ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

RICHARD GLOSSIP,	)	Oklahoma County
	)	Case No. 97-256
Petitioner,	)	
	)	
vs.	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	POST-CONVICTION
	)	CASE NO. **PCD-2015-820**
	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 22 2015

MICHAEL S. RICHIE
CLERK

REPLY TO STATE'S RESPONSE TO PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION REVIEW, MOTION FOR DISCOVERY, AND MOTION FOR EVIDENTIARY HEARING

Mark Henricksen
Attorney at Law
600 N. Walker, Suite 201
Oklahoma City, 73102
phone (405) 609-1970
fax (405) 609-1973
mark@henricksenlaw.com

INTRODUCTION

Mr. Glossip's execution based solely on the lying words of a confessed murderer would be unconstitutional and immoral.

This Reply is divided into three sections: (I) Reply to the State's Response to the pending Successive Application for Post-Conviction Relief ["Application"]; (II) Reply to the State's response to the pending motion for discovery; and (III) Reply to the State's response to the motion for a hearing.

I. REPLY TO STATE'S RESPONSE TO APPLICATION

A. This Court has authority to consider the claims raised in Mr. Glossip's Application.

First, as explained in the Application, this Court has authority to consider Mr. Glossip's claims. In light of the newly discovered evidence before the court, the state and jury's reliance on false testimony from the medical examiner, and the violations of Mr. Glossip's rights under the Double Jeopardy Clause and the Sixth, Eighth, and Fourteenth Amendments, it would be a miscarriage of justice and constitute a substantial violation of Mr. Glossip's constitutional rights if his conviction is allowed to stand and he is executed.[1] *See Valdez v. State,* 2002 OK CR 20, 46 P.3d 703, citing 20 O.S.2001, § 3001.1; *see also McCarty v. State,* 2005 OK CR 10, 114 P.3d 1089

The cases relied on by Petitioner to show the *Valdez* Exception applies to his successive application do not, as the State claims, differ substantially from his situation. They stand for the proposition that, under unique circumstances, this Court will consider substantive legal claims

[1] In his Application, Petitioner cited *Brown v. State,* Case No. PCD-2002-781 (unpublished), and stated a copy was attached. Application at 13. The decision, however, was inadvertently not attached and is attached to this pleading as Exhibit 1.

based on varying factual situations if the failure to do so would result in a miscarriage of justice, or if a substantial violation of an individual's constitutional or statutory rights is involved. For example, the claims this Court has considered in successive applications include ineffective assistance of counsel, notwithstanding previous litigation of that claim based on different factual allegations, claims based on newly discovered evidence and/or the introduction of false testimony and/or destruction of evidence, when such claims are raised under unique circumstances that establish a miscarriage of justice. *See id.*; *Brown, supra; McCarty, supra; see also Malicoat v. State,* 2006 OK CR 25, 137 P.3d 1234 (Eighth Amendment claim directed toward means of execution).

Second, Mr. Glossip's claims rely in large part on newly discovered evidence that meets the requirements of 22 O.S.2011, §1089(D)(8)(b). For example, the Affidavits of Michael Scott, Richard Barrett, and Johnny Lombardi all contain newly discovered evidence that could not have been discovered previously by exercise of reasonable diligence. *See* Attachments C, F, and G. Likewise, the even more recently discovered evidence presented in the 9.21.15 Affidavit of Joseph Tapley could not have been discovered through reasonable diligence. *See* Attachment N to Petitioner's First Supplement to the Application.

Three of these individuals were previously in custody, and people in custody do not commonly discuss their fellow inmates with law enforcement or lawyers, especially when doing so may require them to testify. There is a well recognized culture in jails and prisons that condemns, and endangers, individuals who testify against fellow inmates as "snitches." The relatively rare inmate who volunteers incriminating information against fellow inmates in cases unrelated to their own almost always does so for personal gain. That is not the case here. The three former inmates who have provided evidence that Sneed was not truthful when he

implicated Mr. Glossip, and that he acted alone in killing Barry Van Treese and had a personal motive to rob and harm him, are no longer in custody and have nothing to gain by providing this evidence. They have provided their affidavits because they feel it necessary to tell what they know about Sneed, since failing to do so would condemn Mr. Glossip, an innocent man, to die. *See, e.g.,* Aff. N, ¶¶ 16-20. These men are concerned about their ability to keep their jobs and their privacy and have no desire to subject themselves to negative publicity regarding their criminal pasts.[2] The evidence they present was not previously available to Mr. Glossip.

These men have provided evidence in the form of sworn affidavits under unique circumstances. But for the fact that Mr. Glossip's case gained the attention of the press and many supporters, these individuals would not have known that they possessed evidence that could save an innocent man's life, and Affiants Scott, Tapley and Lombardi would not have known whom to contact with their information. The evidence they have provided is highly relevant and exculpates Mr. Glossip by showing that Sneed, who commonly broke into cars and rooms at the Best Budget Inn to steal money and property to fuel his severe drug addiction, acted alone in killing Barry Van Treese.

B. Newly Discovered Evidence Creates Ever-Increasing Doubt that Justin Sneed's Testimony Can be Relied on Legitimately to Convict Mr. Glossip and Sentence Him to Death.

The State's Response examines the trial evidence in the light most favorable to the prosecution to argue that Mr. Glossip is not an innocent man. Res. 9-20. The sufficiency of

[2] These risks are not illusory. On September 18, 2015, three days after Michael Scott's affidavit was filed with this Court, The Oklahoman published a substantial article about Affiant Scott, which included both a photograph of Scott and his criminal record. Moreover, it appears someone aligned with the state leaked confidential information to the newspaper as the article purports to quote answers Scott gave to diagnostic questioning done at the DOC. *See* http://newsok.com/credibility-of-glossip-case-witness-comes-into-question-records-show/article/5447998 (last visited 9.21.15

evidence at the second trial, however, is not the issue. Much of the evidence and the inferences to be drawn from the evidence was keenly disputed at trial. *See* Exhibit 2 (this is the statement of the facts from the opening brief in the direct appeal from the second trial, which sets forth a more balanced representation of the trial evidence). The question before this Court now is whether the newly discovered evidence and all the evidence at the second trial, not just the evidence that supports the prosecution's theory, shows that going forward with Mr. Glossip's execution based on the word of Justin Sneed would result in a miscarriage of justice and a substantial constitutional violation.[3]

An illustration of why the State's treatment of the evidence is not appropriate in analyzing Mr. Glossip's postconviction claims is found in the State's claim that "evidence that Petitioner was preparing to leave the state demonstrates a consciousness of guilt." Res. 17-18. In fact, there is no legitimate evidence of this. The trial evidence was that Mr. Glossip had said he was "moving on," i.e., leaving the motel, and he was openly selling some large items of property, like an aquarium and the vending machines he owned at the motel. But the only evidence that he was leaving the state came from an officer who explained why the police had place Petitioner under surveillance. That officer testified "I believe we received some information that he was selling his belongings and planning to leave the state." Vol.14, Tr. 23.

