IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. PCD-2015-820**
	)	
THE STATE OF OKLAHOMA,	)	**Execution September 30, 2015**
	)	
Respondent.	)	

RESPONSE TO PETITIONER'S FIRST SUPPLEMENT TO SUCCESSIVE APPLICATION FOR POST-CONVICTION REVIEW, 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 First Supplement to Successive Application for Post-Conviction Review, Motion for Discovery, and Motion for Evidentiary Hearing, filed with this Court on September 21, 2015.

ARGUMENT AND AUTHORITY

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

In his first proposition of error, Petitioner claims newly discovered evidence supports his claim that he is innocent, such that his execution would violate the Eighth Amendment. He submits additional "new" evidence in support of this claim in his first supplement. However, Petitioner continues to present evidence that is not truly "new" because it could have been earlier discovered through the exercise of reasonable diligence and it does not show that no reasonable fact finder would have found him guilty.

Affidavit of Joseph Tapley

In his first supplement, Petitioner asserts that the September 2015 affidavit of Joseph Tapley, Justin Sneed's alleged former jail cell mate, is "new" evidence supporting his first proposition of error. To summarize, Mr. Tapley alleges that he was Mr. Sneed's cell mate from the summer of 1997 until October 1997 in the Oklahoma County Jail. Attachment N at ¶¶ 1-2. Mr. Tapley claims that Mr. Sneed "told [him] very detailed accounts of how [Sneed] killed Barry Van Treese on two or three separate occasions." *Id.* at ¶ 5. Mr. Tapley believes that Mr. Sneed "did it for the money because [Sneed] told [him] the money was in the car," although Mr. Tapley admits that he does not "remember the exact words [Sneed] said." *Id.* Mr. Tapley is "sure that Justin Sneed acted alone" because Mr. Sneed never mentioned that someone else was involved or said Petitioner's name. *Id.* at ¶¶ 10, 17.

Petitioner has not demonstrated that his first proposition, to the extent that it is based on Mr. Tapley's affidavit, meets the requirements of 22 O.S.2011, § 1089(D)(8)(b)(1) and (2). Mr. Tapley's affidavit does not entitle Petitioner to relief or an evidentiary hearing for largely the same reasons that Michael Scott's affidavit failed to warrant relief or an evidentiary hearing. *See* Respondent's Response to Successive Application at 23-28.

First, Petitioner has not set forth sufficient specific facts showing that this evidence – of Mr. Sneed sharing the details of his crime with his cell mate without mentioning Petitioner's name – 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). Indeed, given that Petitioner's first trial was held in June 1998, this information, allegedly shared with Mr. Tapley in 1997, was also discoverable with reasonable diligence prior to Petitioner's first trial, second trial, and direct appeals.

Petitioner stresses that Mr. Tapley did not contact his attorney until less than 24 hours before his scheduled execution. First Supplement at 3. However, even if Mr. Tapley came forward only after recent media attention on Petitioner's case, § 1089(D)(8)(b)(1) 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 the information provided by Mr. Tapley was earlier unascertainable. Petitioner argued in his initial application for post-conviction relief 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. And Petitioner's defense theory since trial has been that Mr. Sneed was a liar who killed Mr. Van Treese without any influence from Petitioner. *See Glossip v. State*, 2007 OK CR 12, ¶ 61, 157 P.3d 143, 154. Thus, a reasonable investigation before Petitioner's initial post-conviction would naturally have included interviewing those close to Sneed since his arrest (*i.e.*, his current and former cell mates) to marshal evidence that Sneed lied in implicating and testifying against Petitioner. In short, the

information now provided by Mr. Tapley was "ascertainable through the exercise of reasonable diligence" prior to Petitioner's initial post-conviction.

Second, the facts alleged in Mr. Tapley's affidavit, if proven and viewed in light of the evidence as a whole, are insufficient to establish by *clear and convincing* evidence that no reasonable fact finder would have found Petitioner guilty. *See* 22 O.S.2011, § 1089(D)(8)(b)(2).[1] **To begin with, even accepting as true the affidavit's claims, Mr. Sneed never actually told Mr. Tapley that he acted alone in killing Mr. Van Treese.** Thus, Petitioner's assertion that Mr. Tapley's affidavit shows that "Sneed confessed in 1997 to his jailhouse cellmate that he acted alone in killing Barry Van Treese," First Supplement at 3, is a gross misrepresentation of the affidavit's contents. It is apparent from the face of the affidavit that Mr. Tapley merely assumes that Mr. Sneed acted alone because Sneed did not mention an accomplice. Perhaps Mr. Sneed failed to mention Petitioner because he did not want to become known in the jail as a "snitch." In any event, it cannot be said that no reasonable jury would have found Petitioner

