No. PCD-2015-820

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

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

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

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v.	)	**Case No. PCD-2015-820**
	)	
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	)	**At 3:00 p.m.**
Respondent.	)	

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

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

In June 2004, an Oklahoma jury convicted Petitioner of first degree murder and sentenced him to death.[1] The state trial court sentenced Petitioner in accordance with the jury's recommendations. This Court affirmed Petitioner's murder conviction and death sentence on direct appeal, *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143, *cert. denied*, 552 U.S. 1167 (Jan. 22, 2008), and denied

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

state post-conviction relief. *Glossip v. State*, No. PCD-2004-978, slip op. (Okla. Crim. App. Dec. 6, 2007) (unpublished).

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 The federal district court denied relief in an unpublished opinion.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 Sept. 28, 2010) (unpublished).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 (10th Cir. Jul. 25, 2013) (unpublished).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 *Glossip v. Trammell*, No. 10-6244, Order (10th Cir. Sept. 23, 2013) (unpublished).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

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

[2]This Court set the November 20, 2014 execution date on May 28, 2014. At the State's request, the execution date was then moved to January 29, 2015. This Court set the January 29, 2015 execution date on October 24, 2014. However, on January 28, 2015, the United States Supreme Court, at the State's request, stayed Petitioner's execution in *Glossip v. Gross*, Case No. 14-7955.

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

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

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

To obtain a stay of execution from this Court, Petitioner must show "that there exists a significant possibility of reversal of the defendant's conviction, or vacation of the defendant's sentence, and that irreparable harm will result if no stay is issued." 22 O.S.2011, § 1001.1(C). As this Court stated in *Lockett v. State*, 2014 OK CR 3, ¶ 3, 329 P.3d 755, 757-58:

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

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

Petitioner alleges that he has newly discovered evidence to support his claims. Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), states that a subsequent post-conviction application shall not be

considered unless the claims raised "have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable". Title 22, Section 1089(D) states, in pertinent part:

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

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

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

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

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

Procedural Default

As noted above, before Petitioner may obtain review of the merits of any claim he raises in this successive application for post-conviction relief, he must present sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual or legal basis for the claim was unavailable. 22 O.S.2011, § 1089(D)(8). *See, e.g., Bland v. State*, 2007 OK CR 25, ¶ 2, 164 P.3d 1076, 1077; *Duvall v. Ward*, 1998 OK CR 16, ¶ 3-4, 957 P.2d 1190, 1191. Petitioner does not rely on a legal basis that was unavailable, but instead contends that his facts are newly discovered. To show that a factual basis was unavailable at the time of the prior post-conviction application, Petitioner must show that "the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date." 22 O.S.2011, § 1089(D)(8)(b)(1). Additionally, Petitioner must show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." *Id.*, § 1089(D)(8)(b)(2).

As will be shown, review of Petitioner's supporting documents confirms that the factual basis for the claims and issues raised here was available previously.

There is no reason why these issues could not have been developed and presented in Petitioner's original application for post-conviction relief.

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

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

Valdez Exception

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

Petitioner's attempt to overcome the procedural default of his claims must fail. In *Valdez*, this Court held that it had "power to grant relief when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez*, 2002 OK CR 20, ¶ 28, 46 P.3d at 710. The cases cited by Petitioner invoking the miscarriage of justice exception differ substantially from his situation and illustrate *Valdez's* limits.

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

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

Department regarding former police chemist Joyce Gilchrist. Simply put, the *Valdez* miscarriage of justice exception was not an issue in *McCarty*.

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

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

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

innocence that warrants merits review of his constitutional claims or any form of post-conviction relief. The following recitation of the facts, as well as review of his specific allegations and evidence make this point abundantly clear.

PETITIONER IS NOT AN INNOCENT MAN

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

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

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

Petitioner provided three different stories to Sgt. Tim Brown. Petitioner initially said he last saw the victim at 7:00 a.m. on January 7, 1997, walking across the motel parking lot (Vol. 9, Tr. 193-95). Later, Petitioner told Sgt. Brown that he had last seen the victim at 4:30 a.m. on January 7 in the motel parking lot (Vol. 9, Tr. 206). Finally, Petitioner claimed he last saw the victim was at 8:00 p.m. the night before (Vol. 9, Tr. 209).

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

Petitioner also told numerous lies about Room 102. Petitioner told Ms. Hooper that the victim had stayed in Room 108 (Vol. 7, Tr. 55). He also told Ms. Hooper not to put Room 102 on the housekeeping list. He stated he and Mr. Sneed would clean that room (Vol. 7, Tr. 64). He advised Jackie Williams, a

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

housekeeper at the motel, not to clean any downstairs rooms. Ms. Williams had never been given that type of instruction before (Vol. 8, Tr. 122-23). Petitioner initially claimed that Mr. Sneed told him the window in Room 102 was broken by a couple of drunks (Vol. 9, Tr. 206). Petitioner told Mr. Everhart that he had rented Room 102 to a couple of drunk cowboys who broke the window (Vol 11, Tr. 188-90). He told Ms. Pursley, a motel resident, the same lie that the window in Room 102 had been broken by two drunks (Vol. 9, Tr. 45-48).

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

After the body was found, Petitioner continued lying. In his first interview with the police, on January 8, 1997, Petitioner lied to the detectives claiming that he knew nothing about the murder or the body being in Room 102 (State's Exhibit 1; Court's Exhibit 3 at 10-11). In the second interview, after being asked why he lied, Petitioner said it wasn't to protect Sneed. Rather, Petitioner said he initially lied to detectives because when Mr. Sneed told him about the murder, he felt like

he "was involved in it, I should have done something right then" and that he did not want to lose his girlfriend over it (State's Exhibit 2; Court's Exhibit 4 at 16-17).

B. Proceeds from Murder. At Petitioner's book-in, the police recovered approximately $1,757.00 from Petitioner (Vol. 12, Tr. 5-13). Mr. Sneed testified that he obtained approximately $4,000.00 from the victim's vehicle after committing the murder. Mr. Sneed testified that Petitioner told him where the money was located. He testified that the money was split with Petitioner (Vol. 12, Tr. 124-30). The evidence showed that Petitioner had no legitimate source for the money that was recovered. On January 6, 1997, Petitioner received a paycheck for $429.33 (Vol. 14, Tr. 42; Vol. 15, Tr. 17). Petitioner spent all but approximately $60.00 of that paycheck on January 7, 1997 (Vol. 14, Tr. 42-43). Petitioner received, at most, approximately $500.00 for furniture, a vending machine, and an aquarium he sold prior to his arrest (Vol. 15, Tr. 16-17). Petitioner had no savings according to his girlfriend, D-Anna Woods. Ms. Woods told the police that the two were living paycheck to paycheck and "she didn't think [Petitioner] could save any money." (Vol. 14, Tr. 44). This Court found this to be "[t]he most compelling corroborative evidence" noting there was "no evidence that Sneed had independent knowledge of the money under the seat of the car." *Glossip*, 2007 OK CR 12, ¶ 43, 157 P.3d 143, 152.

C. Motive. The evidence established that the victim was planning to confront Petitioner on January 6 or January 7, 1997, about shortages on the

motel books (Vol. 11, Tr. 169-70, 172-77, 201). Mr. Everhart had previously told the victim he believed Petitioner "was probably pocketing a couple hundred a week extra" from the motel cash receipts during the last two or three months of 1996 (Vol. 11, Tr. 172-73). In December 1996, Billye Hooper had also shared her concerns about Petitioner's management of the motel with Mr. Van Treese, who told her he "knew things had to be taken care" of regarding Petitioner's management of the motel. Mr. Van Treese advised he would take care of it after Christmas (Vol. 7, Tr. 37-40; Vol. 8, Tr. 32-34). Donna Van Treese testified that by the end of December 1996, she and the victim discovered shortages from the motel accounts receivables totaling $6,101.92 and that the victim intended to confront Petitioner about these shortages on January 6, 1997. Mr. Van Treese told his wife that he would also audit the Oklahoma City motel and perform a room-to-room inspection of the motel at that time (Vol. 4, Tr. 62-66, 70-72).

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

up with the weekend's receipts that were missing and if he came up with that, he was going to give him another week to come up with the registration cards and get all the year-end receipts together." Otherwise, Van Treese told Bender he was going to call the police (Vol. 8, Tr. 82).

Evidence was presented that the condition of the Oklahoma City motel on January 7, 1997 was deplorable. Kenneth Van Treese, the victim's brother, assumed control of the motel immediately after the murder. He discovered that only around 24 of the rooms at the motel were in habitable condition. Twelve rooms had no working heat. Other problems included keys that did not fit room doors, broken or dirty plumbing fixtures and broken telephone systems (Vol. 11, Tr. 116-18). Kenneth Van Treese testified that "the main thing that was wrong with the motel was it was filthy . . . absolutely filthy" (Vol. 11, Tr. 119). The jury could easily infer that the victim was unaware of these deteriorating conditions because he made only four overnight trips to the motel during the last half of 1996 (Vol. 4, Tr. 36-40, 42, 58-59).

This evidence corroborates Mr. Sneed's testimony that Petitioner feared being fired the morning of January 7, 1997 because of Petitioner's mismanagement at the motel and provides strong motive for the murder. Petitioner's motive to murder Mr. Van Treese explains why Petitioner's active concealment of the body for seventeen hours is inconsistent with either Petitioner's innocence or mere culpability as an accessory. The jury could infer

that Petitioner wanted the victim murdered so he would not lose his job and not be prosecuted for embezzlement.

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

to do." (Vol. 9, Tr. 17). Ms. Pursley described how Mr. Sneed would not eat unless someone told him to eat (Vol. 9, Tr. 18).

Petitioner and Mr. Sneed were described as "very close" friends by Billye Hooper (Vol. 7, Tr. 28). Mr. Sneed was largely dependent upon Petitioner for food and money (Vol. 7, Tr. 28; Vol. 9, Tr. 21). Ms. Pursley testified that Mr. Sneed usually followed Petitioner when they were together, that you normally did not see one without the other and that "[Petitioner] would have to tell him what to do and how to do it." (Vol. 9, Tr. 19-20, 23). Petitioner had control over Mr. Sneed because Mr. Sneed had no other place to go and no family in the area (Vol. 9, Tr. 21, 24). Ms. Pursley observed that "[y]ou had to almost tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal." (Vol. 9, Tr. 23). Cliff Everhart testified that Mr. Sneed was Petitioner's "puppet", that Mr. Sneed "was not self-motivated. [Petitioner] told him everything to do. [Petitioner] would tell him to do this, he'd do it . . . If he needed something, he'd come to [Petitioner]." (Vol. 11, Tr. 185). Billye Hooper testified that Mr. Sneed did not know the victim very well (Vol. 7, Tr. 34). This corroborated Mr. Sneed's testimony that he had only met the victim approximately three times prior to the murder during which time the pair had no real conversations (Vol. 12, Tr. 76-77). Witnesses who knew both Petitioner and Mr. Sneed testified that, based on Sneed's personality, they did not believe Mr. Sneed would commit a murder on his own (Vol. 7, Tr. 34; Vol. 9, Tr. 25).

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

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

6-9). Evidence that Petitioner sold his possessions shortly after his initial contact with homicide detectives (but before he admitted in the second interview to actively concealing the victim's body in Room 102) represents evidence tending to connect Petitioner with the murder of the victim. Evidence that Petitioner was preparing to leave the state demonstrates a consciousness of guilt which, combined with the additional circumstantial evidence discussed above, corroborates Mr. Sneed's testimony by connecting Petitioner with the murder.

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

> In this case, the State presented a compelling case which showed that Justin Sneed placed himself in a position where he was totally dependent on Glossip. Sneed testified that it was Glossip's idea that he kill Van Treese. Sneed testified that Glossip promised him large sums of cash if he would kill Barry Van Treese. Sneed testified that, on the evening before the murder, Glossip offered him $10,000 dollars if he would kill Van Treese when he returned from Tulsa. After the murder, Glossip told Sneed that the money he was looking for was under the seat of Van Treese's car. Sneed took an envelope containing about $4,000.00 from Van Treese's car. Glossip told Sneed that he would split the money with him, and Sneed complied. Later, the police recovered about $1,200.00 from Glossip and about $1,700.00 from Sneed. The most compelling corroborative evidence, in a light most favorable to the State, is the discovery of the money in Glossip's possession. There was no evidence that Sneed had independent knowledge of the money under the seat of the car.