[3] The only evidence of the sole aggravating factor supporting the death verdict, murder for hire, comes from Justin Sneed. Evidence that Mr. Van Treese was killed in the course of a burglary does not, as a matter of law, support this aggravating factor, without which the death penalty is not a possible punishment. The new evidence from Affiants Scott, Barrett and Tapley shows that Sneed, instead of being motivated to kill Mr. Van Treese by anything Mr. Glossip said or did, was motivated to take money to fuel his drug habit. This new evidence is consistent with what Sneed told Dr. Edith King in the report attached as Exhibit B to the State's Response—that "the alleged crime was in connection with a burglary." The newly discovered evidence confirms that Sneed acted alone in taking money from Mr. Van Treese and killing him and that Mr. Glossip is not guilty of the offense or the single aggravating factor supporting the death verdict.

Clearly, if offered for the truth of the matter asserted this evidence is inadmissible hearsay and its admission and use would violate Petitioner's right to confrontation.

It should be noted, too, that much of the evidence relied on by the State in its Response is inadmissible under the rules of evidence, unreliable and, most importantly, contradicted by the newly discovered evidence presented by Mr. Glossip. Take, for example, the State's suggestion that Mr. Glossip had control over Mr. Sneed and that Sneed had no where to go and would not have done anything (including killing another human being) unless told to do so. Res. at 15-17. This theory of prosecution is based largely on a plethora of inadmissible and speculative testimony as to the relative character traits of Mr. Glossip and Mr. Sneed, which was disputed at trial. *See, e.g.,* 12 Okl.St.Ann. §2404(A). For example, under the prosecution's theory, Sneed was totally dependent on Mr. Glossip and would never have taken Mr. Van Treese's money or killed him had he not been ordered to do so, but this has always been refuted by Sneed's ability to regain his old job and find housing within a day of killing Mr. Van Treese. But more significantly, all of this evidence takes on a new light when considered along side the newly discovered evidence. For example, Ms. Pursley's testimony that Sneed was simple, had to be told what to do, and would not even eat unless someone told him to eat takes on an entirely different meaning when one understands that Sneed's lack of appetite was likely a symptom of drug use.

Likewise, the State's theory that Sneed would have no motive to kill absent instructions from Mr. Glossip is undermined by the newly discovered evidence, which shows Sneed's motive is better explained by his propensity to steal from people at the motel and his severe addiction to methamphetamine. Moreover, the lack of organization associated with the murder of Mr. Van Treese, including Sneed's repeated beating of the victim and his driving the victim's car to a

nearby Credit Union and parking it askew so that it would be quickly noticed, is also consistent with a culprit high on methamphetamine. This evidence of a drug-fueled and money-motivated killing by Sneed acting alone directly contradicts any notion that Mr. Glossip, a man with no prior convictions, who had always been employed and had no difficulty finding employment, would arrange a murder for hire because he was afraid of losing his job.

When the evidence presented at trial is considered as a whole, and alongside the newly discovered evidence, Mr. Glossip's conviction and death verdict are so unreliable that they violate his rights under the constitution and his execution, in light of this record, would be a severe miscarriage of justice.

C. Argument and Authority

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

The State challenges Petitioner's reliance on the facts contained in Michael Scott's Affidavit, Attachment F, because (1) it is not notarized, and (2) the State claims the affidavit offers "little more than inadmissible hearsay. The first argument is not persuasive as the affidavit was accompanied by an affidavit of Quinn O'Brien who explained that she observed Mr. Scott sign his affidavit and there was no notary available when he signed it. Nevertheless, to avoid any argument over this point, a notarized affidavit by Mr. Scott has been filed with this Court. *See* Supplement to Application filed Sept. 21, 2015. The State's allegation that the affidavit contains only inadmissible hearsay is not supported by Oklahoma law and rules of evidence, which recognize a hearsay exception based on statements against penal interest when corroborated. *See* 12 Okl.St.Ann. § 2804 (B)(3). Sneed's statements to Scott would also be admissible as prior inconsistent statements should Sneed testify. *See* 12 Okl.St.Ann. § 2613; *see*

also Omalza v. State, 1995 OK CR 80, 911 P.2d 286, 300. Moreover, under the circumstances present in this case, exclusion of the evidence in Scott (and now Tapley's) affidavits would violate Mr. Glossip's rights under the Due Process Clause of the Fourteenth Amendment. *See, e.g., Green v. Georgia*, 442 U.S. 95 (1979). The evidence of what Sneed told these men is highly relevant to Sneed's credibility, and substantial reasons exist to assume the reliability of these statements. The corroborating evidence is substantial and these men have no ulterior motive in providing their affidavits. In these circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi,* 410 U.S. 284 (1973).

The State also challenges the Scott and Barrett affidavits on the ground they are "inherently suspect," citing the unpublished decision in *Mathews v. State,* Case No. PCD-2010-1193. Presumably, the State would make the same challenge to the Tapley affidavit. However, the only thing the affidavits of Scott, Barrett and Tapley have in common with the affidavit found inherently suspect in *Mathews* is the timing of the affidavits. The difference here is that the late filing of the affidavits in this case does not undermine the credibility of the affiants. In contrast, the affidavit in *Mathews* was prepared by a relative of the defendant who had signed a much earlier affidavit in which he did not tell petitioner's counsel of his cousin's statement that petitioner was not the triggerman. The court found it "require[d] a stretch of credulity to reconcile those statements Bobby Ray Mathews attested to [in his earlier affidavit] with the statements he makes in his most recent affidavit." And, in *Mathews,* even if the new evidence was true and the petitioner was not the triggerman, he would still be guilty of the murder under the facts and circumstances of the *Mathews* case.

The bottom line is that the new evidence contained in the recently submitted affidavits is credible and goes to the heart of whether Sneed's testimony can fairly and justly provide the foundation to execute Mr. Glossip. Any doubts as to the reliability of the newly discovered evidence should be resolved at an evidentiary hearing. The facts set forth in the supporting affidavits, if proven, would establish by clear and convincing evidence that Mr. Glossip is not guilty of murder and should not be sentenced to die for a crime he did not commit.

PROPOSITION TWO: COUNSEL WERE INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT

The allegations above are incorporated in this Proposition. This Court has considered claims of ineffective assistance of trial and postconviction counsel in successor applications when unique circumstances giving rise to a miscarriage of justice. *See Valdez, supra.*

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

The State appears to argue that this claim is waived since the words "Double Jeopardy" are not expressly stated in the proposition heading. Res. 37. Yet, petitioner's discussion of the issue in Proposition Three plainly put the Attorney General on notice that petitioner was challenging his conviction on double jeopardy grounds. *See id.* at 38-42 (state discusses whether double jeopardy is violated under the circumstances of this Court's initial reversal of petitioner's conviction). Petitioner's claim is a straightforward one: Mr. Glossip's current murder conviction violates his rights under the Double Jeopardy Clause because he was re-tried at a second trial for the same offense after the State failed to present sufficient evidence at the

first trial.