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[1] Viewing the evidence "as a whole" and viewing the evidence "in light most favorable to the State" are not mutually exclusive. *Cf. Miller v. State*, 2013 OK CR 11, ¶ 171, 313 P.3d 934, 986-87 (stating both that this Court is considering the evidence in the light most favorable to the State and that it is considering the evidence as a whole); *Perry v. State*, 1995 OK CR 20, ¶ 36, 893 P.2d 521, 530 (same). It makes no sense that the drafters of § 1089, in stating that this Court must consider new facts in light of the evidence as a whole, intended for this Court to view the evidence any less favorably to the State in post-conviction than it would on direct appeal. Rather, the most natural reading of § 1089(D)(8)(b)(2) is that the evidence is to be considered both as a whole and in the light most favorable to the State. The drafters could not have intended for every credibility determination and reasonable inference that is drawn from the evidence to be reexamined anew in an eleventh-hour post-conviction proceeding. This is precisely why a § 1089 petitioner must come forward with *clear and convincing* evidence of innocence.

guilty had the jury known the alleged fact that Mr. Sneed described his crime to his cell mate without mentioning Petitioner. In other words, Mr. Tapley's affidavit does not show that Petitioner is actually innocent.

Mr. Tapley's affidavit does not offer "clear and convincing" evidence of Petitioner's actual innocence for multiple other reasons. As Respondent argued with regard to Mr. Scott's affidavit, this Court has explained that eleventh-hour affidavits like Mr. Tapley's, made within days of a scheduled execution date, are "inherently suspect." *See Matthews v. State*, Case No. PCD-2010-1193, slip op., at 7 (Okla. Crim. App. Jan. 7, 2011)[2] (unpublished). According to Petitioner, Mr. Tapley came forward with his claims on the eve of Petitioner's execution scheduled for September 16, 2015, and he signed his affidavit on September 21, 2015, just days before Petitioner's re-scheduled execution on September 30, 2015. First Supplement at 3. Mr. Tapley's affidavit also lacks credibility because it was generated around 18 years after Mr. Tapley claims he heard Mr. Sneed make the alleged statements in 1997.

Not only does Mr. Tapley claim to describe conversations that allegedly occurred almost 20 years ago, but it appears that, if these conversations happened at all, they may have occurred while Mr. Tapley and Mr. Sneed were under the influence of drugs. Specifically, Mr. Tapley admits to using

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[2] 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.

methamphetamine with Mr. Sneed while incarcerated and states that Mr. Sneed was "tweaking" while in jail. Attachment N at ¶¶ 13-14. Although Mr. Tapley's affidavit attempts to paint the picture of a reformed and reliable man – stating that he owns a business, has children, and does not want his name in the press or involved with this case, Attachment N at ¶ 16 – Mr. Tapley's criminal history tells a different story. Mr. Tapley's record indicates that he is not a trustworthy witness who can offer "clear and convincing" evidence of Petitioner's innocence. Over the last two decades, Mr. Tapley has been convicted of: in 1997, **grand larceny**, **concealing stolen property**, rape, and burglary; in 1999, failure to comply with the Sex Offender Act, unauthorized use of a vehicle, attempting to elude a police officer, driving while under the influence, and **falsely impersonating another**; in 2003, assault and battery with a dangerous weapon; and, in 2015, driving while under the influence. *See State v. Tapley*, CF-1997-1606; CF-1997-3309; CF-1997-5322; CF-1998-3085; CF-1998-7937; CF-1999-3441; CF-2003-2670; CM-2014-497.[3]

Put simply, the "inherently suspect" affidavit of an individual who has been repeatedly convicted of crimes involving deceit, describing alleged conversations that occurred almost 20 years ago while Mr. Sneed and Mr. Tapley may have been under the influence of methamphetamine, does not even come close to being clear and convincing evidence of Petitioner's actual innocence. This is especially true

[3] Cases involving deceit are bolded.

given that Mr. Tapley does not even claim that Mr. Sneed actually said that Sneed acted alone.

In sum, to the extent that Petitioner relies on Mr. Tapley's affidavit in support of his first proposition, 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.

