IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

RICHARD GLOSSIP, *Petitioner*, v. STATE OF OKLAHOMA, , *Respondent*..	)	Oklahoma County Case No. CF-97-256 Court of Criminal Appeals Direct Appeal Case No. D-2005-310 Post-conviction Case No. PCD-2004-978 Post-conviction Case No. PCD-2015-820 No. ______________________

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

DEATH PENALTY

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COURT OF CRIMINAL APPEALS FORM 13.11A

SUCCESSIVE APPLICATION FOR POST–CONVICTION RELIEF
- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, Richard E. Glossip, through undersigned counsel, submits this Successive Application for Post-Conviction relief under Section 1089 of Title 22. This is the third time an application for post-conviction relief has been filed in Mr. Glossip's case. Pursuant Rule 9.7A (3)(d), copies of the Original Application for Post-Conviction Relief and the prior Successive Application for Postconviction Relief are attached hereto as Attachments 1 and 2. The appendix of exhibits to the prior applications have not been attached, but are available should the Court find them necessary for its review of this subsequent application.

The sentence from which relief is sought: Death.

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

   (a) Oklahoma County District Court

   (b) Case Number: CF-1997-256

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

3. **Terms of sentence:** Death

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

5. **Is Petitioner currently in custody?** Yes

   Where? H-Unit, Oklahoma State Penitentiary, McAlester, Oklahoma

   Does Petitioner have criminal matters pending in other courts? No

   Does Petitioner have sentences (capital or non-capital) to be served in otherstates or jurisdictions? No

I. CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of deathwas imposed:** First Degree Murder, in violation of Okla. Stat. tit. 21, § 701.7(A).

Aggravating factors alleged:

1. 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;
2. The murder was especially heinous, atrocious, or cruel [dismissed by Court prior to trial];
3. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society [rejected by jury].

Aggravating factors found:

1. 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.

Mitigating factors listed in jury instructions:

1. The defendant did not have any significant history of prior criminal activity;
2. The defendant is 41 years of age;
3. The defendant's emotional and family history;
4. The defendant, since his arrest on January 9, 1997, has been incarcerated andhas not posed a threat to other inmates or detention staff;
5. The defendant is amenable to a prison setting and will pose little risk in such structured setting;
6. The defendant has family who love him and value his life;
7. Has limited education and did not graduate from high school. He has average intelligence or above. He has received his G.E.D.;
8. After leaving school, the defendant had continuous, gainful employmentfrom age 16 to his arrest on January 9, 1997;
9. The defendant could contribute to prison society and be an assistance to others;
10. Prior to his arrest, the defendant, had no history of aggression;
11. The defendant was not present when Barry Van Treese was killed; and
12. The defendant has no significant drug or alcohol abuse history.

Was Victim Impact Evidence introduced at trial? Yes

7. Check whether the finding of guilty was made:

After plea of guilty ( ) After plea of not guilty (X).

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ( )

9. Was the sentence determined by:

A jury (X), or ( ) the trial judge?

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).

Petitioner was not convicted of any offense other than the single capital offense.

11. n/a
12. n/a

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

Silas Lyman
1800 E. Memorial Rd.#106
Oklahoma City, OK 73131
(405) 323-2262

Names and addresses of all co-counsel in the trial court:

Wayne Woodyard
Oklahoma Indigent Defense System
610 South Hiawatha
Sapulpa, OK 74066
(405) 801-2727

14. Was lead counsel appointed by the court? Yes

15. Was the conviction appealed? Yes

To what court or courts? Oklahoma Court of Criminal Appeals

Date Brief In Chief filed: December 15, 2005

Date Response filed: April 14, 2006

Date Reply Brief filed: May 4, 2006

Date of Oral Argument: October 31, 2006

Date of Petition for Rehearing (if appeal has been decided): May 3, 2007

Has this case been remanded to the District Court for an evidentiary hearing ondirect appeal? No

If so, what were the grounds for remand? n/a

Is this petition filed subsequent to supplemental briefing after remand? No

16. Name and address of lawyers for appeal

Janet Chesley Kathleen Smith
Capital Direct Appeals
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070
(405) 801 2666

17. Was an opinion written by the appellate court? Yes, for D-2005-310
Yes, for D 1998-948[1]

If "yes," give citations if published:
Glossip v. State, 2007 OK CR 12, 157 P.3d 143 (2007)
Glossip v. State, 2001 OK CR 21, 29 P.3d 597 (2001)

18. Was further review sought? Yes

a. After this Court affirmed Mr. Glossip's death sentence in D-2005-310, he sought

[1] [1] This Court reversed Mr. Glossip's conviction and death sentence in his first appeal.

certiorari in the U.S. Supreme Court, which was denied on January 22, 2008 in Glossip v. Oklahoma, 552 U.S. 167 (2008).

b. An Original Application for Post-Conviction Relief was filed in this Court, Case No. PCD- 2004-978, on October 6, 2006. The court denied Mr. Glossip's original application in an unpublished opinion on December 6, 2007. The following grounds for relief were raised in the original application:

PROPOSITION I

PROSECUTORIAL MISCONDUCT DEPRIVED MR. GLOSSIP OF A FAIR TRIAL- AND RELIABLE SENTENCING PROCEEDING.

PROPOSITION II

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

PROPOSITION III

TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE THAT JUDICIAL BIAS SO INFECTED THE PROCEEDINGS THAT MR. GLOSSIP WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTIONS 6, 7, 9, AND20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION IV

MR. GLOSSIP WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT FAILEDTO KEEP THE JURY SEQUESTERED DURING DELIBERATIONS.

PROPOSITION V

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS

CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW.

c. On November 3, 2008, Mr. Glossip filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma. Glossip v. Trammell, Case No. 08-CV-00326-HE. The federal district court denied the petition on September 28, 2010. The following grounds for relief were raised in Mr. Glossip's habeas petition:

GROUND ONE

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND SENTENCE OF DEATH UNDER THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

GROUND TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE INTO THE RECORD IN VIOLATION OF MR. GLOSSIP'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND THREE

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO DISPLAY SELECTIVE PORTIONS OF CERTAIN WITNESSES' TESTIMONY THROUGHOUT THE TRIAL BECAUSE IT OVEREMPHASIZED THAT TESTIMONY, CONSTITUTED A CONTINUOUS CLOSING ARGUMENT, AND VIOLATED THE RULEOF SEQUESTRATION OF WITNESSES.

GROUND FOUR

MR. GLOSSIP WAS DEPRIVED OF A FAIR TRIAL AND A FAIR SENTENCING HEARING BY THE IMPROPER TACTICS, REMARKS, AND ARGUMENTS OF THE PROSECUTORS DURING BOTH STAGES OF TRIAL.

GROUND FIVE

MR. GLOSSIP WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITEDSTATES CONSTITUTION.

GROUND SIX

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE AGGRAVATING CIRCUMSTANCE OF MURDER FORREMUNERATION.

GROUND SEVEN

ERRORS IN JURY INSTRUCTIONS GIVEN IN THE SECOND STAGE OF TRIAL DENIED MR. GLOSSIP'S RIGHTS UNDER THE EIGHTH ANDFOURTEENTH AMENDMENTS TO DUE PROCESS AND A RELIABLE SENTENCING PROCEEDING.

GROUND EIGHT

THE TRIAL COURT ERRED IN ALLOWING IMPROPER VICTIM IMPACT TESTIMONY DURING THE SENTENCING STAGE, VIOLATING MR. GLOSSIP'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND NINE

THE TRIAL COURT'S VOIR DIRE PROCESS VIOLATED MR. GLOSSIP'S RIGHTS PROTECTED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE OKLAHOMA CONSTITUTION.

GROUND TEN

THE ADMISSION OF A PRE-MORTEM PHOTOGRAPH OF THE VICTIM INJECTED PASSION, PREJUDICE, AND OTHER ARBITRARYFACTORS INTO THE SECOND STAGE PROCEEDINGS.

GROUND ELEVEN

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

GROUND TWELVE

TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE THAT JUDICIALBIAS SO INFECTED THE PROCEEDINGS THAT MR. GLOSSIP WASDENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL IN VIOLATIONOF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THEUNITED STATES CONSTITUTION.

GROUND THIRTEEN

THE ACCUMULATION OF ERRORS SO INFECTED THE TRIAL AND SENTENCING PROCEEDINGS WITH UNFAIRNESS THAT MR.GLOSSIP WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUEPROCESS AND A RELIABLE SENTENCING PROCEEDING IN VIOLATION OF THE SIXTH,

EIGHTH AND FOURTEENTH AMENDMENTS.

The Tenth Circuit affirmed the denial of habeas relief in Case No. 10-6244 on July 25, 2013. See Glossip v. Trammell, 530 Fed.Appx. 708 (2013). A petition for rehearing was filed on September 9, 2013 and was denied on September 23, 2013. A petition for writ of certiorari was filed in the Supreme Court and was denied on May 5,2014. See Glossip v. Trammell, 134 S.Ct. 2142, 188 L.Ed.2d 1131 (2014).

d. A Subsequent Application for Post-Conviction Relief was filed in this Court, Case No. PCD-2015-820, on September 15, 2015. The court denied Mr. Glossip's subsequent application in an unpublished opinion on September 28, 2015. The following grounds for relief were raised in the subsequent application:

PROPOSITION ONE

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

PROPOSITION TWO

COUNSEL WERE INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT

PROPOSITION THREE

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

PROPOSITION FOUR

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

The Court of Criminal Appeals denied a petition for rehearing on September 29, 2015. Mr. Glossip filed a petition for a writ of certiorari in the U.S. Supreme Court the same day, and it was denied September 30, 2015.

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes

21. Have other motions been filed with this application or prior to the filing of thisapplication? Yes

If yes, specify what motions have been filed:

Renewed Objection to Setting Execution Date

22. List propositions raised (list all sub-propositions).

PROPOSITION ONE

Richard Glossip is factually innocent of the murder of Barry Van Treese.

PROPOSTION TWO

The State's bad faith destruction of vital evidence during the pendency of Mr. Glossip's first direct appeal violated his right to due process.

PROPOSITION THREE

Mr. Glossip's trial counsel were constitutionally ineffective for failing, on behalf of their innocent client facing the death penalty, to conduct any independent investigation of the crime, investigate Mr. Glossip's mental impairments and deficits, interview many of the State's witnesses, or investigate and pursue the State's destruction of evidence in violation of the Sixth, Eighth, and Fourteenth Amendments and Art. II, §§ 7, 9 and 20 of the Oklahoma Constitution.

PROPOSITION FOUR

The investigation, trial, and appeal in Mr. Glossip's case failed to meet the demands of the due process of law.

PROPOSITION FIVE

Mr. Glossip is intellectually disabled and ineligible for the death penalty under the Eighth and Fourteenth Amendments and Art. 2, § 9 of the Oklahoma Constitution.

PART C: FACTS

STATEMENT OF THE FACTS OF THE CASE, INCLUDING REFERENCE TO SUPPORTING DOCUMENTATION, RECORD, AND APPENDICES

On January 7, 1997 between 10:00 and 11:00 p.m., after a search to locate motel owner Barry Van Treese, his body was discovered beaten to death and stabbed in a guest room of the Best Budget Inn, his property in Oklahoma City next door to the Vegas Club (a strip club) and a Sinclair gas station. The motel was a notorious location for illicit drugs dealing, at the height of the use of "crank" (methamphetamine) in the region, and it was also a destination for the sex trade spilling over from the club next door.

After departing a similar motel he owned in Tulsa at around 12:15 am on January 7, Van Treese called back and instructed staff there that, if his wife Donna called, they were to tell her that he had left approximately 20 minutes later than he actually had and would not be home for five and a half hours because he needed to stop in Oklahoma City. Attachment 8. Turnpike records confirm he exited in Oklahoma City at 1:36 am. Recollections of Best Budget Inn residents in Oklahoma City indicate that the window in Room 102, where his body was ultimately found, was broken at around 4:15 am. Attachment 9; Attachment 10. Late in the evening on January 7, Van Treese's bludgeoned body, which also had knife wounds on both the front and back, was discovered with his pants off and his underwear pulled down. Attachment 11 at 3. The Oklahoma City Police Department (OCPD) questioned only a handful of the registered guests from the motel's 21 occupied rooms that night, but the guest in the next unit, Room 103, told them that in the early morning hours he heard an argument next door between a man and a woman, as well as a metallic sound and glass breaking. RT Vol. 4 at 158.

There has never been any dispute that Justin Sneed, an unpaid handyman and

methamphetamine addict staying at the motel, committed that murder; he pleaded guilty to it, admitted stealing thousands of dollars in cash from Van Treese, and was sentenced to life in prison in 1998. Tr. 6/18/98.

The motel's manager, Richard Glossip, the Applicant, was also convicted of this murder, but sentenced to death, on the State's theory, taken directly from Sneed's coached confession, made while himself facing the death penalty, that Mr. Glossip had orchestrated Sneed's crimes. According to the prosecution, Glossip convinced Sneed to carry out the murder, either in exchange for a portion of the money they could steal from Van Treese or by somehow entirely overpowering Sneed's will. Under this theory, Glossip's motive was to avoid being fired by Van Treese either over purportedly embezzling more than $6,000 in motel proceeds throughout 1996—despite Van Treese having tallied his books and paid Glossip a bonus in each of the first 11 months of 1996 due to the motel's monthly financial performance—or, alternatively, the motel building's poor condition. Sneed's statement was the State's only direct evidence of Glossip's participation in the murder.

In the early morning hours on January 8, the day after Van Treese's body was discovered wrapped in bedding on the floor of Room 102, OCPD detectives interviewed Mr. Glossip, the 33-year-old manager with limited education, who had stayed at and around the motel throughout the search. Police then made a cursory attempt to locate Sneed, who had fled the motel before the body was located. They checked the bus station and learned Sneed had *not* purchased a ticket out of town, but initiated no further steps to locate him. On January 9, OCPD Detective Bob Bemo interviewed Glossip a second time and arrested him. On January 14, with Glossip still in OCPD custody, a roofing contractor in Oklahoma City, who was then employing Sneed, called the police after seeing a news story about the murder. With the roofer's help, the police quickly

arrested Sneed. In the first 20 minutes of Sneed's interview, Bemo spoke Glossip's name eight times (six of which were before Sneed himself ever mentioned Glossip), coaxing Sneed to blame Glossip for the murder, which he then did.

Sneed did not tell police (and was not asked) anything about his girlfriend, a dancer at the Vegas club next to the motel who went by the stage name "Fancy." Attachment 12 at 4. Fancy was a very young white girl, perhaps under 18, petite and with dark hair and scars on her face. *Id.* at 4; Attachment 13 at 2. The Vegas club had a VIP room in the back, where big spenders could pay for various forms of personal attention from the dancers. *Id.* at 5. Many of the dancers—including Fancy—formed relationships with men they called their "sugar daddies" who would give them gifts and money. *Id.* Van Treese, who resided with his family in Lawton, periodically visited his Oklahoma City motel and, it has emerged, the Vegas Club. At least two witnesses have credibly reported that Van Treese was, in fact, Fancy's "sugar daddy," and that Fancy was known to call Van Treese "my big Barry" and he would let her stay at the motel without paying. *Id.*; Attachment 14 at 2.

While Sneed was jailed for this crime and awaited his plea deal, he confided in no fewer than four other inmates—witnesses who were never interviewed by police nor the prosecution and only recently located by Mr. Glossip's current counsel—all of whom report that Sneed's description of his crime had nothing to do with Richard Glossip. Attachment 15, Attachment 14, Attachment 16, Attachment 17 . Sneed even told one of them that his girlfriend (he couldn't remember her name but knew that Van Treese was her sugar daddy) had learned Van Treese would be carrying between $20-30,000 in cash on the day he was killed, and the two of them had planned together to rob him, and Sneed ended up killing him. Attachment 14. Another also recalled hearing it was a botched robbery and a woman was involved. Attachment 17. Another

had been asked by Sneed to lie to the police for him, and pretend he had overheard Glossip and Sneed discussing a planned murder of Van Treese at the motel prior to the crime. Attachment 16.

Mr. Glossip was tried—without the benefit of all this information—in 1998, but his attorney was so grossly ineffective this Court unanimously threw out the conviction. In October 1999, before the reversal of Glossip's first conviction and sentence, the Oklahoma County District Attorney's Office instructed the OCPD to *destroy* ten items of evidence. The OCPD unquestioningly proceeded to destroy crucial evidence, including physical evidence from Room 102 and the motel's business records retrieved from the trunk of Mr. Van Treese's car, which would have been crucial for determining whether the State's theory that Glossip had embezzled proceeds had any basis in fact. Attachment 18. The motel's finances could not be reconstructed or investigated using traditional methods such as bank statements or tax returns due to the highly suspect practices Van Treese, who was a former banker, used in circumnavigating his tax-levied bank account(s) due to six-figure federal tax debt (discussed *infra*).

After this intentional destruction of evidence emerged pre-trial in January 2003, the State in 2004, rather than recognizing the resulting impossibility of a reliable retrial, once again tried, convicted, and sentenced Glossip to death. Glossip thereafter exhausted appeals in state and federal courts and has come within a day of being executed three times.

In 2020, after reviewing case records, a Republican-led bipartisan committee of Oklahoma legislators called on the Attorney General and Governor Stitt to re-investigate the matter. When they did not respond to those requests, the legislators engaged a large law firm, Reed Smith, LLP, to conduct a comprehensive independent investigation of the case on a pro bono basis, beginning early in 2022. On June 7, 2022, Reed Smith submitted a report to the legislators, who made it public on June 15, 2022. The report, which was based on a review of

more than 12,000 documents, 36 witness interviews, 7 juror interviews, two expert consultations, and a lengthy interview with Mr. Glossip himself, among other steps, concluded that "the 2004 trial cannot be relied on to support a murder-for-hire conviction. Nor can it provide a basis for the government to take the life of Richard E. Glossip."

The report contains a significant amount of new information that was not previously known and has never been presented to a court. It identifies a wide range of failings throughout the process, including the State's intentional destruction of important evidence, unreliable interrogation tactics, shoddy collection and retention of evidence, failure to take important investigatory steps, and crucial evidence never presented to the jury that counters the State's theories and casts great doubt on the reliability of its witnesses. The report concluded that the State presented a complicated and implausible murder-for-hire theory, but there was an obvious explanation for the events that the jury was never offered: Justin Sneed, a 19-year-old methamphetamine addict, had planned to rob Van Treese but ended up killing him in the process, and had implicated Glossip as suggested by police to lessen the consequences.

I. THE BEST BUDGET INN

The Best Budget Inn was located just off the interstate in Oklahoma City, nestled between the Vegas Club (a strip club), a Sinclair gas station, a credit union, and a McDonald's. Lawton resident Barry Van Treese owned this BBI and another in Tulsa. Van Treese did not visit his motels daily. Rather, he employed a live-in manager who was responsible for day-to-day operations at each business. RT Vol. 4 at 32. The manager at the Oklahoma City motel, Mr. Glossip, was instructed to hold all the motel's proceeds, as Van Treese did not use a bank account for the BBI. Rather, receipts were recorded daily on a pre-printed form (a "daily report"), which logged the rooms rented, the money taken in, and any expenses. RT Vol. 4 at

129-30. The manager was to bundle this daily report with the cash, checks, and credit receipts from that day's business and keep them safe until Van Treese came to review and collect them. *Id.* The manager would also regularly report the day's numbers by phone to Van Treese's wife, Donna, who kept the books. RT Vol. 5 at 49. The Van Treeses paid their managers a weekly salary, and each month the managers could also receive a bonus based on the motel's performance, which the Van Treeses calculated by giving a fixed percentage of any amount brought in over a minimum threshold. RT Vol. 4 at 51. The Oklahoma City motel's only other official employee was a daytime desk clerk. RT Vol. 4 at 43. Other services, like housekeeping and maintenance, were often performed on a barter basis by people who would be given a free room at the motel in exchange for their services. RT Vol. 5 at 69-70.

These Best Budget Inns in Tulsa and in Oklahoma City were well known sites of a lively drug trade, and dancers from the Vegas Club routinely used rooms in the Oklahoma City motel to engage in sex work. Attachment 13 ¶¶ 1-3, 8-9; Attachment 19 ¶¶ 5, 10; Attachment 20 ¶¶ 3-4, 6; Attachment 21 ¶¶ 10, 26; Attachment 12 ¶¶ 2, 16, 25; *see also* Attachment 3[2] at 156 ("Former Oklahoma City Police Officer Michael O'Leary stated that the Oklahoma City Best Budget Inn was a constant source of calls for drugs, prostitution, robberies, and auto burglaries, recalling arresting a former high school classmate of his with a chunk of meth.").

The Reed Smith investigation learned, through records from foreclosure proceedings and an interview with Van Treese's accountant, that Van Treese had "significant state and federal tax liabilities," leading to his bank account being levied by the IRS and as a result he kept significant sums of cash in his vehicle, rather than in the levied account. Attachment 3 at 17, 160-65. He

[2] Although each attachment contains bates-type page numbers, for the Reed Smith report, the page numbers cited herein refer to the page numbers used in the report itself.

even admitted he sought to make "payroll with Circle K money orders" to avoid putting money in banks. *Id.* at 162. The investigation also learned that Van Treese faced significant mortgage debt on multiple properties, including several motels and rental properties and his home. *Id.* at 164. Perhaps unsurprisingly given this financial situation, the investigation determined Van Treese was unwilling to spend money on necessary repairs at his motels. *Id.* at 159-60. This explains why Van Treese's motels in both cities were widely known for being dirty and in disrepair, and cauldrons of illicit activity. RT Vol. 12 at 23; RT Vol. 5 at 73; Attachment 3 at 158-60.

II. RICHARD GLOSSIP

In 1995, Van Treese hired Richard Glossip, a man from western Illinois in his thirties, to manage the motel with his live-in girlfriend, D-Anna Wood. RT Vol. 4 at 182-83; RT Vol. 5 at 60. Mr. Glossip had no criminal record aside from traffic tickets and two disorderly conduct citations he received, and paid a fine for, when he was 18 years old, and was known as a mild-mannered, diligent manager who periodically made largely futile efforts to rid the motel of its criminal element. Attachment 19 ¶ 7; Attachment 13 ¶ 5; Attachment 20 ¶ 10; Attachment 12 ¶¶ 7-11. Mr. Glossip's brother, Bobby—one of Richard's 15 siblings—was a popular drug dealer who frequented the BBI to ply his trade. However, there has never been any suggestion Richard participated in that trade or other illegal activities. Attachment 20 ¶ 10; Attachment 13 ¶¶ 3-5.