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

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

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

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

Petitioner has repeatedly attempted to undermine the reliability of Mr. Sneed's testimony. As shown above, Mr. Sneed's testimony was sufficiently corroborated. It was also highly credible as found by the trial judge, the late Twyla Mason Gray. Judge Gray, during an *in camera* conference, noted:

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

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

ARGUMENT AND AUTHORITY

I.

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

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

Petitioner claims his "new evidence" includes (1) expert opinions that Mr. Sneed was interrogated in a manner to produce false and unreliable information;

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

Opinions regarding interrogation of Mr. Sneed.

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

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

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

Further, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b)(2). Dr. Leo concludes that the interrogation techniques **"could have caused"** Mr. Sneed to make a false statement. Although Petitioner provides this Court with select portions of Mr. Sneed's interview, Petitioner has failed to provide a complete copy. Mr. Sneed's interview was not admitted at his trial and, thus, is not before this Court. The record reveals that Mr. Sneed, like most individuals accused of a crime, including Petitioner, began by minimizing his involvement and then finally admitting his own involvement and the involvement of Petitioner in the murder. Although Mr. Sneed may have continued adding facts, even during Petitioner's second trial, Mr. Sneed was consistent in his statement that Petitioner was the mastermind behind the murder. Further, trial counsel effectively cross-examined Mr. Sneed on the evolution of his statement from denial to admission of guilt and his withholding

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

of information. (Vol. 12, Tr. 205-213; Vol. 13, Tr. 6-50). In addition, the record shows Mr. Sneed was not promised anything, nor had he spoken to anyone from the District Attorney's office prior to giving his statement (Vol. 12, Tr. 54-55). Thus, the statement was not given to receive a plea agreement.[7] The opinion of Dr. Leo does not support a claim of innocence nor support a finding that no reasonable fact finder would have found Petitioner guilty or would have rendered the penalty of death.

Unsworn Affidavit of Michael Scott

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

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

September 5, 2015. Attachment F at ¶¶ 1-2. Mr. O'Brien's affidavit notes that "[n]o notary was available at the time Mr. Scott signed the affidavit." *Id.* at ¶ 4.

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

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

after viewing the Dr. Phil segment on Petitioner, this evidence was discoverable as early as 2006.

Petitioner does not even allege that a reasonable investigation would not have uncovered this evidence prior to his first post-conviction application, let alone provide "sufficient *specific facts* establishing that the current claim[] . . . could not have been presented previously . . . because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence . . . ." *See* 22 O.S.2011, § 1089(D)(8)(b)(1) (emphasis added). Put simply, it is irrelevant under the statute when Mr. Scott came forward with his claims–instead, the statute focuses on when the factual basis for Petitioner's claim became ascertainable through the exercise of reasonable diligence. Here, Petitioner does not explain what investigation was undertaken prior to his original post-conviction application or provide sufficient specific facts to demonstrate that evidence of Mr. Sneed's bragging about "setting up" Petitioner was earlier unascertainable.

Second, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b)(2). For starters, it is apparent that Mr. Scott's affidavit offers little more than inadmissible hearsay. *See Matthews v. State*, Case No. PCD-2010-1193, slip op., at 7-9 (Okla. Crim. App.

Jan. 7, 2011)[8] (unpublished) (holding that affidavit provided neither sufficient support for post-conviction relief or required an evidentiary hearing in part because the affidavit contained inadmissible hearsay). Thus, Petitioner has not shown that Mr. Scott can offer any admissible testimony in light of which no reasonable fact finder would have found him guilty. To the extent that Petitioner seeks relief based on Mr. Scott's affidavit, relief may be denied on this ground.[9]

Further, this Court has explained that affidavits such as Mr. Scott's, made within days of a scheduled execution date, are "inherently suspect." *Matthews*, slip op., at 7. Jeffrey Matthews, who was set to be executed on January 11, 2011, presented with his third application for post-conviction relief an affidavit by the

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

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

surviving victim's brother dated October 21, 2010. *Matthews*, slip op., at 2, 4, 6. In the affidavit, the brother claimed that the surviving victim told him that Matthews was not inside the house at the time of the murder. *Matthews*, slip op., at 4, 6. Similarly here, Petitioner has produced an affidavit that was allegedly signed by Mr. Scott on September 5, 2015, less than two weeks before Petitioner's scheduled execution date, and has presented the affidavit to this Court less than 24 hours prior to the scheduled execution. Accordingly, this "inherently suspect" affidavit, containing only inadmissible hearsay, falls far short of clear and convincing evidence of actual innocence that demonstrates that no reasonable fact finder would have found Petitioner guilty.

Mr. Scott's affidavit further lacks credibility because it was generated around eight years after Mr. Scott claims he heard Mr. Sneed make the alleged statements in 2006 and 2007. Mr. Scott's affidavit does not provide a convincing explanation for why he did not come forward with his allegations concerning Mr. Sneed's statements until the eve of Petitioner's execution. Mr. Scott claims he "realized just how important this information was" only when he viewed a Dr. Phil segment on Petitioner. However, this explanation is inconsistent with Mr. Scott's claim that, among the Joseph Harp inmates, "it was common knowledge that Justin Sneed lied and sold Richard Glossip up the river" and that Mr. Sneed repeatedly bragged about "selling Richard Glossip out." In other words, Mr. Scott understood at the time of Mr. Sneed's statements the implications of Mr. Sneed's

alleged perjury for Petitioner, and Mr. Scott does not explain what new information he learned during the Dr. Phil segment that in any way changed his understanding of Mr. Sneed's statements or their implications for Petitioner. Accordingly, Mr. Scott's affidavit is not credible on its face and is insufficient to warrant post-conviction relief or an evidentiary hearing.

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

Affidavit of Richard Barrett

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

Further, the affidavit of Mr. Barrett does not support a finding that no reasonable fact finder would have found Petitioner guilty or would have rendered

the penalty of death. The affidavit merely discusses his unlawful actions with Bobby Glossip and Mr. Sneed. He claims that Mr. Sneed was a drug user. This information was known at Petitioner's trial as Mr. Sneed testified to his use of marijuana and crank (Vol. 12, Tr. 47). The record also reveals, contrary to the affidavit of Mr. Barrett, that Mr. Sneed admitted during Petitioner's first trial to using methamphetamine, however, Mr. Sneed testified that he snorted it, rather than shooting it in his arm (1998 Vol. 6, Tr. 111-112).

Further, Mr. Barrett's affidavit is highly suspect because contrary to trial testimony,[10] Mr. Barrett claims he "saw nothing to make me think that Justin Sneed was controlled by Richard Glossip". Attachment G. However, Mr. Barrett also states that he met Petitioner when "he would come to Rule 102" to see his brother and tell them to quiet down. He also states he "never saw Richard come to the room when Justin Sneed was there." Attachment G at ¶ 10. Thus, it is unclear how Mr. Barrett would know whether Mr. Sneed was controlled by Petitioner unlike others who dealt with Petitioner and Mr. Sneed on a continuous

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[10]Petitioner and Justin Sneed were described as "very close" friends by Billye Hooper, the front desk clerk at the motel (Vol. 12, Tr. 28). Mr. Sneed was largely dependent upon Petitioner for food and money (Vol. 9, Tr. 21; Vol. 12, Tr. 28). Kayla Pursley testified that Mr. Sneed usually followed Petitioner when they were together, that you normally did not see one without the other and that "[Petitioner] would have to tell him what to do and how to do it." (Vol. 9, Tr. 19-20, 23). Petitioner had control over Mr. Sneed because Mr. Sneed had no other place to go and no family in the area (Vol. 9, Tr. 21, 24). Ms. Pursley observed that "[y]ou had to almost tell [Sneed] what to do in any circumstance, whether it was a working relationship or personal." (Vol. 9, Tr. 23). Cliff Everhart testified that Mr. Sneed was Petitioner's "puppet", that Mr. Sneed "was not self-motivated. [Petitioner] told him everything to do. [Petitioner] would tell him to do this, he'd do it . . . If he needed something, he'd come to [Petitioner]." (Vol. 11, Tr. 185).

basis. Mr. Barrett's untimely affidavit does not support a finding that there exists a significant possibility of reversal of Petitioner's conviction or vacation of his death sentence.

Opinion of Dr. Pablo Stewart

Petitioner asserts that the opinion of Dr. Stewart supports a finding that Mr. Sneed acted alone. Like the affidavit of Mr. Barrett, the opinion of Dr. Stewart was ascertainable at the time of trial. Further, it does not support a finding of innocence as the findings of Dr. Stewart are based on speculation that Mr. Sneed was a methamphetamine addict and that he used it intravenously over a period of time. Attachment J. As noted above, Mr. Sneed testified specifically that he used marijuana and "a little bit of crank" (Vol. 12, Tr. 47). He also testified that he snorted it, rather than injecting it intravenously (1998 Vol. 6, Tr. 111-12). Further, testimony of the motel staff did not support a finding that Mr. Sneed's behavior showed "extreme agitation, rapid cycling of thoughts, and significantly impaired executive functioning." Attachment J at 2. Even Petitioner does not describe Mr. Sneed's behavior on the night of the murder as fitting the behavior described by Dr. Stewart of an individual on methamphetamine.

Further, Dr. Stewart based his opinion on information that he received stating that Mr. Sneed was prescribed lithium upon his arrest. However, records submitted by Petitioner in his original application for post-conviction relief, No. PCD-2004-978, reveals that Petitioner was not prescribed lithium until March,

1997 after having a tooth pulled. *See* Appendix 4 attached to original application for post-conviction. (A copy is attached as Exhibit B). Thus, Dr. Stewart's opinion is based on unreliable and false information. Accordingly, Petitioner is not entitled to relief.

Conclusion

The Petitioner has not provided this Court with any reliable facts supporting his claim that could not have been presented previously in Petitioner's direct appeal or original post conviction application. Further, Petitioner has not alleged facts that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b). Petitioner cannot show there exists a significant possibility of reversal of Petitioner's conviction or vacation of Petitioner's sentence based on the evidence submitted in his second post-conviction application or that irreparable harm will result if no stay is issued. Nor has he shown that a miscarriage of justice will occur if his execution is carried out. This is because Petitioner's evidence in no way calls into question the evidence contained in the existing appellate record, evidence which, as previously found by this Court, shows Petitioner's significant involvement in the murder. *Glossip v. State*, 2007 OK CR 12, ¶ 37-53, 157 P.3d 143, 151-54. He is therefore not entitled to post-conviction relief or a stay of execution.

II.

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

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

Petitioner, in his second proposition of error, contends that his trial counsel was ineffective in failing to attack Mr. Sneed's credibility by attacking (a) the alleged improper interrogation techniques, and (b) Mr. Sneed's "modus operandi" of breaking into cars and motel rooms to support his drug addiction. In his fourth proposition of error, Petitioner contends trial counsel was ineffective in failing to adequately cross-examine Dr. Chai Choi's testimony. As shown above, and as will be shown below in discussing the testimony of Dr. Choi, Petitioner's claims of ineffective assistance rely on facts that have been available and could have been considered in his prior post-conviction application. Further, these claims do not in any way advance a claim that Petitioner is innocent. Thus, Petitioner is not entitled to any relief. 22 O.S.2011, § 1089(D)(8).

Proposition Two

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

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

Proposition Four

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

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

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

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

Conclusion

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

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

1089(D)(8)(b). Petitioner cannot show there exists a significant possibility of reversal of Petitioner's conviction or vacation of Petitioner's sentence based on the evidence submitted in his second post-conviction application or that irreparable harm will result if no stay is issued. Nor has he shown that a miscarriage of justice will occur if his execution is carried out. This is because Petitioner's evidence in no way calls into question the evidence contained in the existing appellate record, evidence which, as previously found by this Court, shows Petitioner's involvement in the murder. *Glossip v. State*, 2007 OK CR 12, ¶ 37-53, 157 P.3d 143, 151-54. He is therefore not entitled to post-conviction relief or a stay of execution.

III.

PETITIONER'S DOUBLE JEOPARDY ALLEGATION IS PROCEDURALLY BARRED.