Affidavit of Michael Scott

In his motion to substitute, Petitioner submits a notarized version of Michael G. Scott's affidavit, in which Mr. Scott repeats his claim that he heard Mr. Sneed "brag[]" about "setting Richard Glossip up." Attachment F at ¶ 7. Although Mr. Scott's affidavit is now sworn and dated, its contents remain the same. Thus, as previously argued in Respondent's initial response, Mr. Scott's affidavit continues to not meet the requirements of 22 O.S.2011, § 1089(D)(8)(b)(1) and (2). *See* Respondent's Response to Successive Application at 24-28.

First, even if Mr. Scott did not come forward with his claims until recently, 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 initial post-conviction. *See* 22 O.S.2011, § 1089(D)(8)(b)(1). 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, Mr. Scott's affidavit offers little more than inadmissible hearsay, *see Matthews*, slip op., at 7-9, and none of the hearsay exceptions applies. Additionally, Mr. Scott's affidavit is "inherently suspect" because it was prepared within days of Petitioner's scheduled execution date, *see id.* at 7, and 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 fails to offer a convincing explanation for why he did not come forward with this information until after seeing a Dr. Phil segment on Petitioner's case.

In addition, Respondent has obtained evidence that further supports Respondent's position that Mr. Scott's affidavit is suspect. It has been reported that in a 2005 Oklahoma Department of Corrections document, Mr. Scott "answer[ed] 'yes all the time' to a question 'Have you lied about something or not told the truth?'" Graham Lee Brewer, *Credibility of Glossip case witness comes into question, records show*, The Oklahoman, Sept. 18, 2015, attached as Exhibit B hereto.[4] He also admitted to the past use of cocaine, marijuana, inhalants, amphetamines, and barbiturates. *Id.* In addition, Mr. Scott has March 2015 convictions of driving under the influence, possession of a controlled dangerous substance, unlawful possession of drug paraphernalia, and driving without a

[4] The document referenced in the article is available from the Department of Corrections should this Court order its release.

driver's license; and October 2005 convictions for three counts of **robbery with a firearm**. *See State v. Scott*, CM-2015-167; CF-2005-811. As this Court has explained, it does not remand for an evidentiary hearing in a capital post-conviction proceeding "on a whim." *Murphy v. State*, 2005 OK CR 25, ¶ 11, 124 P.3d 1198, 1201. Surely the affidavit of an admitted liar, drug abuser, and thief, containing inadmissible hearsay, prepared nearly a decade after the events alleged, does not rise to the level of the clear and convincing evidence of actual innocence that would warrant an evidentiary hearing.

For all of these reasons, Mr. Scott's affidavit does not meet the requirements of § 1089(D)(8)(b) and, even if it did meet the statutory requirements, is not credible on its face. Thus, Petitioner is not entitled to post-conviction relief or an evidentiary hearing.

Affidavit of Richard Barrett

In his successive application, in support of his first proposition of error, Petitioner presented the affidavit of Richard Barrett, in which Mr. Barrett describes his unlawful actions with Bobby Glossip (Petitioner's brother) and Mr. Sneed. In relevant part, Mr. Barrett claims that Mr. Sneed used to trade various items for methamphetamine from Bobby Glossip, including "a nickel-plated .38 caliber handgun." Successive Application at 19-20. In Petitioner's successive application, Petitioner's counsel asserted that Mr. Barrett's claim was corroborated by the fact that "Bobby Glossip . . . was arrested in 1996 for being

a felon in possession of a firearm, file # CF-96-7587, Oklahoma v. Robert Glossip." Successive Application at 20 n.5.

However, Respondent has obtained the police report detailing Bobby Glossip's arrest, which describes the seized handgun as "Pistol; Jennings; Model#Bryco 38/380 Auto; Black in Color; Serial 3590536." *See* Exhibit C attached hereto. Thus, the police report does not corroborate Mr. Barrett's statement, as alleged by Petitioner. E-mail records show that Petitioner's counsel received the police report, and was separately advised that the gun found on Bobby Glossip was black, prior to the filing of Petitioner's application for post-conviction relief. *See* Exhibits C, D attached hereto.

Conclusion

Petitioner has not provided this Court with any reliable facts supporting his first proposition 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). 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 an evidentiary hearing.[5]

II. PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE PROCEDURALLY BARRED FROM REVIEW. (IN RESPONSE TO PROPOSITIONS TWO AND FOUR)

In his application, Petitioner raises two claims of ineffective assistance. In his second proposition of error, Petitioner 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.