Although Mr. Glossip reliably completed the simple tasks of managing the motel, he had only limited education (records reflect no further enrollment after he was asked to repeat 8th grade), and an unadjusted full-scale IQ of 78—in the borderline deficient range of cognitive functioning. Attachment 45 at 2. In fact, that IQ testing likely reflects an actual IQ of 74, after adjustment for the age of the test used, which, taking into account the test's standard error of

measurement, means his true IQ is between 69 and 79, which is firmly in the intellectually disabled range. Attachment 23 ¶ 11. Moreover, Mr. Glossip's IQ score on the verbal portion of the test was significantly higher (85), while his non-verbal intelligence fell at 74, again, unadjusted. Attachment 22, ¶ 31. Mr. Glossip's score on a related memory test was similarly in the severely impaired range, as was his score on a test of executive functioning. Attachment 23, ¶ 10.

But Mr. Glossip's impairments are not limited to his IQ. Testing conducted in 2011 revealed that his problem-solving ability was severely impaired, in the 2nd percentile meaning 98% of the cohort functioned better than his level. Attachment 45 at 3. Since childhood, he also has had "difficulty taking in or encoding meaningful information and the multi-step process of decoding/deciphering and then forming new memories is taxing if not overwhelming for him." *Id.* Further evaluation by Dr. George Woods after Mr. Glossip was nearly executed for the third time in 2015 confirmed "low processing speed, poor working memory, impaired visual memory, and cognitive impairment." Attachment 22, ¶ 32. Mr. Glossip struggled in particular to "integrat[e] multiple elements to produce a coherent, functional whole," failing, for instance, the simple task of drawing a clock face, *id.* ¶ 33, and demonstrated a marked absence of mental flexibility and abstract thinking, responding when asked why people in glass houses should not throw stones, "Because it will break the glass." *Id.* ¶ 34.

Dr. Woods explained that many of the deficits he observed stemmed from right parietal lobe impairment, which is "common in people who have suffered trauma," and causes Mr. Glossip, in complex or stressful situations, to be incapacitated and "unable to understand the circumstances." *Id.* ¶ 35. Dr. Woods also observed "difficulty in executive functioning, which is critical for planning and problem-solving, as well as challenges picking up social cues and

understanding context." *Id.* Consistent with these observed deficits, Dr. Woods determined that Mr. Glossip suffered significant trauma growing up in a chaotic home as the seventh of sixteen children, where he experienced violence and neglect. *Id.* at ¶¶ 15-20. On top of his measurable cognitive impairments, this history led to a "longstanding tendency to avoid confrontation," *id.* ¶ 38, in which, for instance, Mr. Glossip would go "fishing . . . to avoid confronting his problems." *Id.* ¶ 23.

Mr. Glossip has been able to successfully hide these impairments throughout his life. Dr. Woods explains this is common in individuals with significant impairments:

> Common strategies include simply pretending to understand when they do not, speaking with false confidence, and relying heavily on others, both directly and indirectly. This phenomenon is known as the "cloak of competence." It commonly masks impairments with reasonable effectiveness in day-to-day interactions, leaving laypeople and those having only casual interactions unaware of the individual's underlying deficits.

Id. ¶ 37.

A review of Mr. Glossip's social history reveals heavy use of these strategies. He has been in two formal and one common-law marriage, each with a woman who made decisions for him, *id.* ¶¶ 21, 26-28, and has worked in jobs that, while nominally managerial, required primarily the performance of rote tasks with the steps clearly spelled out. *Id.* ¶¶ 25, 29. He has also drawn on "his relative strengths in the verbal realm to convey a false sense of capability and, at times, confidence." *Id.* ¶ 37. Still, he has exhibited problems with recognizing the import of his situation, not fully understanding, for instance, that his first wife, whom he married while still a minor and who was seven years his senior, had exploited him, *id.* ¶ 24, or that it is unusual, and even suspicious and dangerous, to run a motel by keeping large amounts of cash on the premises. *Id.* ¶ 29.

In sum, Dr. Woods concluded:

> Mr. Glossip's specific cognitive and intellectual deficits, coupled with his traumatic childhood in which he plainly received very little in the way of guidance and support, have left him with a lifelong difficulty in processing circumstances; assessing and understanding his situation; and determining for himself what is in his best interests. His inability to respond appropriately to external stimuli, along with his longstanding tendency to avoid confrontation, left him ill-equipped to react to serious dangers and especially vulnerable to manipulation by others.
>
> The combination of Mr. Glossip's trauma history; a lack of emotional awareness or skills; and his cognitive impairments, which leave him unable to think clearly, assess his situation, and make any kind of reasonable plan, have rendered Mr. Glossip unable to respond appropriately or reasonably to unfamiliar situations that are stressful and urgent. In such situations, he is vulnerable to the wills of others. If provided direction, he would be uncommonly prone to follow it without appreciation of the consequences it may produce for him.

Id. ¶¶ 38-39. He is "vulnerable to manipulation and being taken advantage of," and has a tendency to "seek to please" more powerful people. Attachment 23, ¶ 14.

Even with these difficulties, Mr. Glossip generally met the motel's financial targets and thus received bonuses from the Van Treeses on a regular basis. RT Vol. 4 at 119.

III. <u>JUSTIN SNEED</u>

In the summer of 1996, a handful of rooms at the motel were rented by a crew of roofers from Texas who had come to town to do seasonal repair work. RT Vol. 12 at 44; Attachment 21 ¶ 9. That crew included two stepbrothers, Wes and Justin Taylor. RT Vol. 12 at 41-42. Both had warrants out for their arrest in Texas, and Justin, actually, was not a Taylor at all; his real surname was Sneed. RT Vol. 12 at 42. After a few weeks working on the roofing crew and living at the motel, the brothers arranged instead to stay for free at the motel as handy men, helping with laundry and doing work that was significantly easier than construction labor and left them free to hang around the motel, with its drug trade and connection to the Vegas club. RT Vol. 12

at 46-47. Shortly after this change, Wes's father came looking for him and took him home to Texas to face his pending charges; Justin Sneed stayed on. RT Vol. 12 at 42, 46.

Sneed, it was well known around the motel, was a heavy drug user. In particular, he used methamphetamine, smoking, snorting, and even injecting it. Jamie Spann, a friend and co-worker who had known him for years remembered:

> Justin Sneed used to party and do drugs every night. He popped pills, smoked weed, drank alcohol. . . and used meth. Back in those days, the meth was very strong. It would keep you up for days. Sneed would shoot meth, eat meth or snort meth. He was always high. . . . I have seen Justin Sneed shoot meth with a needle. I saw him mix it using the bottom of a beer or soda can. He would turn the can over and use the depressed part of the bottom of the can. He would use a needle to put '40 units' (the measurement on the needle) of water and squirt it onto the meth (powder) that he put on the bottom of the can. Then he would mix this and draw it back up into the syring[e]. There would then be about '70 units' in the syring[e]. . . He would then inject himself. . . Sometimes if he was in a hurry he would just wrap the meth in toilet paper and just eat the toilet paper and wash it down with Dr. Pepper. He also had a small mirror with him that he would use to snort meth off of, either through a straw or with a dollar bill. Sneed would also take a Tylenol capsule apart, dump out the Tylenol & refill it with meth. And then take the pill. The meth tested terrible. . . Justin Sneed always had a bag of dope on him. . . . When I first met Sneed, he got his meth from a cook in Ranger, Texas, which is near Cisco. He would bring this dope with him to Oklahoma. . . . Sneed was a meth addict. . . . Justin Sneed was a dope fiend in those days. He would do anything for dope. . . . Justin Sneed was so strung out on meth that he would do anything to get more drugs.

Attachment 21. Albert Mize, a regular at the motel, said of Sneed, "He was a full blown addict, and used methamphetamine intravenously on a daily basis." Attachment 13 ¶ 6. Mize personally sold drugs to Sneed. *Id.* ¶¶ 8, 12. A third witness, Richard Barrett, explained,

> Each time I went to the Best Budget Inn, the guy I knew as the maintenance man would come to Room 102 within 30 minutes of me arriving to buy drugs from Bobby Glossip [Rich's brother], who was buying drugs from me," and "[b]ased on [his] own experience, [he] believe[s] Justin Sneed was addicted to methamphetamine in a bad way. . . [he] often saw Justin Sneed 'tweaking' This means a twitching of his mouth and a chewing of his lips. This is a sure sign that someone is high on methamphetamine.

Attachment 20 ¶¶ 6-7.

Tricia Eckhart, a former maid at the motel, explains that Sneed, whom she knew as Justin Taylor, "was a horrible drug addict." Attachment 19 ¶ 10. And Stephanie Garcia, a dancer from the Vegas Club who knew Sneed, and Sneed's girlfriend, another dancer known as "Fancy," well from spending significant time with him at the motel, explained he "changed very quickly when he started using drugs heavily. He became very scary . . . Sneed was into needles. I personally witnessed him inject himself with meth and heroin. There were times I saw him squirt blood on the bathroom wall if he could not find a vein, or if blood clotted in the needles he was using." Attachment 12 ¶¶ 15. Garcia "personally used drugs with Sneed more than 20 times," which he bought "from a dealer at the Best Budget Inn who sold what we called 'bathtub' or 'peanut butter' or 'dirty' meth," and when "Sneed used drugs, he also became violent and paranoid." *Id.* ¶ 18. He was a "'back-to-back' drug user" who "was always looking for drugs or money for drugs." *Id.* ¶ 20.

Unsurprisingly, Sneed was also known to steal to support his habit. Spann, who had known him since high school, recalled that even then, "Sneed used to break into houses to steal things. He'd steal anything that wasn't bolted down." Attachment 21 ¶ 6. He "went to other motels to steal from other roofers," and "would steal from toolboxes and from the trucks." He stole tools, a BBQ grill, and jewelry. *Id.* ¶¶ 22-23. Because he was an addict, "[i]f he stole money, he would never split it with anyone." *Id.* ¶ 20. Barrett explained Sneed "broke into cars at the motel parking lot and stole items from the cars," and brought items to trade for drugs, including "food stamps . . . radar detectors, car stereos, a Samsonite silver hard-covered briefcase and, on one occasion, a nickel-plated .38 caliber handgun," which he said he had taken "from occupied rooms at the motel and cars in the parking lots of the motel and other businesses near the motel." Attachment 20 ¶¶ 5, 7. Garcia, the dancer, "had personal knowledge of Sneed's plans to steal

money. On one occasion, [she] personally witnessed him pick up a brick and announce that he was going to get ‘the money and the drugs.’ Later that evening, he came back with drugs and had blood on his shirt, and he looked messed-up.” Attachment 12 ¶ 23. Sometimes, he even used “girls who worked at the club to lure men into the rooms so he could set the men up and rob them.” *Id.* ¶ 25.

Initially, Glossip was friendly with Sneed. But as Sneed spent more time there and got more into drug use, they drifted apart. [Attachment 6 at 0005]. Garcia even remembered that “in the months and weeks before the homicide,” Sneed “would often hide from Rich because he was getting high and he did not want Rich to know that.” Attachment 12 ¶ 41.

On one occasion, Sneed asked Glossip to help him stage a robbery at the motel, where Sneed would take the money and Glossip would report it was stolen by a stranger who did not fit Sneed’s description. Glossip refused. RT Vol. 9 at 22, 233.[3] Attachment 4 at 23-24; Attachment 5 at 36-37; Attachment 6 at 19; Attachment 24 at 1.

A 1997 psychological evaluation of Justin Sneed revealed additional information about his background, including that he “admits to using a variety of drugs including marijuana, crank, cocaine, and acid,” that he self-reported “he used to get angry quite often . . . yell at teachers and reject everyone and get into fights.” Attachment 25 at 3. He reported being “kicked out of school in the 8th grade for fighting other students and teachers,” used to “reject authority,” and “often got into trouble.” *Id.* He had previously been in legal trouble for burglary and for making a bomb threat. *Id.* at 2. The evaluator found he would pose a significant threat if released not only because of the present charges but “because he has a violent history” and “a history of

[3] Sneed testified that his brother Wes had approached Glossip with that idea, and Glossip had approached Sneed. RT Vol. 12 at 73. For reasons discussed *infra,* his testimony was not credible.

polysubstance abuse." *Id.* at 4.

IV. THE MURDER

On the evening of Monday, January 6, 1997, Van Treese stopped by the motel, as he often did, to pick up the proceeds that had accumulated since his last visit, which was over a week earlier (on his way to a vacation at the very end of 1996), and to issue paychecks to Glossip and the daytime desk clerk, Billye Hooper. RT Vol. 5 at 74-78; RT Vol. 7 at 53-54. He left the motel shortly before eight o'clock that night, bound for his Tulsa property. RT Vol. 5 at 77. He was expected back the next day for work on refurbishing some of the motel rooms, *id.* at 78; RT Vol. 4 at 71, 191; RT Vol. 11 at 234, but the next morning, he was not there, and that afternoon, his car was found unlocked and parked with a front wheel on the curb in the credit union parking lot next door. RT Vol. 8 at 168.

A search was conducted, primarily by motel employees and Clifford Everhart, an associate of Van Treese's who occasionally worked informally as security at the motel,[4] lasting from mid-afternoon until late evening. A window had been broken in one of the rooms, Room 102, during the night, which several people around the motel had observed, and had been temporarily repaired from the outside by Sneed and Glossip with plexiglass, but no one looked inside that room until Everhart and OCPD patrol officer Tim Brown entered it between ten and eleven p.m. to find Van Treese, savagely beaten to death. RT Vol. 9 at 221-25. Justin Sneed was quickly identified as the likely killer, but he had fled the scene upon arrival of police in the mid-afternoon. Mr. Glossip voluntarily spoke to police that night and was arrested two days later;

[4] Everhart's status and role were never clear. He represented to various parties that he was a part owner of the motel, but that appeared to be untrue. Attachment 3 at 18 n.55; 100 n.391; 122 n.450. The Reed Smith investigation uncovered an extensive history of problematic and dishonest behavior, including resigning in disgrace as the chief of police in Binger, Oklahoma. Attachment 3 at 166-74.

Sneed was arrested five days after that.

V. THE SLOPPY AND TRUNCATED POLICE INVESTIGATION

The police investigation of the murder—as documented in their reports—lasted just ten days, and, despite a range of unanswered questions, quickly ceased upon the arrest of Justin Sneed.

A. Investigation and Interviews

Police collected evidence from Room 102, but failed to search the entire motel property or surrounding area, and during the entire investigation interviewed just 14 people, some of whom they asked almost nothing:

- **Tuesday, January 7th, 1997** – Detectives Bob Bemo and Bill Cook arrived at the motel between 10 and 11 pm, and Bemo interviewed two motel guests (John Prittie and Daniel Patrick Webb) and two motel residents (Kayla Pursley and John Beavers, aka "Big John"), one of whom (Pursley) was also the night clerk at the neighboring Sinclair gas station. Sneed was not at the scene to be interviewed, having fled the motel prior to their arrival.
- **Wednesday, January 8th, 1997** – Bemo and Cook brought Richard Glossip and his girlfriend D-Anna Wood to the police station for interviews in the early morning hours. Bemo also interviewed two witnesses by telephone: Matt Steadman, the off-duty sheriff's deputy working security for the credit union across the street who set off the search upon finding Van Treese's car on the afternoon of January 7th, and William Bender, whose wife was the manager at the victim's other motel in Tulsa who had seen Van Treese that night, after he left the Oklahoma City motel. Another officer interviewed a bus station attendant (Lynn Manning) about whether "Justin Taylor" had bought a ticket the day before; he had not. Officer Bill Weaver interviewed the motel's maid, Jackie Williams.

- **Thursday, January 9th, 1997** -- Bemo and Cook conducted a second interview with Glossip, and placed him under arrest. Cook also interviewed the motel's desk clerk, Billye Hooper.
- **January 10th-13th 1997** – No documented interviews conducted.
- **Tuesday, January 14th, 1997** – Bemo received a phone call from the owner of the roofing company Sneed had previously worked for, Robert Brassfield, after he saw Sneed on the news; Sneed had returned to work for him after fleeing the motel, and was staying in a nearby apartment. There is no documentation of any attempt to locate Sneed between the January 8 bus station interview and this phone call. An officer then coordinated with Brassfield and his son-in-law, David Jackson, about Sneed's location, and Sneed was arrested. Bemo and Cook then interviewed Justin Sneed (described in detail below).
- **Wednesday, January 15th 1997** -- No documented interviews conducted.
- **Thursday, January 16th, 1997** – Bemo and Cook interviewed D-Anna Wood a second time, primarily in an attempt to trace the source of the approximately $1,700 Glossip had with him when he was arrested.

Crucially, with the exception of William Bender (discussed in more detail *infra*), none of these interviews yielded any information about possible embezzlement from the motel, any concerns the Van Treeses may have had about its condition, any indication that Mr. Glossip's job might be in peril, anything about the relationship between, or any agreement between, Sneed and Glossip, or any information about Sneed being meek or vulnerable.

Aside from these interviews with just 14 witnesses, police analyzed latent prints collected from Room 102. Several matched Sneed; one was unidentified, although Sneed, Glossip, and the victim were all excluded. RT Vol. 10 at 212. They also did limited processing of Van Treese's

car, from which they extracted certain items the investigator thought would be useful, and where they located $23,100 in cash (some of which was stained with blue dye), then swiftly returned both the car and the money, without inventorying either, to the Van Treese family. Tr. 6/5/98 at 81-86; discussed in Attachment 3 at 92-93.

The only other investigative step documented is the collection of a surveillance video from the neighboring Sinclair station that was never watched and is now missing.[5] (Attachment 26 ; Tr. 5/29/98 at 12).

Though a handful of reports from the latent print analyst continued to trickle in through January and February, police effectively stopped investigating after arresting and interrogating Sneed. They did so even though Mr. Glossip had continued to steadfastly deny participation in the murder, and even though Sneed's statement was the only evidence they had connecting Mr. Glossip to the killing itself. They had discovered no physical evidence connecting him to the murder. The only witness who said anything about Mr. Glossip being involved in the murder was Sneed, whose interview is described below.

B. Police Interviews of Glossip

Much of the suspicion that developed around Richard Glossip arose from his own statements to police, which he made without counsel under the naïve belief that if he was innocent, he was not in any danger. Police appeared to develop suspicion of Mr. Glossip initially based on perceived inconsistency in statements given during the search for Van Treese about when Mr. Glossip had last seen him—around 8 pm the night before, as he was leaving for Tulsa,

[5] The loss of this tape, which could have contained crucial information about who was where when in the timeframe of the murder, is discussed in the Reed Smith report at pp. 81-84.

or around 7 the next morning (when in fact Van Treese was already dead), when Mr. Glossip initially reported he had seen Van Treese walking across the parking lot, and later said he saw a person he *thought* was Van Treese, but was not sure. RT Vol. 9 at 209, 215-216 (testimony of Officer Tim Brown). That suspicion was magnified when Mr. Glossip told Officer Brown, upon discovery of the body, that he believed Justin Sneed was the killer, as Sneed had come to his door in the early morning hours with a black eye, talking about a broken window in Room 102. *Id.* at 233.

Although Mr. Glossip quickly realized that he should have gone straight to authorities when he developed a strong suspicion of what had happened to Van Treese, and repeatedly expressed that understanding, over the course of two recorded interrogations and additional unrecorded conversation, detectives, using unethical and discredited interrogation techniques, led him to falsely confess to having known about and helped to conceal Van Treese's murder—the crime of accessory after the fact, for which they arrested him, and with which he was swiftly charged. Mr. Glossip's limited intelligence, inability to problem-solve, and difficulties with processing salient information undoubtedly left him highly vulnerable to this sort of manipulation.

Detectives Bemo and Cook first interviewed Mr. Glossip in the early morning hours of Wednesday, January 8, 1997, at the police station after they had finished their work at the motel crime scene.[6] The interview lasted nearly two hours. Mr. Glossip denied involvement with the murder, but did say that he had strongly suspected Justin Sneed had something to do with it, and realized he should have told authorities that much sooner. He described being awakened by

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[6] A complete transcript of this interview is attached as Attachment 4.

Sneed in the early morning hours, being told two drunks had broken a window in Room 102, and instructing Sneed to clean up the glass, and in the morning to repair the window. He also related that Sneed had a black eye at the time, which Sneed claimed had occurred when he slipped in the shower, and that Sneed had previously approached him about staging a robbery of the motel.

The detectives then conducted a brief interview with D-Anna Wood, who explained, "see Rich suspected that Justin had something to do with it. But I said no, don't jump the gun, because we shouldn't be saying stuff if we don't really know." Attachment 6 at 16-17. She spontaneously repeated this later in the interview. *Id.* at 20.

During the day on Wednesday, Mr. Glossip sold some of his belongings, both because, given what had happened, he and Wood did not want to stay on at the motel, and because an acquaintance had advised him to talk to a lawyer, and needed money to pay for one. Attachment 27; Attachment 54. The next morning, Thursday, he did call a lawyer, David McKenzie, who told Mr. Glossip to come to his office. Mr. Glossip brought the money he had, but when he got there, the lawyer did not take his money, because it would not be enough to pay for representation. Attachment 28. Mr. Glossip did not formally hire McKenzie, but McKenzie did call the detectives on Mr. Glossip's behalf to tell them he would not be taking a polygraph examination, and gave Mr. Glossip a card to show police if they tried to talk to him, saying under no circumstances were they to speak to or interrogate him without counsel present. Tr. 6/8/98 at 19.

As they were leaving McKenzie's office, Mr. Glossip and Ms. Wood were accosted by OCPD officers who brought them to the station to talk to the detectives, despite McKenzie having just told detectives by phone that Mr. Glossip would not be taking the polygraph. Tr.