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

As an initial matter, Petitioner has waived his double jeopardy argument by failing to offer any relevant authority or meaningful argument in support. Although Petitioner extensively argues the law concerning sufficiency-of-the-evidence claims and the evidence presented at his first trial, he offers a mere two

sentences about double jeopardy and cites zero supporting authority. Specifically, while Petitioner notes that double jeopardy would prohibit the retrial of a defendant if the evidence were insufficient at the defendant's first trial, he cites no case law or other authority in support of this proposition. Petitioner further fails to mention "double jeopardy" in his statement of the issue for Proposition Three. Petitioner's statement of the issue instead states simply that the evidence at his trial was insufficient to support his conviction.[13]

This Court's Rules state that arguments must be supported by citations to the authorities and statutes and that "[m]erely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal." Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2014); *see also* Rule 9.7(A)(3)(g), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2014) (providing that post-conviction applications shall contain argument and authority in the same manner as direct appeal briefs). Moreover, "[f]ailure to list an issue pursuant to these requirements constitutes waiver of alleged error." *Id.* Thus, Petitioner's reference to double jeopardy only in passing, without citation to

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

authority or the development of meaningful argument concerning the double jeopardy aspect of Proposition Three, constitutes a waiver of this issue.

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

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

petition for rehearing, this Court concluded that it had not overlooked Petitioner's insufficiency-of-the-evidence claim and that Petitioner had not presented any persuasive reason or case law requiring this Court to reconsider the claim when reversal was warranted on other grounds.

Although this Court declined to consider the merits of Petitioner's double jeopardy claim when raised in his petition for rehearing, Petitioner has had, at a minimum, two additional opportunities to raise this claim at prior stages of his case. Accordingly, Petitioner has waived his double jeopardy claim by failing to raise it at these times.

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

Second, Petitioner failed to raise the claim that his retrial violated double jeopardy in his second direct appeal. Specifically, in his second direct appeal, Petitioner argued that the State presented insufficient evidence to convict him of

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

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

decision of an enumerated appellate court, or (b) is a new rule of constitutional law given retroactive effect by an enumerated appellate court. 22 O.S.2011, § 1089(D)(9).

In this case, Petitioner does not cite any authority providing the legal basis for his double jeopardy argument and certainly does not identify a new legal basis or rule of constitutional law that was previously unavailable. Moreover, although Petitioner cites a number of cases concerning his sufficiency-of-the-evidence arguments, none of these cases–ranging in date from 1913 to 1998–was decided after Petitioner's original post-conviction application was filed in October 2006. Because Petitioner has failed to show that Proposition Three could not have been presented in his original post-conviction application, this Court may not consider the merits of or grant relief based on this claim. *See Duvall v. Ward*, 1998 OK CR 16, ¶ 6, 957 P.2d 1190, 1191 (holding that Petitioner failed to establish that claims could not have been presented in a previously considered application for post-conviction relief where he did not show that the legal basis of each claim was not recognized by or could not have been reasonably formulated from a final decision of an enumerated appellate court or that the claims relied on a new rule of constitutional law given retroactive effect).

As a final matter, even if the merits of Proposition Three were considered, this claim does not warrant relief because the claim is without merit. This Court has explained that "double jeopardy bars retrial only where a conviction is

reversed on appeal for insufficient evidence." *LaFevers v. State*, 1995 OK CR 26, ¶ 16, 897 P.2d 292, 302. In Petitioner's first direct appeal, however, this Court reversed based on a finding of ineffective assistance of counsel, not based on the insufficiency of the evidence. *Glossip*, 2001 OK CR 21, ¶¶ 8, 36-37, 29 P.3d 597, 599, 605. Indeed, this Court expressly declined to reach Petitioner's claim based on the sufficiency of the evidence and certainly did not make a determination that the evidence was insufficient. *See Glossip*, 2001 OK CR 21, ¶ 8, 29 P.3d 597, 599. Because this Court did not reverse Petitioner's original conviction because of insufficient evidence, double jeopardy did not bar his retrial. *See Cannon v. State*, 1995 OK CR 45, ¶ 16, 904 P.2d 89, 98 (rejecting defendant's claim that his original convictions barred future prosecution because this Court's reversal of those convictions, while ostensibly a reversal and remand for a separate trial from defendant's accomplice, was actually a reversal based on insufficiency of the evidence).

In conclusion, Proposition Three warrants neither post-conviction relief nor an evidentiary hearing because it is not properly raised in the current successive application, is procedurally barred because it is waived, is foreclosed by § 1089(D), and fails on the merits.

UNREASONABLE DELAY IN REQUESTING STAY OF EXECUTION

In *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006), the United States Supreme Court underscored its opinion in *Nelson v.*

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

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

MOTION FOR DISCOVERY AND EVIDENTIARY HEARING

Petitioner has filed, separately from his second application for post-conviction relief, motions for discovery and an evidentiary hearing. Both motions should be denied. First, Petitioner's request for discovery is nothing more than a fishing expedition and is insufficient to satisfy this Court's rules. Petitioner supports his discovery requests to this Court with an unsworn affidavit of Michael Scott[14]. This is his sole basis for his request for "identifying information for all

[14]Although Petitioner claims to this Court that Mr. Scott "swears under oath," as (continued...)

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

He makes numerous other requests without explaining the significance or relevance of these requests. For instance, Petitioner seeks discovery of medical records at the time of his arrest so that Petitioner can "explore" Sneed's mental health during the interrogation and seeks details of alleged "psychiatric treatment" Sneed received prior to trial. Petitioner alleges details of Sneed's psychiatric treatment show he was treated with lithium during his pre-trial incarceration and that such information is filed under seal in federal court. Petitioner states he needs this file to be unsealed. A review of Petitioner's federal pleadings do in fact show a "Determination of Competency to Stand Trial, Psychiatric Evaluation of Justin B. Sneed, by Edith King, Ph.D., dated July 1, 1997" was filed under seal in Petitioner's federal habeas corpus action, Case No. CIV-08-326-HE. However, this exact document was appended to Petitioner's Original Application for Post Conviction Relief, appendix 4, and attached hereto as Exhibit B. Clearly,

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[14](...continued)
shown above, the affidavit is undated, and is not notarized.

discovery is not warranted for information Petitioner already has in his possession.

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

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

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

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

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

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

to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the second application for post-conviction relief. *Id.*

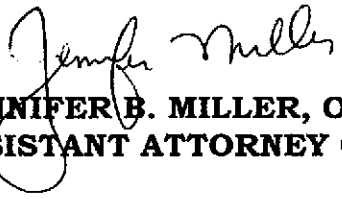
Petitioner's motion for discovery and evidentiary hearing should therefore be denied.

CONCLUSION

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

Respectfully submitted,

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA



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CERTIFICATE OF MAILING

I certify that on this 16th day of September, 2015, a true and correct copy of the foregoing was mailed, with full first-class postage pre-paid, to:

Mark Henricksen
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Oklahoma City, OK 73102

JENNIFER B. MILLER

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JEFFREY DAVID MATTHEWS,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2010-1193
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

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

A. JOHNSON, PRESIDING JUDGE:

Before the Court is Petitioner Jeffrey David Matthews' third application for post-conviction relief, motion for evidentiary hearing and emergency motion for stay of execution. A jury convicted Matthews in 1999 in the District Court of Cleveland County, Case No. CF-95-183, of the first degree murder of his great uncle and sentenced him to death.[1] Since then Matthews has challenged his Judgment and Sentence on direct appeal,[2] in collateral

[1] Matthews' jury found two aggravating circumstances to support the death penalty: 1) Matthews created a great risk of death to more than one person; and 2) that the murder was committed while Matthews was serving a sentence of imprisonment. Matthews' jury also convicted him of Assault and Battery With a Deadly Weapon (Count II), Conspiracy to Commit a Felony (Count III) and Unauthorized Use of a Motor Vehicle. Matthews' jury recommended one hundred years imprisonment on Count II, fifty years imprisonment on Count III and twenty years imprisonment on Count IV. The Honorable Candace Blalock followed the jury's sentencing recommendation and ordered Matthews' sentences to be served consecutively.

[2] This Court affirmed Matthews' Judgment and Sentence in *Matthews v. State*, 2002 OK CR 16, 45 P.3d 907. Certiorari was denied by the United States Supreme Court in *Matthews v. Oklahoma*, 537 U.S. 1074, 123 S.Ct. 665, 154 L.Ed.2d 570 (2002).

proceedings in this court,[3] and in habeas corpus proceedings and other lawsuits in federal court.[4] All of these challenges have proven unsuccessful. Matthews is set to be executed on January 11, 2011. The State filed a response to this third application on December 27, 2010.

In this most recent challenge to his judgment and sentence, Matthews raises two claims. He argues that newly discovered evidence supports his claim that he was denied a fair trial and that his execution must be stayed because the State intends to use pentobarbital as the barbiturate drug in the lethal injection process in violation of Oklahoma law.

We reject both arguments and deny his application for post-conviction relief.

The Post-Conviction Procedure Act governs post-conviction proceedings in this State. 22 O.S.Supp.2006, §§1080 -1089. It provides in relevant part:

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[3] Matthews' second application for post-conviction relief was denied earlier this year in *Matthews v. State*, Case No. PCD-2010-266 (unpublished opinion)(April 14, 2010) Matthews' original application for post-conviction relief was also denied. *See Matthews v. State*, Case No. PCD-2002-391 (unpublished opinion)(Aug. 26, 2002).

[4] Matthews sought a writ of habeas corpus in the United States District Court for the Western District of Oklahoma which was denied. *See Matthews v. Workman*, No. Civ-03-417-R. 2007 WL 2286239 (W.D.Okla. Aug. 6, 2007). Matthews appealed the federal district court's decision and the Tenth Circuit denied relief in *Matthews v. Workman*, 577 F.3d 1175 (10th Cir.2009). The United States Supreme Court denied certiorari in *Matthews v. Workman*, ___U.S.___, 130 S.Ct. 1900, 176 L.Ed.2d 378 (2010). This Court originally set Matthews's execution date for June 17, 2010. His execution date was rescheduled to August 17, 2010 after the governor granted Matthews two reprieves. On August 17, 2010, the Honorable Stephen Friot of the United States District Court for the Western District of Oklahoma stayed Matthews's execution pending review of a motion for preliminary injunction filed by Matthews in *Pavatt v. Jones, et al.*, No CIV-10-141-F. Matthews intervened in that federal civil rights lawsuit challenging Oklahoma's lethal injection protocol on Eighth Amendment grounds. Judge Friot held a hearing and ruled against Matthews and Matthews's stay of execution dissolved on November 20, 2010. The Tenth Circuit upheld the district court's ruling on December 14, 2010. *See Pavatt, et al. v. Jones, et al.*, No. 10-6268.

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

22 O.S.Supp.2006, § 1089(D)(8). Further, the rules of this Court provide that "[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2010).

A. Newly Discovered Evidence

Matthews argues that newly discovered evidence demonstrates that he was denied a fair trial. He maintains that executing him for the murder of his

great-uncle without a fair trial would constitute a miscarriage of justice. In support, he relies on 1) the evidence previously offered in his second post-conviction relief application, 2) affidavits from friends, family members and a juror generated for purposes of obtaining executive clemency, and 3) an October 21, 2010 affidavit from Bobby Ray Matthews, Minnie Short's brother, attesting that Minnie Short, the surviving victim, said that Matthews was not inside the Short residence when Earl Short was murdered. Matthews submits that these materials support a finding that the validity of his conviction is in doubt for these reasons 1) no physical evidence connected him to the crime scene, 2) the possibility local police framed him for the murder, 3) alternative perpetrators have not been eliminated, 4) the jury struggled to reach a guilty verdict with the evidence presented, and 5) Bobby Ray Matthews' recent affidavit provides proof that the State's theory portraying Matthews as the shooter was wrong.

Matthews' primary obstacle to review here is that the majority of the information submitted in support of this claim was discovered more than sixty days ago and cannot be considered by this Court under our rules. To overcome this procedural bar, Matthews claims the failure of this Court to review his claim and all materials together would create a miscarriage of justice under *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11.[5]

[5] Under Valdez, this Court may exercise its inherent power to grant relief when an error complained of has resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right.