In his first supplement, Petitioner submits additional "new" evidence in support of his ineffective assistance claims: (1) Mr. Tapley's affidavit; and (2) expert reports criticizing Dr. Choi's trial testimony. As shown above with regard to Mr. Tapley's affidavit, 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

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[5] In Respondent's initial response, in addressing Petitioner's first proposition, Respondent submitted an affidavit from Warden Carl Bear showing Mr. Sneed's recent visitations. It has come to Respondent's attention that the date was inadvertently left off this affidavit. Respondent therefore had this affidavit dated, re-signed, and re-notarized, and files it with this supplemental response. *See* Exhibit E attached hereto.

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. Petitioner now incorporates Mr. Tapley's affidavit in support of this proposition. First Supplement at 5. As explained in Respondent's initial response, Petitioner claimed in his first application for post-conviction relief 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. This Court determined, however, that the claim was barred because it was "merely an attempt to expand on" Petitioner's claim raised on direct appeal that trial counsel was ineffective in failing to adequately cross-examine Mr. Sneed and object to testimony portraying Mr. Sneed as a follower. *Glossip v. State*, No. PCD-2004-978, slip op. at 6 (Okla. Crim. App. Dec. 6, 2007) (unpublished).

Petitioner's second proposition, even when supported by Mr. Tapley's affidavit, remains 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. In his first supplement, Petitioner now attempts to bolster this claim with the reports of Dr. Michael Baden and Dr. Shaku Teas. First Supplement at 6-7. To summarize, Dr. Baden contends that Mr. Van Treese did not bleed to death and that he was dead within minutes of the attack, and Dr. Teas believes that Mr. Van Treese could not have lived for hours after the attack. Attachments O, P.

As Respondent previously argued, 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. *See* 22 O.S.2011, § 1089(D)(8)(b)(1). With reasonable diligence, this alleged impeachment evidence could have been discovered prior to Petitioner's initial post-conviction. Even if Petitioner now contends that Dr. Choi's testimony was "false," the evidence he submits in support of this claim all could have been obtained with reasonable diligence. The reports of Drs. Baden and Teas

indicate that their analyses were based largely on the autopsy report and the trial testimony of Dr. Choi. Thus, to the extent that Petitioner argues that Drs. Baden's and Tea's reports show that Dr. Choi's testimony was false, Petitioner could have obtained these reports prior to his initial post-conviction.

Further, Petitioner cannot show, based on these opinions merely challenging Dr. Choi's testimony, that no reasonable fact finder would have found Petitioner guilty of murder or would have rendered the penalty of death. The issues of whether it took Mr. Van Treese hours to die or only minutes and whether blood loss contributed to his death do 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. Even if Petitioner's alleged new evidence showed that Dr. Choi's testimony were "false" on these issues, these issues simply were not dispositive as to a finding of Petitioner's guilt or of the aggravating circumstance in this case. The reports of Drs. Baden and Teas do not entitle Petitioner to any relief.

Conclusion

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

reasonable fact finder would have found him guilty. *See* 22 O.S.2011, § 1089(D)(8)(b). 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 an evidentiary hearing.

III. PETITIONER'S DOUBLE JEOPARDY ALLEGATION IS PROCEDURALLY BARRED.

In his third proposition, Petitioner argues that the evidence at his first trial was insufficient to support his conviction and therefore his retrial violated double jeopardy. In his first supplement, Petitioner offers no additional evidence in support of his third proposition. Therefore, Respondent does not further address Petitioner's third proposition herein.

Motion for Discovery

In his motion for discovery, Petitioner sought assistance in obtaining "actual polygraph charts," claiming his attorneys have determined that certain information discussed during Petitioner's clemency was "highly suspect," and referred this Court to a report from Charles R. Honts, Ph.D., allegedly attached to this successive application for post-conviction relief. Motion for Discovery at ¶ 4. As Respondent noted in its response, no such report was attached.

In his first supplement, Petitioner states that Dr. Honts's report was inadvertently omitted and he now files that report, dated July 9, 2015. Attachment Q. To summarize, Dr. Honts states that, in a July 7, 2015 phone call, Petitioner's counsel asked him "to opine concerning the probative value of disclosing a deceptive result of a polygraph without providing providing [sic] the foundational materials from the polygraph examination." Attachment Q at 1. Dr. Honts concludes that "a polygraph examination result presented without the supporting materials from said examination is of no value and should not be discussed or relied upon in any legal proceeding." *Id.* at 3.