6/8/98 at 17.[7] Mr. Glossip initially did as McKenzie had instructed and told the detectives he would not take the polygraph. Upon this refusal, the detectives told Mr. Glossip they were going to place him under arrest. Tr. 6/8/98 at 23. As they walked him to a holding cell, Detective Bemo told Mr. Glossip he could go home if he passed the polygraph, *id.* at 24. Hearing that, against the advice he had just sought out from the lawyer, Mr. Glossip agreed to the test. They told him if he was in fact innocent, he should not need an attorney. *Id.* at 23. Detectives summoned a polygrapher, although the State has never produced any report or record of an examination administered to Mr. Glossip; the only evidence of that exam is Detective Bemo's testimony that he'd been told Glossip "flunked" the alleged polygraph, with no detail of what had been asked, or what the responses or actual results had been. O.R. 806; Tr. 4/23/97 at 92. Despite numerous requests from attorneys for Mr. Glossip throughout the life of the case, no polygraph materials have ever been produced. Following this alleged polygraph, the detectives interrogated Mr. Glossip a second time, this time for about 40 minutes.[8] That recorded interview is riddled with indications that significant unrecorded conversations had occurred in the interim.[9]

After Detective Bemo assured him that "this is your chance to help yourself. I know that—it's bad. It's not as bad as it was," and "now you can help yourself even more. You've got

[7] This encounter was the subject of an unsuccessful motion to suppress Glossip's second statement to police. O.R. 726-737.

[8] A complete transcript of this interview is attached as Attachment 5

[9] Examples in the transcript of the second interview include, "Bemo: Just before we were going down to the jail, you told us that you did not employ this attorney; right?" (p. 1); "Bemo: We've read your rights to ya . . . already . . . twice" (p. 1) (they were only read once in the first recorded interview); "Glossip: Also, I want to say something to you: He did not mention at any time that I had to have any money for him. And he did not mention at any time that I was going to be fired. . . . Bemo: Well, why would this other person say something?" (p. 32) (this is clearly a denial of the contents of William Bender's statement, made to Bemo in between the two interviews of Mr. Glossip but not discussed in any recorded interview; the discussion continues over the next several pages); "Glossip: Why would he tell his brother that I'm a good guy and a hell of a manager and go up there and tell them he's going to fire me?" (p. 35) (there has been no recorded discussion of conversation with Mr. Van Treese's brother); "Bemo: You were going home when our officers stopped you, weren't you? . . . You told us you were going home. Glossip: When did I tell you that? Bemo: When we were [cut off] (p. 40).

to fill in the gaps," and "if you're willing to help yourself, then we'll do everything we can to help you. But you've got to do—you've got to tell us about this thing, and you've got to tell us everything" Attachment 5 at 2-3, Mr. Glossip repeated the same account he had given in his prior interview, with one important addition: when Sneed had come to his door in the middle of the night, in addition to telling Mr. Glossip about the window, he said "I killed Barry." Attachment 5 at 10-11, 13. Mr. Glossip explained that Sneed was mumbling and he couldn't really understand him, but he did not believe Sneed had actually done it, in part because he looked out the window and did not see Van Treese's car parked where it was always parked when he was on the property. *Id.* at 10, 14. He also added that when Sneed fixed the window on Tuesday morning, Mr. Glossip had helped to hold the plexiglass. *Id.* at 18. When heavily prompted, he agreed that at that point, while he wasn't sure and did not see anything, he understood what was likely inside the room. *Id.* at 19. His account was otherwise identical to his previous one. The detective, in framing the question as "you knew" was clearly angling for a criminal charge of accessory after the fact.

Consistent with what D-Anna had told police the day before, Mr. Glossip emphasized that he had discussed it with her and he wanted to tell someone his suspicions about Sneed, but she told him not to say anything, because they did not know for sure. Mr. Glossip agreed he should have done something sooner, but he was scared, and it had not occurred to him that Sneed would take off. *Id.* at 29-30. He then told Detective Bemo what he clearly wanted to hear: "I didn't have nothing to do with Barry's death. Justin did it. I mean, I guess I did. I covered it up." *Id.* at 36. Bemo indicated his approval and sought to placate Mr. Glossip, telling him, "Well, I believe that you don't have—you didn't have anything to do with the actual murder," *id.* at 36, and "at least you're not looking at a first-degree murder charge." *Id.* at 52.

Despite the seriousness of the allegations, Mr. Glossip remained preoccupied with his relationship, telling Bemo, "I don't think you realize how much I love that girl out there. I love her to death . . . but she's scared and I don't know what she's going to do," *id.* at 40, and later saying, "I want to get out of all of it, man. I don't want to lose her." *Id.* at 52.

Mr. Glossip was then formally arrested, and he was charged—consistent with what Bemo had elicited from him—with accessory after the fact to first degree murder in the death of Barry Van Treese in Oklahoma County, Case No. CF-1997-256 (accessory against Glossip only). Upon his arrest, police confiscated the $1,757 in cash he had on him that he had planned to use to pay the attorney, McKenzie.

C. Police Interview of Sneed

Several days later, on January 14, police finally apprehended and interrogated Sneed. He was back in the employ of the same roofer he had worked for when he came to Oklahoma City, and had moved into a nearby apartment with others in the crew. Attachment 29 at 2. *See also* Attachment 21, ¶ 11 (noting Sneed would work for the roofing company intermittently). Sneed confessed to killing Van Treese with a baseball bat.[10] Detectives told Sneed that everyone they talked to was "putting the whole thing on" him and would leave him "holding the bag." Attachment 29 at 5. They told him he should not "take the whole thing." The only other person whose potential involvement Sneed had mentioned was his stepbrother, Wes Taylor. The following exchange then occurred:

> Det. Bemo: You know Rich is under arrest, don't you?
>
> Sneed: No. I didn't know that.
>
> Det. Bemo: Yeah. He's under arrest, too.

[10] A complete transcript of this interview is attached as Attachment 4.

> Sneed: Okay.
>
> Det. Bemo: So he's the one – he's putting it on you the worst. Now, I think that there's more to this than just you being by yourself and I would like for you to tell me what – how this got started and what happened. . .

Attachment 29 at 7. Only then did Sneed say Rich Glossip had asked him to rob Van Treese. He later changed his story to say that Mr. Glossip had asked him to kill Van Treese. The Reed Smith investigation analyzed this interview and noted that detectives mentioned Mr. Glossip's name or indicated his involvement six times before Sneed said anything about him, and eight times total in the first 20 minutes. Attachment 3 at 66-69. Reed Smith's investigators also consulted with Dr. Richard Leo, a preeminent expert on false confessions and interrogations, and also talked with trial prosecutor Gary Ackley, ultimately concluding that the "contamination by the police thus raises serious doubts about the reliability of Sneed's statements that Glossip was involved in the murder." *Id.* at 59.

On the heels of this interview, the State charged Sneed with first-degree murder. O.R. 1. Mr. Glossip, as noted above, was charged only with accessory after the fact. O.R. 803. But approximately a week later, with no documented investigation in between, the State withdrew the accessory charge (Attachment 30 and amended the first-degree murder case to include Mr. Glossip as a co-defendant. CF-1997-244 (first-degree murder against Sneed and Glossip); O.R. 9; *see also* O.R. 606 (findings of fact and conclusions of law on first appeal recognizing "Glossip's own statements implicated him as an accessory after the fact, but Glossip could not have been charged with Murder in the First Degree without Sneed's testimony.").

After a preliminary hearing, the State filed a Bill of Particulars noticing its intent to seek the death penalty against Glossip, signed by Oklahoma County District Attorney Robert Macy,

alleging two aggravating factors (neither of which would ultimately be the basis for the death sentence): that the murder was especially heinous, atrocious, or cruel, and the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. O.R. 28-29. Sneed was offered a plea deal where he would avoid exposure to the death penalty in exchange for testimony against Glossip. O.R. 86 (state's witness list dated September 16, 1997, stating for Sneed, "Plea agreement was made September, 1997."). Sneed's testimony was the only direct evidence the State ever presented of Glossip's involvement in the murder.

D. Key Omissions

The areas police did *not* investigate are striking—a fact recognized extensively in the Reed Smith investigation. Attachment 3 at 82-114.

1. Witnesses from the motel, gas station, and strip club

This murder was committed at a motel off the interstate, in close proximity to a strip club, and sandwiched between a Sinclair gas station and a McDonald's. The motel had 54 guest rooms, approximately 50 of them operational. Attachment 31. On the night of January 6, 1997, motel records reflect 21 of those rooms occupied, many containing two beds; the following night, 19 were listed as rented. Attachment 32. Police interviewed three guests. Van Treese was murdered in Room 102. Nearby rooms 105, 106, 107, and 121 were listed as occupied, but there is no record of any attempt to interview those guests, despite the fact that John Prittie, in room 103, reported hearing the homicide as it took place. They interviewed no regulars who frequented the motel nor patrons or personnel from the club next door, despite the likelihood of some workers from the club being present as unregistered guests in the motel that night. Of the

motel witnesses police did interview, two reported hearing an argument in Room 102. Prittie thought he heard a woman's voice. Attachment 32. Beavers, when asked later, testified it sounded like a couple, RT Vol. 6, at 26. Yet police made no documented attempts to discover who the woman was or figure out what her role might have been. And when they interviewed Jacqueline Williams, the maid who lived on-site in Room 250 with her three children, it appears they asked her only about the events of Tuesday afternoon, and did not ask if she had seen or heard anything around the time of the murder in the early morning hours. There is no record of any attempt to speak to the children, who were certainly old enough at 9, 11, and 13, to have valuable observations. [Attachment 34]. Williams would later testify in 2004 that her boyfriend, Lonzo Estell, also lived there; he was never interviewed either. RT Vol. 9 at 113. Also in the 2004 trial, she testified about hearing noises that night with her children, *id.* at 120-21, something no one asked any of the five people living in that room about in 1997 when they were purportedly trying to solve the murder.

There is no report of an interview of Cliff Everhart, an investigator, at the time, with the Oklahoma Indigent Defense System, and a former chief of police, the associate of Van Treese who claimed to be a part owner of the motel and who participated extensively in the search for Van Treese, nor of Donna Van Treese, the victim's wife and motels' bookkeeper—two indisputably key witnesses. Nor do police reports reflect any interview of Leslie Williams, an apparent girlfriend of Cliff Everhart who was present during much of the search for Van Treese and the discovery of the body. RT Vol. 9 at 59.

Sneed, in his interview with detectives and before the police introduced Glossip's name, told them the killing had been intended as a robbery, and his brother, Wes Taylor, was involved in setting it up. When asked during Sneed's preliminary hearing whether police had made any

attempt to investigate or interview Wes Taylor, Det. Cook replied "No. He was in Texas. . . at the time of the investigation, it didn't seem that—like it had a lot of priority." Tr. 10/1/97 p. 42.

Additional witnesses approached the police with information, and it appears the police and detectives simply ignored them. Kirby Evans, who had no relation to the motel or any of the parties, phoned on the second day after the murder and stated his co-worker, Kim Hooper, told him she had a boyfriend who was at the motel on the night of the murder and seemed to have some knowledge about the murder; Evans provided contact information to the police for the boyfriend. Attachment 35. There is no indication police made any attempt to contact him.

2. Physical evidence and records

There is no record of any search for the murder weapon and one was never found. The bloody clothes worn during the murder were hastily stashed in the motel's laundry room, but police did not look for or locate them until after apprehending Sneed a week later, when he showed them where to look. There is no record of any attempt to discern the source of the shower curtain taped over the window in Room 102 (102's shower curtain was intact in the bathroom).

Nor did police collect the motel's records—registration cards in the office, payment records, guest registers, employment records, or anything else, despite having been told by William Bender (the spouse of the Tulsa motel's manager, who would ultimately become an important witness for the State) that Van Treese was upset specifically because of the terrible state of those records at the Oklahoma City motel. Police never questioned the desk clerk, Billye Hooper, about the records or took any of the other readily available steps to corroborate or dispute Bender's statements. The file contains a very small number of records apparently produced for the first time during the first trial (Tr. 6/3/98 at 36-37)—financial summary

spreadsheets created by Donna Van Treese and room rental records for the days surrounding the murder—but nothing more, a startling oversight, given that the State's theory at trial would become that an important motive for the murder was concealing embezzlement and mismanagement of the motel.

Police collected a security video from the gas station next door within hours after the body was found. Attachment 26. It is unknown to this day in what direction the camera was pointed and what it could have captured. There is no police report of any viewing of the video or identification of what it did or did not show. The first prosecutor stated on the record she had "not looked at that tape," but assumed it had no evidentiary value (meaning it would not help the *State* to prove *its* case). Tr. 5/29/98 at 12. The prosecutor for the second trial denied it had even been booked into evidence. Attachment 36. Critically, Pursley, the clerk, has said Sneed came into the Sinclair gas station in the early morning hours, perhaps immediately before the killing. This video likely showed what time he entered, who he was with, and what they were wearing (important because bloody clothes were later found). It could also identify others who may have been involved or been witnesses and able to corroborate or dispute existing witness accounts. If it showed the exterior of the station at all, and pointed in the right direction, it could even conceivably show who entered and exited room 102 and moved the car during this homicide. The Reed Smith investigation discussed the loss of this evidence in detail and concluded "significant concerns are raised by this mishandling of relevant and potentially exculpatory evidence." Attachment 3 at 81-84.

Van Treese's car was discovered with $23,100 cash in the trunk, some of which, officers noted, was stained with blue dye as though it had been part of a bank robbery. Attachment 37. There is no record of any follow-up on this suspicious fact. Indeed, the record reflects police

swiftly returned this marked cash to the family, along with the car and its entire contents, except for the handful of items police decided, for reasons that remain unclear, to retain. Tr. 6/5/98 at 84-85. Nor do records reflect any attempt by officers to interview others who may have known how Van Treese came by that cash, or to learn what activities he was involved in that could have yielded suspicious cash or who may have wanted to kill him. This omission is puzzling in a crime believed to have been motivated at least in part by robbery. Indeed, in the second trial, Donna Van Treese would ultimately testify that Van Treese had collected that cash because there was a balloon payment on the mortgage for the motel property. RT Vol. 5 at 16. The investigation by Reed Smith—investigation that police could and should have done—obtained the Van Treeses' mortgage documents and was "unable to locate any note that carried a balloon payment." Attachment 3 at 148.

Harold Wells, the Tulsa narcotics officer who had arranged the phone interview with William Bender,[11] reportedly told Det. Bemo he "knew Barry Van Treese very well," and at his Tulsa establishment, Van Treese "would always provide a room for the police to work their deals." Attachment 8. There is no record of any further investigation into this arrangement, which certainly could have been relevant to who may have wanted to kill Van Treese. Then, the witness Wells directed to Bemo, William Bender, gave a statement that was inconsistent in important ways with information other witnesses provided, and was so internally inconsistent and unclear that the detective noted the problems in his report. Attachment 8. A thorough investigation would have included attempting to resolve these inconsistencies and get more detailed information, in particular about Van Treese's plans and movements the night he was killed and the source of the

[11] In 2011, Wells was convicted on federal charges for his role in planting drugs on suspects and stealing cash in connection with drug arrests. *Curtis Killman, Judge: Former Tulsa Police Officer to Stay in Prison,* Tulsa World (Dec. 13, 2017), https://tinyurl.com/yc7es9xj.

money in his car. It appears police never asked any further questions of Bender, or even made the short drive to Tulsa to speak to him in person or interview his wife, Marty Baker, the official manager of that motel. Baker had very likely spoken to Van Treese on the night of January 6, and was one of the last people to see him alive. In addition, Bender seemed to have independent knowledge of the crime, such as the fact that Van Treese was found in room 102 with his pants down or off, but there is no record of police attempting to discover how he had learned these facts and what else he may have known about the crime.

These omissions regarding the Tulsa employees are especially striking because the evidence police did have of the timeline of the evening had gaping holes. Testimony established that Van Treese arrived at the Oklahoma City motel around 6:00 p.m. and left at 7:50 p.m. Bender told police he arrived in Tulsa at 11:30 p.m. and left around 12:15 a.m., but had left instructions to tell his wife Donna, if she called, that he hadn't left until 12:40 a.m., and would be home in five and a half hours, apparently because he was going to stop back in Oklahoma City (although the drive from Tulsa to Norman by way of Oklahoma City is only about two and a half hours, suggesting Van Treese intended to spend about three hours in Oklahoma City in the middle of the night). Police obtained records from Van Treese's Pike Pass, which logged when and where he entered and exited the highway. Attachment 38. They reflect that at 5:12 p.m., he passed through Chickasa, and at 5:31, through Newcastle, which is about 20 minutes from the Oklahoma City motel—consistent with the reports of when he was there. He then got on the turnpike in Oklahoma City, exiting in Tulsa at 9:44 p.m.—again consistent with having left Oklahoma City shortly before 8:00 p.m. But the first report of Van Treese arriving at the Tulsa motel was at 11:30 p.m.—an hour and 45 minutes after he got off the interstate in Tulsa. The files contain no record of any attempt to find out where Van Treese was for these crucial hours

that were among the last of his life, or whether it was during this window that he acquired the large amount of cash later found in his trunk. He got back on the Turnpike in Tulsa and got off in Oklahoma City at 1:36 a.m., indicating he likely left Tulsa shortly before midnight. His reasons for wanting his wife to be told he left significantly after he did were never explored, but given what has emerged about his behavior in relation to the Vegas Club and, specifically, Sneed's girlfriend, Fancy, a tryst at his motel may have been in his plans. Based on the recollections of Kayla Pursley and John Beavers, the window in Room 102 was broken sometime around 4:15 a.m. (the Sinclair surveillance tape likely could have pinpointed this time more precisely). This means Van Treese was in Oklahoma City for perhaps two and a half hours before he was killed. Police reports reflect no attempt to complete this absolutely crucial chronology. *See also* Attachment 3, Appendix 3 (detailing evidence of Van Treese's timeline).

The Reed Smith investigation also concluded there were critical gaps in the police investigation, including failure to collect and maintain relevant evidence, failure to investigate additional possible crime scenes and failure to search the motel, failure to follow up on leads, failure to investigate (or even fully document) the dye-stained money from Van Treese's trunk, failure to follow up on or confirm witness statements and clarify inconsistencies on important issues, such as the amount of money Van Treese collected that evening from the Oklahoma City motel, and failure to conduct any formal or documented interviews with crucial witnesses (they identified 17 specific people and several other categories of people they should have identified and interviewed, only a few of whom were still alive, could be located, and agreed to be interviewed. *See* Attachment 3 at 98-107. The independent investigators were especially concerned about the loss of the Sinclair tape, which defense lawyers had requested to view, as

well as the premature release of Van Treese's car and the suspicious cash to the family. *Id.* at 81-86.

In summary, there were many, many avenues that needed to be investigated to make a reliable determination about how the murder of Barry Van Treese came about. Instead, police accepted the first explanation that was presented to them (by Justin Sneed)—regardless of its source, coherence, or consistency with other evidence—and looked no further. When prosecutors arrived at a theory with which to try the case, based on alleged embezzlement, there is no record police or county investigators undertook any formal investigation to support that theory.

VI. TRIALS AND DESTRUCTION OF EVIDENCE

A. First Trial

Glossip was tried, convicted, and sentenced to death in 1998, on the theory that he (1) had been caught mismanaging the motel and didn't want to be fired, but rather wanted to take over and run the motel himself, Tr. 6/3/98 at 8-9 (first trial opening statement); and (2) had a long-running plan to convince Sneed to rob Van Treese for him. *Id.* at 9. This Court unanimously reversed that conviction based on the utter incompetence of Mr. Glossip's first attorney, particularly his failure to use the video of the police interrogation showing detectives leading Sneed to implicate Glossip and his failure to pursue instruction on accessory after the fact. *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597 (2001), ¶¶ 17, 19, 22.

B. Destruction of Evidence

On November 10, 1999, during the pendency of this appeal and at the instruction of the Oklahoma County District Attorney's Office, the OCPD intentionally destroyed 10 items of physical evidence from Mr. Glossip's case, including several items from inside the Room 102

crime scene (duct tape, wallet, knives, keys, the shower curtain that had been taped over the window); various documents including financial records ("white box with papers," deposit book, two receipt books); and, lastly, an "envelope with note." Attachment 39 at 1-2. It is clear from the available documentation and Reed Smith's investigation, including an interview with the OCPD detective ultimately responsible for carrying out the District Attorney's Office's instruction (*infra*), that the District Attorney's Office formally requested this destruction. Attachment 18. There is no question the destruction of this vital evidence was intentional.

The Reed Smith investigation learned that in the 1990s, the District Attorney's Office maintained a strict agreement with the police department dictating that evidence in a death penalty case must *never* be destroyed (much less while proceedings were ongoing, as they were here, with Mr. Glossip's direct appeal then pending). Attachment 3 at 45. There is no evidence anyone from the District Attorney's Office ever expressed surprise or concern about this occurrence, let alone that anyone tried to stop it from occurring. Tr. 1/16/03 at 23-26. Review of the now available documentary evidence leaves nothing to the imagination about the intentionality of the District Attorney's Office's instruction and the OCPD's resulting actions.

The items in question were among the evidence collected by Officers Jones and McMahon for the Van Treese homicide, processed into OCPD's custody on January 10, 1997, under case number 97-2261. Attachment 40. OCPD Case Report Inquiry records reflect that on June 1, 1998, the day jury selection began in Mr. Glossip's first trial, these materials were among the evidence items released from OCPD custody for court use. Attachment 41. Mr. Glossip perfected his appeal from his first conviction and sentence on February 1, 1999, and, by an opinion filed on July 17, 2001, this Court reversed that judgment. *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597 (2001).

On October 27, 1999, with Mr. Glossip's ultimately successful appeal pending, the District Attorney's Office released the box in question to the custody of Inspector "J. McNutt" (née Hogue),[12] under its original OCPD case number, 97-2261. Attachment 39 at 5.

The next day, on October 28, 1999, a handwritten "OCPD Evidence/Property Booking Form," apparently by Inspector McNutt, notes "DA Returns," at the top and assigns a new OCPD case number, 99-95391, to the evidence in question. Attachment 39 at 0003-0004. Inspector McNutt composed the narrative for the body of the report, giving it the subject line: "Property Transfer from Okla. County DA's Office[;] **Appeals Exhausted**: Property for Destroy." Attachment 39 (emphasis added). As noted above, the OCPD "Property Disposition or Release," card, also apparently bearing Inspector McNutt's signature, confirms destruction of the box in question on November 10, 1999, checking the box "Dispose as Authorized by City Ordinance." Attachment 39 at 1-2.