The State seriously misconstrues Supreme Court precedent, and as a result it also misconstrues this Court's precedent, when it claims that "double jeopardy bars retrial only where a conviction is reversed on appeal for insufficient evidence." Res. at 41-42, quoting *LaFevers v. State,* 1995 OK CR 26 ¶16, 897 P.2d 292, 302. Although this quotation is an accurate quotation, it must be read in context, and neither *LaFevers*, nor any of the cases it relies on, concern a case like Petitioner's in which an appellate court reverses a conviction on an issue other than sufficiency of the evidence *and there is also insufficient evidence to support the conviction. Compare, e.g., Montana v. Hall*, 481 U.S. 400, 402–03 (1987) (jeopardy not implicated where conviction reversed on ground not related to sufficiency of the evidence and there was no suggestion the evidence was insufficient).

LaFevers, a case in which the defendant's conviction was reversed on grounds other than sufficiency , relied on three cases for the quoted proposition. *See id.* at fn. 24, citing *Burks v. United States*, 437 U.S. 1, 11 (1978); *Montana v. Hall*, 481 U.S. 400, 402–03 (1987); *Edwards v. State*, 815 P.2d 670, 672 (Okl.Cr.1991). These cases, when read in context, do not bar Petitioner's double jeopardy claim. Instead, they recognize that when a conviction must be overturned due to insufficient evidence, Jeopardy attaches. *See id.,* 815 P.2d at 672, citing *Burks, supra*; U.S. Const. amend. V, Okla. Const. art II, §21. Although *Glossip I* reversed on grounds other than sufficiency of the evidence, the court never resolved the sufficiency of evidence issue. *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597. Under this scenario, one not contemplated in any of the cited cases, double jeopardy bars petitioner's conviction due to insufficient evidence of guilt at petitioner's first trial, as explained in Proposition Three of the Application. Otherwise, a defendant's double jeopardy rights would be dependent on whether an

appellate court that reverses a conviction on non-sufficiency grounds elects to address a legitimate sufficiency issue. The Double Jeopardy Clause is not so limited.

PROPOSITION FOUR: COUNSELS' PERFORMANCE VIOLATED MR. GLOSSIP'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE MEDICAL EXAMINER TESTIFIED IN A WAY THAT MISLED THE JURY AND UNDERMINES THE RELIABILTY OF THE VERDICT AND DEATH SENTENCE.

The State treats this proposition as solely an ineffective assistance of counsel claim, but the issue is broader than that. Petitioner's Sixth, Eighth and Fourteenth Amendment rights are all violated by a conviction and death sentence that are based in significant part on Dr. Choi's false testimony. Dr. Choi's testimony was false in at least two respects: the victim did not take hours to die; and the victim could not have been saved by timely medical intervention after Sneed left Room 102 and informed Petitioner of what he had done.

The Reports of Dr. Wigren, Dr. Plunkett, Dr. Baden and Dr. Leas, all highly qualified forensic pathologists, do not "merely challenge" or slightly impeach Dr. Choi's testimony, as suggested by the State. Res. at 34. Petitioner has presented solid evidence that conclusively establishes that Dr. Choi's testimony was false. Contrary to Dr. Choi's testimony that the victim survived for hours after he was beaten by Sneed, the truth is he died within thirty minutes or less. *See* Attachments K, M, O and P.[4] Likewise, Dr. Choi's agreement with the prosecutor that the victim would "have survived if he would have received prompt medical attention" is demonstrably false. *See id.*

[4] Attachments K and M (Wigren and Plunkett reports) were filed on September 15, 2015 with the Application; Attachments O and P (Baden and Teas reports) were filed September 21, 2015 with Mr. Glossip's First Supplement to the Application.

The State ignores the problems arising from Dr. Choi's inconsistent and false testimony that Mr. Van Treese could have survived if he had received prompt medical attention and focuses exclusively on her consistently false testimony that it took hours, not minutes for the victim to die. Res. 34-35. The State claims this false testimony could not have impacted the jury's finding as to guilt or its death verdict. Res. 35. The record demonstrates otherwise. The prosecution repeatedly relied on Dr. Choi's false testimony in their argument that Petitioner was guilty of murder, (vol.15 Tr. 60,63,77), and it relied again on this false testimony in its initial and rebuttal closing arguments in the penalty phase. *Id.* at 98,105-106. That the jury likely relied on Dr. Choi's false testimony is illustrated by the prosecutor's rebuttal closing argument:

> Now, what do we know about this murder? We know that it was senseless because Barry Van Treese did not have to die. As bad as these pictures are, this is not what killed him. Not this head wound on State's 65. You know what killed him? The fact that this white shirt is soaked in blood. That's what killed him. *He bled to death. Richard Glossip could have stopped it.* That is cold and that is calculating. He even goes in and takes a hundred --dollar bill out of his wallet while he's laying there bleeding to death.[5]

Vol. 15, Tr. 105-106. (emphasis added).

When as here the State's expert testifies falsely, the prosecution makes repeated use of the false testimony at both the trial on the charge and the penalty phase, and it appears that jurors very likely relied on the false evidence, any confidence in the jury's verdict is severely undermined. This Court has previously recognized the miscarriage of justice that may occur when a conviction is based on false expert testimony. *See McCarty v. State, supra.*

[5] The only evidence that Mr. Glossip took any money from the victim's wallet comes from Mr. Sneed, who never mentioned this "fact" until the second trial, more than seven years after he had killed Mr. Van Treese. Vol.12, Tr.123-124; Vol.13, Tr.14.

II. REPLY TO STATE'S RESPONSE TO THE PENDING MOTION FOR DISCOVERY

Counsel has tried to obtain complete discovery from the District Attorney, and he has refused counsel's request. Dr. Peter Speth, a forensic pathologist, was enlisted to provide an opinion as to the veracity of Dr. Choi's testimony and, in doing so, endeavored to obtain digital photographs of histologic slides and autopsy photographs from the Medical Examiner's Office and was unsuccessful. Counsel requested the District Attorney's assistance in obtaining this information, which would assist the doctors who provided reports in support of Proposition Four, and the District Attorney informed counsel that the information would need to be requested from the Medical Examiner's Office.

III. REPLY TO THE STATE'S RESPONSE TO THE MOTION FOR AN EVIDENTIARY HEARING.

As explained above and in the Application, the evidence in the affidavits and reports on file with this Court, if proven, support Mr. Glossip's request for relief. Accordingly, this Court should remand this matter to the district for an evidentiary hearing.