Nothing in Dr. Honts's report shows that Petitioner is entitled to discovery. To begin with, this Court should not consider Dr. Honts's report because it is untimely filed. This Court's Rules 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. (2015). Petitioner does not state when he received Dr. Honts's report, but the report is dated July 9, 2015. Assuming that Petitioner received the report on this date, he did not file it with this Court until 74 days later. (Even the date Petitioner allegedly intended to file the report – September 15, 2015 – was 69 days later.) Thus, Petitioner is untimely in seeking relief based on Dr. Honts's report, and the report should not entitle him to discovery.

In addition, as Respondent previously argued, two other reasons demonstrate that Dr. Honts's report does not warrant discovery. First, "polygraph tests are not admissible for any purpose." *Matthews v. State*, 1998 OK CR 3, ¶ 18, 953 P.2d 336, 343. Second, 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 F attached hereto. Thus, this information has been available for years, and Petitioner cannot show reasonable diligence in attempting to obtain this information.

CONCLUSION

Based upon the foregoing, Petitioner's successive application for post-conviction relief, motion for discovery, and motion for evidentiary hearing should be denied.[6]

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[6] Should this Court find that Petitioner has presented facts that could not have been previously discovered through due diligence and that would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found Petitioner guilty or sentenced him to death, this matter must be remanded to Oklahoma County District Court for an evidentiary hearing. *See* 22 O.S.2011, § 1089(D).

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on this 24th day of September, 2015, a true and correct copy of the foregoing was mailed, with full first-class postage pre-paid, to:

Mark Henricksen
600 N. Walker, Suite 201
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.

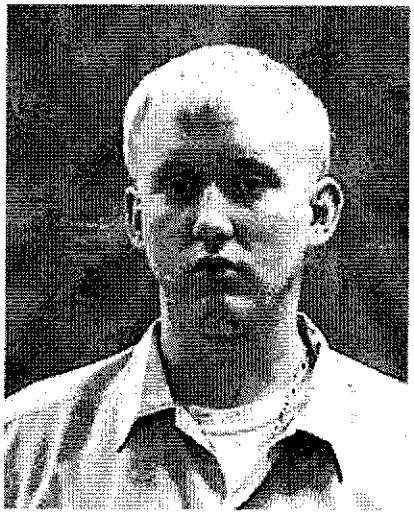
EXHIBIT
B

Credibility of Glossip case witness comes into question, records show

Michael G. Scott, a former inmate who said he served time with Justin Sneed, testified recently he heard Sneed brag about setting Glossip up as the fall guy for the 1997 murder of Barry Alan Van Treese.

by Graham Lee Brewer *Modified: September 18, 2015 at 10:20 pm • Published: September 18, 2015*

The new key witness being relied on by attorneys to stop the execution of Richard Glossip once told authorities he lied "all the time," records show.



Michael G. Scott

The former inmate's testimony was entered as new evidence by Richard Glossip's attorneys. Glossip's execution was postponed until Sept. 30. [Photo provided by Corrections Department]

Glossip's execution was postponed this week after Michael G. Scott, a former inmate who said he served time with Justin Sneed, testified recently he heard Sneed brag about setting Glossip up as the fall guy for the 1997 murder of Barry Alan Van Treese.

However, Scott's credibility has now come into question.

In a 2005 Oklahoma Department of Corrections document, Scott admitted he was an habitual liar — answering "yes all the time" to a question "Have you lied about something or not told the truth?"

In the document, Scott, then 18, admitted to using several illegal drugs, including cocaine, marijuana, inhalants, amphetamines and barbiturates. He also noted that he only completed nine years of school.

Glossip, 57, was convicted for hiring Sneed, 37, to kill their boss, Van Treese, at the Best Budget Inn in Oklahoma City. Sneed was convicted of beating Van Treese, 54, to death with a baseball bat.

He received a sentence of life without parole after agreeing to testify against Glossip.

Glossip, who received the death penalty, always has maintained his innocence.

The Oklahoma Court of Criminal Appeals postponed Glossip's execution by lethal injection for 14 days — until Sept. 30 — after defense attorneys claimed Scott's testimony is new evidence that could cast doubt on Glossip's guilt.