The Reed Smith investigation concluded that the destruction was intentional, not only because of the paperwork, but because a detective the firm interviewed confirmed that ordinarily no evidence would *ever* have been destroyed in a capital murder case and thus it would require the extraordinary step of the District Attorney's Office affirmatively ordering the destruction. Attachment 3 at 45. The investigation also confirmed through new interviews that a form listing the destroyed evidence was not a police form, but one used by the District Attorney's Office. *Id.* at 44 n.205; Attachment 39 at 0005]. The Reed Smith investigation additionally established that the police department's record of the destruction deviated from protocol, as the destruction request obtained its own case number (99-95391) rather than a file entry associating the

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[12] The records reflect in various places "Janet Hogue" and "JMcNutt." As noted in the Reed Smith Report, Hogue appears to have been the prior surname of Inspector McNutt and it further appears that her profile in the OCPD database, by default, identified her entries as belonging to Hogue even when made when her surname was McNutt.

destruction with the existing Glossip case number (97-2261). Further, a search performed at Reed Smith's request revealed that the later case number was not associated with any other documents or records besides those destroyed. *Id.* at 54.

Thus, whoever individually or collectively orchestrated this destruction initiated in the District Attorney's Office took steps apparently within the OCPD to isolate this action from standard operating procedures and thereby to keep the records out of the primary case file. Now-retired Inspector Janet McNutt, was, at the time, Det. Bemo's partner, but had no other connection to the case or obvious reason to be assigned this task. *Id.* at 56.

Although defense attorneys discovered the documentation of this destruction in preparation for the second trial, after a brief discussion of the matter in a pretrial hearing, they took no further steps to address it, let alone efforts to raise this stark violation of Mr. Glossip's due process rights. Tr. 1/16/03 at 23-26. When Judge Gray opined more than a year before Mr. Glossip's retrial, "The only thing I know to do is to go with what we have and see what happens,"; *id.* at 26, defense counsel made no record of the gravity of the issue and the need to inquire more deeply as to what transpired and who had responsibility among police and prosecutors for these measures taken to grossly impair Mr. Glossip's defense.

Defense counsel did not, at that time or subsequently, identify the destroyed evidence's relevance—particularly the fact that among the destroyed records was the **only** apparent source of evidence permitting adversarial testing of the State's premise that Glossip had embezzled proceeds from the motel.[13] The defense did not assert that the District Attorney's destruction of

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[13] In Mr. Glossip's retrial, Ms. Donna Van Treese testified that a flood at her home destroyed all business records for the Oklahoma City Best Budget Inn that remained her possession. RT Vol. 4 at 115:20-116:9. Apart from profound concerns about her retention of those materials without the prosecution at least securing copies, this occurrence eliminated any prospect of overcoming the affirmative destruction of critical business records for Mr. Glossip's defense.

this evidence warranted dismissal of the indictment. Trial counsel made no such record, nor did counsel ever return to this matter.

Appellate counsel too failed to litigate this plain error violative of substantial rights. Further still, post-conviction and federal habeas corpus counsel all failed to litigate this matter, speaking to Mr. Glossip's inadequate representation through all stages.

C. Second Trial

The second trial began in May, 2004. The State added an additional aggravating factor mere months before the trial began (the only one the jury would ultimately find), O.R. 1044, and called twelve witnesses it had not called at the first trial. Its case against Glossip, with the exception of Sneed's testimony, was entirely circumstantial. Prosecutors called six technical investigators and forensic analysts,[14] plus a stipulation from one more,[15] none of whom could connect items from the scene to anyone except Justin Sneed (although they did have an unidentified fingerprint from the broken glass in Room 102's window for which Sneed, Glossip, and Van Treese were all ruled out). Other than Sneed's testimony, the case against Glossip instead consisted of (1) an attempt to establish a motive, (2) a portrayal of Sneed as helpless and entirely dependent on Glossip (and thus easily manipulated by him into killing Van Treese), and (3) evidence concerning actions taken *after* the murder that did not reflect any involvement in the crime itself.

1. <u>Motive</u>

The prosecutors' pitch—although none of this arose in any documented police investigation, outside of the interview with Sneed—was that Glossip wanted Van Treese dead because he had been caught mismanaging the motel, and was about to be fired (although the prosecution never

[14] Darren Guthrie, Charlene Cable, John Fiely, Joseph McMahon, Mike Jones, and Cindy Hutchcroft.
[15] Melissa Keith.

explained how killing the owner would permit Glossip to stay employed at the dead man's motel). Van Treese's wife, Donna, whom police had never formally interviewed, testified that she and her husband had just discovered the motel was short $6,000 over the prior year, and they blamed Glossip, believing he had been embezzling. RT Vol. 4 at 56. Her evidence was a one-page spreadsheet showing the motel had taken in less money than projected (Attachment 42); no underlying records were provided, and she testified any relevant records were destroyed in a flood in her home at some point before the second trial. RT Vol. 4 at 115. The prosecution had apparently not obtained copies of these records at any point in the case, despite their indispensability to their theory of Glossip's motive. There is no record she reported any of this to police when Mr. Van Treese went missing, or when his murder was discovered. Expert accountants have reviewed the spreadsheet she did provide and concluded it shows no embezzlement at all; rather, it shows a difference between projected and actual revenue. Attachment 43; Attachment 43. Actual documentation of fraud or embezzlement would be significantly more involved, including tax returns and, critically, detailed reviewed of the business records over a significant span of time. Attachment 44. In addition, Glossip had consistently received bonuses based on his performance, calculated and paid each month during the period when the purported shortage accrued. RT Vol. 4 at 119, 181; RT Vol. 15 at 109. The Reed Smith investigation concluded there was no evidence of embezzlement, and that prosecutors should not have presented that evidence without taking steps to verify it, such as obtaining the original underlying records or consulting with a forensic accountant. Attachment 3 at 129-53. Further, defense counsel failed to adversarially test the State's case predicated upon conjecture without direct evidence of any financial misdeeds.

Cliff Everhart also testified he thought Glossip had probably been stealing, and that he and

Van Treese had planned to confront Glossip on the night of the 6th, though when Everhart went by the motel in the early evening on that date, Van Treese was not there, and no confrontation occurred. RT Vol. 11 at 175-77. He had testified in the first trial he had no dealings with the money at the motel. Tr. 6/4/98 at 104-05, 136-37. Billye Hooper testified she had told Van Treese right before Christmas that they needed to talk, and he said he knew, and they would talk when the Van Treeses got back from their Christmas vacation. RT Vol. 7 at 35-36.[16] Neither Donna nor Everhart nor Hooper testified they had alerted Glossip to any concerns they had (which would be necessary for those concerns to provide a motive for murder), and none of them produced any actual evidence of mismanagement. None of them told police about this alleged plan when they learned of Van Treese's disappearance and, shortly after, his murder, although that information, if true, would have been obviously relevant and at the forefront of their minds if indeed these parties expected Van Treese, with their input or participation, to confront Glossip. The Reed Smith investigation additionally concluded that Everhart's testimony was inherently unreliable for a range of reasons both relating to Everhart himself and to the specific testimony he provided. Attachment 3 at 166-75.

The State's other evidence of purported motive was the testimony of William Bender, the Tulsa manager's husband, whose problematic police phone interview is described above. Bender was not called at the first trial. He testified Van Treese had arrived at the Tulsa motel between 11:00 p.m. and midnight on the night of January 6th and was extremely upset. RT Vol. 8 at 62-64.[17] The timeline discussed above indicates Van Treese was in Tulsa for at least an hour before

[16] D-Anna Wood testified that in fact Hooper was renting rooms off the books and keeping the money for herself. RT Vol. 5 at 190.

[17] The State first attempted to introduce his testimony about what Barry Van Treese had said under the "excited utterance" exception to the hearsay rule, *id.* at 65, but the court decided it could admit them under the "present sense impression" exception instead, on the premise that Van Treese was looking at documents with three columns

arriving at his Tulsa motel, but nothing in the testimony addressed this gap. Bender testified Van Treese had carefully inspected the Tulsa records and checked inside rooms. Bender further testified that Van Treese, in the midst of his ire concerning his Tulsa property complained about thousands of missing and damaged registration cards and approximately $3,000 missing from the Oklahoma City motel. Bender stated Van Treese had given the Oklahoma City manager until he got back from Tulsa to come up with the missing money, or he would call the police, and he wanted Bender to become the manager in Oklahoma City. *Id.* at 82-83. However, none of the witnesses in Oklahoma City had seen Van Treese upset that evening (both Hooper and Wood reported he seemed normal) or reported any problems with his review of the motel's receipts, and none of those registration cards were in evidence (nor is there any record police ever attempted to collect them, or any other motel records). Moreover, the police report of Bender's only interview in 1997 was riddled with inconsistencies, as detailed above. Bender's wife, who apparently witnessed much of Van Treese's visit to the Tulsa motel that night, was never interviewed—by either side—or called as a witness.

As with Everhart, the Reed Smith investigation raised serious concerns about Bender's testimony, in particular that he testified to hearsay, purportedly stated by Van Treese, that should not have been permitted and that was roundly contradicted by other evidence. Attachment 3 at 193-95.

2. Sneed's Character

The other pillar of the State's case was that Sneed was young, meek, alone, needy,

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comparing the two motels when speaking to Bender. *Id.* at 75, 80. No such documents were ever produced. Among the items of evidence destroyed by police during the pendency of the first appeal (before William Bender was ever called as a witness, as he had not testified in the first trial) were the above-discussed white box containing unidentified papers, one deposit book, and two receipt books. This problematic hearsay ruling is discussed in detail in the Reed Smith report at pp. 123-28. While objected to at trial, it was not appealed.

entirely dependent on Glossip, and thus easily controlled by him and made to commit a brutal murder on his behalf. RT Vol. 3 at 208-09, 216 (State's opening statement); RT Vol. 15 at 68; 73 (closing argument describing Sneed as a "Rottweiler puppy, let's say 11 months old, and Richard Glossip was the dog trainer."), 94, 157 ("Ole bumbling Justin Sneed), 181 ("It's not enough that we got the bat boy. It's time to convict the coach."). Prosecutors repeatedly referred to Glossip as the "mastermind." RT Vol. 15 at 74, 157. The jury was *not* provided with the information detailed above about Sneed's drug addiction, nor his criminal history or recent psychological evaluation, nor about Mr. Glossip's own limitations.

The testimony about Sneed came primarily from two witnesses: motel desk clerk Billye Hooper and long-term resident Kayla Pursley. Hooper was asked over defense objection if based on what she knew about Sneed and Glossip's personalities and relationship, she thought Sneed would have committed the murder without Glossip, and she said she thought Sneed would not have done it alone, though she declined the prosecutor's invitation to say he would not have done it without Glossip in particular. RT Vol. 7 at 30-31, 34. Pursley, who was not called at the first trial, testified Sneed had played video games with her young children and "was very childlike. . . . He didn't make a lot of decisions. You had to tell him sometimes what to do." RT Vol. 9 at 17. She believed Glossip frequently told Sneed what to do, that Sneed wouldn't have any money unless he got it from Glossip, and that Glossip had control over Sneed, who didn't have anywhere else to go. *Id.* at 19-23. Of course, Sneed had voluntarily given up his well-paying roofing job to stay instead at the motel and immediately rejoined that roofing crew after he fled. Pursley, however, was willing to agree with the prosecutor who asked her if Sneed would not have committed the murder without Glossip. *Id.* at 103. Sneed, for his part, denied playing video games with Pursley's children, but thought his brother might have. RT Vol. 12 at 70. He said he

had only been around the Pursleys “a few times” after his brother left. *Id.* at 71. The Reed Smith investigation found this testimony (from both witnesses) to be “speculative and unreliable,” and considered defense counsel’s failure to object to it “inexplicabl[e].” Attachment 3 at 195.

Witnesses who were never interviewed during the proceedings were willing and able to give credible evidence contradicting this unreliable characterization of Sneed as meek and non-violent. A co-worker described him as “kinda wild, would go out a lot at night.” [Attachment 29] Another co-worker who had known him since high school called him “manipulative” and said he “liked to fight” and was a “‘bully-type’ guy.” Attachment 21 ¶¶ 4-5, 7. He recalled at the motel “Justin Sneed acted like he was the king . . . He’s the type of guy who wanted to run the show.” *Id.* ¶ 12. He even remembered “one time that [Sneed] was going to fight another roofer but the other roofer was afraid of him.” *Id.* ¶ 30. A motel regular said Sneed “was a hot head, and was always acting like a tough guy or a big shot.” Attachment 13 ¶ 7. He “was shocked to hear that anyone had tried to portray [Sneed] as someone who is slow, or could be manipulated by anyone, let alone Richard Glossip.” *Id.* Unlike Hooper and Pursley when asked by the prosecutor, he thought the murder “sounds like something an addict like Justin Sneed would do.” *Id.* at 14. Another regular “saw nothing to make [him] think that Justin Sneed was controlled by Richard Glossip.” Attachment 20, ¶ 9. And a dancer from the Vegas Club who knew him described him as “very scary,” “loud,” and “violent and paranoid.” “cruel and violent,” and “crazy.” Attachment 12, ¶¶ 15, 18, 21. Sneed once told her “he had places to hide a body where it would never get found,” *id.* ¶ 24, and he “was not the kind of guy that would take orders from anyone.” *Id.* ¶ 31. She had seen him shove a girl into the bathroom, calling her a “fucking bitch,” and had seen him choke a different girl until she passed out. *Id.* ¶¶ 32-33.

The Reed Smith investigation similarly determined that extensive evidence existed

countering the State's portrayal of Sneed, none of which was presented to the jury. Attachment 3 at 209-33. For his part, Glossip, far from being a "mastermind," has an IQ of no more than 78. Attachment 45.

3. <u>Actions After the Fact</u>

The remainder of the evidence about Glossip concerned the possibility that he had taken steps to conceal the murder after it occurred, consistent with the police's original conclusion that Glossip had committed, at a maximum, the crime of accessory after the fact. *See* O.R. 593, 606 (findings of fact and conclusions of law on first appeal, by same judge who would preside over second trial, recognizing "Glossip could not have been charged with Murder in the First Degree without Sneed's testimony.").

One allegation was that Glossip had pretended to search the motel rooms, thus preventing anyone from actually looking in Room 102 (although there was disagreement and inconsistency among witnesses about whether Glossip had been part of the purported search, or whether that had been solely Sneed before Glossip returned from Wal-Mart.) Billye Hooper testified both that "When Cliff [Everhart] got there, he instructed Justin to go check all the rooms that were not rented at the time," and that she had seen Sneed and Glossip together when "they left together to go out to check the rooms and things." RT Vol. 8 at 76. She had testified in the first trial that she called Sneed and relayed to him a request from Everhart and Glossip that Sneed check all the rooms. Tr. 6/4/98 at 37. Everhart testified he sent Sneed and Glossip together, RT Vol. 11 at 185, though Sneed alone reported that task was complete. *Id.* at 240. Sneed, for his part, testified Everhart asked him to do the checking before Glossip ever returned from Wal-Mart, and that he had more or less finished when Glossip arrived back from Wal-Mart. RT Vol. 12 at 157. A police report completed while the investigation was still a missing persons case suggests

Everhart and Sneed were involved in the search of the rooms, but not Glossip. [Attachment 46] In any event, as the Reed Smith investigation pointed out, police should never have relied on reports of a search purportedly conducted by civilians who may have been suspects. Attachment 3 at 88-90.

The State also alleged, similarly, that Mr. Glossip asked the housekeeper, Jackie Williams, not to clean downstairs rooms on the morning of January 7. Williams told police the day after the body was found that Sneed had asked her not to clean upstairs. Attachment 34; after speaking with prosecutor Gary Ackley seven years later, shortly before the second trial, she changed her account to say it had been Glossip, not Sneed, who made the request. RT Vol. 8 at 122; Attachment 47; Sneed himself also testified he was the one that had told her to clean only upstairs. RT Vol. 12 at 139. The Reed Smith investigation also noted that Williams had only been working at the motel for about a month, and therefore did not have a good basis for assessing what was unusual at the motel. Attachment 3 at 189.

The State also presented evidence that Glossip had said he had seen Van Treese at the motel early Tuesday morning (when he was already dead), RT Vol. 9 at 194 (testimony of Tim Brown), then said he saw Van Treese after the window had been broken (again, after he was killed), *id.* at 206, and then changed to say the last time he definitely saw Van Treese was 8:00 p.m. the night before. *Id.* at 209. Glossip later said he had seen someone in the parking lot that morning he *thought* was Van Treese, but he was not sure, and denied ever saying that he had definitely seen Van Treese then. *Id.* at 215-17, 219. Hooper also testified Glossip had told her Van Treese had been around early Tuesday morning. RT Vol. 7 at 62-63. Notably, Glossip usually wore glasses, but his glasses were broken that day, and one of the places he had gone during the day on Tuesday, after the purported sighting and before Mr. Van Treese's car was

found and he was declared missing, was to an optician to get a replacement. RT Vol. 5 at 88 (testimony of D-Anna Wood). The jury did not hear this point.

Finally, the State relied heavily on the fact that Mr. Glossip had $1,757 in his possession when he was arrested, which it claimed could only be the proceeds from the robbery, in which, the State alleged, approximately $4,000 was taken from Van Treese's car and divided between Sneed and Glossip. RT Vol. 15 at 94, 169-170. Money taken from Sneed upon his arrest had blood on it, but there was no blood on any of the money taken from Glossip.

There are two facets of this assertion: the amount of money Van Treese had collected from the Oklahoma City motel on Monday evening (which was later stolen from under the front seat of his car), and other sources for the money Glossip was carrying. Regarding the total amount collected, the Reed Smith investigation concluded that Van Treese must have collected less than $3,000 from the motel that evening, meaning they could not have split the money as Sneed had described ($4,000 split approximately equally). Attachment 3 at 109-13. Reed Smith noted that Van Treese could only have collected six days' worth of receipts, because, given that Donna Van Treese had already completed year-end paperwork, and given the reported timing of the family's ski vacation, Van Treese had previously collected receipts through the end of December. Attachment 3 at 110. Based on surviving motel records for the days immediately prior to the murder, the maximum amount of those proceeds was $2,848.45, which almost certainly over-estimates the amount actually picked up. *Id.* at 112.[18] This amount, much less than the $4,000 posited by Sneed and the State, was consistent with motel employees' original reports to police;

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[18] Reed Smith also noted the possibility that Van Treese had spent some of the money he collected in between his first stop at the Oklahoma City motel and his murder, such as during the unaccounted-for hour and a half or so he spent in Tulsa. Attachment 3 at 113.

Billye Hooper, for example, was asked for a tally shortly after the murder and reported it would have been $2,877. Attachment 48. Everhart's initial estimate had been approximately $2,500 (Attachment 29), and Mr. Glossip himself told Officer Tim Brown Van Treese had collected "about $3,000 in cash." Attachment 50. All of these relatively contemporaneous reports put the ballpark amount collected hovering at or below $3,000. Higher amounts emerged only later, after money had been taken from Sneed and Glossip that the State alleged was robbery proceeds, and the State realized less than $3,000 would not have been enough for its theory. The combined amounts seized from Sneed ($1,680) and Glossip ($1,757) significantly exceeds the amount Van Treese could have picked up, but Sneed certainly could have taken the complete amount and spent a significant portion of it in the intervening week, especially given that police found drug paraphernalia among his possessions. RT Vol. 12 at 66.

Conversely, there was significant evidence of Mr. Glossip collecting cash on Wednesday, January 8, for the purpose of paying the lawyer he was planning to hire the next day. The evidence showed he had sold a number of items, including an entertainment center and large television, an aquarium, and a futon, and that he had owned two vending machines on motel property, which he sold back to the motel for cash. RT Vol. 11 at 127, 129. He had also presumably retained some earnings from the vending machines. Mr. Glossip has also reported that he received approximately $150 from Kayla Pursley in repayment for a loan he had made her. Attachment 51. He certainly still had some money left from the paycheck he had received on the evening of January 6, even after the shopping he did on the 7th, and he had also told D-Anna Wood that he had saved money in a cookie jar in his apartment, although he did not give a precise amount of what had accumulated during his tenure managing the motel since mid-1995. *See* Attachment 27. Further, Kenneth Van Treese, Barry's son, testified that he paid Mr. Glossip

in cash for the days he had already worked and for which he had yet to be paid. RT Vol. 11 at 130. While it is not possible now to precisely account for every dollar Mr. Glossip may have had or legitimately obtained then, it is clear that he had collected a significant amount of cash unrelated to the robbery of Van Treese. Indeed, there has never been evidence that any portion of the $1,757 he had taken to retain a lawyer included money relating to the robbery.

4. Sneed's Testimony

Following this evidence, the State called Justin Sneed and played video recordings of Glossip's two police interviews. Apparently unaware of Mr. Glossip's at best borderline deficient intellectual and cognitive functioning, the State characterized him as the "mastermind" of the murder. RT Vol. 15 at 74, 157. Sneed testified, in short, that Glossip had asked him to kill Van Treese on several occasions, offering him escalating sums of money, before finally convincing him to do it on January 6. He testified Glossip had told him when Van Treese saw the condition of the rooms, they would both be fired, and then described the attack itself, in which he went alone into Room 102 and beat Van Treese with a baseball bat and attempted to stab him with a small pocketknife. He reported Glossip directed him to move the car and take the money from under the front seat; he and Glossip split the approximately $4,000 he took. Mr. Glossip then accompanied him back to Room 102 to make sure Van Treese was dead and to conceal the crime scene. *See generally* RT Vol. 12 at 37-192. Sneed's testimony contained a number of significant discrepancies from statements he had made previously (and subsequently); the Reed Smith report catalogs them exhaustively. *See* Attachment 3 at 234-49; collected in chart form spanning 20 pages in Appendix 5 to the report. Examples include the amount of money he was purportedly offered to commit the murder (initially $7,000; at the second trial $10,000; later still back down to $7,500) and why Mr. Glossip purportedly wanted Van Treese dead (so he could be

boss of the motel; at the first trial, because he was worried about getting kicked out of the motel; at the second trial, because he wanted to manage both motels and was concerned about the condition of the rooms; later, he never gave any reason). Incredibly, particularly in light of the holding in the prior appeal, defense counsel did not play the video of the detectives leading Sneed to implicate Glossip, and pointed out only a small sample of the inconsistencies in his testimony. The Reed Smith investigation learned that several jurors reported wanting to have seen that video. Attachment 3 at 8 and n.22 (noting four jurors expressed this desire).