Mark Henricksen

Mark Henricksen
Attorney at Law
600 N. Walker, Suite 201
Oklahoma City, 73102
phone (405) 609-1970
fax (405) 609-1973
mark@henricksenlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2015, a true and correct copy of the foregoing Petitioner's Reply was delivered to the Clerk of this Court, with one of the copies being for service on the Attorney Counsel for Respondent.

Mark Henricksen

Mark Henricksen

EXHIBIT 1

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID JAY BROWN Appellant, v. THE STATE OF OKLAHOMA Appellee.	)	Case No. PCD-2002-781

ORDER EXTENDING THE STAY OF EXECUTION AND GRANTING MOTION FOR EVIDENTIARY HEARING

David Jay Brown was tried by jury, convicted of first degree murder, and received the death penalty. This Court affirmed Brown's conviction for murder, and the United States Supreme Court denied certiorari.[1] This Court affirmed the denial of Brown's first Application for Post-Conviction Relief.[2] Brown's application for federal habeas corpus relief was denied,[3] and an execution date was set for February 5, 2002. The United States District Court for the Western District issued a stay of execution on January 5, 2002, which was dissolved on April 24, 2002. A new execution date was set for June 25, 2002. At a June 11, 2002, clemency hearing, a majority of the Oklahoma Pardon and Parole Board voted to recommend clemency based in part on the issues now before the Court. Governor Keating denied clemency on June 18, 2002. On June 21, 2002, Brown filed an Emergency Request for Stay of Execution, a Second

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[1] *Brown v. State*, 1994 OK CR 12, 871 P.2d 56 (Okl.Cr.), *cert. denied*, 513 U.S. 1003, 115 S.Ct. 517, 130 L.Ed.2d 423.
[2] *Brown v. State*, 1997 OK CR 1, 933 P.2d 316.
[3] *Brown v. Gibson*, 7 Fed. Appx. 894 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 650, 151 L.Ed.2d 567 (2001).

EXHIBIT 1

Application for Post-Conviction Relief, and a Request for Evidentiary Hearing on the issue of ineffective assistance of counsel. This Court granted a thirty-day stay of execution on June 25, 2002, and directed the State to file a response. On July 17, 2002, this Court extended the stay of execution for thirty days.

Upon consideration of the application and response, we **GRANT** Brown's request for an extension of the stay of execution, and **EXTEND** the stay of execution **until further order of the Court**. We **REMAND** the case to the District Court of Grady County for an evidentiary hearing on the issues of newly discovered evidence and ineffective assistance of counsel.[4] The evidentiary hearing should be held within forty-five (45) days from the date of this Order. The trial court shall file findings of fact and conclusions of law with this Court within forty-five (45) days of the conclusion of the evidentiary hearing. Each party may file a response to the trial court's findings of fact and conclusions of law within thirty (30) days after the findings and conclusions are filed with this Court.

The scope of the evidentiary hearing encompasses Brown's claims of newly discovered evidence, and his allegations that the State withheld evidence and presented a false picture of the evidence to the jury. At the evidentiary hearing the trial court is to resolve the following issues: (1) Brown's claims of newly discovered evidence consisting of the crime scene reconstruction and the

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[4] *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703, 710-11; Rule 9.7(D)(5), (6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2002).

affidavit of Deputy Sheriff Cunningham;[5] (2) Brown's claim that the State withheld five Oklahoma State Bureau of Investigation reports in violation of *Brady v. Maryland*;[6] (3) Brown's claim that the State deliberately presented a false and misleading version of the circumstances surrounding the crime in violation of *Giglio v. United States*;[7] and (4) Brown's claims of ineffective assistance of counsel connected with the issues presented in (1), (2) and (3). The trial court shall grant discovery requests and issue subpoenas as necessary to thoroughly present and review the evidence on these issues.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of August, 2002.

DISSENT

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

Chas S. Chapel

CHARLES S. CHAPEL, Judge

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[5] Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2002); *Sellers v. State*, 1999 OK CR 6, 973 P.2d 894, 895).
[6] 373 U.S. 83, 88, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963).
[7] 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

RETA M. STRUBHAR, Judge

STEVE LILE, Judge

ATTEST:

Clerk

LUMPKIN, PRESIDING JUDGE: DISSENTS

I dissent to the Court's decision to grant the request for a stay of execution and remand this case for an evidentiary hearing.

An evidentiary hearing on post-conviction review is required only if necessary to facilitate post-conviction review. *Cummings v. State*, 970 P.2d 188, 192 (Okl.Cr.1998), 22 O.S.2001, § 1089(D)(3). In the application for post-conviction review, Petitioner lists the witnesses he would call but does not demonstrate why the issue cannot be resolved based on the record. Therefore, he has not demonstrated that an evidentiary hearing is necessary in this case.

Further, an evidentiary hearing is not required in this case because the claims raised by Petitioner are barred from review on the merits as they could have been raised on direct appeal or in the first post-conviction application. *See Cargle v. State*, 947 P.2d 584, 590 (Okl.Cr.1997) *citing* Rule 9.7, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999). There is nothing in the record provided to this Court showing that the information contained in the attachments to the post-conviction application is newly discovered evidence or that it could not have been presented at the direct appeal or the first post-conviction application.

In his supporting brief, Petitioner states that defense counsel had been in possession of some of the withheld evidence since 1994. Patrick J. Ehlers, counsel on the first post-conviction application, states in an attached affidavit that during the course of his representation, Petitioner repeatedly requested that

counsel raise a claim founded on *Brady v. Maryland*[1] alleging that certain exculpatory OSBI reports were improperly withheld from defense counsel by the prosecution. Mr. Ehlers' states that while he was aware of the OSBI reports in question and their contents, he did not raise the *Brady* claim. (Attachment 17).

Further, in the first post-conviction application, a claim that the State failed to turn over an OSBI report was raised. Petitioner argued the prosecution failed to turn over the OSBI report of witness Inez Baker. *Brown*, 933 P.2d at 324. This Court found the allegation was not preserved for post-conviction review, as Petitioner had not shown why the issue was not raised on direct appeal. *Id.* There should be no difference with regard to the claims that other OSBI reports were withheld. Further, this Court stated Petitioner had failed to show that the report in question was not received by defense counsel at the time of trial. *Id.*

Claims that the OSBI reports of Inez Baker, Lillie McGuire, Laverne Ann McGuire, LeeAnn McGuire, and Connie Brown were withheld from the defense by the State were raised in the 1997 petition for writ of habeas corpus. In denying habeas relief, the federal district court found the claim procedurally barred. In making this finding, the court noted that prior to trial, trial counsel informed the court, "[w]e've been provided copies of everything . . ." (State's Exhibit B., *Brown v. Ward*, CIV-97-156-A, pg. 32). The federal district court found the record showed the Oklahoma Indigent Defense System who represented Petitioner on appeal had a copy of the prosecutor's file which contained the report (of Inez

[1] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Baker). *supra.* The court found that appellate counsel could have raised the argument on appeal, but failed to do so. *supra.* The court made a similar finding regarding the reports of Lillie McGuire, Laverne Ann McGuire and LeeAnn McGuire stating that the evidence did not support the assertion that the reports were suppressed. [2]

Based upon this record, it is clear that the claim of failure to disclose OSBI reports could have been raised previously before this Court. If Petitioner could claim in his first post-conviction application that certain OSBI reports were withheld, he could have claimed that other reports were also withheld. As he failed to raise the issue concerning other reports, but could have, further consideration by this Court has been waived. *See Duvall v. Ward*, 957 P.2d 1190, 1192 (Okl.Cr.1998). To the extent a previous claim was raised on the same legal issue, that issue is barred from consideration by *res judicata. Brown*, 933 P.2d at 320.