Scott stated that in 2006 he "heard Justin Sneed talk about the murder case that he was in prison for, and about Richard Glossip. I clearly heard Justin Sneed say that, in his statements and testimony, he set Richard Glossip up, and that Richard Glossip didn't do anything."

Scott served five years in state prison on armed robbery charges. He said when he saw Don Knight, one of Glossip's attorneys, speaking about the case on television, he felt compelled to tell someone.

Knight and Glossip's legal team presented Scott's affidavit as new evidence in the case, along with the interview of another man, former inmate Richard Allan Barrett, who testified that Sneed was addicted to methamphetamine. Barrett has prior federal drug convictions.

Over the past several days, Glossip's legal team has asserted that had the jury in Glossip's case seen Scott's affidavit and known that Sneed had a serious drug addiction they would have found his testimony against Glossip less credible.

Reached by phone Friday, Knight dismissed the new attempts to discredit Scott.

"This is 2015. You're bringing me documents from 2005," he said. "If (Scott) was a drug user and liar in 2005, which by the way, Justin Sneed was a drug user and a liar in 1997, and apparently what he has to say is good enough for the government.

"If they're going to say that liars and drug users are people that we can't trust ... that's exactly who they're expecting us to trust."

Knight said both Scott and Barrett, who are both free men, came to him with information, fully aware that their lives would come under scrutiny for their involvement. Knight said other inmates to whom he has spoken, who have similar information about Sneed, have declined to get involved in the case.

"If it wasn't for the courage of those two guys, I don't think we'd be having this conversation right now," Knight said. "I think they would have killed (Glossip) on Wednesday. So, I guess they must have something to say, and I guess those affidavits must be worth something."

- Knight still is working to find new evidence and is asking the court for a new trial in Glossip's murder for hire conviction.

  "I want a hearing," he said. "I want to put Michael Scott up on the witness stand, and I want whoever represents the state to have at it. Let's do it in court, that's where it needs to be."

Jennifer Miller

From: Prater, David <dprater@oklahomacounty.org>
Sent: Friday, September 18, 2015 10:45 AM
To: Jennifer Miller
Subject: FW: Robert Glossip's Arrest Report
Attachments: Robert Glossip Arrest Report CF 1996-7587.pdf

Jennifer,

Attached is the message header and report as forwarded to Ms. Lord.

David

From: Prater, David
Sent: Tuesday, September 15, 2015 3:16 PM
To: 'kathleen@klordlaw.com'
Subject: Robert Glossip's Arrest Report

OKLAHOMA CITY POLICE DEPARTMENT

CRIME REPORT

Reported Date: 11/21/96 Time: 23:14 Case: 96-120580 Page: 1
Code: 63-2.402 SS Crime: POSSESS CDS Class: 1B0103
Occurrence Date: 11/21/96- Day: THURSDAY - Time: 23:14-
Status: Closing Officer:
Location: 4800 NW. 10TH ST., OK RD: 37

INVOLVED VEHICLES

IMPOUNDED: License: VBR679 State: OK Type: A Expires: 97
Year: 88 Make: PONTIAC Model: FIREBIRD Style: 2DR Color: BLU
Identifiers:
Vin: 1G2FS21E5JL224010 Disposition: BROWNS #221483

SUSPECTS/ARRESTS

ARRESTED: GLOSSIP ROBERT DEAN DOB: 03/21/59 Race: W Sex: M
301 S. COUNCIL RD., OK
Apt: 102 State: OK Zip: 73127 Phone: 405 495-7413 Adu/Juv: A
POB: HILLSBRY, IL Hair: GRY Eye: BRO Hgt: 507 Wgt: 150 Bld: MED
Business Name: CLARK DIESEL SERVICE
2000 S. AGNEW Phone: 405 632-5188
OKC,OK

Driver License: 340587245 OK Social Security: 340587245
CII: FBI: Booking Number:

CRIME ANALYSIS ELEMENTS

Age: 37 Build: MED

NARRATIVE

HEFNER TELEPHONE REPORT:

FORENSIC #: 25037
PROPERTY ROOM:

NO.	CUST. CODE	TYPE CODE	CAT CODE	ARTICLE	BRAND/MAKE NAME/SERIAL	QTY/VALUE
1	E/C	X	F	PISTOL; JENNINGS; MODEL #BRYCO 38/380 AUTO; BLACK IN COLOR; SERIAL 3590536		1
2	E/C	X	Y	BLACK LEATHER HOLSTER		1
3	E/C	X	Y	LIVE ROUNDS OF .380 AMMUNITION		6
4	E/C	X	Y	CLIP FOR .380		1
5	E/C	C	N	ONE SYRINGE WITH A 1/4		

