe Mr. Sneed when Mr. Sneed said he had killed Mr. Van Treese. Attachment 6 at 3. Petitioner also said that, after Mr. Van Treese's car was found, he did not check Room 102 because he was told the motel had been searched so he thought, "he's not here or, you know, they would have found him." Attachment 6 at 204. However, in his January 9, 1997 interview with police, Petitioner admitted that when he helped Mr. Sneed put up the plexiglass, he knew Mr. Van Treese's body was in Room 102. Pet. 3rd PC, Appx. 3 Att. 5 at 18-19. This was before Mr. Van Treese was known to be missing. Further, Mr. Glossip maintained to Reed Smith that he did not know Mr. Van Treese's body was in Room 102 even *after* Mr. Van Treese was reported missing. Attachment 6 at 4.
- Petitioner told Reed Smith that Ms. Wood "didn't say she gave Barry a key" to Room 102, "[s]he said she gave somebody a key." Attachment 6 at 33-34. Petitioner made this assertion in the context of claiming he did not know Mr. Van Treese would be returning to the motel on the night of January 6-7. Attachment 6 at 32-33.. Yet, Ms. Wood very specifically testified that Mr. Van Treese "walked over to the board and took the key to 102." (2004 Tr. V 79).
- Petitioner claimed, for the first time ever as far as the State is aware, that Mr. Sneed would have known that Mr. Van Treese had cash in the trunk of his car because Mr. Sneed once opened the trunk to fix a light.[34] Attachment 6 at 59-60. If that is true, why did Mr. Sneed leave all of that money in the trunk?

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

- Petitioner told police that he went back to bed after helping Mr. Sneed put Plexiglas over the broken window and asked Billye Hooper to wake him at noon; she woke him at "about 1:00, 1:30" and he and Ms. Wood went to Walmart. Pet. 3rd PC, Appx. 2, Att. 4 at 18. Petitioner told Reed Smith that he and Ms. Wood were gone from the motel by 9:00 or 10:00 in the morning that day, and that he "never, ever got up at 1:00, ever. That's a crock. And I didn't even know she [Billye] said that." Attachment 6 at 141-42. Of course, it was Petitioner himself who said that. When Reed Smith reminded him of his statement to police, Petitioner said he must have been confused (although he then insisted again that he had not told police that he got up after 1:00). Attachment 6 at 143-44, 205. Yet, during his second police interview, Petitioner had said the same thing: "I told Billie [sic] to wake me up at noon. She finally got me up; it was, like, 1:40, I think it was, or something like that." Pet. 3rd PC, Appx. 3, Att. 5 at 20. It was then that Petitioner and Ms. Wood ran errands and went to Walmart. Pet. 3rd PC, Appx. 3, Att. 5 at 20.
- While it is not related to the murder, Petitioner told Reed Smith that he celled with a man named Earl Frederick who was sentenced to death. Attachment 6 at 85. According to Petitioner, Mr. Frederick said, "'If you get sent to death row,' he goes, 'I'm dropping my appeals.' I got sent to death row. He dropped his appeals two weeks later and was executed not long after." Attachment 6 at 86. Earl Frederick did dismiss his appeals, but it was in 2002 (not 1998), shortly after his own direct appeal was denied.[35]

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

- One piece of evidence relied upon by Petitioner and Reed Smith is an affidavit from Margaret Humphrey who worked in the Tulsa motel owned by Mr. Van Treese. Pet. 3rd PC, Appx 5, Att. 58. Ms. Humphrey claimed Mr. Sneed came to Tulsa an unspecified number of times with Mr. Van Treese, and that she once overheard Mr. Sneed say that he was going to kill Mr. Van Treese. Pet. 3rd PC, Appx. 5, Att. 58 at ¶ 6. Ms. Humphrey had not given anyone this alleged evidence until 2019. Pet. 3rd PC, Appx. 5, Att. 58 at ¶ 11. However, Petitioner told Reed Smith that he did not know of Mr. Sneed ever going to the Tulsa motel. Attachment 6 at 111.
- Petitioner's reply brief in the third post-conviction proceeding said of the State's recent interviews with his jailhouse information witnesses, "It is Mr. Glossip's understanding from these witnesses that they each supplied the same information set forth in their respective affidavits . . . ." Petitioner's Reply to State's Response to Successive Application for Post-Conviction Relief at 36 (filed August 22, 2022) (Pet.'s Reply), OCCA Case No. PCD-2022-589. In fact, one of Petitioner's key affiants, Michael Scott, rather than affirm his prior statements made in his affidavit, informed agents with the Attorney General's Office that he "had some trouble remembering stuff" and did not "feel like [he] would be a reliable witness." Mr. Scott's feelings on the issue were resolute: "At this point, I don't want to be involved in anything [because] I feel I cannot contribute accurately." Attachment 5A at 1:00, 2:00.
- The Reed Smith Report made it sound as if no one knew where the money in Mr. Van Treese's trunk came from, implying he acquired it through nefarious means. Pet.'s 3rd PC, Appx. 1, Att. 3 at Bates 92-93, 99-101. And Petitioner's third post-