As for the information provided by Deputy Terry Cunningham, the record shows he was a witness at trial. Therefore, the defense could have questioned him at any time about his involvement in the case and his personal opinion of Petitioner's guilt. Petitioner has failed to show that the information provided in Deputy Cunningham's affidavit of March 2002 could not have been ascertained earlier through the exercise of due diligence. *See Slaughter v. State*, 969 P.2d 990, 994 (Okl.Cr.1998).

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[2] On appeal, the Tenth Circuit agreed that the claim that the State had failed to disclose the OSBI reports of Laverne, Lillie, and Lee Ann McGuire was procedurally barred. *Brown v. Gibson*, 7 Fed. Appx. 894, 896 (10th Cir. 2001).

The same can be said regarding the information contained in the affidavit of Ron Singer. In his appeal to the Tenth Circuit of the federal district court's denial of habeas relief, Petitioner submitted for the first time a crime scene reconstruction report. The Tenth Circuit rejected Petitioner's request to remand for an evidentiary hearing based upon the reconstruction report, as the evidence did not overcome the significant other evidence establishing Petitioner's guilt. *Brown*, 7 Fed. Appx. 894 at fn. 3. Further, affidavits included in Petitioner's second post-conviction application show funds were available through OIDS on post-conviction for additional investigation, yet counsel chose to take a different approach on appeal. Consequently, Petitioner has failed to show how the information contained in the Singer reconstruction report could not have been ascertained earlier through the exercise of due diligence.

Petitioner asserts that he tried to raise this issue of withheld evidence earlier but counsel would not follow his wishes. Counsel on the first post-conviction application admits he knew of the existence of the OSBI reports in question but did not raise Petitioner's requested *Brady*[3] claim. Counsel also states that while funding was available for the services of a crime scene reconstruction expert, he did not follow through on Petitioner's request for such an expert. Counsel offers no legal justification for his decisions. (Attachment 17).

While post-conviction counsel does not actually admit he was ineffective, that seems to be the gist of his affidavit. "When a criminal defense attorney attests to his or her own ineffectiveness in an effort to obtain relief for a capital

[3] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

post-conviction applicant, that affidavit will be thoroughly scrutinized and will rarely, if ever, be solely relied upon to support an allegation of deficient performance." *Walker v. State*, 933 P.2d 327, 336 (Okl.Cr.1997).

Oklahoma's Post-Conviction Procedure Act does not provide for ineffective assistance of a first post-conviction attorney to serve as cause for failure to raise an issue in that first application. Under Oklahoma statutory law, cause exists for filing a claim in a second post-conviction application if the factual or legal basis of the claim was unavailable. Even when reviewing a first post-conviction application, this Court has held that to establish cause to overcome procedural default, a petitioner must present a reason to excuse the procedural default. *Braun v. State*, 937 P.2d 505, 513 (Okl.Cr.1997). Though ineffective assistance of appellate counsel may constitute cause, "the mere failure" of appellate counsel to raise a claim does not, in and of itself, deprive a petitioner of reasonably effective assistance of counsel. "Rather, unless a petitioner can show that some objective external factor" prevented his attorney from raising issues on appeal, this Court stated it would "presume the omission on direct appeal was the result of 'appellate counsel's studied decision not to raise the ... issues on direct appeal' and was within the 'broad range of professional conduct *Strickland* permits, . . . '" *Id.* "Unless a petitioner presents a 'substantial' reason to rebut this presumption, a petitioner will not establish cause for the procedural default." *Id.*, (internal citation omitted).

Here, Petitioner has failed to show his claim of intentionally withheld evidence was not available to first post-conviction counsel, and as a result of that unavailability could not have been raised on his first post-conviction application. Further, Petitioner has not provided a substantial reason rebutting the presumption his post-conviction counsel's decision not to raise the issue was a studied one and the proper exercise of his own independent judgment on the merits of the claims. Counsel's failure to follow his client's wishes does not rise to the level of ineffective assistance of counsel. Accordingly, Petitioner has failed to establish cause for the procedural default.

More directly on point, the record shows the basis for Petitioner's claim – the knowledge that evidence existed that was not used at trial – was known prior to the time of the filing of this second post-conviction application, specifically at the time of direct appeal and at the filing of the first post-conviction application. Therefore further consideration of this issue by this Court has been waived. *See Duvall*, 957 P.2d at 1192.

Turning to Petitioner's claim that if the evidence alleged to have been withheld is found to have been previously disclosed, then trial counsel was ineffective for failing to use it to impeach the State's case. The claim of ineffective assistance of trial counsel was raised and addressed in both the direct appeal and the first application for post-conviction relief. *See Brown*, 871 P.2d at 61-62, 66-67, 72, & 74; *Brown*, 933 P.2d at 320. However, the specific issue of failure to present evidence of the movement of shell casings at the crime scene and a crime scene reconstruction expert, and failure to cross-examine state's

witnesses with their OSBI reports have not been previously raised. In his affidavit, trial counsel states he did not have access to the OBSI reports in question. (Attachment 8, Affidavit of Chris Box). However, this statement contained in the 2002 affidavit contradicts a statement made at trial by counsel that he had the prosecution's entire file. Further, the record in this case shows Petitioner's appellate counsel repeatedly tried to obtain such an affidavit from trial counsel earlier but was unsuccessful. Given the history of this case, an affidavit belatedly provided after an execution date has been set does not conclusively demonstrate that evidence was in fact withheld. Further, assuming arguendo, trial counsel did not have access to the evidence in question, there is nothing in the record to this failure was the result of state action.