Of the several filings he provides in support of his current application for relief, only one complies with our sixty day rule—the October 21, 2010 affidavit of Bobby Ray Matthews. The remaining affidavits and exhibits were available more than sixty days before the filing of this third application for post conviction relief. Also Matthews includes in this third application many of the same affidavits and arguments rejected in his second application for post-conviction relief. These recycled materials will not be considered not only because they are untimely, but also because we have previously rejected them and further consideration is barred under the doctrine of *res judicata*.[6]

With the exception of Bobby Ray Matthews' affidavit, Matthews has not shown that the affidavits obtained after the filing of his second application for post-conviction relief could not have been presented earlier with the exercise of reasonable diligence. Nothing in these affidavits suggests the affiants were unavailable or unwilling at that earlier time to provide the information contained in their affidavits filed in this matter. We note these affidavits were originally generated for purposes of obtaining executive clemency for Petitioner. The affidavits of Wilma JoAnn Daniels (attachment 2), Judith Elkins (attachment 3), Amanda Smith (attachment 4), Randy L. Howell (attachment 5) and Bobby Youngblood (attachment 6) are consistent with Matthews' claim in his second post-conviction application that prosecutorial and law enforcement misconduct deprived him of a fair trial and that he is actually innocent. In

[6] This includes Matthews' attachments 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 18.

these affidavits it is alleged that Matthews should not be executed because 1) the evidence was insufficient to establish that Matthews was the gunman, 2) Matthews was framed by local police because of animosity between law enforcement and the Matthews' family, and 3) alternative suspects have not been eliminated. With the exercise of reasonable diligence, Matthews could have presented these affidavits in conjunction with his similar arguments and claims in his second post-conviction relief application. Under the Capital Post-Conviction Procedure Act, we are barred from considering these affidavits and the arguments based upon them. 22 O.S.Supp.2006, § 1089(D)(8).

We reject Matthews' claim that he has suffered or will suffer a miscarriage of justice if we decline to review his most recent claim based on these materials. Because we find no miscarriage of justice here, we decline to exercise our inherent power to override all procedural bars and grant relief.

Matthews' primary piece of new evidence is the October 21, 2010 affidavit of Bobby Ray Matthews (attachment 1). Bobby Ray Matthews attests that he spoke with his sister, the surviving victim Minnie Short, at the hospital within hours of the murder. He claims Minnie told him that Matthews was involved in the burglary and murder, but had remained outside the house during the crime. He claims further that Minnie told him that it was two other boys who entered her house that morning and that she was adamant that Matthews was not with them. Matthews explains that he withheld this information during the August 2010 interview with Petitioner's defense team

because he "wanted to stay out of it," "didn't want to stir up any trouble within my family" and because he never believed Matthews would be executed.

The State correctly notes that this affidavit offers little more than inadmissible hearsay to prove that Matthews was not the triggerman and was not inside the house at the time of the murder.[7] 12 O.S.Supp.2002, §§ 2801, 2803 & 2804. The submission of this affidavit now—within days of Matthews' scheduled execution date—makes it inherently suspect. This is particularly so in light of the fact that the same Bobby Ray Matthews made a similar affidavit as recently as August, 2010 and therein made no mention of statements by Minnie Short tending to exonerate Petitioner. He does state in that earlier affidavit, however, that he believes "they don't have the right person," that "Jeff was probably involved in some way and could have been out there when it happened," but that he does not believe "Jeff was the one who shot and killed Earl."

It requires a stretch of credulity to reconcile those statements Bobby Ray Matthews attested to in August with the statements he makes in his most recent affidavit. The reasons he provides for withholding information about Minnie's hospital bed revelations until now are simply unworthy of belief.

Furthermore, the statements Bobby Ray Matthews belatedly attributes to Minnie are contradicted by the evidence. Minnie herself testified she could

[7] Mrs. Short has been dead now for several years and is unavailable to rebut these allegations. *See* Respondent's Exhibit D.

identify none of the intruders in her house and specifically did not identify Jeffery David Matthews. Also, Petitioner Matthews has relied in the past on the testimony of his co-defendant, Tracy Dyer, in his second trial exonerating him from any involvement in the crime.[8] The statements newly attributed to Minnie by her brother, Bobby Ray, implicate Petitioner Matthews in the crime and contradict his claim of actual innocence. Those statements are also inconsistent with the statements made in the affidavit of Wilma JoAnn Daniels (also submitted by Petitioner), that her sister Minnie told her that she could not say who was in her house because she was not wearing her glasses (attachment 2).

The Tenth Circuit, in rejecting Matthews' attack on the sufficiency of the evidence, reviewed the evidence against Matthews, and noted

> significant and uncontested other evidence pointed [to Matthews], including: (1) Mr. Matthews's girlfriend's testimony that Mr. Matthews left his home with Mr. Dyer the night before the murder and did not return that night; (2) Mark Sutton's testimony that he loaned Mr. Matthews his .45 caliber Ruger the day before the murder and that Mr. Matthews did not return it; (3) the same .45 caliber Ruger was later identified as the murder weapon and was discovered behind Mr. Matthews's home; (4) Bryan Curry's testimony that a year prior to the murder, he drove Mr. Dyer and Mr. Matthews to the Shorts' residence to burglarize their cellar; (5) Thomas Tucker's testimony that he saw two people in pickup trucks near the Shorts' residence around the time of the murder, one of whom was wearing khaki coveralls; (6) Mrs. Short's testimony that the shooter was wearing khaki coveralls; and (7) the

[8] Dyer pled guilty pursuant to a plea agreement in which he received a life sentence for the murder and agreed to testify against Matthews. In Matthews' first trial, Dyer testified that Matthews shot the victim and Matthews was convicted. Matthews appealed and we reversed his case for a new trial because of the erroneous admission of Matthews' statements that were the product of an illegal arrest. *See Matthews v. State*, 1998 OK CR 3, 953 P.2d 336. On retrial, Dyer recanted and claimed Matthews was not involved in the burglary-murder.

> fact that police seized Mrs. Short's pill bottle, $300.00 cash, and a pair of brown coveralls from Mr. Matthews's home two days after the murder.

Matthews v. Workman, 577 F.3d 1175, 1185 -1186 (10th Cir.2009). *See also Matthews v. State*, 2002 OK CR 16, ¶ 36, 45 P.3d 907, 920.

On this record, we find that the affidavit of Bobby Ray Matthews neither provides sufficient support for post-conviction relief in this case, nor requires an evidentiary hearing on the issues raised.

Oklahoma's Lethal Injection Protocol

Oklahoma law states:

> The punishment of death ***must*** be inflicted by continuous, intravenous administration of a lethal quantity of an ***ultrashort-acting barbiturate*** in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.

22 O.S.2001, § 1014 (A) (emphasis added).

Matthews argues using pentobarbital as the barbiturate drug in the execution process violates Oklahoma's statute prescribing the manner of executing a death sentence because pentobarbital is an intermediate-acting barbiturate rather than an ultrashort-acting barbiturate.[9] Matthews raised this claim in summary fashion in federal court. *See Pavatt, et al. v. Jones, et al.*, No. 10-6268 (10th Cir.2010)(unpublished). Matthews presented no evidence, and few legal authorities, in support of the claim. *Id.* The federal district court

[9] The classification of "ultra-short" or "intermediate" refers to the duration the patient is unconscious or sedated rather than the length of time it takes the barbiturate to take effect.

summarily rejected the claim as meritless at a preliminary injunction hearing, and did not expressly address it in its subsequent written order memorializing its oral rulings. *Id.* In rejecting Matthews' claim that he has a protected "state-created life interest" in being executed in accordance with the precise protocol set forth in § 1014 (A), the Tenth Circuit noted that, though not entirely clear, the term "ultrashort-acting" barbiturate in Oklahoma's statute (22 O.S.2001, § 1014 (A)) appears to be used "in a different sense, to refer to how quickly the barbiturate takes effect." *Id.* n. 2. That court, however, made no ruling on the claim before us.

Prior to the execution of John David Duty on December 16, 2010, the Oklahoma Department of Corrections (ODOC) had used sodium thiopental as the ultrashort-acting barbiturate in all executions since the legislature enacted § 1014 (A) in 1977. In recent times, however, ODOC has been unable to obtain sodium thiopental and, in response, has changed its lethal injection protocol to allow for the use of pentobarbital in the event there is an insufficient quantity of sodium thiopental. *See* Respondent's Exhibit G "Revised ODOC Execution Protocol" OSP-040301-01 p. 15 (effective October 21, 2010). According to Matthews, ODOC intends to use pentobarbital in his execution.[10]

[10] The State argues Matthews has known that ODOC intended to use pentobarbital since September 2010 and that this claim is barred by this Court's sixty day rule. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2010). This Court set Matthews' current execution date on December 14, 2010 after two reprieves from the governor and the dissolution of a stay granted by the United States District Court for the Western District of Oklahoma. This Court has not yet had the opportunity to rule on this issue. If Matthews' claim is correct, then his legal sentence will be carried out in an illegal manner.

We are called upon to interpret the phrase "ultrashort-acting barbiturate" in 22 O.S.2001, § 1014 (A). Our task in construing a statute is to determine and give effect to the intent of the Legislature as expressed in the statute. *Head v. State*, 2006 OK CR 44, ¶ 13, 146 P.3d 1141, 1145. To determine the intent of a legislative enactment, we look, at among other things, to the evils and mischief to be remedied and consider the consequences of any particular interpretation. *Id.* "Where construction of a statute produces anomalous or absurd results, we must presume that such consequences were not intended and adopt a reasonable construction that avoids the absurdity." *Id.*

In considering the issue, we have reviewed the deposition testimony of the State's expert, Mark Dershwitz, M.D., Ph.D., presented in the federal civil rights lawsuit challenging Oklahoma's lethal injection protocol on Eighth Amendment grounds.[11] *See Pavatt, et al. v. Jones, et al.*, No. CIV-10-141-F, *supra*. His testimony shows that there is little practical difference between sodium thiopental and pentobarbital in the execution process. Pentobarbital is a longer lasting anesthetic than sodium thiopental. It reasonably follows that using a barbiturate with a longer duration would do no further harm to the condemned individual and would mitigate any concern the individual would

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Given the nature of this claim, we address it on the merits. *See Malicoat v. State*, 2006 OK CR 25, ¶ 3, 137 P.3d 1234, 1235.

[11] Dr. Dershwitz is a medical doctor, a professor of anesthesiology at the University of Massachusetts and a board certified practicing anesthesiologist who holds a Ph.D. in pharmacology.

regain consciousness and suffer pain as the other two drugs are administered. Both pentobarbital and sodium thiopental cause rapid unconsciousness and both are lethal in the dosage specified by Oklahoma's lethal injection protocol. Furthermore, there is practically no difference in the time required for these drugs to take effect.

Death by lethal injection prescribed in § 1014 (A) is designed to kill the individual. Using either barbiturate—pentobarbital or sodium thiopental—results in the rapid onset of unconsciousness followed by swift death.[12] Both barbiturates are ultrashort-acting insofar as the onset of sedation with either is rapid. The law requires the use of "an ultrashort-acting barbiturate" so that the condemned person will be executed as quickly and painlessly as possible. The intent of § 1014 is to ensure that the individual is unconscious before the potentially painful drugs (vecuronium bromide and the potassium chloride) are administered. The obvious purpose of § 1014 is to ensure that the onset of unconsciousness is quick and that the individual does not suffer during the execution process. The purpose and intent behind the statute lead us to conclude that the legislature did not use the term "ultrashort-acting" barbiturate in its clinical or kinetics sense, but rather to refer to how quickly the barbiturate takes effect to render the individual unconscious. To interpret § 1014 in such a way that requires the use of an anesthetic designed to render

[12] Oklahoma requires a minimum five minute delay between the administration of the barbiturate and the other drugs during which time a licensed physician monitors the inmate's

an individual unconscious for only a short period of time, as in a clinical setting, would be absurd and contrary to the obvious objective of the statute. The expert testimony from the recent federal proceeding shows that pentobarbital is an ultrashort-acting barbiturate in the onset of sedation. As the Tenth Circuit noted, the district court's findings—that the individual will not be sentient for more than a very short time following the intravenous injection of 5,000 milligrams of pentobarbital—is well supported by the evidence.[13] We find on this record that the use of the barbiturate pentobarbital in Oklahoma's execution protocol does not violate 22 O.S.2001, § 1014 (A). This claim is denied.

CONCLUSION

After carefully reviewing Matthews' third application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Matthews' third application for post-conviction relief is **DENIED**. Further, his motions for an evidentiary hearing and for an emergency stay of execution are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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level of consciousness to ensure that the condemned is sufficiently unconscious prior to the administration of the second drug (vecuronium bromide).