5. <u>Jury Instruction</u>

The jury was instructed that, "No person may be convicted on the testimony of an accomplice unless the testimony of such a witness is corroborated by other evidence," and that "In determining the question as to whether or not the testimony of an accomplice has been corroborated, you ***<u>may</u>*** eliminate that testimony entirely and then examine all of the remaining testimony, evidence, facts, and circumstances. . ., " O.R. 1271, a pattern instruction that this Court held mere months later did not adequately convey Oklahoma law's requirement that accomplice testimony "***<u>must</u>*** be corroborated with evidence, that standing alone, tends to link the defendant with the commission of the crime charged," *Pink v. State,* 2004 OK CR 37 ¶ 15, 104 P.3d 584, 590 (emphasis added)—in this case, murder, not a cover-up or accessory after the fact. In other words, the jury was told Sneed's testimony required some corroboration, but under the instructions it received, it was not required to evaluate the evidence without anything that came from Sneed. Mr. Glossip was again convicted and sentenced to death.

VII. <u>APPEALS</u>

The case was again appealed and this Court, in a 3-2 decision, affirmed. *Glossip v. State*, 2007 OK CR 34, 168 P.3d 185. The majority, in weighing the corroboration of Sneed's

statement, emphasized evidence it interpreted as Mr. Glossip "intentionally steer[ing] everyone away from room 102," *id.* at ¶ 49, which, at best, tied Glossip to an after-the-fact cover-up, rather than to the murder itself. The dissent believed that whether there was even sufficient evidence corroborating Sneed's statement to allow its consideration by the jury was a "very close" call, *id.* (dissenting op. of Chapel, J., at ¶ 30), and recognized that the jury instruction given on that issue had been disapproved in *Pink,* but ultimately concluded because the prosecutor had not exploited the faulty instruction in closing argument to the degree that occurred in *Pink*, no reversal was needed.

Mr. Glossip pursued his original state post-conviction action during the pendency of his direct appeal proceedings under Case No. PCD-2004-978. The petition's only critiques of prior counsel were a failure to object to judicial bias and a failure to thoroughly cross-examine Justin Sneed, specifically by using a particular document (a report from his competency evaluation) that was available in the court file. There was no indication post-conviction counsel had even done any investigation beyond the court record about Sneed, nor about the crime itself or any of the state's other evidence. Of course, there was no attempt to introduce any such evidence. The application was denied by unpublished order entered December 6, 2007, and Mr. Glossip proceeded to federal court. Although the federal habeas court denied Mr. Glossip's petition, in granting a certificate of appealability, it observed, "Unlike many cases in which the death penalty has been imposed, the evidence of petitioner's guilt was not overwhelming." *Glossip v. Sirmons,* No. CIV-08-0326-HE (W.D. Okla.), Doc. 66 (Sept. 29, 2010) at *1-2.[19]

VIII. EXECUTION ATTEMPTS

[19] *Cf. Jones v. State,* 2006 OK CR 5, 128 P.3d 521, 541 (noting suppressed impeachment evidence not material because even without the relevant witness's testimony, "the evidence presented against Jones was overwhelming.").

Oklahoma's execution protocol contains a detailed sequence of events leading up to an execution colloquially known as "death watch." Attachment 52. When the date is set, the inmate is given a series of forms to fill out. The decisions he's asked to make include what he would like to be done with his body (though he is informed he is not allowed to donate his organs), what medical information he wants released, who he wants to have visit him the day before he is killed, who he would like to invite to witness his execution, and what he wants for his last meal. The prison then sends in both a doctor and a mental health professional to evaluate him and make sure nothing about his health is going to interfere with the execution process. At this point, he is strip searched, x-rayed, and screened for concealed objects on a BOSS Chair, then given a different set of clothes and shoes and moved to another cell—a death watch cell.

In a death watch cell—where the condemned is kept for 35 days—the inmate is under 24-hour continuous observation, with the lights on around the clock. Guards take away all the prisoner's property except for a small amount of legal and religious materials, pen and paper, and a single book or magazine. They can have a comb, a little bottle of soap, a toothbrush, and toothpaste, but only when they need them; as soon as they're finished, they're taken away again. The death watch cells at OSP are located near the execution chamber, and inmates start at the farthest-away cell, and are moved to cells closer and closer to the execution chamber as the date draws nearer.

Two weeks before the execution, the prison gets a body bag from the medical examiner's to put the inmate's body in after they execute him. The day before the execution, at 9 pm, visitation and telephone privileges end. That means the inmate has to say his last goodbyes (which he must do through glass because it is non-contact visitation), the night before. He is also given his last meal. In his final 12 hours, the inmate is taken for a full-body x-ray. While he is

gone, corrections take all his remaining possessions. Then, they strip-search him and BOSS-scan him again, give him his last set of clothing, and place him back in a cell. If he wants any items back (a book, pen and paper, religious items, hygiene items), he must ask for them, and can only have them while actively using them. In his last 4 hours, he is attended by members of the "Restraint Team," who make log entries about what he is doing every 15 minutes. Once they have checked with the governor and attorney general that the execution is still proceeding, they take the condemned from the holding cell to the execution chamber, and secure him to the table, where staff members will find a vein, start an IV, and ultimately, administer the lethal drugs. If a stay is entered before they proceed with the drugs, and it is not for longer than 35 days, they just take him back to his death watch cell, and start the countdown over again.

Mr. Glossip's first execution date was set for November 20, 2014. Death watch began on October 16, and Mr. Glossip was given the required notifications and forms, examined, searched, and moved to a 24-hour death watch cell. He stayed there for just over a week—and went through a clemency hearing, where clemency was denied by a board that included a former close colleague of his trial prosecutor, Attachment 3 at 44—before the execution was canceled at the State's request because, it emerged, it was unready. Attachment 53. Mr. Glossip's execution was then rescheduled for January 29, 2015.

This time, Mr. Glossip's death watch process—forms, cell, lights, observation, etc.—was triggered on Christmas Day, 2014, while his lawsuit challenging the lethal injection protocol was pending in the 10th Circuit Court of Appeals. His fellow prisoner, Charles Warner—in the cell just ahead of his—was executed on January 15th, even though the lawsuit was still pending review by the U.S. Supreme Court, and Mr. Glossip was moved closer to the chamber. This time, the death watch continued past the 14-day mark, and the state was obligated, under its execution

protocol, to obtain Mr. Glossip's body bag. January 28th—the last day—arrived, and Mr. Glossip said his goodbyes and ate his last meal, even though the Supreme Court had not yet ruled on the petition in his lethal injection case. That night, the Supreme Court granted the petition, and the state was forced to call off the execution, in what had been Mr. Glossip's final 24 hours.

The Supreme Court ultimately denied relief, and the same day, the Attorney General sought a new execution date for Mr. Glossip, which was scheduled for September 16, 2015. This time, the death watch process would start over again on August 12, and Mr. Glossip was again presented with the litany of dreadful choices to make and moved to the death watch cells to resume a deeper state of dread in waiting for his end.

The day before his execution, a small team of pro bono attorneys who had only just become aware of his case scrambled to present the Oklahoma Court with evidence that Mr. Glossip was innocent. They alleged that the evidence of Mr. Glossip's involvement was not sufficient—either as an evidentiary matter or as an Eighth Amendment matter—to permit his execution, and that his attorneys had failed to use readily available impeachment evidence against Sneed and the Medical Examiner. However, given their very recent introduction to the case, they had not yet had an opportunity to thoroughly investigate the full range of facts. Again, Mr. Glossip said his goodbyes and had his last meal. The Restraint Team took over, and he entered his final four hours. Then, the Court agreed to stay the execution while it considered the submission, but just for two weeks—and Mr. Glossip was returned to his 24-hour death watch cell.

Eventually, the court declined to hear any new evidence of Mr. Glossip's innocence (again 3-2), and he once again moved closer to the chamber, into his last 24 hours where he said his goodbyes and had his last meal, was x-rayed, and readied for execution. They were prepared

to move him from the holding cell to the chamber and strap him down when prison officials discovered the drug the execution team had loaded in the syringes intended for Mr. Glossip was not the drug called for in the protocol—they had potassium acetate in place of potassium chloride, and they had gotten to the very cusp of his execution before realizing it, and simultaneously realizing the earlier execution of Mr. Warner had used these wrong chemicals.[20] Mr. Glossip was kept in limbo in his isolated holding cell for hours while attorneys debated whether they should go ahead and kill him anyway, or stop the execution so they could follow the protocol. The scheduled time for his execution had come and gone before they decided they had to abide by their protocol. The governor called the execution off. Shortly thereafter, the head of the Department of Corrections and the governor's counsel resigned, and the warden of the prison where the botched executions occurred abruptly retired.[21]

IX. POST-2015 DEFENSE INVESTIGATION AND TRUE FACTS OF THE CRIME

Since his aborted execution in 2015 and the associated petition, Mr. Glossip's new pro bono attorneys have conducted a wide-ranging investigation, and learned that as Sneed himself described to multiple witnesses, the killing was not a murder for hire, but rather a botched robbery for drug money, committed by Sneed and his girlfriend.

While he was in jail prior to providing testimony in exchange for escaping the possibility of the death penalty, Sneed explained how the murder came about to multiple people.

The most complete account comes from Paul Melton, who spent several months housed

[20] These events are described in Interim Report Number 14 of the multi-county grand jury that investigated this matter.
[21] Mark Berman, "Oklahoma corrections director resigns after problems with executions," Washington Post, December 4, 2015, tinyurl.com/yfj956wx; Sean Murphy, "Fallin's general counsel resigns amid execution inquiry," Associated Press, Feb. 11, 2016, tinyurl.com/42m8x2t2.

near Justin Sneed in the Oklahoma County Jail in 1997, and who was never approached or interviewed by anyone from the police, prosecution, or the defense until Mr. Glossip's lawyers tracked him down in 2016. In a sworn affidavit (Attachment 14), Melton sets out what Justin Sneed told him about the crime while they were incarcerated together:

- Sneed had a girlfriend, and Van Treese was her "sugar daddy," giving her regular payments of $500-$1,000.
- Sneed beat to death Barry Van Treese, the owner of the motel, who lived out of town but stayed at the motel when visiting Oklahoma City. Either Sneed or his girlfriend worked at the motel.
- Sneed and the girlfriend learned that on the day Van Treese was killed, he would be carrying $20,000-$30,000 in cash, and they made a plan to rob him: the girlfriend would get Van Treese to meet her in one of the motel rooms, and Sneed would either be there waiting or go into the room after Van Treese arrived.
- The robbery scheme fell apart when Van Treese fought back and upset the plan, leading to Sneed killing him when he had only intended to rob him.
- The girlfriend was in the room during the murder.
- They did not get all the money they thought was there; Sneed was upset they killed a man for only a few thousand dollars, when they had expected $20,000-$30,000.
- Sneed had two concerns: not getting the death penalty, and his girlfriend not being caught.
- Sneed never mentioned Richard Glossip; the only other person whose involvement he ever mentioned was the girlfriend.

This account is highly credible for many reasons. Multiple details were separately confirmed by other witnesses—witnesses who had nothing to do with and had never met Melton. And stunningly, three other inmates who had overlapped with Sneed in the County Jail independently reported similar conversations with Sneed.

Joseph Tapley was Sneed's cellmate for several months in 1997. Tapley, who had never been interviewed by either side, contacted Mr. Glossip's attorney when he learned Mr. Glossip was set

to be executed for Sneed's crime, and swore in an affidavit that Sneed had given him detailed accounts of his murder of Van Treese, including that he did it for money he believed was in the car, and that he had beaten Van Treese to death with a baseball bat, also breaking the window of the motel room, and that he had moved Van Treese's car to the bank parking lot. Attachment 15. Like Melton, Tapley reported that Sneed was very concerned about getting the death penalty, and that at no point in his discussions of the crime did he say anything about Richard Glossip.

Roger Lee Ramsey, who was in the unit at the jail when Sneed was brought in, independently reported hearing from Sneed that Sneed had beaten Van Treese with a baseball bat and stabbed him. Attachment 17. Ramsey explained that Sneed used the word "we" when describing what happened in the motel room, at one point indicating a woman was involved, and had explained the plan had been to rob Van Treese by luring him into the motel room and taking his money. Ramsey only ever heard Sneed mention anyone named Richard as a person he was mad at and wanted to "get even" with for some reason, that he was consequently blaming for his own crime.

A fourth inmate who spent time in the Oklahoma County jail in 1997 with Sneed, Terry Allen Cooper, states Sneed told him he was afraid of the death penalty and attempted to enlist his help in trying to "lay it all off on Rich." Attachment 16. Cooper states Sneed knew that Cooper had spent time at the Best Budget Inn and asked him to falsely tell police Cooper had overheard Sneed and Glossip before the murder talking about wanting to kill the owner and split the money. Cooper refused.

These four independent witnesses—Melton, Tapley, Ramsey, and Cooper—all corroborate one another, although they do not know one another and provided their details entirely independently. Consistent with their accounts, Dr. Edith King, who was appointed to do a competency evaluation of Sneed, reported that on July 1, 1997, Sneed told her "the alleged crime

was in connection with a burglary," and made no mention of being hired or otherwise influenced by anyone else to commit the crime, nor did he make any mention of Richard Glossip, in a setting where, had it been true, he would be expected to do so. Attachment 25.

Two other witnesses who spent time incarcerated with Sneed in the Department of Corrections' Joseph Harp facility also heard Sneed talk about his case: Michael Scott, who was celled across the hall from Sneed, and Frederick Gray, who worked in the prison law library. Scott reports in a sworn affidavit that he heard Sneed on multiple occasions openly bragging about the deal he had made to save his own life, that he had set Glossip up, and that Glossip had not done anything. Attachment 55. Scott came forward of his own accord when he learned Mr. Glossip was about to be executed. Gray similarly reported that in a law library meeting where inmates discussed their cases, Sneed bragged about his crime, which he described as a plot to rob his boss, and explained he had set up his "fall partner," who was not involved in the crime, to get revenge for his failure to help Sneed cover up the killing. Attachment 56. Gray heard Sneed explain he had falsely told police his "fall partner" had hired him to kill their boss.

Sneed's account of his crime to his jailmates is highly consistent with the evidence. Van Treese's car was found with $23,100 in the trunk—the correct amount from Melton's account. RT Vol. 4 at 109. The man in the room next door, John Prittie, heard an argument in Room 102 between a man and a woman, as well as a metallic sound and glass breaking. RT Vol. 4 at 158. John Beavers, a longtime motel resident, also heard a crash and voices that "sounded like a couple." RT Vol. 6 at 26. The victim was attacked with two different weapons and had knife wounds on both the front and back of his body RT Vol. 11 at 82, suggesting two attackers, and Sneed was unable to account for all the injuries to Van Treese with his own actions. RT Vol. 12 at 227. Two sets of bloody clothes were found in the motel's laundry room. RT Vol. 9 at 166. All

of this evidence is consistent with the account of the killing as an intended robbery by Sneed and a woman inside the motel room.

New witnesses discovered by Mr. Glossip's pro bono counsel have independently provided details widely consistent with the account Sneed gave to Melton. Two witnesses who spent time at the Best Budget Inn confirm Sneed had a girlfriend: Albert Mize, a drug dealer in the area, reports Sneed had a young-looking girlfriend with brown hair and sores on her face. Attachment 13. Stephanie Garcia, who worked as a dancer at the Vegas Club, independently reports that Sneed's girlfriend, a small, dark-haired young woman she knew from the club as "Fancy," had scars on her face. Attachment 12. Garcia also reported Fancy had a relationship with Van Treese, who gave her regular payments of $500-$1,000—the same amount separately noted by Melton. Garcia reported Fancy came around a few days after the murder acting very afraid, saying she needed to "get rid of a box" for Sneed, and told Garcia, "I am not going down for this murder." Garcia also stated under oath that a man she knew as a customer at the club, John Miller, had told her that on the night of the murder, Fancy called him demanding to be picked up from the Best Budget Inn right away and taken to another motel; when Miller picked her up, she had blood on her shirt and shoes.

This is exactly the sort of crime committed by methamphetamine addicts, and as detailed *supra,* a host of witnesses have reported that Sneed had a raging methamphetamine addiction: Garcia, the dancer (Attachment 12; Mize, the dealer (Attachment 13); Barrett, another dealer (Attachment 20); Spann, who had known Sneed since high school (Attachment 21); and Eckhart, a maid at the motel (Attachment 19). These witnesses also described the effects of meth, noting Sneed "would do anything to get more drugs" and meth "makes you crazy and violent" (Spann), that this crime "sounds like something an addict like Justin Sneed would do, an attempted

robbery while strung out on methamphetamine" (Mize); meth addicts "stay awake for days or weeks and will do anything to get more of the drug, even kill" (Barrett); drug addicts "chase two things; drugs and the money to pay for drugs," and [w]hen Sneed was high, he was crazy. . . When he was coming off being high and needing more drugs, he was even crazier" (Garcia). Several of Sneed's jail-mates also reported he displayed signs of heavy meth use following his arrest in 1997. *See* Attachment 15; Attachment 16 ; Attachment 16.

Dr. Pablo Stewart, a renowned psychiatrist who specializes in substance abuse, confirms the meth available in the late 1990s was "much more potent than it is today," and that meth users, particularly intravenous users, often develop "psychotic symptoms" and "are prone to frenzied actions that can lead to 'overkill' behaviors. . . to take actions far in excess of what may be needed in any given circumstance"—such as "us[ing] a baseball bat and beat[ing] a victim to death in a frenzy, even if the intent is just to knock that person out with one blow." Attachment 57. This crime exactly fits the profile of a robbery by a methamphetamine addict: it involved a large amount of cash, it was committed with a baseball bat and a broken knife, unlikely choices of weapon for a killing carefully planned in advance: the victim was struck at least 9 times with a bat, RT Vol. 11 at, and the car was parked askew in the nearby parking lot. It adds up.

Not only was Sneed well known to be a meth addict; witnesses also consistently identified him as an inveterate thief. Spann recalled that in high school, "Sneed used to break into houses to steal things. He'd steal anything that wasn't bolted down," and more recently he stole from other roofers and even customers to trade for meth. Attachment 21. Barrett learned to always lock his car because Sneed "broke into cars at the motel parking lot and stole items," and reported Sneed brought, to trade for drugs, food stamps, radar detectors, car stereos, a firearm, and other items he claimed to have stolen from motel rooms and cars on the property; "90% of

the people [Barrett] knew who were addicted to meth were thieves; stealing to support their habit." Attachment 20. Eckhart, the maid, remembered Sneed stealing from motel guests and once trying to steal from her room. Attachment 19. Garcia, the dancer, witnessed Sneed making plans to steal money—later returning with drugs. Attachment 12. Garcia also described a specific ploy Sneed sometimes used: he would use girls from the club to lure men into motel rooms so he could rob them—exactly the plan Melton, who does not know Garcia, reported hearing about from Sneed in the Oklahoma County Jail in 1997.

Beyond his addiction and general M.O., two witnesses independently reported overhearing Sneed talk about attacking Van Treese in the weeks before the murder: Eckhart, the maid, who heard Sneed telling someone on the phone "that the motel owner 'was going to get what he deserved,'" Attachment 19, and Margaret Humphrey, an employee at Van Treese's Tulsa motel, who reported hearing "[t]he maintenance man from Oklahoma City," a "young, skinny man who was on drugs and very aggressive," say "that Barry 'was going to get what was coming to him,'" that he was "going to rob and kill Barry when Barry came to the Oklahoma City Best Budget Inn on payday," and that he "would get what is owed to him." Attachment 58. Van Treese was, in fact, murdered after traveling to the BBI on payday. Again, these witnesses do not know one another. Consistent with these reports, Eckhart and D-Anna Wood had both reported Sneed expressing frustration that Van Treese did not pay him for his work. Attachment 3 at 232-33.

X. REED SMITH INVESTIGATION

On June 15, 2022, the group of Oklahoma legislators released Reed Smith's report on the independent investigation of the case the lawmakers had requested. The report, based on nearly four months of work by over 30 attorneys collectively devoting over 3,000 hours and running

343 pages including its appendices, addressed the question, "Was the verdict from Glossip's second trial reliable in light of all facts and evidence now known?" Attachment 3 at 6. It concluded that "fundamental concerns and new information revealed by this investigation cast grave doubt as to the integrity of Glossip's murder conviction and death sentence." *Id.* The concerns include:

- "The 1999 destruction of several pieces of key physical evidence as well as potentially exculpatory financial documents, *before* Glossip's retrial, by the Oklahoma City Police Department at the direction of the Oklahoma County District Attorney's Office"

- "Intentional contamination by the lead homicide detectives of Sneed's interrogation, that appears to have signaled to Sneed to implicate Glossip as involved and the mastermind of the murder, rather than to gather information from Sneed of what happened regardless of whether or not it fit a particular hypothesis."

- "A deficient and curtailed police investigation driven by the lead detectives' prematurely formed hypothesis that detracted from finding or looking for evidence of what in fact transpired."

- "[D]iscovery and collection of facts—some altogether newly found—that directly undermine the State's theory of the case and the reliability of the murder conviction"

- "Critical gaps in juror instructions that, based on jury interviews, appear to have caused the jury to misunderstand Oklahoma's statutory mandate requiring a specific analysis be undertaken to determine whether there is sufficient corroboration of accomplice testimony."

- "The Prosecution's failure to vet the evidence collected by the police and its further distortion of nearly every witness's testimony to fit its case theory and secure a guilty verdict."

The report itself runs 259 pages, and it includes appendices detailing, among other things, all known evidence of Van Treese's movements on the night of the murder, each item of evidence purportedly corroborating Sneed's statements and the investigation's findings on each point, a careful tracking of each account given by Justin Sneed, identifying what he said about each item on four separate occasions and where they are materially inconsistent, a list of witnesses to

whom Sneed spoke about the murder and what he said to each, and an analysis of police treatment of inconsistent statements (the primary basis for suspicion of Mr. Glossip) by various other witnesses.