Like the claims addressed above, this claim could have been raised earlier, but was not. On direct appeal, a claim was raised that trial counsel was ineffective for other reasons. Having had the prosecution's file, appellate counsel could have certainly raised the issue that trial counsel was ineffective for failing to use the OSBI reports for impeachment. Additionally, a claim of ineffective assistance of appellate counsel was raised on several grounds in the first application for post-conviction relief, but this issue was not among those raised. 933 P.2d at 323. These claims of ineffective assistance were denied. *Id.* at 933-934. Therefore, Petitioner has failed to establish ineffective representation under the standard set forth in *Strickland v. Washington.* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Petitioner also characterizes his claim as a violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) asserting that the prosecutor knowingly used false testimony. This claim has not been raised in any of the previous appeals before this Court but could have been as the factual and legal basis was available at the time of the earlier appeals.[4] Therefore, further consideration by this Court is waived.

Petitioner additionally argues his case should be reviewed pursuant to *Valdez v State*, 46 P.3d 703, 710-11 (Okl.Cr.2002), wherein this Court stated it may grant relief "when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. 20 O.S. 2001, § 3001.1".[5] Contrary to Petitioner's argument, *Valdez* does not state a new rule of law or change in our jurisprudence regarding subsequent post-conviction applications. *Valdez* does not overrule *Walker v. State*, 933 P.2d 327, 331 (Okl.Cr.1997). Further, as *Valdez* itself recognizes, the facts in that case were unique. Due to the unique circumstances of *Valdez*,

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[4] This claim was raised for the first time in Petitioner's appeal to the Tenth Circuit on denial of post-conviction relief. The Court declined to consider the claim. 7 Fed. Appx. at 907, fn. 6.

[5] As part of his argument that review is warranted under *Valdez*, Petitioner asserts a juror in his case was subject to racial intimidation. In support of this claim, Petitioner refers to Attachment 22, Affidavit of Jerry Jenkins, the only African-American juror. Mr. Jones states he only voted to convict Petitioner and later sentence him to death because he was pressured by other jurors. This claim was raised in the first application for post-conviction relief. This Court found the issue waived. 933 P.2d at 325. This first application for post-conviction relief was filed under the previous Post-Conviction Procedure Act. *See* 22 O.S.1991, § 1089. The Post-Conviction Procedure Act has been substantially revised since then. *See* 22 O.S.Supp.1995, § 1089. Under the previous Act, a petitioner's claims were first heard by the district court in which judgment and sentence was pronounced. As in the present case, claims were addressed in an evidentiary hearing. Further, this claim was raised before the Tenth Circuit, which, in a *de novo* review, rejected the claim. 7 Fed. Appx. at 908-909.

the analysis and holding of that case should be limited to those facts and should not be applicable to Petitioner's case.

Further, under *Valdez*, and now in this case, this Court has placed at serious risk any hope the State of Oklahoma may have had of establishing a consistent jurisprudence which would serve as an adequate state procedural bar to minimize federal court interference in state convictions. By interpreting the term "miscarriage of justice" differently than the federal courts, and prior decisions of this Court, the majority has opened up the inquiry at anytime to anything which might show a violation of a statutory or constitutional right, regardless of waiver, res judicata or procedural bars. In other words, the majority has said it will not be bound by a rule of law. This ruling is contrary to the purposes of the Capital Post-Conviction Procedure Act and eviscerates the concept of finality of judgments.

Finally, Petitioner argues that if this Court does not grant his request for relief, it should remand the case to the District Court of Grady County for evidentiary hearings to inquire further into the knowing use of false testimony. Based upon my review of the record, I find Petitioner has not set forth sufficient information to show this Court by clear and convincing evidence the State knowingly used false testimony. In support of his claim, Petitioner directs us to the prosecution's closing argument at trial. The record shows the prosecution's closing argument to the jury was based on inferences drawn from the evidence presented at trial and does not rise to the level of false testimony. Further, the record shows the factual basis of this claim could have been

previously ascertained and therefore the issue could have been raised in a previous appeal. Petitioner's claims that certain evidence was only recently discovered are nothing more than unsupported conclusions and are therefore not sufficient to meet the threshold requirements for an evidentiary hearing. *See* Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001). Accordingly, the motion for an evidentiary hearing should be denied.

EXHIBIT 2

STATEMENT OF FACTS

In the early morning hours of January 7, 1997, Justin Sneed beat Barry Van Treese to death with a baseball bat in Room 102 of the Best Budget Inn, a motel in Oklahoma City owned by Mr. Van Treese and his wife Donna. Appellant, Richard Glossip, and his girlfriend D-Anna Wood managed the motel and lived in an apartment connected to the motel office. (Tr. IV 32, 42-43) Justin Sneed had come to the motel with a roofing crew out of Texas in July 1996. After Sneed quit his roofing job, Mr. Glossip had allowed him to stay on at the motel where he worked as the maintenance man in exchange for his room. (Tr. XII 68, 73)

Operation of the Best Budget Inn of Oklahoma City.

The Best Budget Inn was a somewhat rundown motel located near Interstate 40 and Council Road in Oklahoma City. (Tr. XI 116-22) Every customer who checked into the motel was required to fill out a registration card with basic identification information. The cards were sequentially numbered and the manager of the motel was responsible for maintaining the cards. (Tr. IV 52-53) Payments for the rooms went into the cash register and at the end of the day all receipts were taken from the drawer and placed in an envelope. Rather than depositing the money into a bank, the envelopes containing each day's receipts were simply stored in a "safe place" of the manager's choosing. (Tr. IV 53-54) While Mr. Glossip was manager, the "safe place" was a cabinet over the stove in the manager's apartment. (Tr. V 82) Daily reports were generated at the end of each day which recorded, among other things, which rooms had been rented, the name of the guest, the date each individual checked in, the room rate and the amount actually collected from each guest. (Tr. IV 53; State's Ex. 77) The information contained in the daily report was transmitted to Donna Van Treese by telephone each day. (Tr. IV 62-63).

Mr. Van Treese, who lived in Lawton, traveled to the Oklahoma City motel at least twice a month, on the 5th and the 20th, to pay employees and to collect all receipts since his last visit. As a general rule, when Mr. Van Treese arrived, he first reviewed the daily reports which were stored with the registration cards in a folder. He reviewed each day's

EXHIBIT 2

report separately and totaled up the amount of cash and credit card receipts. In other words, he audited all records and moneys collected whenever he picked up the cash that had accumulated since his last audit. (Tr. IV 50, 54-55)

As manager, Mr. Glossip received a salary of $1,500 per month. In addition, he was provided a free apartment with all utilities, including telephone and cable television, paid by the motel. In addition, he received a bonus equal to 5% of total revenues in excess of $18,000 per month. (Tr. IV 50, 55) The $18,000 figure was set by the Van Treeses and represented the amount necessary to pay all motel and personal expenses, including their personal mortgage as well as an allowance for groceries and all other living expenses for their family. (Tr. V 8-9) For the year 1996, Mr. Glossip received a bonus every month except for December. (Tr. IV 180; Def. Ex. 71)

Beginning in June, 1996, the Van Treeses endured a number of family tragedies and, as a result, Mr. Van Treese's visits to the motel during the last half of 1996 were less frequent than usual. (Tr. IV 36-42) He had been to the motel periodically to make payroll, audit the books and pick up receipts, but not to do any specific repairs since prior to June, 1996. (Tr. IV 58) Normally, January through March were the slowest months at the motel and that was the time rooms were repainted, carpets replaced, and repairs done to prepare for the spring and summer season. (Tr. IV 58-59) In January 1997, Mr. Van Treese intended to go room by room with a maintenance sheet to evaluate what repairs needed to be done at the Oklahoma City motel. (Tr. IV 71-72)

Operation of the Tulsa Best Budget Inn.