[13] According to the warden who supervised John David Duty's execution on December 16, 2010, Duty received the prescribed dosage of pentobarbital and appeared to expire within approximately three minutes. He was pronounced dead by the attending physician before the vecuronium bromide and potassium chloride could be administered. The warden perceived no difference with Duty's execution as compared to those where sodium thiopental was used. *See* Respondent's Exhibit G.

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OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur
SMITH, J.: Concur in Part, Dissent in Part

LUMPKIN, JUDGE: CONCURRING IN RESULT

I concur in the results reached in this case but write separately to address the same concerns I raised in *Valdez v. State*, 2002 OK CR 20, ¶ 1, 46 P.3d 703, 711 (Lumpkin, P.J., concurring in part/dissenting in part) and *Malicoat v. State*, 2006 OK CR 25, ¶ 1, 137 P.3d 1234, 1239 (Lumpkin, V.P.J., concurring in part/dissenting in part). Appellant's claims are waived as he cannot show the claims could not have been presented to this Court previously.

In analyzing Petitioner's claim of newly discovered evidence the Court determines that: "[b]ecause we find no miscarriage of justice here, we decline to exercise our inherent power to override all procedural bars and grant relief." This broad statement is not supported by our Rules or precedent.

This Court has repeatedly stated that Oklahoma's Post-Conviction Procedure Act is not an opportunity to raise new issues, resubmit claims already adjudicated, or assert claims that could have been raised on direct appeal or the original application for post conviction relief. *Rojem v. State*, 1996 OK CR 47, ¶ 6, 925 P.2d 70, 72-73; *Moore v. State*, 1995 OK CR 12, ¶ 4, 889 P.2d 1253, 1255-56. This is a statutory requirement of the Post Conviction Procedure Act. 22 O.S.Supp.2006, § 1089. Further, it is a requirement of Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010). The legal doctrines of waiver and *res judicata* have been developed through the ages to ensure finality of judgments. *Valdez*,

2002 OK CR 20, ¶¶ 5-6, 46 P.3d at 712 (Lumpkin, P.J., concurring in part/dissenting in part). By disregarding binding authority, in order to assist a defendant in litigating issues already decided or waived, this Court disregards the concept of the Rule of Law. *Id.* Failure to adhere to statutory requirements, as well as this Court's own Rules, creates inconsistency and brings into question the validity of the Court's opinions. *Malicoat*, 2006 OK CR 25, ¶ 1, 137 P.3d at 1239 (Lumpkin, V.P.J., concurring in part/dissenting in part). "Either the doctrines of waiver and res judicata apply to all or the doctrines are eviscerated." *Valdez*, 2002 OK CR 20, ¶ 7 n. 3, 46 P.3d at 712 n. 3 (Lumpkin, P.J., concurring in part/dissenting in part).

In the present case, the basis for Bobby Ray Matthews' affidavit has been available since the date of the crime. He attests that the surviving victim provided him with the information at the hospital within hours of the murder. As the current claim could have been presented previously in the direct appeal or previously considered post conviction applications, the issue has been waived.

Additionally, the Court reviews the merits of Petitioner's claim that the use of pentobarbital violates Oklahoma's statute prescribing the manner of executing a death sentence "[g]iven the nature of this claim." Rule 9.7(G)(3) requires that "no subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Neither the Post Conviction Procedure Act

nor our Rules provide for an exception "given the nature of the claim." 22 O.S.Supp.2006, §§ 1080-1089. The materials presented clearly reveal that Petitioner knew of the factual basis serving as the basis for this claim more than sixty (60) days before the filing of the present application. As such, Petitioner waived the claim and the Court is prohibited from reviewing the merits of Petitioner's claim.

This Court should adhere to Rule 9.7, the statutory requirements of 22 O.S.Supp.2006, § 1089 and consistently apply the doctrines of waiver and *res judicata* to all post conviction applications.

SMITH, J., CONCURS IN PART/DISSENTS IN PART:

I concur in the decision that the use of the barbiturate pentobarbital in Oklahoma's execution protocol does not violate 22 O.S.2001 § 1014(A).

However, I dissent to the denial of the Motion for Evidentiary Hearing and Emergency Request for Stay of Execution. Matthews should be granted an evidentiary hearing on the affidavit of Bobby Ray Matthews.

OKLAHOMA COUNTY
CRISIS INTERVENTION CENTER

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLAHOMA
JUL 17 1997
PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

July 1, 1997

THE HONORABLE JUDGE Richard Freeman
Oklahoma County District Court
321 West Park Avenue
Oklahoma City, OK. 73102

RE: Justin B. Sneed
Case No: CF-97-0244

Dear Judge: Richard Freeman

Enclosed, please find the Psychiatric Evaluation for the Determination of Competency to Stand Trial on.

Respectfully submitted,

Edith B. King, Ph.D.

Edith King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern L. Smith , Assistant District Attorney
George Miskovsky III, Assistant Public Defender

EXHIBIT
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DETERMINATION OF COMPETENCY TO STAND TRIAL
PSYCHIATRIC EVALUATION

DATE: July 1, 1997

RE: Justin B. Sneed
CF: 97-0244

By order of the Oklahoma County District Court, Judge Richard Freeman, under Oklahoma Statute Section 1175.3 dated April 22, 1997 and received in this office April 24, 1997. Justin B. Sneed was examined at the Oklahoma County Jail July 1, 1997.

The following statutory questions are responded to accordingly, and a more detailed psychiatric summary is attached.

1. Is this person able to appreciate the nature of the charges against him or her?

Yes. Mr. Sneed said he is in jail on a "Murder I" charge which he said is "for killing somebody." He explained "If I'm found guilty it means the death penalty." He also said "It (Murder I) carries life, life without parole, or death." Asked about his options, he said "after what I've said to some people going home is probably not possible." He indicated that the alleged crime was in connection with a burglary but that he does not carry a charge of burglary. His history includes some "hot checks" in Texas but, he said, "that doesn't matter."

2. Is this person able to consult with his or her lawyer and rationally assist in the preparation of his or her defense?

Yes. Mr. Sneed correctly identified his lawyer by name and said he has seen him one time. He also identified an investigator he has talked to. He said he has also been assigned another lawyer in addition to the first. In his appraisal, he said his only hope to get out of the death penalty is to plead guilty. He also said that if his only possibility is either life without parole or death he would not plead guilty, since he does not want to spend the rest of his life in prison. He explained that if he received life without parole he would get tired of it --- it would be depressing, with no sunlight and no air. He understands other terms such as probation, and said he had a year's probation as a juvenile for burglary of a house and a bomb threat. He is very aware of how limited his options are at this point.

3. If the answer to question 1 or 2 is "no", can the person attain competency within a reasonable time if provided with a course of treatment, therapy or training?

N/A.

4. Is the person a mentally ill person or a person requiring treatment as defined by Oklahoma Statute Title 43A, Section 3?

Yes. Mr. Sneed denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling. He was apparently married and said his wife used to tell him she thought he had "problems." She thought he had trouble "paying attention" and may have had ADHD (Attention Deficit Hyperactivity Disorder). He admits to using a variety of drugs including marijuana, crank, cocaine, and acid. He said he drank alcohol for one summer but didn't like it.

He is currently taking lithium at the jail and said it was administered after his tooth was pulled. He was not on lithium before coming to the jail and was started on it in March. He does not think he has any serious mental problems although he said he has "deja vu" sometimes. When he first came to the jail he said he had a strong feeling the pod was familiar. He now has this sensation once or twice a month. The lithium helps him "not to feel so angry" and he used to get angry quite often. He said he used to "yell at teachers and reject everyone and get into fights." It sounds as if he may well have had ADDHD and mood instability which lithium may help. He denies auditory or visual hallucinations but said he sometimes gets a ringing in his ears.

At this time Mr. Sneed gives an impression of being depressed to a moderate degree. He is able to communicate quite well for the most part, but his affect is flat and sad. Medication is probably helpful.

5. If the person were released without treatment, therapy, or training, would he or she pose a significant threat to the life or safety of himself/herself or others?

Yes. This is answered in the affirmative only because he has a violent history, a history of polysubstance abuse, and is facing charges on a violent crime. He does not give an impression of being a violent person. He was calm and quiet and cooperative. He answered questions fully and did not seem to conceal anything. He was not at all threatening in manner.

Summary of Psychiatric Examination

Justin B. Sneed is a 19 year old Caucasian male who was born on September 22, 1977. He stated that he was born in New Mexico and lived in both Texas and Oklahoma after that. He lived with his mother and stepfather because his parents divorced when he was four and she remarried. He has one stepbrother and one full brother. He has two sisters. He said he was the "baby" until recently when his mother had a baby.

He said he was kicked out of school in the 8th grade for fighting other students and teachers. He was described as "a trouble maker."

He was married when he was 17 years old to a girl he had been with from the age of 16. She became pregnant and they are still married but separated. He and his wife have two daughters who are with his mother.

Mr. Sneed said he used to "reject authority" and grew up as a boy who often got into trouble. He had "plenty of spankings" and was especially hateful toward his stepfather. He said he and his mother have always gotten along "just great" and his wife referred to him as a "momma's boy."

It may well be that Mr. Sneed has had an atypical mood swing disorder in his past characterized by "ups and downs" including anger outburst. His hyperactivity would be consistent with that picture. His present medication is probably helping him control his moods.

Mr. Sneed is able to assist an attorney and communicate satisfactorily regarding his legal situation. He is in touch with reality and positive in his attitude toward his lawyers. It is recommended that he be considered competent to stand trial.

Edith G. King, Ph.D.

Edith G. King, Ph.D.
Director, Forensic Psychology
Oklahoma License Number 134

xc: Fern L. Smith, Assistant District Attorney
George Miskovsky III, Assistant Public Defender

DEATH PENALTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

The State of Oklahoma,)

Plaintiff.)

D-04-877

vs. CF 97- 0244

~~F-98-548~~

Richard Glossip,)

Defendant.)

Proceedings had April the 22nd, ~~1997~~

Before Judge Charles Humble

A P P E A R A N C E S

FOR THE STATE: Ms. Fern Smith, Assistant District Attorney, Oklahoma County Courthouse, Oklahoma City, Oklahoma 73102.

FOR THE DEFENDANT: Mr. Wayne M. Fournerat, Attorney at Law, 2525 N.W. Expressway, Suite 330, Oklahoma City, Oklahoma 73112.

REPORTED BY: Ken Sharpe, Certified Shorthand Reporter

second interview?

A Well, there are some things that preceded this interview. Mainly, we had asked Mr. Glossip if he would take a polygraph examination during the first interview, which he readily agreed to. He said he'd do anything he could to help out. We were advised later that evening that Mr. Glossip was selling some of his items that he owned and was trying to get money and was packing his things, planning on leaving town. At that point my partner and I decided to call in a couple of investigators that were working in a special unit there in which to watch Mr. Glossip the following morning. They drove to the motel and set up out there approximately 8:00 a.m. and observed his movements and then advised us that he was heading downtown.

Mr. Glossip had been scheduled to take the polygraph at 1:30 and was asked to be at the police department by 12:30. When he drove past the police department, continuing downtown, he drove to an office building, I think it was 228 Robert S. Kerr, where he made contact with an attorney by the name of Mr. McKinsey. A short while later, approximately 1:00 p.m., I believe, my partner received a call from Mr. McKinsey, who advised us that, Mr. Glossip was in his office and that he'd advised him not to take the polygraph examination and that he was not going to take it.

At that time we had no more conversation with the attorney, and it was reported to us that Mr. Glossip and his girlfriend were leaving the building and getting in their vehicle. At that time we asked the officers, Mauck and Creeth, if they would stop him and ask him if he would come over to the police department to talk with us, which he agreed to do.

At that time he informed us that he was not going to -- he'd been advised by his attorney not to take this polygraph examination and that he wasn't going to take it at that time. We left him in the interview room momentarily while we discussed what our next course of action was going to be, and because of the fact that we were concerned that Mr. Glossip was getting ready to leave town, we decided that we had enough probable cause to place him in jail.

He had made several conflicting statements to officers and other individuals at the crime scene and to us that clearly indicated that he was a possible principal in this homicide. We drew up a probable cause affidavit and our lieutenant signed it and we were escorting him to the jail when he stopped us and wanted to talk.

At this point we told him there was nothing else to talk about, that he was going to be placed in jail, and he said, "You're putting me in jail because I won't take a polygraph?" And I told him, "No, we're putting you in jail

because we think you're involved in this homicide."