Crucially, Reed Smith's investigators accessed a wide range of information Mr. Glossip's defense teams had never been able to obtain. In particular, they were able to conduct interviews with at least five Oklahoma City police officers and were also granted interviews with both of the prosecutors who conducted Mr. Glossip's second trail, Gary Ackley and Connie Smothermon. They additionally had access to statements made by both lead detective Bob Bemo and prosecutor Gary Ackley years after the trial that did not exist at the time of prior filings (both discussed the case in a 2017 documentary film). Moreover, they were able to conduct interviews with seven of the trial jurors, obtaining crucial information with respect to prejudice relating to the fairness of the trial and the deficient performance of counsel.

In addition, the investigation included both conducting new interviews and review of materials from interviews conducted after the previous (2015) filing. The Reed Smith investigation had access to significant information that has never been available to defense investigators. Police officers still employed by the department, for instance, could not speak to *any* investigator without permission, which would not have been granted to a defense investigator, and even with permission, officers could decline. Indeed, the Reed Smith investigators have indicated that one officer agreed to be interviewed only after repeatedly confirming they were not with the defense. Another witness they spoke to was a friend of the Van Treese family, surely not amenable to overtures from the defense. Attachment 3 at 114 (describing interview with Dudley Bowdon). And both trial prosecutors granted them interviews defense investigators could never obtain. Even the Oklahoma County District Attorney's Office

provided at least some limited information, *id.* at 84, which it has steadfastly refused to do for the defense for years. These were crucial contributions to the report, especially in the discussion of the destruction of evidence, confirming the defense could not have obtained the necessary information without the issuance of this independent report.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PRELIMINARY STATEMENT ON PROCEDURE

As a preliminary matter, this pleading's posture as a successive application does not constrain the Court's ability to grant relief. This Court may consider the merits and grant relief on a subsequent application where it "contains sufficient specific facts establishing that the current claims and issues have not and 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 on or before that date." Okla. Stat. tit. 22 § 1089(8)(b)(1).

None of the claims in this application has been previously presented. No prior appeal or petition included claims regarding the destruction of evidence. While the 2015 application argued insufficient evidence and constitutional problems with relying on the word of the convicted killer, this Court has never been presented with a claim based on the overall unreliability of the investigation and trial, nor with a pure freestanding factual innocence claim. Although the direct appeal and prior post-conviction applications alleged ineffective assistance of counsel, their claims were entirely different from the one presented here. The distinct nature of this claim is discussed in detail with the merits of that proposition.

As discussed in detail in the statement of facts and in each proposition, this application arises in large part from the independent investigation conducted at the behest of Oklahoma lawmakers by the law firm Reed Smith. The report of that investigation was released publicly on June 15, 2022. Mr. Glossip could not have presented claims relying on the existence or the contents of this report before it was released, and this petition is being presented expeditiously (approximately two and a half weeks after the report's release). This application thus satisfies

both § 1089(8)(b) and Oklahoma Court of Criminal Appeals Rule 9.7(G)(3), which requires filing within 60 days of the new information becoming available.

As detailed in the statement of facts, the report contains a significant amount of previously unknown information. Even where claims concern in part information that may have been previously available, they depend on information from the report for key elements that rendered them legally viable. For example, the report contains information crucial to establishing prejudice, for proving the nature of the decision to destroy evidence, and for confirming actions and omissions by trial counsel. Accordingly, these claims are presented at the earliest opportunity, considering the necessary requirements that must be proven.

Section 1089(D)(8)(2) also requires 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." As detailed specifically in Proposition One (factual innocence), that standard is met here, where the present state of the evidence clearly demonstrates that Justin Sneed committed this murder in the course of a planned robbery that did not involve Mr. Glossip.

In any event, this Court maintains the power to grant post-conviction relief any time "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11 (citing Okla. Stat. tit. 20 § 3001.1). In *Valdez,* this Court considered the merits of a claim of ineffectiveness of counsel for failing to discover the defendant's social, mental, and health history and failing to advise him of the assistance available from the consulate of his home country even though ineffective assistance of counsel

had been raised in a prior proceeding. *Valdez,* 46 P.3d at 710. Moreover, the Court recognized that the relevant evidence "could have been discovered earlier," and "that the evidence was *not* discovered due to trial counsel's inexperience and ineffectiveness." *Id*. Still, the Court recognized that the circumstances of a particular case could justify considering the claim anyway. *Id*. In other words, where it would be plainly unfair to turn a blind eye, this Court can, and previously has, reached the merits of claims that could not otherwise meet statutory procedural requirements. A case where no one conducted meaningful investigation until after the primary review process was complete (where trial, appeal, and post-conviction counsel were all from the same agency—the Oklahoma Indigent Defense Service), the State has admitted to destroying evidence, the actual killer is serving the lesser sentence of life, and a thorough independent investigation conducted by a disinterested law firm finds the conviction and sentence to be unreliable and untenable, is just the sort of case this residual power is made for.

This Court has exercised this authority multiple times. In *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234, the petitioner attempted to challenge the state's lethal injection protocol, alleging it risked causing him severe pain in violation of the Eighth Amendment, and this Court, construing his filing as a subsequent application for capital post-conviction review, rejected the State's argument that the claim was procedurally barred because "[t]his Court has the authority to consider the merits of an issue which may so gravely offend a defendant's constitutional rights and constitute a miscarriage of justice." 137 P.3d at 1235.

In *Slaughter v. State*, the Petitioner filed a subsequent application for post-conviction relief, but the Court refused to hold a hearing, finding it was procedurally barred. OK 2005 CR 2, ¶25, 105 P.3d 832, 837. Two months later, after an execution date was set, he filed a third application for post-conviction relief, "raising essentially the same issues raised in his second

application for post-conviction relief." 2005 OK CR 6, ¶ 3, 108 P.3d 1052, 1053. The Court recognized the continued presence of procedural bars, and stated its doubts about the claims, but explained its "rules and cases do not impede the raising of factual innocence claims at *any stage* of an appeal," and proceeded to analyze the merits of the claims. 108 P.3d at 1054.

In *McCarty v. State*, 2005 OK CR 10, 114 P.3d 1089, the Petitioner had completed the review process. Several years later, he filed a second application for post-conviction relief, alleging actual innocence, a due process denial, and a *Brady* claim. In that case, the State agreed to waive procedural bars, and although this Court rehearsed those bars in its opinion, it addressed the merits—ultimately reversing the conviction and vacating the sentence. 114 P.3d at 1091.

Here, refusing to hear Mr. Glossip's claims on the merits would cause a grave miscarriage of justice, both because the claims address in large part serious misconduct by state actors, which must be addressed whenever they have arisen as a matter of basic fairness and the integrity of the criminal justice system, and because the facts now known unequivocally demonstrate that Mr. Glossip is factually innocent. *See Salazar v. State,* 1993 OK CR 21, 852 P.2d 729, 739 ("Because this Court lacks the power to grant relief to a man or woman who has been wrongfully executed, this Court, like all courts grappling with the difficult issues raised in capital cases, must act prudently and with the utmost fairness.").

In *Slaughter,* this Court also considered a claim that § 1089 and Rule 9.7(G)(3) were unconstitutional because they purported to prohibit merits review of actual innocence evidence, "thereby depriving inmates of due process of law and resulting in cruel and unusual punishment." 108 P.3d at 1055. The Court rejected that claim, not because such a prohibition would not violate those constitutional provisions, but rather because it found "no actual innocence claims in Petitioner's post-conviction filings that have been barred from review." 108

P.3d at 1056. If this Court *were* to refuse to consider new evidence of innocence, as is unquestionably asserted in this application, it would be in violation of The Eighth and Fourteenth Amendments to the U.S. Constitution and Art II, §§ 7 and 9 of the Oklahoma Constitution.

Finally, should this Court determine that procedural bars do apply here, Mr. Glossip requests that the State agree to waive them, and that, if necessary, this Court give it the opportunity to do so.

PROPOSITION ONE: Richard Glossip is factually innocent of the murder of Barry Van Treese.

A. Requirements for Relief Based on Factual Innocence

Factual innocence of the crime provides a freestanding basis for relief in a capital case. *See, e.g., Slaughter v. State,* 2005 OK CR 6, ¶ 6, 108 P.3d 1052, 1054 ([T]his 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."); *McCarty v. State,* 2005 OK CR 10, ¶¶ 17-19, 114 P.3d 1089, 1094 (claim of factual innocence fails because proffered evidence did not prove innocence); *see also Herrera v. Collins,* 506 U.S. 390, 417 (1993) (assuming execution would be unconstitutional, and relief available from federal courts, upon a "truly persuasive demonstration of 'actual innocence'" made after trial); *Doe v. Jones,* 762 F.3d 1174, 1183 (10th Cir. 2014) (discussing possibility of freestanding federal innocence claim); *Clayton v. Gibson,* 199 F.3d 1162, 1180 (10th Cir. 1999) (proffered evidence insufficient to establish freestanding claim of actual innocence).[22]

[22] Although several Tenth Circuit cases suggest no such federal claim exists, their only basis for this is *Herrera,* which specifically carves out the possibility that in a rare capital case, such a claim *may* exist. *See, e.g., LaFevers v. Gibson,* 238 F.3d 1263, 1265 n.4 (10th Cir. 2001). In any case, this Court is clear that innocence is a stand-alone basis for relief under Oklahoma law.

This Court has explained that the evidence must be truly exculpatory, rather than simply creating a conflict in evidence that a jury might have considered. For instance, in *McCarty,* the Petitioner presented new evidence that seminal fluid found in the victim belonged to somebody else; because part of the theory was that the applicant acted with an accomplice, and because the applicant himself had argued that the presence of semen did not necessarily establish a rape connected to the murder, the absence of his sperm was entirely compatible with the theory of his guilt presented at trial, and thus did not establish actual innocence. 2005 OK CR 10 at ¶¶ 18-19, 114 P.3d at 1094. This Court has also recognized that the strength of the evidence of guilt at trial is relevant to determining how much evidence is needed for a claim of actual innocence; a stronger case for guilt at trial would require a correspondingly higher showing of actual innocence. *See Slaughter,* 2005 OK CR 6 at ¶ 21, 108 P.3d at 1056 ("Given the prosecution's accomplice and alternative theories, along with the strong evidence of guilt admitted at trial, it is a gross overstatement to claim that the DNA results from one crime scene hair, the conceivable flaws in comparative bullet lead analysis, and uncorroborated and likely inadmissible brain fingerprinting tests rise to the level of actual innocence claims.").

Here, the evidence at trial was markedly weak, as multiple courts observed. The federal district court, for instance, observed, "Unlike many cases in which the death penalty has been imposed, the evidence of petitioner's guilt was not overwhelming." Attachment 58 at 1-2. One of the dissenting judges on this Court wrote that the question of whether there was even sufficient evidence in the record to corroborate Sneed's statement to allow its consideration was "very close." *Glossip v. State*, 2007 OK CR 34, ¶ 30, 168 P.3d 185. And the two dissenting judges in 2015 noted that without Sneed's statement, "[t]he tenuous evidence in this case is questionable at best." Attachment 59 at 10. In other words, this is precisely the type of case to which this

Court was drawing a contrast in *Slaughter.*

Moreover, in light of the findings of the Reed Smith investigation, the case against Mr. Glossip is even weaker today than it was at trial. Specifically, the testimony about the motel financials—a primary motive asserted for Mr. Glossip's involvement and basis for the key statutory aggravator—has been thoroughly discredited. *See* Attachment 3 at 129-53. The firm's investigation also concluded that the State's calculation of the proceeds stolen from Van Treese, on which it relied to link to the robbery the $1,757 Mr. Glossip was carrying when he was taken into custody ($4,000 total, split evenly), was incorrect, and in fact the proceeds had to be less than $3,000. *Id.* at 109-14. Reed Smith's finding undercuts the State's claim that the cash Glossip was carrying was his half of the $4,000. Mr. Glossip's mental impairments, not previously appreciated, also significantly weaken the State's case that he was the "mastermind." Given the circumstantial nature of the case, these elements were crucial; without them, the case against Mr. Glossip is incredibly weak, and requires correspondingly less affirmative evidence of innocence to overcome.

B. Affirmative Evidence of Innocence

The evidence presented in the statement of facts firmly establishes that the murder was a botched robbery, not a planned-out killing for hire. The two versions are entirely incompatible: if Justin Sneed was attempting merely to rob Barry Van Treese, then he could not have simultaneously been aiming to kill him at Mr. Glossip's behest to conceal embezzlement or other mismanagement. An unintended killing in the course of a robbery cannot be a murder for hire.

Nor is there any chance that it was a robbery, but still involved Mr. Glossip. That has never been alleged; the State has firmly maintained that Mr. Glossip wanted Van Treese dead, and has never suggested he instead ordered a robbery. Nor would any such suggestion be

tenable. The evidence is clear that Mr. Glossip had regular access to significantly larger amounts of cash than what was stolen that day from Van Treese (and indeed had custody of that very cash prior to Van Treese's arrival). Robbing Van Treese, for Mr. Glossip, would have been a simple matter of absconding with the cash he already regularly had. The evidence is also uncontroverted that Mr. Glossip had no involvement in the drug and prostitution trade at the motel, as described in the statement of facts. Simply put, the murder occurring in a botched robbery is incompatible with Mr. Glossip's having arranged to have Sneed attack Van Treese.

1. <u>Evidence that the Murder Was a Botched Robbery Attempt by Sneed and His Girlfriend.</u>

The new evidence detailed in the statement of facts firmly evinces that Sneed planned only to rob Van Treese, not to kill him, and that it was his girlfriend "Fancy," not Mr. Glossip, who planned it with him. That evidence, described in detail in the statement of facts, includes:

- A detailed account from Paul Melton, a witness who was incarcerated with Sneed before he pled guilty, describing Sneed's account of his crime: Sneed's girlfriend, a dancer at the neighboring Vegas Club who had a "sugar daddy" relationship with Van Treese in which he paid her specific amounts, had learned he would be carrying a large amount of cash that night and planned with Sneed to rob him; the robbery went awry and Sneed ended up killing Van Treese, and later implicating Glossip to save himself. Melton even reported Sneed's expectation of finding $20,000-30,000 in the car, matching the amount police later found.

- Independent statements from three other men incarcerated with Sneed in the Oklahoma County jail and two in the Department of Corrections who each heard Sneed explain his crime as an attempted robbery that had nothing to do with Mr. Glossip. Sneed asked one of them to lie for him and falsely state he had overheard Sneed and Mr. Glossip discussing the murder before it occurred. Several heard Sneed express that he had set Mr. Glossip up.

- Also consistent with these statements was Sneed's statement to the psychologist who evaluated his competence, in which he explained the murder had been related to a burglary, and made no mention of anyone else ordering him do it.

- Stephanie Garcia, a dancer at the Vegas Club who saw Sneed's girlfriend, whom she knew as "Fancy," very distressed several days after the killing and heard her say she was "not going down for this murder." Garcia also independently reported Fancy's "sugar

daddy" relationship with Van Treese and reported Van Treese paid Fancy amounts precisely matching the payments described by Melton. Additionally, Garcia had previously known Sneed to rob men by having dancers from the Vegas Club lure them into motel rooms.

- Statements from additional witnesses confirming that Sneed had a girlfriend matching Fancy's description.

- Copious evidence that Sneed was addicted to methamphetamine, and that the type of over-the-top violence exhibited in this crime is common among methamphetamine users.

- Copious evidence that Sneed had a long history of stealing.

- Two witnesses who overheard Sneed, prior to the murder, talk about harming Van Treese. Witnesses had also overheard Sneed expressing frustration that Van Treese did not pay him for his work.

This evidence alone is sufficient to establish by clear and convincing evidence that no reasonable juror would have convicted Mr. Glossip of first-degree murder.

But this evidence must be viewed in the context of evidence at trial, including evidence that Sneed fled the scene when police arrived while Glossip stayed and voluntarily cooperated with police (RT Vol.13 at 10, 41-43); evidence that two motel guests nearby at the time of the murder believed they heard both a man's and woman's voice coming from inside the motel room around the time of the murder (RT Vol. 4 at 158; RT Vol. 6 at 26); evidence that Sneed and his brother had previously made plans to rob the motel (RT Vol. 10 at 22; RT Vol. 12 at 73-74); and evidence that Van Treese's car was found with $23,100 in the trunk (RT Vol. 10 at 152). Further, the extensive evidence of Sneed's history lies in stark contrast to Mr. Glossip's total lack of such a history and, for that matter, many years as a manager of cash-intensive businesses with no prior suggestion of mishandling funds.

2. Evidence that Mr. Glossip's Actions After the Killing Did Not Reflect His Involvement in the Murder.

Significant new evidence has also emerged that provides an innocent explanation for Mr.

Glossip's partly odd behavior after the murder incompatible with the State's theory that he was the mastermind of the murder and was attempting to conceal his crime. First, and most significant, is the fact that Mr. Glossip has significant mental and cognitive impairments—information that never made it to the jury, the State, or any prior court. This fact, properly understood, casts Mr. Glossip's actions in a decidedly different light.

It is incompatible with the State's oft-stressed theory that Mr. Glossip was the "mastermind" of this murder—that, in the words of the prosecutor, he was the "coach" while Sneed was the "Bat boy." Simply put, he was incapable of the type of multi-step planning required to execute a murder-for-hire plan designed to conceal embezzlement. Attachment 22 ¶ 35. The State, the jury, and every court to examine this case thus far was unaware of those impairments and had operated under the gross misunderstanding that he readily possessed the wherewithal to orchestrate such a plot.

This evidence also significantly clarifies Mr. Glossip's actions during the day on January 7. Following Sneed's statement that he had "killed Barry," someone with Mr. Glossip's impairments would be unable to assess that information and make a plan of action that appropriately accounted for the severity of the situation, the importance of the information he could contribute, or the consequences of failing to come forward. It was unquestionably a complex situation requiring understanding, problem-solving, and planning. Such an unfamiliar, complicated, and urgent situation would predictably overwhelm a person with these frontal and parietal lobe deficits, leading him to freeze—i.e., fail to act with volition, which is precisely what Mr. Glossip did, proceeding as if the early morning encounter with Sneed had not happened and following the direction of others. Mr. Glossip's trauma history and resultant resistance to confrontation further explains his reluctance to contact police to accuse Sneed,

whom he had considered a friend, of murder, especially when he was not certain what had happened and his girlfriend was strongly advising him not to. Attachment 22 ¶¶ 36, 38-39.

Mr. Glossip's impairments also clarify why he might fail to think through the consequences of keeping that information to himself, why he might be willing to assist with repairing the window even believing a crime may have occurred, and why he might give a second statement to police mere hours after an attorney's unequivocal instruction to him never to do so. It further explains his inability to clearly express when he had last seen Van Treese, and his lack of realization that it was necessary to do so precisely and accurately. He has maintained that he saw a person he believed was Van Treese early that morning, but was not sure (and indeed, one of his errands scheduled for later that day was to get a new pair of glasses). A person of greater cognitive functioning could have articulated more clearly his uncertainty, or been able to clarify with officers when they later accused him of changing his story.

Mr. Glossip's impairment is also clearly reflected in his second statement to Detective Bemo, where he expresses concern primarily about losing his girlfriend because of his arrest, rather than about the obviously far more significant consequences of facing a murder charge that carries the death penalty. It even explains why Mr. Glossip—by all accounts a generally upstanding, hard-working person with middling vocational abilities—found himself managing a motel overrun by drugs and prostitution for a business owner who did business by avoiding financial institutions and keeping envelopes of cash in the trunk of his car.

In sum, a large amount of new evidence establishes that the murder occurred in a botched robbery carried out by Justin Sneed and his girlfriend, without the participation of Richard Glossip, and that Richard Glossip, a man with significant mental and cognitive impairments, made poor decisions in reliance on others that led to his entanglement in this case. The cursory

investigation, abysmal representation, and unfair trial described in this Application explain how this miscarriage of justice occurred. Richard Glossip is factually innocent, and this Court must vacate his conviction and death sentence.

Section 1089(C) requires the applicant to state "specific facts explaining as to each claim why it was not or could not have been raised in a direct appeal and how it supports a conclusion that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." For this proposition, the claim could not have been raised in a previous filing because it depends in significant part on the Reed Smith report that was received in June, 2022, and the claim itself establishes that Mr. Glossip is factually innocent. But regardless of the requirements of § 1089, this Court should hear the merits of this claim to avoid a grave miscarriage of justice: the execution of an innocent man.

PROPOSITION TWO: The State's bad faith destruction of vital evidence during the pendency of Mr. Glossip's first direct appeal violated his right to due process.

With Mr. Glossip's direct appeal pending—and before his ultimate retrial—the Oklahoma County District Attorney's Office instructed the OCPD around October 27, 1999, to destroy a box of critical evidence. This was done without explanation, nor could a lawful justification exist. This action eliminated valuable evidence Mr. Glossip would not be able to obtain by other means. *California v. Trombetta*, 467 U.S. 479, 488-9 (1984); *Harris v. State*, 2019 OK CR 22, ¶¶ 35-37, 450 P.2d 933, 949. Further, the evidence was plainly "potentially useful," and its destruction was plainly in "bad faith." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 20, 241 P.3d 214, 226; *Villandre v. State*, 2005 OK CR 9, ¶8 n.16 (citing cases). The destruction violated Mr. Glossip's due process rights and, under the Due Process Clause of the Fourteenth Amendment and Art. II, § 7 of the

Oklahoma Constitution, necessitates vacatur of his 2004 judgment. *See generally Bever v. State*, 2020 OK CR 13, 467 P.3d 693.

The prosecution's case against Mr. Glossip in the 2004 retrial centered on his alleged motive to have Van Treese murdered because he feared confrontation and reprisal from the purported embezzlement of motel proceeds. O.R. 1047-48. This not only drove the prosecution's theory of motive, it was essential to the State's last-minute additional aggravator of renumeration/murder for hire, O.R. 1044, 1047-48, the only aggravator the jury ultimately found in imposing the death sentence. Unmistakably, evidence of the motel's business records, specifically, of the proceeds that Mr. Glossip, as its manager, would theoretically be able to embezzle, were essential to both the question of criminal liability and the presence of a statutory aggravating circumstance to permit a death sentence.

As set forth in the statement of facts, among the materials the District Attorney's Office directed the OCPD to destroy on October 27, 1999, were not only items of physical evidence from the crime scene, but also the only available financial records for the motel,[23] specifically two receipt books, a deposit book, and other papers. Attachment 18.