S t a n d a r d T r a i l e r - F i r s t P a g e

Reporting Officer: BROWN, TIMOTH Number: 000456 Date: 11/21/96 Time: 23:14
Typed by: CW0054 Number: CW0054 Date: 11/22/96 Time: 03:50
Approving Officer: Number: Date: Time:

INCH OF LIQUID THAT FIELD
TESTED AS METHAMPHETAMINE;
SEAL #25037

CHARGES ON AR:

POSSESSION OF CDS/METHAMPHETAMINE/AFCF
POSSESSION OF A LOADED FIREARM/AFCF
POSSESSION OF DRUG PARAPHERNALIA/AFCF

CITY CHARGE:

NO INSURANCE

BODY OF REPORT:

AT 2314 HOURS ON 112196, THIS OFFICER OBSERVED A BLUE PONTIAC FIREBIRD, WHICH WAS MISSING THE HOOD% DRIVING WESTBOUND ON NW. 10TH FROM MERIDIAN. I HAD RECEIVED INFORMATION ON AN EARLIER DATE THAT THE DRIVER DRIVING THIS VEHICLE HAD BEEN SEEN ON TWO OCCASIONS CARRYING A FIREARM AND HE WAS KEEPING IT IN THE WAIST AREA UNDER HIS JACKET. I ALSO DISCOVERED THROUGH INDEPENDENT INVESTIGATION THAT THE SUBJECT WAS A CONVICTED FELON. WITH THIS INFORMATION, I PULLED THE VEHICLE OVER IN THE 4800 BLOCK OF NW. 10TH ST.

UPON APPROACHING THE DRIVER, HE GAVE ME A VALID OKLAHOMA DRIVER'S LICENSE IN THE NAME OF ROBERT DEAN GLOSSIP. I ASKED HIM IF HE HAD INSURANCE ON THE VEHICLE AND HE STATED THAT HE COULD NOT FIND IT. I NOTICED THAT THE SUBJECT KEPT SHAKING IN HIS HANDS. I ASKED HIM TO STEP OUT FROM THE VEHICLE. AS HE STARTED TO GET OUT, I NOTICED AS HIS JACKET CAME OPEN THAT HE IN FACT HAD A HOLSTER ON HIS RIGHT HIP AND IT HAD A FIREARM IN IT. THE FIREARM WAS TAKEN FROM SUBJECT GLOSSIP, AT WHICH TIME, I PLACED HANDCUFFS ON HIM AND ESCORTED HIM BACK TO MY SCOUT CAR.

AR GLOSSIP STATED TO ME THAT THE REASON HE HAS THE GUN IS THAT HE HAS BEEN ROBBED IN THE PAST AND THAT HE IS NOT GOING TO LET IT HAPPEN AGAIN. I ADVISED HIM THAT I HAD INFORMATION THAT HE HAD BEEN IN THE PENITENTIARY ON FELONY CHARGES. HE STATED, "YES", THAT HE WAS OUT ON PAROLE ON A TEN YEAR SENTENCE. MR. GLOSSIP WAS ADVISED THAT HE WAS UNDER ARREST FOR THE FIREARMS CHARGES.

A DISTRICT WRECKER WAS CALLED FOR IMPOUNDMENT. AS AN INVENTORY WAS BEING MADE PRIOR TO IMPOUNDMENT, A BLACK BRIEFCASE WAS OBSERVED IN THE BACK SEAT AREA. I ASKED MR. GLOSSIP IF IT WAS HIS BRIEFCASE AND HE STATED, "NO." HE STATED THAT IT BELONGED TO A FRIEND OF HIS AND THAT HE DID NOT KNOW THE COMBINATION TO OPEN IT.

AT THAT POINT, I CALLED FOR A CANINE UNIT AND K-1 CAME TO MY LOCATION. K-1 RAN HIS DOG AROUND THE VEHICLE. THE BRIEFCASE WAS SITTING OUTSIDE OF

THE VEHICLE TOWARDS THE REAR. THE DOG DID NOT HIT ON THE BRIEFCASE AT ALL. HOWEVER, WHEN THE DOG WENT TO THE PASSENGER DOOR, HE STARTED TO JUMP UP IN THE SEAT WHERE THERE WAS A BLACK SHIRT ON THE PASSENGER FRONT SEAT. THE K-9 DOG STARTED TO GRAB THE SHIRT, AT WHICH TIME, HE WAS PULLED BACK. THE SYRINGE WAS THEN FOUND UNDERNEATH THE SHIRT, ON THE SEAT.