And at that point he says, "Wait a minute," he says, "I'll take this polygraph." And I said, "Well, we can't give that to you. The time has passed." I said, "You have an attorney over there." And he said, "Well, I didn't hire that attorney. I didn't pay that attorney any money. That attorney is not representing me. I wanted to take the polygraph all along, and that's what I want to do now if we can do it."

We reiterate to him, "Are you sure you want to do this?" Mr. Glossip advised that he did if we could still get it, so we then escorted him back over to the homicide office, at which time I called our polygraph operator and asked him if we could still give the examination to Mr. Glossip, and he said that he could still do it and to bring him over, which we did.

At that time Mr. Glossip was given a polygraph, and after about an hour or two, we were called back over there and advised by our polygraph examiner that Mr. Glossip had failed his polygraph examination.

Q Okay. Were there certain specific questions that he had failed on the examination?

A Yes, ma'am. If I may refer to my report. There's so many different things. We were advised by Warren Powers, who is the polygraph examiner, that three questions that

Mr. Glossip did not do well on was, number one, "Did you plan or conspire with Justin Taylor to cause the death of Barry Vantrees?" The number two question was, "Do you know for sure who caused the death of Barry Vantrees?" And number three, "Did you, yourself, cause the death of Barry Vantrees?" Mr. Powers advised Mr. Cook and myself that on questions one and two, that Glossip failed those badly. He said on question three, that he -- on the first chart that was run, he flunked it. On the second chart, he didn't do badly, but on the third chart, he failed it completely. These questions were not necessarily given in the order that I presented them to you, but they were part of the control questions that were asked.

Q As a result of that, did you then have a second interview with the defendant?

A Yes, we did.

Q Did you inform him at the time you were conducting the interviews that he had in fact failed the polygraph and the questions that he had failed?

A Yes, we did.

Q What did the defendant then tell you concerning the murder of Mr. Barry Vantrees?

A The defendant was extremely nervous, as he was in the first interview, and said that he was sorry that he had lied to us during the first interview. Basically he said, "I

Two truths and a lie: What records, interviews reveal about Richard Glossip's murder conviction

By CARY ASPINWALL | SEPTEMBER 13, 2015 | LAW + ORDER, LONGREADS, WATCHDOG

As Richard Glossip faces execution on Wednesday, what do court records and his own words reveal about his case? Plus, his accomplice, Justin Sneed, speaks exclusively to The Frontier.

This story was written as part of The Next To Die, a multi-newsroom collaboration tracking upcoming executions. To see scheduled executions nationwide, please visit https://www.themarshallproject.org/next-to-die

The Next to Die
WATCHING DEATH ROW

Richard Glossip is scheduled to be executed by the state of Oklahoma in 2 days 2 hours and 31 minutes.

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EXHIBIT
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It was Jan. 8, 1997, and Oklahoma City police had discovered motel owner Barry Van Treese's beaten, lifeless body inside room 102 at the Best Budget Inn.

They suspected his killer was the maintenance man, Justin Sneed, who suddenly disappeared from the motel. Police were trying to find Sneed and solve the homicide, so they were questioning the motel's manager, Richard Glossip.

Police had read Glossip his Miranda warning, but he was not exercising his right to remain silent. He was talking — a lot. And investigators suspected he wasn't telling the truth.

The Best Budget Inn on the night Barry Van Treese was murdered.

A detective hounded Glossip: "We know it's a murder, okay? We know Justin's involved in it. And I think you know more about this than what you're telling."

"Honestly don't," Glossip replied.

We're going to find Justin, the detective replied, so you better tell us now what you know.

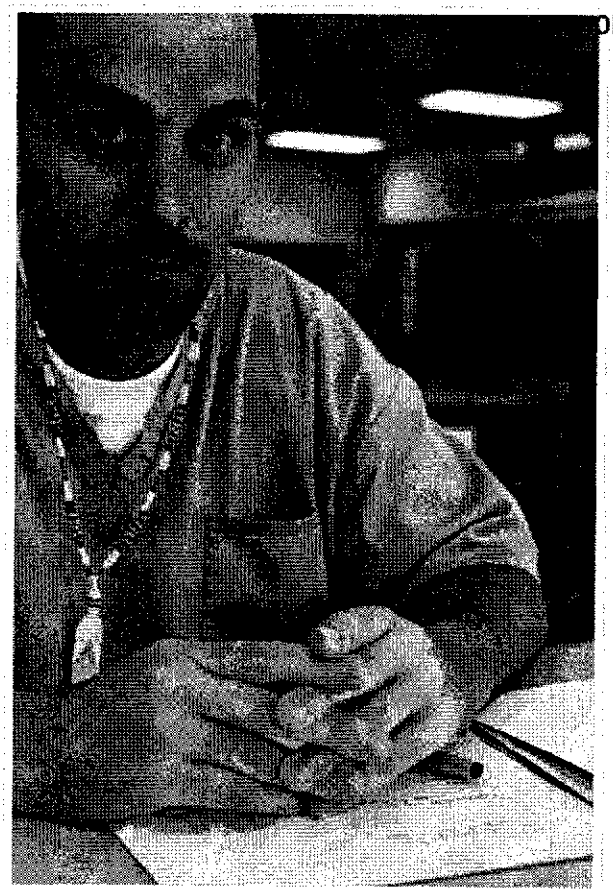
If he brings your name up in this thing, you're going down for first-degree murder, warned the cop.

Glossip replied he hoped police would find Sneed: "I didn't do none of this."

The detective responded: "I'm going to tell you right now, the first one that comes forward is the one that's going to be helping himself. ... If you didn't do the actual deed, buddy, then you don't have anything to worry about."

"I told you, and this is the God's honest truth, I had a hunch that Justin did it, and that's as far as it went. I do not know one hundred percent."

But that was a lie.



Justin Sneed agreed to recent interview at his prison to affirm he stands by what he said at trial: Richard Glossip gave him money to kill their boss in 1997. CARY ASPINWALL/The Frontier

The other guy's story

Justin Sneed has already taken one life, but he says he's not the one who can save Richard Glossip from the execution chamber on Wednesday.

"I stood on my truth," he told The Frontier in an exclusive interview. "I'm just trying to be an honest person."

Both men were convicted for the 1997 murder of Van Treese, but only one was sentenced to death.

Two separate juries convicted Glossip of paying Sneed, his young employee and friend, to kill their boss, splitting a few thousand dollars they found in Van Treese's car.

For decades, Glossip has fought a vigorous court battle against his conviction and argued he is innocent. His only mistake was helping cover up the crime, Glossip argues.

Since his arrest, Sneed has never denied his role in fatally beating Van Treese with a baseball bat. He received a life-without-parole sentence in exchange for testifying against Glossip.

While the public battle waged by Glossip's supporters has played out on the Dr. Phil show and in the National Enquirer, Sneed has remained mostly silent.

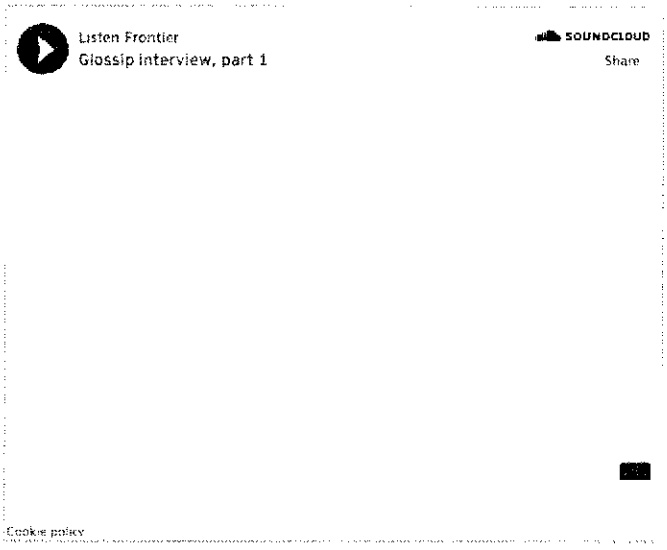
Until now.

Sneed, 37, agreed to an interview with The Frontier at Joseph Harp Correctional Center earlier this month, to address some of the claims that have been made about the case.

The Frontier also reviewed hundreds of pages of case files available at the Oklahoma Court of Criminal Appeals, in an attempt to answer public questions about Glossip's conviction as his execution date approaches.

Court testimony and police records document the reasons Glossip first became a suspect and was charged with first-degree murder in the killing, including the transcripts of his own 1997 interviews with police as they investigated the homicide.

"There has never, ever been any evidence against me," Glossip told The Frontier in a July phone interview from death row at Oklahoma State Penitentiary. "Because of a couple bad decisions I made that day, I'm here today."



'Light most favorable'

Justin Sneed is behind bars for the rest of his life; but plenty of people have been talking about him lately, guessing what they think he really wants to say or calling him an outright liar.

Glossip's legal team **issued a press release Friday:** "New counsel for Mr. Glossip have just uncovered additional evidence that Mr. Sneed lied to save his own life."

Monday morning, Glossip's attorneys have a press conference scheduled to discuss what they say is new evidence they've uncovered.

On Sept. 3, Glossip's supporters held a press conference where the anti-death penalty activist and nun **Sister Helen Prejean announced** more than 270,000 people had signed a petition supporting clemency for Glossip.

The day before, she also made a trip to the prison in Lexington to visit Sneed. But in front of the cameras the following day, Prejean didn't mention her conversation with Sneed. Nor have Glossip's attorneys mentioned in numerous press conferences what Sneed insists he has repeatedly told them: He told the truth at trial.

It was Glossip who paid him to kill Barry Van Treese, Sneed said, for a pool of money they would split. The amount changed depending on when Glossip was talking about it — at one point, it was $10,000, Sneed told investigators.

They were each caught with slightly less than $2,000.

When Glossip's final conviction was upheld by **a 2007 decision of the Oklahoma Court of Criminal Appeals,** the opinion stated: "The most compelling corroborative evidence, in a light most favorable to the State, is the discovery of the money in Glossip's possession.

There was no evidence that Sneed had independent knowledge of the money under the seat of the car. Glossip's actions after the murder also shed light on his guilt."

To understand what happened in 1997, Sneed said people need to know he was a 19-year-old who was abandoned by his older stepbrother at the motel Glossip managed.

No money, no job, no education. He had dropped out of school in the eighth grade. He worked with a roofing crew on occasion and did handyman repairs at the motel for room and board. He admits he was a drug user.

He grew up without his father, and always had an attachment to older male authority figures. His brother filled the role for a while, then Glossip.

"I can see now how cocky and manipulative he was," Sneed said.

When questioned by police in 1997, Glossip told investigators he bought Sneed's meals and cigarettes and considered him his best friend. They played Nintendo together.

Sneed is not a smooth talker like Glossip, and comes across much as investigators described him in reports on the case: meek, quiet.

Sneed said his initial reluctance to testify against his former friend has been misinterpreted. It's not because he's lying, he told The Frontier. He was reluctant because he knew the state was seeking the death penalty against Glossip and he didn't want to be a part of that.

Glossip's supporters want Sneed to change his story to help postpone the execution, Sneed said.

Sneed's family members have told The Frontier that a letter that Glossip's supporters have claimed was written by Sneed's daughter was authored on her behalf by a group of supporters taking advantage of his then-teenage daughter's lack of knowledge about the case.

The letter alleges that Sneed has regrets about his testimony, and wants to recant.

Sneed said he can't say for sure that his daughter was manipulated, but she was uninformed about the crime.

O'Ryan Sneed grew up without her father, and her family spared her the gruesome details about his role in Van Treese's death, he said.

"I do not want to mislead or misguide my daughter. Even if I have to sacrifice myself, she deserves to know the truth," Justin Sneed said.

For nearly a year after the letter surfaced, O'Ryan Sneed has not responded to media requests for interviews or to verify that letter's authenticity.

Justin Sneed said he's had people ask him why he won't just change his story and say that Glossip is innocent, to spare him his death sentence. He's taken responsibility for his role in the murder and doesn't want to cause the Van Treese family any more pain, he explained.

Sneed said he's also struggled with watching the case unfold publicly, amid the uncertainty of a Supreme Court challenge that Oklahoma's death row inmates ultimately lost **this past June.** Glossip was the lead plaintiff **in the case.**

But the Supreme Court's vote to uphold Oklahoma's use of lethal injection was 5-4. It could have gone the other way with a single vote; Sneed said he wonders if it's a sign of what's coming for the death penalty.