A. <u>With Mr. Glossip's Ultimately Successful Direct Appeal Pending in this Court, the State, in Prima Facie Bad Faith, Coordinated the Violation of Law and Policy in Destroying Evidence Critical to Mr. Glossip's Further Litigation.</u>

The documentary record, augmented by Reed Smith's investigation and access to State actors, evinces a coordinated effort, apparently initiated from the District Attorney's Office and executed in the OCPD, to take evidence at the center of Mr. Glossip's case and destroy it while his first appeal was before this Court. Shockingly, then-Inspector McNutt of the OCPD—a

[23] *See* RT Vol. 4 at 115:20-116:9 (testimony of Ms. Van Treese, averring that a basement flood destroyed all business records that remained in her possession for the Oklahoma City Best Budget Inn).

detective with no prior involvement in the Van Treese homicide case but, at the time (October 1999), Det. Bemo's partner—collected the evidence in question from the District Attorney's Office (Attachment 39 at 1-2), and processed the destruction of these materials, explicitly misstating "Appeals Exhausted" in the title of the OCPD Evidence/Property Booking Form (*Id.* at 3). As retired detective Hogue told Reed Smith interviewers, "in 1999[, i]f the DA's office called you over and said this is for destruction, you say okay. You make a list and you take it over to the property room for destruction." Attachment 3 at 47 (quoting Reed Smith interview in April 2022).

There is no question that Mr. Glossip's meritorious appeals were not exhausted at the time of destruction. Yet the records reflect that OCPD designated this destruction, carried out on November 10, 1999, under the category, "Dispose as Authorized by City Ordinance." Attachment 39 at 1. While the given city ordinance is not specified on the form, it is clear no ordinance would authorize destruction of evidence in a case pending appeal,[24] let alone a homicide conviction.[25] Further, given the case was capital, OCPD policy even at that time, 1999, was to *never* destroy such evidence. Attachment 3 at 45.[26] Records show steps to obscure this action by creating a new OCPD case number for the evidence's destruction rather than documenting it within the existing case concerning Mr. Glossip, evidencing cognizance of the illegality of this destruction. Attachment 39 at 3-4.

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[24] The applicable ordinance appears to have been Oklahoma City Municipal Code § 43-42 (1999), which proscribed the destruction of property if it "needed to be held as evidence or for any other purpose in connection with any litigation," absent the Chief of Police's application to the district court order and after a hearing. *See* Attachment 3 at 56 n.242 and accompanying text.

[25] Reed Smith interviewed former OCPD officers M. O'Leary, Lieutenant B. Horn, and detective J. Fiely circa May 2022, who all confirmed that the department's protocol for homicide cases was to retain evidence indefinitely. Attachment 3 at 47 n.213.

[26] Reed Smith interviewed former Assistant District Attorney Gary Ackley in June 2022. Mr. Ackley stated that his former office "had a long-standing agreement with the [OCPD] since the 1990s to never destroy evidence in a capital murder case." Attachment 3 at 45 n.207.

Former Assistant District Attorney Ackley expressed to Reed Smith his shock in this turn of events:

> The Glossip deal horrifies me. I have no idea how something could happen. No idea why it would happen. In my admittedly faulty recollection, that was well after we had reemphasized this stuff couldn't get destroyed.

Attachment 3 at 57 n.248 and accompanying text.

At bottom, this destruction is plainly more than merely "law enforcement personnel's ineptness," *Mollett v. State,* 1997 OK CR 28, 939 P.2d 1, 10, rather it is the product of a series of intentional acts between the District Attorney's Office and the OCPD to violate the policy and law to harm Mr. Glossip's prospective litigation.

B. <u>The Destroyed Evidence Was Clearly "Potentially Useful" to Mr. Glossip.</u>

As set forth above, the State's theory was that Barry Van Treese believed Mr. Glossip was embezzling from his motel and Glossip had Van Treese killed before the victim could fire him.[27] RT Vol. 15 at 153:8-18 (State's closing argument). Leaving aside the lack of evidence that Mr. Glossip even knew Van Treese had this understanding and intentions, the predicate issue of embezzlement plainly lies at the heart of the State's case for both liability and death. Thus, the destruction of the only records relating to the motel's proceeds amply exceed the "potentially useful" standard. The other items destroyed at that time also satisfy this standard and are addressed herein.

The deposit book, two receipt books, and a box of additional papers were retrieved from Van Treese's automobile. The receipt books captured the motel's expenses, while the deposit

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[27] This factual support for the State's theory is deeply flawed, as well set forth in the Reed Smith Report (#-#). The asserted shortages were calculated on a summary chart absent actual records. Attachment 42; Attachment 3 at 137-38*. Whatever the strength of the evidentiary basis for this theory, records relating to proceeds and the motel's finances were essential to Mr. Glossip's defense. The only actual records relating to the motel's proceeds appear to have been the records destroyed in November 1999.

book captured Van Treese's financial record keeping for the motel itemizing cash provided from the manager, Mr. Glossip, to the owner. *See* Attachment 3 at 52. There is no conception of "potentially useful" that these records would not meet, given that they were the only actual records concerning the expenses and proceeds of the motel. *See, e.g.*, *United States v. Bohl*, 25 F.3d 904, 912 (10th Cir. 1994) ("evidence disposed of here was central to the government's case . . . nothing was more probative on the issue of the steel composition of TSL's towers than the towers themselves.").[28] The only way to prove definitively no embezzlement was occurring—something Mr. Glossip needed to do to meet the State's case—would be to examine the motel's records. Their intentional destruction made that impossible.

While these motel records were absolutely crucial, other destroyed items clearly exceed the "potentially useful" threshold in their own right. The OCPD collected several of these items from Room 102, and they directly concern Sneed's assertion that he and Glossip placed the shower curtain over the broken window and Glossip pulled cash from the wallet—both assertions whose truth or falsity would be essential to an assessment of Sneed's credibility. In 1997, the police claimed no fingerprints were recovered from any of these: (a) roll of duct tape apparently regarding the tape used to hang the shower curtain covering Room 102's broken window; (b) duct tape used to hang the shower curtain; (c) white shower curtain used to cover window; and (d) bag with wallet, knives, and keys (no fingerprints testing). *See, e.g.*, Tr. 1/16/03 at 24. This conclusion, however, was patently unreliable, as police had *not* noticed fingerprints later discovered on the money taken from Sneed's apartment at the time of his arrest. *Id.* at 25-26. Mr. Glossip did not have the opportunity to independently examine the evidence before it

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[28] To the extent the precise content of these records remains unknown, that is the result of police failure to carefully document the evidence they collected, before they destroyed it, and they, not Mr. Glossip, must bear the risk of any uncertainty they created.

was destroyed before his retrial, nor was he permitted, with the benefit of the advances in testing sensitivity and accuracy in the years following 1997, to subject it to DNA testing near the time of his 2004 trial. Indeed, current Oklahoma law would permit Mr. Glossip to secure DNA testing of these items now, had they not been destroyed. *See* Okla. Stat. tit. 22 § 1373. And of course, the only attorney who represented Mr. Glossip at his first trial, before the destruction, was so incompetent that this Court reversed the conviction unanimously. The record reflects he never even viewed all the evidence, let alone had it assessed by an expert. Tr. 5/29/98 at 13. And if, as the evidence now shows, there was in fact a second person—a woman—inside the room during the murder, examination of the physical evidence in that light would be an important step in preparing a defense based on that fact, something Mr. Glossip will now have no opportunity to do.

C. <u>The State Destroyed the Only Records Concerning Motel Finances and Various Items of Physical Evidence from the Murder Scene.</u>

The foregoing State misconduct eliminated Mr. Glossip's ability to obtain evidence vital to his defense. The evidence in question was unique and thus no comparable evidence was available by any means. *Trombetta*, 467 U.S. at 488-9 (holding violation occurs upon destruction of evidence "possess[ing] an exculpatory value that was apparent before the evidence was destroyed, and be[ing] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."); *Harris v. State*, 2019 OK CR 22, ¶34, 450 P.3d 933, 948. *Harris* emphasizes that under *Trombetta* the constitutional preservation "obligation is not triggered unless the exculpatory value of the evidence is apparent before its destruction." *Id*.

The decision of the District Attorney's Office to orchestrate the OCPD's destruction of this evidence, given the numerous steps and actors involved between the two institutions, betrays

the value of this evidence; its systematic elimination was neither accidental nor haphazard and reflects the State's extreme bad faith (absent the emergence more than two decades after the fact of an otherwise wholly unapparent explanation), along with its recognition of the destroyed evidence's exculpatory value. *See also State v. McGrone*, 798 So.2d 519, 523 (Miss. 2001) ("The State may not, through the police officer's intentional actions [of failing to comply with subpoena], negate the only means the defendant has for proving a due process violation due to destruction of evidence under *Trombetta* and *Youngblood*.").

Turning first to the financial records, there is no mistaking the value of these materials for Mr. Glossip's defense, given that the State's case, as evolved for the retrial, hinged on essentially bald assertions about the finances without actual evidence of proceeds and expenses. Those very records, as Van Treese contemporaneously kept them, are what the District Attorney's Office eliminated, clearing the way for the victim's widow to present, without any evidentiary foundation, her "summary of the 1996 year-end deposit versus volume report." Vol. 4 at 133:10-21. This reporting manufactured an untethered record that Mr. Glossip was disabled from addressing through the actual evidence of proceeds and expenses found in Van Treese's deposit book and the receipt books that the State destroyed.

Further, Sneed's testimony pins complicity on Mr. Glossip in covering up the state of affairs in Room 102. Vol. 12 at 132:1-11. The physical evidence from Room 102 concerning the duct taped curtain and Van Treese's wallet and related items lacked any indicia of physical contact by Mr. Glossip. Yet the District Attorney's Office ensured the destruction of this evidence before Mr. Glossip ever subjected it to forensic examination, which would have included testing for fingerprints and DNA and could have established not only Mr. Glossip's lack of connection to that evidence of Sneed's crime but, possibly, the involvement of a third

party.

Had Mr. Glossip been able to examine and introduce this destroyed evidence in his defense, he would have eliminated the prosecution's theory of his motive. Thus, the State's orchestrated destruction of this evidence also destroyed any sense that Mr. Glossip received a fair trial and sentencing proceeding. *See McCarty v. State*, 2005 OK CR 10, 114 P.3d 1089.

Section 1089(C) requires applicants to state "specific facts explaining as to each claim why it was not or could not have been raised in a direct appeal and how it supports a conclusion that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." For this proposition, the establishment of bad faith depends on information gathered by Reed Smith from interviews with police and prosecutors that were not available to Mr. Glossip. It was not until Reed Smith's report was released in June, 2022 that the information necessary to establish bad faith—an important element of this claim—became available. Regardless of the requirements of § 1089, this Court should hear the merits of this claim to avoid a grave miscarriage of justice: the execution of an innocent man.

PROPOSITION THREE: Mr. Glossip's trial counsel were constitutionally ineffective for failing, on behalf of their innocent client facing the death penalty, to conduct any independent investigation of the crime, investigate Mr. Glossip's mental impairments and deficits, interview many of the State's witnesses, or investigate and pursue the State's destruction of evidence in violation of the Sixth, Eighth, and Fourteenth Amendments and Art. II, §§ 7, 9 and 20 of the Oklahoma Constitution.

Mr. Glossip's trial attorneys did not present a single witness in the merits phase of his trial. This was not because they had talked to witnesses and determined they had nothing useful to say; it was due to a total failure to even identify, let alone locate, other possible witnesses. Nor did the defense provide the jury with any explanation for how the crime occurred without Mr.

Glossip's involvement. Moreover, there is no evidence they spoke to the majority of the State's witnesses prior to trial, and they did nothing to investigate their client's mental and cognitive functioning, despite the fact that his role as a "mastermind" was a pillar of the State's case and neuropsychological testing years after his conviction reflect a full-scale IQ of 72.

Although present counsel has access to the record and prior counsel's files, neither Mr. Lyman nor Mr. Woodyard, nor prior counsel Lynn Burch, has agreed to be interviewed or provide a declaration speaking to their performance. Accordingly, an evidentiary hearing is highly necessary here, where Mr. Glossip may have the benefit of legal process to procure their testimony about their failure to investigate. *See Malone v. State*, 2007 OK CR 34, ¶ 113, 168 P.3d 185, 229 ("We recognize, however, that the current state of the record does not contain any direct evidence from Malone's trial attorneys about what they did, how much they did, why they made the choices they did, *etc.* An evidentiary hearing would allow a more direct investigation of this question."). Absent evidence to contradict the barren record adducing their total lack of performance in this essential domain of Mr. Glossip's defense—evidence only these attorneys could provide—their deficiency and its prejudice dictate a determination that their ineffective assistance caused the conviction and condemnation of an innocent man, in violation of the Sixth, Eighth, and Fourteenth Amendments, and Art. II, §§ 7, 9, and 20 of the Oklahoma Constitution.

A. Prevailing Professional Standards

Investigating possible theories of defense is an obvious core function of defense lawyers. Ultimately, the "test for effective assistance of counsel is whether the defendant's attorney subjected the prosecution's case to meaningful adversarial testing," and "[i]n order to make the adversarial process meaningful, counsel has a duty to investigate all reasonable lines of defense."

Fisher v. Gibson, 282 F.3d 1283, 1290-91 (10th Cir. 2002). "Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies," the Supreme Court has "noted that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (quoting *Strickland v. Washington,* 466 U.S. 688, 690 (1984)). While an attorney may reasonably decide not to pursue a given area, "a decision not to investigate cannot be deemed reasonable if it is uninformed," and "failure to investigate some of the most obvious aspects of the case" is "unreasonable and deficient." *Id.* at 1296. This principle is magnified in death penalty cases. *See Nguyen v. Reynolds*, 131 F.3d 1340, 1347 (10th Cir. 1997) ("We have emphasized that counsel's duty to investigate all reasonable lines of defense is strictly observed in capital cases.").

Consistent with these rulings, the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,[29] which the Supreme Court has recognized bear on what constitute prevailing professional norms, *see, e.g., Wiggins v. Smith,* 539 U.S. 510, 524 (2003), require counsel to "conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7. These guidelines were published in 2003—before Mr. Glossip's trial—and effectively codify the standard of care well prior to that publication date. They specify that a guilt-phase investigation requires "seek[ing] out and interview[ing] potential witnesses," which should include "eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself"

[29] The most recent version of these guidelines appears at 31 Hofstra L. Rev. 913-1090 (2003).

and "potential alibi witnesses," and "Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses." Commentary to Guideline 10.7.

B. Deficient Performance

The record clearly demonstrates that defense counsel did almost no investigation of the case before going to trial, either to develop theories of defense or to develop effective impeachment of the State's witnesses. There is no conceivable strategic reason for failing to conduct even initial investigation to learn what witnesses not listed by the State might exist; a strategic choice cannot be made without factual basis, and the attorneys cannot have believed the information they might learn would be irrelevant to their theory of defense, because they had no theory of defense. This was not a strategic choice; it was an abject failure to gather even the minimal information needed to make any informed choice. *See Chambers v. Armontrout,* 907 F.2d 825, 828 (8th Cir. 1990) (*en banc*) ("The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial.").

1. Circumstances of Representation and Turnover of Counsel

As an initial matter, the circumstances of the representation confirm very little effort was made by the attorneys who tried the case. This case was set to be tried by a different lead attorney, Lynn Burch, on November 4, 2003. When the parties arrived for trial, Smothermon represented that Sneed now planned to testify that Burch had visited him (almost a year prior) and encouraged him not to testify. Burch disputed that, causing the judge to suggest Burch would need to be a trial witness and should withdraw. He immediately agreed to leave the case, without further inquiry into the State's representations or other possible solutions.[30] Tr. 11/4/03 at 11-12.

[30] No one asked why the State was only raising the issue now, as trial was beginning, when that visit had been known to them at least since January.

The judge then asked the two remaining attorneys, Silas Lyman and Wayne Woodyard, which of them would become lead counsel, and choosing based on which lawyer happened to be standing up and without inquiry into their respective experience, competence, or readiness to take on a death penalty case, stated, "Congratulations, Mr. Lyman. You're it." *Id.* at 16. Lyman explained that Burch "was handling most of it, quite frankly some of the serious matters of the case," and there were many areas that "neither Mr. Woodyard or myself have been prepared on or are prepared on." *Id*. Woodyard agreed that he had "done a very few things in the case," primarily motions, as he was an appellate lawyer. *Id.* at 17. Lyman explained he did not even have a list of all the state's witnesses, but was only "ready on about five." *Id.* at 18. He added that he had just "become chief of the Capital Trial Division down in Norman," which created "many other duties from all of that." *Id.* at 21. Despite this state of affairs and the seriousness of the case, Lyman requested a continuance of just 30 days to prepare. *Id.* at 16. The Court's calendar necessitated scheduling trial instead for May, but Lyman and Woodyard's files reveal they did almost no preparation through November, December, January, February, and March. In the two weeks before trial, they were still scrambling just to locate complete copies of the existing police reports. Attachment 60.[31]

2. Failure to Investigate the Crime

Against this backdrop, it is unsurprising that Lyman and Woodyard did not investigate the case, did not develop any coherent theory of defense, and were not prepared for trial. There is no indication they spoke to a single witness who was not on the State's witness list, and they

[31] This was not the first time Lyman performed unacceptably in a retrial. In 2013, a federal court reversed the conviction in another of his cases, finding Mr. Lyman constitutionally ineffective where he "had explicit instructions from OCCA, and in the absence of compelling reasons not to present that expert testimony, the undersigned believes that Mr. Lyman was obligated to do so." *Fitzgerald v. Trammell,* 2013 WL 5537387 (N.D. Okla. 2013).

called no witnesses in Mr. Glossip's defense. The only memorandum in the defense files of any interviews by Lynn Burch show he spoke only to Justin Sneed, to Mr. Glossip's prior lawyer Wayne Fournerat, and to the lawyer Mr. Glossip consulted prior to his arrest—and to no one else. As detailed in the statement of facts, there were dozens of witnesses in and around the motel and proximate to Sneed—many of whom could be located even over twenty years later—who had information that would have yielded a compelling defense. Several were motel employees; others were regular visitors, who would have been easy to locate. Others spent significant time with Sneed, both in and out of custody, and were readily identified and found. Yet nobody ever spoke to them, as their affidavits confirm. *See, e.g.,* Attachment 15, ¶ 21; Attachment 14, ¶ 16; Attachment 17 at 3; Attachment 21, ¶ 32; Attachment 13 at 15; Attachment 12, ¶ 53. This failure alone was enough to render counsel's performance constitutionally deficient.

But other significant necessary investigation was never undertaken. Like their predecessors in Mr. Glossip's first trial wherein this Court adjudged he received ineffective assistance, Lyman and Woodyard made no attempt to gather motel financial records or obtain any expert review of the very limited records they did have. Nor did they otherwise investigate the nature of the business, seeking, for instance, bank or real estate records. In a case premised largely on an allegation of embezzlement, this omission is inexcusable. Nor did they seek out any additional witnesses to Van Treese's stop at his Tulsa motel on the night he was killed. One such witness was known at the time—William Bender's wife, Marty—but it appears no attempt was made to interview her, nor Harold Wells, the Tulsa officer who put Bender in touch with Det. Bemo, nor anyone else who was at the Tulsa motel that night. These would have been elementary steps of investigation of the "most obvious aspects of the case." *Fisher*, 282 F.3d at

1296. No minimally competent defense lawyer would have failed to seek out additional witnesses to Van Treese's final hours, especially in light of the serious inconsistencies and other problems in Bender's statement. Such "blatant lack of investigation indicates a severe deficiency in the performance of trial counsel." *Jennings v. State,* 1987 OK CR 219, 744 P.2d 212, 214 (quoting ABA Standards for Criminal Justice, Defense Function 4-4.1) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

3. Failure to Assess Mr. Glossip's Mental Capacity

Defense counsel entirely neglected a crucial area: their client's mental functioning. Outside of Sneed's statement, the case against Mr. Glossip was built largely on his behavior after Van Treese was killed. That behavior was unusual, including participating in a search for Van Treese that lasted for hours without revealing his interaction with Sneed in the 4:00-5:00 am timeframe or his suspicion, increasing throughout the day, that Sneed had in fact killed Van Treese in Room 102, and giving unclear or even conflicting statements about when he had last seen Van Treese. The State offered one explanation for his behavior: that he had been the mastermind of the murder of Van Treese, because otherwise, he would have immediately gone to the police with what he knew. It was incumbent on defense counsel to investigate other possible explanations.

In fact, the State went so far as to present *lay* opinion testimony about Mr. Glossip's personality and abilities. In closing argument, the State even referred to this lay testimony as "this study that you've heard, this conversation you've heard about the comparison of the personalities of these two men." RT Vol. 15 at 94; *see also* Attachment 3 at 196. Two lay

witnesses were each asked about whether they perceived Sneed as a follower and Glossip as a leader. 7 RT 34 (Billye Hooper); 9 RT 103 (Kayla Pursley). The capacities of these two men was clearly a central issue in the case, yet the defense made no investigation into their client's capacity or level of functioning in relation to his interactions and behavior surrounding Van Treese's disappearance, let alone to determine whether it was likely or even possible that he was the "mastermind" of Sneed's murder.[32]

This type of investigation was clearly required by prevailing professional norms. *See, e.g., Malone,* 2007 OK CR at ¶ 91, 168 P.3d at 220 (unreasonable and ineffective to fail to have expert crucial to theory of defense meet with defendant until midway through trial); *Seidel v. Merkle,* 146 F.3d 750, 756 (9th Cir. 1998) (ineffective assistance where trial counsel "conducted no investigation to ascertain the extent or possible ramifications of his client's psychiatric impairment."); *Garrison v. Ward,* 2007 WL 2409732 at *15 (E.D. Okla. Aug. 20, 2007) (OCCA unreasonably applied federal law (*Strickland*) in rejecting claim "that trial counsel was ineffective in failing to investigate and present evidence of petitioner's psychiatric history").

Basic investigation would have revealed that Mr. Glossip has a range of impairments detected on widely used screening tests and instruments, and that these impairments are directly relevant both to refute the State's allegation that Mr. Glossip was the mastermind and to explain Mr. Glossip's behavior after the murder but before the body was found. As detailed in the statement of facts, testing conducted postconviction and recently rescored has revealed cognitive and neuropsychological deficits in areas related to problem solving, planning, and abstract thinking, as well as a full-scale IQ of 72, potentially falling in the intellectually disabled range. Attachments

[32] While they engaged a psychologist to conduct a risk assessment for the purpose of disputing an allegation of future dangerousness in a potential penalty phase, Attachment 61, she was not asked to, and did not do, any sort of assessment of Mr. Glossip's level of functioning.