WITH THIS, I THEN CONTACTED LT. TALLEY, #0131, AND ADVISED HIM OF THE CIRCUMSTANCES OF THE ARREST. HE AUTHORIZED HOLD FOR STATE CHARGES ON AR GLOSSIP.

I TRANSPORTED AR GLOSSIP TO THE CITY JAIL, WHERE A FIELD TEST WAS MADE ON THE LIQUID ON THE SYRINGE. IT TESTED POSITIVE FOR METHAMPHETAMINE. I THEN PLACED THE SYRINGE AND LIQUID INTO THE OCPD DRUG LOCKER UNDER SEAL #25037.

THE FIREARM WAS RAN AND IT CAME BACK CLEAR. IT WAS PLACED INTO THE PROPERTY ROOM, ALONG WITH THE HOLSTER.

IN CHECKING WITH UNIT 800, I THEN FOUND OUT THAT ON 081090, THE AR HAD RECEIVED A FOUR YEAR SENTENCE FOR CONCEALING STOLEN PROPERTY. WITH THIS CONFIRMATION, AFTER FORMER CONVICTION WAS THEN PLACED ON AR GLOSSIP.

IT SHOULD BE NOTED THAT AFTER THE SYRINGE WAS FOUND IN AR GLOSSIP'S VEHICLE, HE BECAME VERY IRATE AND STARTED STATING THAT OFFICERS WERE SETTING HIM UP, THAT HE DOES NOT EVEN DO ANY TYPE OF NARCOTICS.

PRIOR TO BOOKING AR GLOSSIP INTO THE CITY JAIL, I CHECKED BOTH ARMS AND FOUND WHAT LOOKED TO BE TRACK MARKS. I THEN STATED TO AR GLOSSIP, "THEY LOOK LIKE TRACK MARKS TO ME." HE STATED, "YES", THAT HE HAS SHOT UP BEFORE, BUT NOT RECENTLY.

AR GLOSSIP WAS THEN BOOKED IN WITHOUT INCIDENT.

END OF REPORT.

Jennifer Miller

From: Prater, David <dprater@oklahomacounty.org>
Sent: Friday, September 18, 2015 10:51 AM
To: Jennifer Miller
Subject: FW: Additional information and request

Jennifer,

Attached is the email string between Ms. Lord and me regarding the color of the pistol seized from Robert Glossip. As you will note below; Ms. Lord was advised that the pistol was in fact black, not nickel. The report followed the next day. The nickel plated pistol is noted in their application at Page 20, footnote 5. They allege facts they know are not true.

David

From: Prater, David
Sent: Monday, September 14, 2015 3:23 PM
To: 'Kathleen@klordlaw.com'
Subject: RE: Additional information and request

Kathleen,

I'm sorry failed to advise you of the information in the police report. The pistol seized from the person of Robert Glossip in CF-1996-7587 was black.

David Prater

From: Prater, David
Sent: Monday, September 14, 2015 2:49 PM
To: 'Kathleen@klordlaw.com'
Subject: RE: Additional information and request

Kathleen,

The medical examiner office would have the autopsy information you have requested. You will need to request that from them. I have the CF 1996-7587 file. I am happy to provide it to you for your inspection when you come to visit.

David Prater

AFFIDAVIT OF CARL BEAR

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

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, Oklahoma.

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 months of August and September, 2015.

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

5. Records indicated 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, Oklahoma)
September 4, 2015 - John Coyle (Attorney at Law - Oklahoma City, Oklahoma)

FURTHER AFFIANT SAYETH NOT.

CARL BEAR, WARDEN
Joseph Harp Correctional Center

Subscribed and sworn to before me this 23rd day of September, 2015.

Notary Public

Commission expires: 8/30/17

Commission number: 01014768

RHONDA L. LANGLEY NOTARY #01014768 EXP. 08/30/17 PUBLIC STATE OF OKLAHOMA

EXHIBIT E

DEATH PENALTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

The State of Oklahoma,)

Plaintiff.)

D-04-877

vs. CF 97- 0244

~~F98-948~~

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