"I thought it would be morally wrong for the state to execute him and then two years later, they do away with the death penalty," he said.

But he told The Frontier he stands by what he said under oath at two trials.

"Everybody's made the choices they've made."

Glossip's own words

There are two transcripts of Glossip's interrogations by Oklahoma City police in the days after Van Treese's body was found, and one video, in rather poor condition.

At no time did Glossip exercise his right to remain silent, which in hindsight, may not have been the smartest choice.

Glossip told police that he and his girlfriend, D'Anna Wood, heard a tapping at the door early in the morning Jan. 7, 1997, and he

opened the door to find his friend Justin with a black eye: "It looked like somebody punched him."

Justin Sneed's black eye from the struggle with Barry Van Treese, from court exhibits.

Glossip told police that Sneed claimed he slipped and hit his head in the shower, on a soap dish. (Sneed later told police that was the story Glossip told him to tell about his black eye.)

This was Glossip's initial account to police of what happened: Sneed told him that a bunch of drunks got wild and out of hand and they broke the glass in room 102. He'd run the drunks off, and Glossip told him to put up some plexiglass.

And Sneed fixed it that morning, Glossip told police.

The transcripts show police growing more suspicious as Glossip continues over-explaining everything: "See this thing is, really, it got out of hand before I even got there."

After a while, Glossip starts to hint that Sneed may be involved. Then he starts to get defensive: "But I swear to you, I had nothing to do with this shit, I was at home in bed with my girlfriend, you can ask her."

At this point, according to the transcript, the detectives have not yet asked Glossip if he was involved. They can barely get in questions, he is so chatty.

The police don't know where Sneed is at this point, and are hoping Glossip can help them find him.

"Well he started hanging out with some pretty bad people that I started running out of the motel. My brother's one of them."

Glossip's brother, Bobby Glossip, had an extensive criminal record and his name has since been mentioned by Richard Glossip's attorneys as someone who might have played a [illegible] several years ago.

Detectives respond: "Well tell us a little about Justin now."
Glossip starts to offer: "Justin and his brother..."

The cops interrupt, wanting specific details about Justin.
Detectives: "How old of a person is he?"
Glossip: "He's nineteen or twenty, and that's another thing I kind of hesitated on. Because I, I just don't see him doing it, I mean, I do and I don't."

In fact, Glossip knows at this point that Sneed was the one who did it. But he doesn't admit that to police until a separate interrogation the following day.

Instead, he says Van Treese "told me when I got out of bed this morning to call the carpet guy." They were supposed to start working on remodeling that day, Glossip told police.

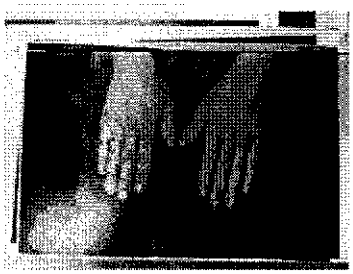
Investigators later alleged that Glossip only called the "carpet guy" to replace the flooring on which his boss bled to death.

Glossip also told police about how much in deposits Van Treese took from the motel that night: "I would say thirty six hundred to four thousand, something like that."

What the witnesses said
There is very little, if any, physical evidence linking Glossip to the crime.

But then again, isn't that the point of murder for hire? You pay someone else to get his hands dirty.

Included in the four boxes sitting in the basement of the Oklahoma Court of Criminal Appeals are photos that were presented as exhibits at the two trials. One is of Sneed's hands, nicked from the beating of Van Treese, fingernails dirty.



Justin Sneed's hands, photographed by Oklahoma City police.

Supporters of Glossip have said it was Sneed who first pointed the finger at his former boss and friend.

But police reports and transcripts of interviews show police very quickly became suspicious of Glossip's possible involvement. Their suspicion was based on his behavior at the crime scene and in the days that followed, in conjunction with what others at the scene observed about his behavior.

Police caught Glossip in several lies, and he didn't tell anyone that he knew exactly where Van Treese's body was while people were searching.

After Sneed told him Van Treese was dead, Glossip went back to sleep. Then he got up and bought his girlfriend, D'Anna Wood, a $100 engagement ring and himself some pricey eyeglasses. After his first interrogation by police, he began selling his possessions.

Police asked him where Sneed was hiding: "Where the hell do you think he went, man?"

Glossip responded: "He's here. He couldn't have went nowhere. He ain't got nowhere to go."

INVESTIGATIONS

Glossip has said lying to the police immediately after Van Treese was found slain was his biggest mistake. He hasn't explained why he lied to his co-workers.

Glossip not only lied to police when he said two drunks had stayed in room 102 and broken the window, he told the same lie to the motel's desk clerk, Billye Hooper, and Cliff Everhart, a friend of Van Treese's who worked security for him.

Despite some current claims that Sneed was the state's only witness, it was the testimony of Hooper and Everhart at trial that probably nailed Glossip. Hooper died in 2009, and Everhart died in 2005, records show.

At Glossip's second trial in 2004, Hooper testified she became suspicious of Glossip because his behavior on the day of Van Treese's killing was so different than usual.

The night before their boss was found slain, Glossip had asked Hooper to stop by the cable company on her way to work because the cable bill hadn't been paid.

"He wanted to get it turned on before Barry came back and found out that it had been disconnected," Hooper testified.

She paid with her personal money and Glossip reimbursed her with cash when she came to work the next morning. But she didn't see Van Treese's car when she arrived. So she asked Glossip where their boss was.

Glossip told her that Van Treese gotten up early to go get some breakfast and get some materials to work on the motel. Hooper said she thought that was odd: She'd never known Barry to be an early riser.

Something else raised her suspicion: Glossip told her not to have housekeeping clean room 102, because Barry "had rented the room to a couple of drunks and they had busted out a

She testified that she laughed at that claim and replied: "Well if he rented 102 to a couple of drunks, he must have rented it for a couple of hundred dollars as well because he would not have rented 102."

Room 102 was different: It was the nicest room at the motel, it had a waterbed and stereo. Van Treese usually stayed there.

Glossip seemed nervous, she testified.

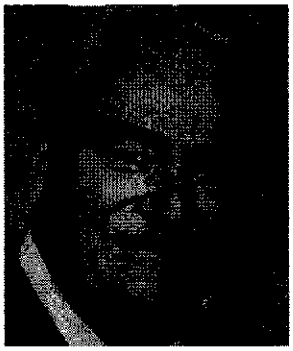
Hours later, Hooper was the one who paged Everhart to tell him Van Treese's car had been found, abandoned in the parking lot of a nearby credit union.

Everhart showed up to search the property for Van Treese, and Glossip told him two or three different stories about when he'd last seen the boss, Everhart testified at trial.

Everhart told the court Glossip had already tried to offer an explanation at the scene: "Maybe the people in the upstairs room were involved in something about why Barry is gone."

People in one of the rooms on the second floor had suddenly taken off and left their stuff behind, Glossip told him.

It was Everhart who found Van Treese's body in room 102, with the broken window. He spotted his friend's wristwatch, broken, laying near his dead body.



Barry Van Treese

Everhart told a police officer who'd arrived at the scene to go find Glossip, because he was too angry.

"Because at that point in time, I felt like if Richard Glossip had not done the crime, he had knowledge and was involved, and my temper was rather hot," Everhart testified.

Everhart and Hooper both also testified that Sneed was Glossip's puppet, and did whatever his friend asked.

The money man

"Why do I need Barry's money? I got my own damn money?" Glossip told the police who were interrogating him. He was found with $1,700 in his possession when cops arrested him.
A detective accuses him of "double talking" everything, and reminds him that when they find Sneed, it will be worse for Glossip if they find out from Sneed that his boss/friend was involved.
"If he puts you back in this, you got some serious problems," the detective warns.
"Then we'll go to court," Glossip responds.

Van Treese had hired Glossip in 1995 to manage the motel, along with his girlfriend, D'Anna Wood.

Wood was only 22 or 23 at the time, and used to tell the desk clerk Billye Hooper that "Rich" had promised her by the time she was 25, she would have an engagement ring, a Camaro, a boob job and a baby.

In fact, in the hours between when Sneed told Glossip he killed Van Treese and police found the body, Glossip bought Wood an engagement ring for about $100, according to trial records.

Everhart worked security for Van Treese in exchange for a small cut of the motel chain's profits. He had previously helped build an embezzlement case against another employee at the Weatherford motel Van Treese also owned.

Hooper had brought some suspicious behavior of Glossip's to the attention of Everhart and Van Treese, he testified.

"I felt that Mr. Glossip was probably pocketing a couple hundred a week extra," Everhart testified.

Everhart was supposed to meet Van Treese at the Best Budget Inn on Jan. 6, 1997, "to confront Rich and discuss the problems with him."

The confrontation never happened, Everhart testified.

In recent interviews, Glossip has tried to claim Hooper testified against him because she may have been the one taking money. It's not the first time he or his former girlfriend have tried to claim that.

Hooper was asked about these claims, and she testified under oath at trial that she never stole any money from the Best Budget Inn.

Had she needed money, she simply would have asked Van Treese, a generous man who "would have helped anyone."

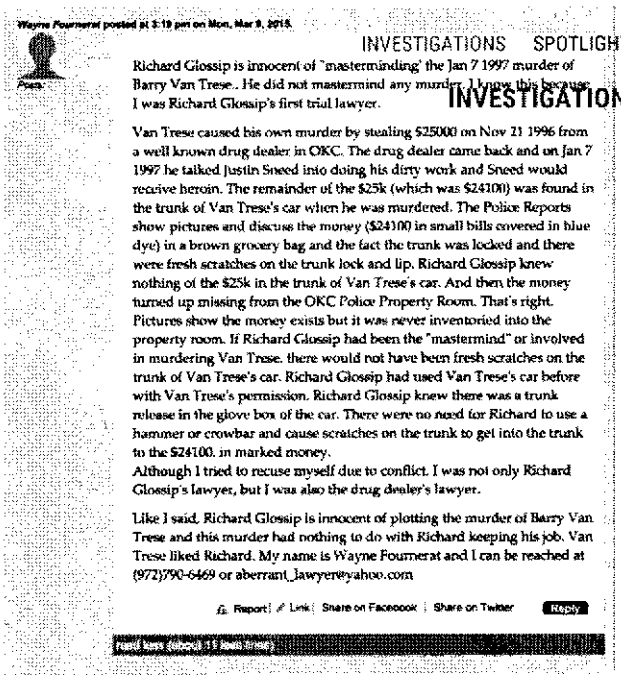
Alternate theories

Wayne Fournerat, Glossip's first trial attorney, has been trying to tell anyone who will listen: Glossip was not the mastermind of Van Treese's murder and does not belong on death row.

Fournerat said he is free from the bonds of attorney-client privilege, as he no longer has a law license and served prison time in Tennessee.

In comment sections and newspaper and TV stories and on websites devoted to freeing Glossip, he writes:

"Barry Van Treese actually had $23,000 hidden elsewhere in his car, but Glossip and Sneed found the smaller stash under the seat."



Wayne Fourmerat posted at 3:19 pm on Mon, Mar 9, 2015.

Richard Glossip is innocent of "masterminding" the Jan 7 1997 murder of Barry Van Trese.. He did not mastermind any murder. I know this because I was Richard Glossip's first trial lawyer.

Van Trese caused his own murder by stealing $25000 on Nov 21 1996 from a well known drug dealer in OKC. The drug dealer came back and on Jan 7 1997 he talked Justin Sneed into doing his dirty work and Sneed would receive heroin. The remainder of the $25k (which was $24100) was found in the trunk of Van Trese's car when he was murdered. The Police Reports show pictures and discuss the money ($24100 in small bills covered in blue dye) in a brown grocery bag and the fact the trunk was locked and there were fresh scratches on the trunk lock and lip. Richard Glossip knew nothing of the $25k in the trunk of Van Trese's car. And then the money turned up missing from the OKC Police Property Room. That's right. Pictures show the money exists but it was never inventoried into the property room. If Richard Glossip had been the "mastermind" or involved in murdering Van Trese, there would not have been fresh scratches on the trunk of Van Trese's car. Richard Glossip had used Van Trese's car before with Van Trese's permission. Richard Glossip knew there was a trunk release in the glove box of the car. There were no need for Richard to use a hammer or crowbar and cause scratches on the trunk to get into the trunk to the $24100. in marked money.