The Van Treeses also owned a Best Budget Inn in Tulsa, Oklahoma. While some aspects of the operation of the Tulsa motel were the same as in Oklahoma City, others were markedly different. For example, all registration cards had to be accounted for and a daily report was generated at the end of every day and phoned in to Donna Van Treese just as in Oklahoma City. However, Mr. Van Treese did not review or pick up the hard copies of the daily reports for the Tulsa motel until the end of each year. (Tr. VIII 102-03) In fact, Mr. Van Treese only visited the Tulsa motel once every three or four months and payroll checks

arrived every two weeks via UPS or Fed Ex. Rather than being stored in a "safe place" on the premises, each day's receipts were required to be deposited into a Tulsa bank by noon the following day. (Tr. VIII 55-58)

Events of January 6-7, 1997.

Barry and Donna Van Treese returned from a family ski trip on the morning of January 5, 1997. The following evening, January 6, 1997, Barry Van Treese drove to the Oklahoma City Best Budget Inn to make payroll, audit the records, and pick up the receipts that had accumulated since his last visit approximately nine days earlier. In addition, Mr. Van Treese intended to check the condition of the rooms at the motel and start the remodeling and repair process that began around this time every year. According to Mrs. Van Treese, he also intended to speak to Mr. Glossip regarding his management of the motel. (Tr. IV 70-71)

Mr. Van Treese arrived at the motel between 5:30 and 6:00 p.m on January 6, 1997. According to Billye Hooper, the day clerk at the motel, Mr. Van Treese was clearly hurried and a little gruff, but he did not seem angry. His main concern was to get the payroll done. (Tr. VII 53-54) He made out the paychecks, checked the paperwork, and picked up the receipts as planned. Around 7:50 p.m., Mr. Van Treese left to check on the Tulsa motel with the intention of returning to Oklahoma City to spend the night. Before he left, he walked over to the board and took the key to room 102, which was the room he usually stayed in while in Oklahoma City. (Tr. V 77-79) He also took with him the envelopes containing receipts of somewhere from $2,800 to $4,000 that had accumulated since his last visit to Oklahoma City. (Tr. VII 77, 83-85)

Barry Van Treese arrived at the Tulsa Best Budget Inn sometime between 11:00 p.m. and midnight on January 6, 1997. William Bender, the manager of the Tulsa motel, testified that Mr. Van Treese appeared to be angry and demanded to see his daily reports. According to Bender, Mr. Van Treese told him there were 2,500 registration cards missing at the Oklahoma City motel and the weekend receipt money had not been deposited. Mr. Van

Treese stayed in Tulsa about forty-five minutes to an hour, then left to return to Oklahoma City. (Tr. VIII 81-82, 98)

D-Anna Wood testified that she and Mr. Glossip closed the Best Budget office and went to bed at approximately 2:30 a.m. the morning of January 7, 1997. (Tr. V 82-83) Sometime around 4:15-4:30 a.m., John Beavers, a longtime resident of the motel, left his room to go to the convenience store across the parking lot. As he was coming down the stairs, he heard glass breaking in the area of room 102. When he got to the edge of the parking lot, he looked back and saw the window of room 102 was broken out and glass was on the sidewalk. (Tr. VI 20-23) Justin Sneed testified that this window was broken during his attack on Barry Van Treese. (Tr. XII 101)

Mr. Glossip and Ms. Wood were awakened in the early morning hours of January 7 by a scraping or knocking noise along the side of their apartment. Mr. Glossip went to the office door to see what was going on and returned a short time later. He told D-Anna it was Justin Sneed reporting that two drunks had broken a window and that he had told Sneed to clean it up. Mr. Glossip then came back to bed and the couple went back to sleep. (Tr.V 82-86) In fact, Sneed had told Mr. Glossip that he had just killed Barry Van Treese because he was afraid Mr. Van Treese was going to throw him out in the street and he had nowhere to go. (State's Ex. 2) Later that morning, Sneed and Mr. Glossip repeated the story that the window had been broken by two drunks and affixed a piece of Plexiglas over it as a temporary fix. (*See, e.g.*, Tr. IX 46, XII 149) Sometime during the attack, Sneed had gotten a black eye that he explained by saying he had slipped in the shower and hit his eye on the soap dish (Tr. XII 137)

In the early afternoon, Mr. Glossip and Ms. Wood left the motel to run errands. After cashing Mr. Glossip's paycheck, the couple went to replace Mr. Glossip's glasses that had broken a few days earlier. They also bought an inexpensive engagement ring for Ms. Wood, and then went to Wal-Mart. (Tr. V 87-89) While at Wal-Mart, Mr. Glossip received a page from Billye Hooper. Ms. Hooper informed him that Barry Van Treese's car had been

found parked awkwardly at the Weokie Credit Union behind the motel. Ms. Hooper was very concerned since she had not seen Mr. Van Treese all day. (Tr. VII 72-74)

Mr. Glossip and Ms. Wood returned immediately to the motel where they met with Cliff Everhart, the part-time security guard and purported owner of 1% of the Best Budget Inn. (Tr. V 96; XI 169-70) Before they arrived, Mr. Everhart asked Justin Sneed to go room to room at the motel to search for Mr. Van Treese. Mr. Sneed skipped room 102 and pretended to search the other rooms.[1] (Tr. XII 157) Mr. Everhart, Mr. Glossip and Ms. Wood then drove around in Everhart's truck to look for Mr. Van Treese. (Tr. V 95-97) While they were searching, Justin Sneed gathered up his belongings and simply walked unnoticed away from the motel. (Tr. XII 159-60)

Around 4:30-5:00 p.m., Oklahoma City Police Officer Tim Brown joined in the search for Mr. Van Treese. (Tr. IX 187, 204) Although all of the searchers were aware that the window had been broken out of room 102 in the early morning hours, that room 102 was the room Mr. Van Treese regularly stayed in when he was at the motel, that Justin Sneed had gotten a black eye sometime in the night and had disappeared while the search for Mr. Van Treese was being conducted, no one checked room 102 until sometime around 10:30-11:00 p.m. that night. (*See, e.g.,*Tr. IX 214, XI225) At that time, Mr. Everhart and Officer Brown entered the room and found Barry Van Treese's body on the floor beneath some bedclothes. (Tr. IX 221, 224-25) Mr. Van Treese had suffered a number of blows to the head consistent with a blunt object and had bled to death as a result of those injuries. (*See, generally,* Tr. XI 15 *et seq.*)

Mr. Glossip's Detention and Subsequent Arrest.