conviction application claimed, "Nor do records reflect any attempt by officers to interview others who may have known how Van Treese came by that cash, or to learn what activities he was involved in that could have yielded suspicious cash or who may have wanted to kill him." Pet. 3rd PC at 38. But Petitioner told Reed Smith, "when they showed me some of the receipts on the envelopes in the trunk, I'm sitting there going, 'That was money I gave him.'" Attachment 6 at 59. Further, Petitioner clearly had information accounting for the source of that money. *See* Pet. 3rd PC, Appx. 4 Att. 43 at 2 ("The envelopes found in Barry Van Treese's trunk had dates and amounts listed on the front side of the envelope." This document then goes on to discuss what was written on the envelopes).

- Petitioner went to see attorney David McKenzie on January 9 before he was arrested. When Reed Smith asked Petitioner if he had hired Mr. McKenzie, he replied, "I didn't hand him any cash, but that's why I had the cash on me. I was going to pay him, and he said, 'Not yet.'" Attachment 6 at 132. In spite of this admission by Petitioner directly to Reed Smith, the Reed Smith report states, "Glossip was intercepted by police while he was at a lawyer's office (Oklahoma criminal defense attorney David McKenzie, Bar #12774) where the appointment *presumably required payment*." Pet.'s 3rd PC, Appx. 2, Att. 3 at 298(emphasis added).[36]

[36] Reed Smith was not objective, and that can best be seen throughout their interview with Petitioner. Petitioner vehemently denied that Mr. Van Treese ever stayed in Room 102. Attachment 6 at 29-30. Later in the interview, Petitioner was looking at a map of the motel when he said, "This is Barry's room." Attachment 6 at 210. The Reed Smith interviewer declared, "And when you say 'Barry's room,' you just mean he was found here; right? He didn't stay in 102." Attachment 6 at 210. A truly impartial interviewer would have asked something like, "What do you mean when you say, 'Barry's room', instead of feeding Petitioner information. Another Reed

- Petitioner's third post-conviction application and the Reed Smith report repeatedly emphasized what they view as a suspicious lack of police reports. Pet.'s 3rd PC, Appx. 1, Att. 3 at Bates 94, 105-14. They fail to mention, however, that Ms. Pope Smothermon told Reed Smith that it was standard to have witnesses in a case for whom there were no police reports. Attachment 20 at 17:00. Ms. Pope Smothermon further stated that she and other prosecutors routinely continued to investigate after the police were finished. Attachment 20 at 18:00.
- Reed Smith, and Petitioner's third post-conviction application, criticize the police for not following up on the fact that some of the money in Mr. Van Treese's car had dye on it, which might have indicated it was taken in a robbery. Pet.'s 3rd PC at 27, 37-38; Pet.'s 3rd PC, Appx. 1, Att. 3 at Bates 21, 40-41, 99, 155 n. 491. The fact is that police did check to see if money that had dye was from a robbery (1998 Tr. V 111).
- Petitioner told Reed Smith that he had "heard rumors that Barry messed with some of the girls from the Vegas Club and stuff like that. I didn't want to believe that stuff, you know. He's an older guy, he had kids. So I just blew it off and that's just people talking, right?" Attachment 6 at 35. But Petitioner said in Joe Berlinger's *Killing Richard Glossip* that, "Barry had messed with prostitutes. And

Smith attorney accused Judge Twyla Mason Gray of falsely complimenting the defense attorneys during the second trial in order to avoid being reversed on appeal. Attachment 6 at 229-30. Further, Justin Sneed told Reed Smith he did *not* want his interview recorded, but they recorded it anyway. Attachment 1 at 3-4. While it was not unlawful for them to do so, they agreed but then recorded it anyway. Attachment 1 at 3-4.

once or twice I'd seen people leaving his room. It wasn't like a new thing. He had been doing that for quite a while." Killing Richard Glossip, Part 1 at 12:50.[37]

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

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

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

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

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

Respectfully submitted,

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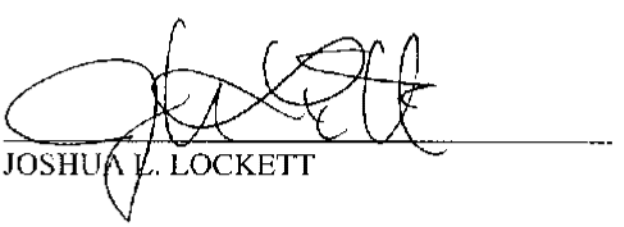

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