Although I tried to recuse myself due to conflict. I was not only Richard Glossip's lawyer, but I was also the drug dealer's lawyer.

Like I said, Richard Glossip is innocent of plotting the murder of Barry Van Trese and this murder had nothing to do with Richard keeping his job. Van Trese liked Richard. My name is Wayne Fourmerat and I can be reached at (972)790-6469 or aberrant_lawyer@yahoo.com

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INVESTIGATIONS SPOTLIGHT MEMBERS BLOGS ABOUT US CONTACT

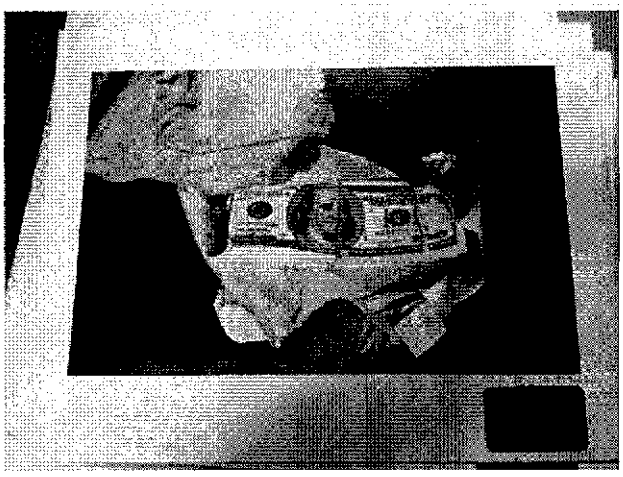
INVESTIGATIONS

BACK TO INVESTIGATIOI

Wayne Fourmerat hasn't been shy about posting his various theories on the Glossip case. This was posted on the Tulsa World website in March.

He alleges that Van Treese was killed because someone stole nearly $25,000 from a prominent heroin dealer, and somehow, it ended up in Van Treese's possession.

He told The Frontier he does not have documents or records to support this, but he says he has inside knowledge, as he was not only Glossip's first trial attorney, but he also represented the drug dealer who said the nearly $25,000 was stolen from him: Bobby Glossip, Richard's now-deceased brother.



Cash found at the scene of Barry Van Treese's murder in 1997.

Glossip's legal team released an affidavit Friday from a drug dealer who said he knew Bobby Glossip, aka "Critter," and recalled that he frequently sold drugs out of room 102 at the Best Budget Inn, to

Sneed and other clients. Sneed broke into cars and stole to support his drug habit, **the affidavit states.**

INVESTIGATIONS

Glossip's attorneys have yet to file any new motions, but there is **another press conference scheduled Monday.** Former University of Oklahoma football coach Barry Switzer and former U.S. Sen. Tom Coburn are **the latest to call on Gov. Mary Fallin** to stay Glossip's execution at least 60 days.

In Glossip's first interrogation, a detective tells Glossip he's still trying to piece everything together, but strongly advises him to share anything he knows.
"This ain't no simple burglary, this ain't no simple robbery, this is a murder, and when you kill somebody, that's as serious as it gets because the people involved in this are going to get the needle."
"I hope they do man, because I'm sorry, I'm not involved in this thing."

Arbitrary and capricious

Through 2011, Oklahoma had the top rate of executions per capita among U.S. states. But between 1967 and 1990, the state didn't execute anyone.

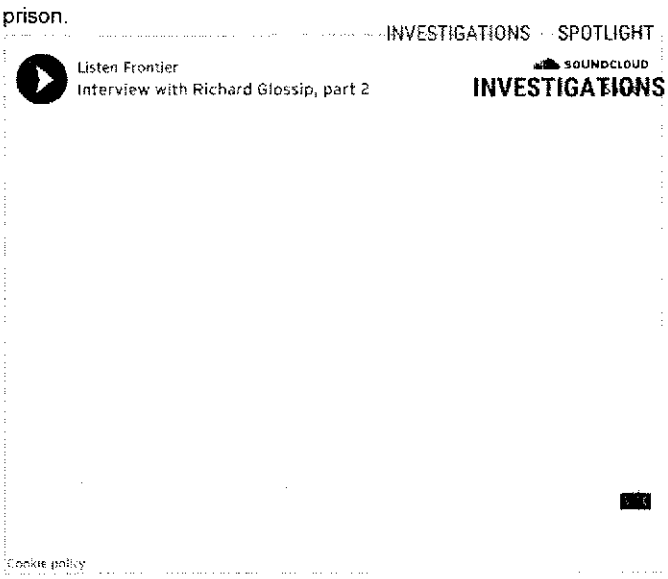
A series of legal challenges to the death penalty in the late 1960s began a voluntary federal moratorium on carrying out executions. And in 1972, **Furman v. Georgia** resulted in the landmark U.S. Supreme Court decision to overturn death penalty statutes in all states that had them, including Oklahoma.

The Court reached its decision because of the way states were using the death penalty: Juries were given unfettered discretion on whether to impose a life sentence or death.

Such discretion was unconstitutional because the way death sentences were handed out was "arbitrary and capricious" and violated the Eighth Amendment, the court ruled.

As a result of the Furman verdict, more than 600 inmates — 15 in Oklahoma — had their sentences converted from death to life in

prison.



When the death penalty was reinstated, each state developed a set of "aggravating circumstances," in an attempt to bring some uniformity and methodology to how death sentences were handed out.

Murder for hire is **an aggravating circumstance** for which prosecutors in Oklahoma can seek the death penalty. They do, and convicts have been executed for it.

The same year that Glossip and Sneed were charged with killing Van Treese, a Tulsa County jury convicted Timothy Shaun Stemple of brutally beating to death his wife of 11 years and running over her with a pickup, aided by a teenage accomplice.

Investigators said he planned his wife's killing to collect a nearly $1 million insurance policy. His accomplice was his mistress's younger cousin.

Though Stemple always denied his role in his wife's murder, Fallin declined to spare his life in 2012.

Stemple was executed while his teenage daughter, Lauren, sobbed on the front row of witnesses.

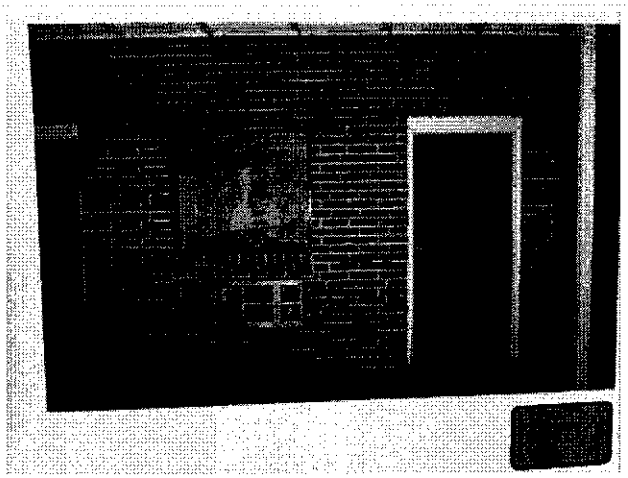
The second interrogation

When Oklahoma City police brought Glossip in for a second day of questioning in 1997, his story had suddenly changed.

He seemed instantly more contrite: "I know, I never should have lied."

Suddenly, his story changed: Early that morning on Jan. 7, when Sneed knocked on his door and woke him up, there was one thing Glossip had omitted in the previous version he told detectives: "He told me that he killed Barry."

Not only did he tell Sneed to buy plexiglass to cover the broken window, Glossip admitted he helped Sneed put up the plexiglass. It's a far different story than he told the day before.



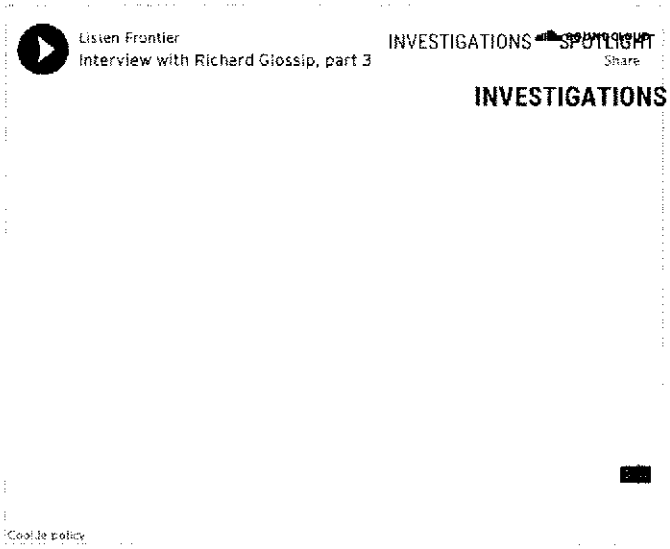
Room 102, with plexiglass covering the broken window.

And even though Glossip maintains he had nothing to do with the murder, he never called the police after Sneed told him about the killing. Glossip instead went back to sleep, got up hours later, bought new eyeglasses and an engagement ring for his girl and then they went to Walmart.

That's where Glossip and Wood were when they got the call that Van Treese's car had been found abandoned at the credit union nearby and things didn't look good.

Glossip continued lying to the police and everyone at the hotel. He pretended to search for Van Treese, looking in dumpsters with Everhart before the body was found.

Later, he admitted to police: "Yeah I was involved in it. I should have done something right then."



Glossip maintains he immediately started selling all his possessions because he knew he needed lawyer money, not because he was planning a getaway.

Just as his legal team is now doing, Glossip mentioned to the homicide investigators in 1997 the names of suspicious characters he thought they should look at, including his brother. He also tried to cast suspicion on Everhart, a former investigator for the Oklahoma Indigent Defense system.

In the police interrogation, he tried to discount the theory that Van Treese was about to fire him because of the books coming up short and the motel's rooms being in shoddy shape.

But Glossip later tells police: "Barry was upset because the motel wasn't doing as well as it could."

An employee at Van Treese's Tulsa motel testified that the boss had asked him to move to the Oklahoma City property, implying that Glossip was on the way out.

"Well I had no clue that he was doing it, so Barry must have been planning on firing me the next day," Glossip responded.

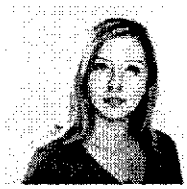
He seemed incredulous that police suspected he was involved in Van Treese's killing, or at least covering it up.

"Well how do I go about getting myself out the rest of it?" Glossip asks.
Detective: "I don't know, uh..."
Glossip: "Cause I, I, I never intended for Barry to ever get hurt."
Detective: "This isn't a question of Barry getting hurt."

"Well, no, I know."

"It's a question of Barry being murdered in the worst way."

The Frontier Editor in Chief Ziva Branstetter and Staff Writer Dylan Goforth contributed to this report.



Cary Aspinwall

CREATIVE DIRECTOR / STAFF WRITER

During more than 15 years as a newspaper reporter, Cary has written about everything from reality TV stars to inmates on death row. She's twice been named Great Plains Writer of the Year and was recently honored as a finalist for the Pulitzer Prize in local reporting. Contact: cary@readfrontier.com or 918-928-5835.

< Kaiser Foundation: Gathering Place project not 'out of control'

AFFIDAVIT OF CARL BEAR

STATE OF OKLAHOMA)
) ss.
COUNTY OF CLEVELAND)

I, Carl Bear, being of legal age and sound mind, do solemnly swear and state as follows:

1. I am the Warden for Joseph Harp Correctional Center located in Lexington, OK.

2. I am familiar with offender Justin Sneed #265681.

3. On September 14, 2015, I reviewed visitation records to determine if Mr. Sneed received visits during the month of August and September, 2015.

4. Records indicate that Mr. Sneed did not have any visits during the month of August 2015.

5. Records indicate that Mr. Sneed received the following visits in September 2015:

September 2, 2015 - Sister Helen Prejean

September 3, 2015 - Cary Aspinwall (Reporter for Frontier - Jenks, OK)

September 4, 2015 - John Coyle (Attorney at Law - Oklahoma City, OK)

FURTHER AFFIANT SAYETH NOT.

Carl Bear, Warden, Joseph Harp Correctional Center

Subscribed and sworn to before me this ___ day of September, 2015.

NOTARY PUBLIC

My commission number is: 09009197

My commission expires: 11/5/17

EXHIBIT
E