After Mr. Van Treese's body was found, Richard Glossip was detained for questioning by Officer Brown and placed in the back of his patrol car. (Tr. IX 230) While seated in the vehicle, Mr. Glossip told Brown that early in the morning Sneed had banged on

[1] The evidence adduced at trial on this point is conflicting. Ms. Wood and Mr. Sneed testified that Sneed searched the rooms alone. (Tr. V 98; XII 157-58) Mr. Everhart testified that he asked both Mr. Sneed and Mr. Glossip to search the rooms together. (Tr. XI 185) Ms. Hooper testified that Everhart instructed Sneed to check the rooms, but indicated Glossip and Sneed left together to do so. (Tr. VII 76)

the glass front doors and then on the side wall of his apartment. Glossip said that he and Ms. Wood had suspected the whole time that Justin had something to do with what happened to Mr. Van Treese, but did not want to say anything until they knew for sure. (Tr. IX 233) Mr. Glossip was then transported to the police station to be interviewed about Mr. Van Treese's death.

Mr. Glossip was questioned by Oklahoma City Police Detectives Bob Bemo and Bill Cook in a videotaped interrogation conducted in the early morning hours of January 8, 1997. Mr. Glossip denied knowing anything about the murder, including Sneed's statement to him that he had killed Mr. Van Treese. (State's Ex. 1) Although Cook and Bemo made clear during the interview that they thought Mr. Glossip was not disclosing everything he knew about the murder of Mr. Van Treese, the detectives released him after the interrogation and he was transported back to the Best Budget Inn. (State's Ex. 1; Tr. XIV 9)

Following the interrogation, Mr. Glossip knew he was a suspect in the murder of Mr. Van Treese. The next day, he began selling a number of his possessions to raise money. He did not try to leave town, but instead visited a lawyer. Immediately upon leaving the lawyer's office, Mr. Glossip and Ms. Wood were taken into custody by officers who had been conducting surveillance and the couple was transported back to the police station. (State's Ex. 2; Tr. XII 6-8)

In a second videotaped interrogation conducted on January 9, 1997, Mr. Glossip told Bemo and Cook that Sneed had told him the morning of January 7 that he had killed Mr. Van Treese. Mr. Glossip acknowledged that he should have said something at that time, but denied any motivation for or involvement in a plot to murder Mr. Van Treese. (State's Ex. 2) After the interview, Mr. Glossip was placed in the county jail. At the time of his arrest, he was carrying $1,757.00 in cash, a sum comprised of his paycheck, proceeds from the sale of vending machines to the Best Budget Inn and personal items to other individuals, and his savings. (State's Ex. 2, Tr. XV 16-18)

EXHIBIT 2

Apprehension of Justin Sneed.

After walking away from the Best Budget Inn the afternoon of January 7, 1997, Justin Sneed tracked down the roofing crew he had originally come to Oklahoma with and went back to work. (Tr. XII 162) He was apprehended on January 14, 1997, and brought to the Oklahoma City police station for questioning. In the apartment where he was arrested, police found a Crown Royal bag belonging to Sneed that contained approximately $1,680 in cash. (Tr. XIV 13-18) In his videotaped interview, which was never shown to the jury, the detectives told Sneed they knew the murder had not been his idea but rather Mr. Glossip's.[2] (Rule 3.11(B) Application Ex. 1A) After first denying any involvement with or knowledge of Barry Van Treese's murder, the detectives told Sneed to "get right with The Almighty" and indicated they already knew what happened and they just needed him to confirm that Mr. Glossip was the mastermind behind the murder. After detectives told Sneed that Mr. Glossip was trying to "hang him" and make him the "scapegoat," he changed his story and told the detectives that Mr. Glossip had asked him to kill Mr. Van Treese with a baseball bat and to split the cash Mr. Van Treese had under the front seat in his car. Although he thought Mr. Van Treese was "sitting on" $7,000, the amount actually obtained from the car was less than $4,000. The brief interview was quickly wrapped up by detectives after Sneed told them what they wanted to hear. (Rule 3.11(B) Application Ex. 1A) In exchange for a sentence of Life Without the Possibility of Parole, Sneed testified against Mr. Glossip at trial. (State's Ex. 43)

Mr. Sneed's story has varied widely from his statement given to police on January 14, 1997 to his testimony at Mr. Glossip's 1998 trial and finally to his testimony in 2004. Each time Mr. Sneed tells the story, embellishments are added. For example, in 1998, Mr. Sneed testified for the first time that, among other things, Mr. Glossip had asked him to kill Barry Van Treese on more than one occasion, that Mr. Glossip had asked him to buy trash

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[2] A copy of Mr. Sneed's videotaped statement and a court reporter's transcript of the videotape are attached as Exhibits 1A and 2 to Mr. Glossip's Application for Evidentiary Hearing Pursuant to Rule 3.11(B) (Hereafter, Rule 3.11(B) Application).

bags, a hack saw and muriatic acid to dispose of the body, and that Mr. Glossip had told him to leave the motel when the police were searching for Mr. Van Treese. (O.R. 604-05) At the 2004 trial, Sneed repeated the changes from 1998 and added several more. For instance, between the 1998 trial and the 2004 trial, the amount of money Mr. Glossip had offered for Sneed to kill Mr. Van Treese increased from $7,000 to 10,000. (Tr. XII 166-67) Sneed also described for the first time another incident in which Mr. Glossip wanted him to kill Mr. Van Treese with a hammer in the boiler room of the motel in November or December, 1996 (Tr. XII 80-81), alleged for the first time that Mr. Glossip had taken the victim's wallet out of his pants pocket and removed a $100 bill (Tr. XII 123), and said he had tried to "push" a knife with a broken tip into Mr. Van Treese's chest during the attack (Tr. XII 102). These and other discrepancies in Sneed's testimony from proceeding to proceeding are discussed in more detail throughout this Brief and in Mr. Glossip's Rule 3.11(B) Application filed concurrently herewith.

At the conclusion of jury deliberations, Mr. Glossip was again convicted of First Degree Murder. (Tr. XV 183) In the punishment phase, the State incorporated the evidence from the first stage of trial (Tr. XVI 69), then presented two victim impact witnesses, each of whom read statements from several of Mr. Van Treese's children in addition to their own. (Tr. XVI 70-88) At Mr. Glossip's request, defense counsel limited presentation of mitigation evidence to five witnesses. After deliberating for almost five hours, the jury rejected the continuing threat aggravator, but found that the murder was commited for remuneration and sentenced Mr. Glossip to death. Other facts will be discussed as they relate to the following Propositions of Error.