22, 23. Thus, even basic evaluation would have revealed highly relevant deficits and indicated a need to further investigate.

4. Failure to Interview the State's Witnesses

The State called 26 witnesses. While the Reed Smith investigation confirmed the prosecution spoke to every one of them prior to putting them on the stand, Attachment 3 at 80 n.321, a review of defense files and the record reveals defense interviews with just eight.[33] Notably, defense counsel did not speak to either of the two men whom the State had already identified as overhearing the murder (John Beavers and John Prittie), one of whom, Prittie, had not previously testified. If they had, they would have realized that both men believed they had heard a man *and a woman* arguing inside the room around the time of the murder—a fact entirely incompatible with Sneed's—and the State's—version of events. While this testimony did come in at trial, counsel had not discerned how it might support the defense, and had developed no theory and marshaled no further evidence on this point despite the existence, as demonstrated in this Application, of extensive compelling evidence that Sneed and a female accomplice conducted the robbery and murder entirely without Mr. Glossip's participation or knowledge.

Alarmingly, witnesses never interviewed before trial included witnesses for whom there were no police reports or recorded statements, nor prior testimony. For instance, Kenneth Van Treese and Bill Sunday both testified for the first time in the second trial; neither was the subject of any police report. Thus, prior to encountering these witnesses on the stand, defense counsel's knowledge of their testimony was limited to the very brief summaries provided by the

[33] This includes the Sneed interview that led to Burch's disqualification. The other seven were Cliff Everhart, D-Anna Wood, William Bender, Jackie Williams, Dr. Chai Choi, and fingerprint examiner Cindy Hutchcroft.

prosecution, which indicated testimony would be to “all statements contained within [t]he police reports previously furnished” and “testimony will be consistent with police reports previously provided,” even though no police reports concerning these witnesses were ever produced. *See* O.R. 81-86; O.R. 1057-58. Both witnesses were crucial to the State’s case on motive, especially concerning the condition of the motel. If defense counsel had interviewed these witnesses and learned what they planned to say, they could have prepared an effective challenge to the suggestion that Mr. Glossip was the cause of the motel’s poor condition and Van Treese was upset with him about it. As demonstrated in the statement of facts, copious evidence countering this portrayal existed, but defense counsel did not investigate and bring any of that evidence to bear. If they had interviewed these witnesses, they could have used that information to direct further investigation, to develop a theory of defense, marshal additional evidence, and to present a coherent defense to the jury.

On top of this unpreparedness, defense counsel had significant difficulty using the prior witness statements they did have to impeach the State’s witnesses. For instance, Lyman attempted to impeach Kayla Pursley with a prior statement, but could not properly establish its admissibility. RT Vol. 9 at 68-69. He later tried to impeach her with a police report, but could not figure out whether he was trying to refresh her recollection or impeach her with a prior inconsistent statement. *Id.* at 74-77. He tried further to impeach her testimony while crossing another witness and again had trouble discerning how he could get the information he wanted into the record. *Id.* at 130. He later struggled with impeachment of Justin Sneed. For instance, as with Ms. Pursley, he tried to “refresh his memory” with his interview, but was in fact trying to use it as impeachment. RT Vol. 13 at 32. He did the same thing a few minutes later. *Id.* at 39. It happened again shortly after, when Lyman actually retreated from the position that he was

making any attempt at impeachment to say he was giving Sneed a chance to explain his prior answer. *Id.* at 50-52. Woodyard had similar troubles seeking to elicit inconsistent statements of Sneed from Det. Bemo. RT Vol. 14 at 73. This incompetence in the technical aspects of trial practice is inexcusable in a capital case and compounded the failure to develop any defense theory and marshal evidence in support.

In addressing the State's witnesses, defense counsel was also entirely unprepared on the issue of key witness William Bender's hearsay testimony about Van Treese's purported statements during his visit to the Tulsa motel shortly before his murder. In October of 2003, the State provided an explicit "Notice of Intention to Offer Hearsay Statements," O.R. 1070, stating its intention to offer Van Treese's statements to Bender. While the defense moved in limine pretrial to prevent Det. Bemo from testifying about what Bender told him that Van Treese had said (double hearsay), O.R. 747-48, citing this Court's finding that Mr. Glossip's attorney was ineffective for failing to object to it, O.R. 649, they appear to have missed the fact that Bender's testimony itself would still be hearsay. The testimony was admitted over objection as a "present sense impression" because Van Treese was purportedly looking at records while he spoke, RT Vol. 8 at 75, a ruling that could have been avoided[34] if the issue had been briefed and decided pretrial rather than on the spot, where the defense cited no caselaw in arguing for exclusion.[35] Defense counsel was obviously confused about the law of hearsay, as he requested that should it be admitted under a hearsay exception, jurors be given a limiting instruction so they would not

[34] This ruling was clearly erroneous, and appellate counsel's failure to appeal it is inexplicable.
[35] The State did not produce the records Van Treese was purportedly looking at, nor did the defense request that they do so—something they absolutely should have demanded. Of course, the State would have been unable to do so, because those records, if they ever existed, appear to have been among those intentionally destroyed by police at the direction of the District Attorney's office, as detailed in Proposition Two.

"take these as truth of the matter asserted in the statement." RT Vol. 8 at 67. The judge had to explain to him, "If it was not being asserted for the truth of the matter, it wouldn't be hearsay and it wouldn't need an exception." *Id.* Even after this exchange, when the Court asked what instruction he was requesting, Lyman repeated, "I think they should be admonished that they've received this evidence and the purpose of the evidence is that the statement was made. It does not mean that in and of itself the statement is true. . ." *Id.* at 69. Especially for a case in which the only defense occurred in cross-examination, these failures of technical abilities and preparation fall far below prevailing professional norms. *Cf. Stouffer v. Reynolds,* 168 F.3d 1155, 1163 (10th Cir. 1999) ("[E]ach apparent effort to develop the defense theory was thwarted by defense counsel's objective incompetence.").

5. Failure to Object to Destruction of Evidence

As detailed in the statement of facts and in Proposition Two, the District Attorney's office directed the OCPD to destroy ten items of evidence, including evidence that would have been crucial to showing that the State's theory based on embezzlement had any basis in fact. In a pretrial hearing on January 16, 2003, prosecutor Fern Smith told the court:

> Also, when . . . Defendant's counsel was in my office looking at the evidence last week, they were asking about some things that they did not see in the evidence, one being a shower curtain, one being a videotape and one being a roll of duct tape. Lying on the top of the evidence that I referred them to, gave them a space with all of the evidence, in it was a report from the Oklahoma City Police Department. They did not look at it. I will give it to them now. It indicates that on October the 28th of 1999, Janet Hogue, a homicide detective was assigned to transfer property from the Oklahoma County DA's Office back to the Oklahoma City property room and she did so. And all that property is listed in these reports and since there was no pending case at that time, it indicates that those items were destroyed.

Tr. 1/16/03 at 23-24. Defense counsel noted the State's assertion that there was no problem because all the items had already been examined for fingerprints was meaningless because police

were known to have missed fingerprints later found on other evidence, *id.* at 25-26, but took no further action. They were aware of what had been destroyed, and aware of the State's theory of the case—this being a retrial—but did nothing to investigate or further object. Given that they had not thoroughly investigated the case nor constructed a theory of defense, they cannot have reasonably concluded that pursuing it would be inconsistent with such a theory, or that it would be of no help. Without determining what evidence might be marshalled to defend Mr. Glossip, they simply cannot have concluded that the destroyed evidence would have been of no use.

As detailed in Proposition Two, this destruction of evidence was a major due process violation that severely prejudiced the defense in its ability to meet the State's evidence. Identifying and objecting to these types of problems are exactly what is meant by the requirement that the defense subject the State's case to "meaningful adversarial testing." *Wiley v. State,* 2008 OK CR 30, ¶ 6, 199 P.3d 877, 879. Holding the State to its duty to collect, preserve, and present the evidence necessary to establish that the Defendant committed the crime, most especially in a capital case, is *the* core job of a defense lawyer. Allowing the State to destroy key evidence without challenge clearly fails to fulfill this Constitutionally mandated function.

C. Prejudice

As an initial matter, as detailed *supra*, the case against Mr. Glossip was never strong. Thus, unlike cases with overwhelming evidence of guilt, changes in the evidence presented by the defense could have dramatically changed the jury's perceptions.

Indeed, the Reed Smith investigation learned that jurors were very interested in Sneed's statement to police, Attachment 3 at 8, and that several of them were persuaded by the prosecution's portrayal of Sneed as "pitiful" and "manipulated." *Id.* at 208. Reed Smith also found that jurors stated they had wanted to hear from Mr. Glossip, *id.* at 256, when they heard

no evidence at all from the defense. Finally, Reed Smith concluded that

> [W]hen you consider that Sneed was an addict in need of money with violent tendencies who must have known that Mr. Van Treese carried a larger sum of cash, then the story becomes much simpler. The more plausible conclusion is that Sneed wanted to rob Mr. Van Treese, things got out of hand, and Sneed ended up killing him. Sometimes the most obvious explanation is the correct one. The jury never got that obvious explanation.

Id. at 209.

The facts detailed above demonstrate what the jury would have heard if Mr. Glossip's counsel had conducted adequate investigation: that Justin Sneed was a methamphetamine addict with a history of violence and a history of stealing, including at the motel and specifically from men lured into the rooms by prostitutes; that Richard Glossip was a man of limited intelligence whose particular brain impairments caused him to freeze and dissemble in challenging situations, was unable to think through situations or solve problems, and depended on others for direction; and that Sneed explained to multiple people independently that he and his girlfriend had planned to rob Van Treese, and had ended up killing him, that he had expected to find between $20-30,000 in the car (which was in fact the amount later found in the trunk), and that he had set Richard Glossip up to avoid the death penalty. They would also have learned that motel employees had overheard Sneed talking about harming Van Treese prior to the murder and complaining that Van Treese did not pay him for his work. They would also have realized, and demonstrated to the jury, that the evidence purporting to show embezzlement showed nothing of the kind, that the run-down condition of the motel was no different from the widely recognized state in which it had always been, and that Van Treese operated it using questionable methods as a result of his own financial problems. Those pieces of information would have dramatically transformed the narrative presented by the prosecution, which depended on a portrayal of Sneed as meek and helpless and on unsupportable allegations of mismanagement of

the motel.

The information about Mr. Glossip's level of functioning and his specific impairments would also have been significantly transformative and explanatory, as set forth in Proposition One, Section (B)(2). Finally, the results of the basic testing that trial counsel should have procured on Mr. Glossip are grossly inconsistent with the "mastermind" theory the State presented. It is unlikely the State would even have attempted to present that theory, let alone successfully, in the face of the evidence trial counsel would have had if they had done even minimal investigation into their client's level of functioning.

Likewise, as established in Proposition Two, the destruction of evidence was such a major violation that if properly challenged, it should have resulted in the dismissal of the indictment. Failing that, at the very least, it would have produced severe sanctions against the State, such as an instruction that the jury was to presume all destroyed evidence was favorable to the defense. *See Ochoa v. State,* 1998 OK CR 41, ¶ 26, 963 P.2d 583, 595 (overruled on other grounds by *Davis v. State,* 2018 OK CR 7, 419 P.3d 271) ("instruction allowing the jury to draw a negative inference from the destruction of evidence . . . may be an appropriate sanction where the defense has made a showing of bad faith."). In a case with so little physical evidence where the financial allegations were central to the State's theory, such an instruction would likely have swayed the jury to find reasonable doubt. In a case that was never strong, these facts would have been devastating to the prosecution, and are highly likely to have changed the outcome of the case, yielding an acquittal (or at most, a conviction for accessory after the fact).

D. <u>This Claim Was Not and Could Not Have Been Previously Presented.</u>

Although Mr. Glossip has previously presented claims of ineffective assistance of counsel for discrete failings, the major failing addressed here has never been addressed. In the direct appeal, five bases were presented:

1. Failure to utilize the video of Sneed's police interview
2. Failure to use readily available evidence to cross-examine witnesses
3. Failure to object to improper character evidence
4. Failure to object to irrelevant and highly prejudicial evidence
5. Failure to object to instances of prosecutorial misconduct.

Each subclaim asserts counsel either failed to introduce information they already had or failed to object to problems at trial. There is no discussion of counsel's duty to investigate, nor any suggestion they should have located evidence or learned information they did not already have. A claim that trial counsel's performance in what they chose to introduce or object to during the trial was constitutionally deficient is clearly a different claim from one that prevailing professional norms required trial counsel to conduct independent investigation of the crime.

In his first application for post-conviction relief, Mr. Glossip alleged two bases for ineffective assistance of counsel: failure to impeach Sneed with a document found on the docket in this case (a report by Dr. Edith King of a competency evaluation of Sneed), and failure to object to judicial bias. Like the direct appeal claims, these claims were limited to a failure to use information that was already known, and even on the court's docket. There was no discussion of counsel's duty to conduct independent investigation of the crime outside the record. The successive petition filed in 2015 also alleged a failure to impeach Sneed, and this Court ruled it was barred because it repeated the ineffective assistance claims already raised.

The claim presented here raises an entirely different duty of capital defense counsel that arises long before the in-trial duties to use certain evidence or raise objections discussed in prior applications. The claims also arising from the Sixth Amendment right to the effective assistance of counsel does not mean they are necessarily the same claim. *See Milton v. Miller,* 812 F.3d 1252, 1264 (10th Cir. 2016) (noting a "dramatically different factual predicate," "Although this

claim and the Original Claim both allege ineffective assistance of counsel, they are separate claims. . . . Counsel can perform ineffectively in myriad ways.").

The claim presented here addresses failure of the attorneys from the Oklahoma Indigent Defense Service (OIDS) in the preparation and presentation of this case. The direct appeal and initial post-conviction petition were both prepared by attorneys from OIDS. Although they are nominally in different "divisions" of the organization, they are part of the same organization. For instance, G. Lynn Burch was a capital appeals attorney and litigated Mr. Glossip's first appeal, but he then prepared for and had planned to conduct the second trial, even though it likely should have been completed out of a trial division. Likewise, Wayne Woodyard, who served as second-chair attorney in the second trial, was from appeals, but explained, "We are, as an agency, asking our appellate lawyers if possible to sit in the trial to make sure issues are raised and sometimes participate as I am doing . . . ." Tr. 11/4/03 at 17. The lines are clearly permeable. OIDS attorneys thus face serious challenges in investigating and alleging ineffective assistance of their colleagues in the agency.

Additionally, the identification of investigation that should have been, but was not, conducted entails actually conducting that investigation, which requires time and resources—things clearly in short supply in OIDS. At the time of the first filing *not* prepared by OIDS, the 2015 post-conviction petition, the attorneys who undertook for the first time a real investigation of the case had only been aware of and participating in the case for a brief time before the execution date. While they had begun an investigation and were able to raise isolated failures, again based primarily on errors apparent from the face of the record, they had *not* been able to conduct the independent investigation of the crime required for adequate representation.

Finally, this claim depends in significant part on the completion of the independent

investigation by Reed Smith, which was not published until June of 2022. That report simply had not begun, let alone existed, at the time of any of the prior filings. It contains, *inter alia,* information crucial to the assessment of prejudice, as the firm was able to speak to a number of jurors about their views of the evidence. *See, e.g.,* Attachment 3 at 8, 58. They were also able to speak to both trial prosecutors, gathering new insights about the State's case, *id.* at 7, 11 n.35, 80 & n.321, and to a number of witnesses familiar with the BBI around the time of the crime who had valuable information never sought by the defense at trial, *id.* at 230. It would not have been possible to bring a fully supported claim based on the failure to investigate before the issuance of this report. These specific facts explain why this claim could not have been presented on direct appeal or in a previously presented petition, per § 1089(C)(2) and (D)(8)(b)(1).

The specific facts explaining how this claim supports a conclusion that the outcome of the trial would have been different but for the error (per § 1089(C)(2)) are detailed in the discussion of prejudice, supra. Because the substantive claim here—ineffective assistance of counsel—requires a showing of a "reasonable probability of a different result," proof of the claim itself necessarily explains how the outcome would have been different. Additionally, the specific facts demonstrating factual innocence are discussed in detail in Proposition One, *infra*, satisfying both ¶ 1089(C)(2) and (D)(8)(b)(2).

PROPOSITION FOUR: The investigation, trial, and appeal in Mr. Glossip's case failed to meet the demands of the due process of law.

Mr. Glossip's conviction and death sentence were obtained through a process so rife with error that their unreliability renders them a violation of the due process of law. Several fundamental breakdowns in that process—the destruction of evidence and the dereliction of duty

by his trial counsel—have been detailed above in Propositions One and Three and are incorporated by reference as if set forth fully here.

That, however, is not the end of the story of the malfeasance that undermines the confidence in Mr. Glossip's verdict. The police engaged in coercive interviewing techniques, failed to interview or document interviews with key witnesses, and failed to collect critical evidence.

The prosecution compounded these errors in important ways. Its primary theory, that Mr. Glossip orchestrated the crime to cover up his embezzlement, had no basis (and could not be challenged) because the State had lost and/or destroyed the records necessary to support that theory. They also relied on witness testimony from a witness whose accounting omitted important details and was undermined by his own credibility issues. Then, instead of allowing the evidence to speak for itself, the prosecution elicited lay witness testimony concerning the ultimate issue. Beyond that, the State presented testimony from witnesses who either flatly contradicted or substantially distorted their testimony from Mr. Glossip's first trial.

In addition to these errors, Mr. Glossip's appellate counsel missed an opportunity to right the ship. Trial counsel had preserved a profound hearsay error concerning critical evidence the State offered in support of its theory of Mr. Glossip's motive, yet appellate counsel inexplicably omitted the error from the appeal. As outlined below, these errors, individually and cumulatively, have deprived Mr. Glossip of his rights and require reversal. U.S. Const. amend. XIV; Okla. Const. art. II, § 2-7; *Lewis v. State*, 1998 OK CR 24, ¶63, 970 P.2d 1158, 1176 ("[W]hen there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial.").

To date, these errors have not been reviewed, either individually or cumulatively, by any court. Yet careful judicial scrutiny is especially warranted in light of the stakes at issue: Mr. Glossip's life. That is, the "'qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny.'" *Woodrow v. State*, 1993 OK CR 7, ¶91, 846 P.2d 1124, 1145 (quoting *California v. Ramos*, 463 U.S. 992, 998 (1983)). That heightened scrutiny plainly applies to sentencing proceedings. *Id.* But it also demands a higher degree of reliability in the guilt/innocence determination. For example, in capital prosecutions, due process requires that, where supported by the evidence, the jury be instructed on lesser included offenses. *Beck v. Alabama*, 447 U.S. 625, 637 (1980). This is because it is "of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

Of course, the death penalty-specific protections are over and above those due process requires in any criminal case. This Court and the Supreme Court of the United States have repeatedly affirmed that the constitution guarantees a defendant the ability to "have the prosecutor's case encounter and 'survive the crucible of adversarial testing.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice," including by excluding evidence of third-party culpability). And the constitutional right to "an opportunity to be heard" would be an "empty one" if the state could foreclose its case from adversarial testing. *Crane*, 476 U.S. at 690.

But in Mr. Glossip's case, the behavior of the State, and the intransigence of defense counsel, insulated the prosecution's case from meaningful adversarial testing and resulted in a

miscarriage of justice.

A. Incompetent and Coercive Investigation Left Fundamental Aspects of the State's Case Free from Adversarial Testing

The State's investigation produced a factual record insufficiently reliable to satisfy due process and that left key evidence unexplored, insulating its case from the adversarial testing due process demands. This shoddy and, at times, malfeasant investigation took place across several domains.

The key evidence purporting to link Mr. Glossip to the murder came exclusively from Sneed and was elicited by Detective Bemo. But, as recounted *supra,* the State fed this key witness—who himself was facing capital charges for the very crime about which he was testifying—its theory that Mr. Glossip was the perpetrator and suggested, further, that implicating Mr. Glossip would reduce his own punishment. *See* statement of facts § VI(C)(3) ("Police Interview of Sneed"). This arrangement, whereby the State's investigator feeds an interested party information and then provides leniency in exchange for their testimony, is widely associated with wrongful convictions. *See* Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 279 (2011); Jessica Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 747-48 (2016).

It is also state conduct that, to put it mildly, "may sometimes cause witnesses to err in identifying criminals." *Simmons v. United States*, 390 U.S. 377, 383 (1968). As the Supreme Court has recognized in the context of eyewitness identifications, the "chance of misidentification is heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." *Id.* The use of Sneed's testimony here was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable

misidentification." *Id.* at 384 (citing *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967)). The State, not Sneed, identified Mr. Glossip as being involved, repeatedly invoking his name before it could elicit the same from Sneed. And Sneed's starkly conflicting accounts, including under oath, do not meet the demands of due process of law. The State, aware of this suggestiveness and of Sneed's series of inconsistent accounts, never should have presented this evidence. The fact that the defense is permitted cross-examination has never given the State carte blanche to create and present patently unreliable evidence.

The balance of the State's investigation also gave rise to a violation of Mr. Glossip's constitutional rights. The State's failure to interview and document interviews with key witnesses, its failure to collect important records, and its loss or release of evidence prevented the prosecution's evidence from being adversarially tested, as the constitution requires. *See Crane*, 476 U.S. at 690 (quoting *Cronic*, 466 U.S. at 656). Dozens of people were at the motel on the night of Van Treese's murder, yet the State only interviewed three guests. *See* statement of facts § VI(C)(4)(1) ("Key Omissions: Witnesses from the motel, gas station, and strip club"). Although those interviewed reported hearing either a couple, or a woman's voice, the State made no effort to determine who the woman was or how she was involved. The State also failed to interview personnel or patrons from the strip club next door, despite the obvious probability that some workers from the club would be present as unregistered guests in the motel. Likewise, the State failed to report any interview of key witnesses, including Cliff Everhart, who claimed to be part owner of the motel and who assisted in the search for Van Treese, of Donna Van Treese, the victim's wife and the motel's bookkeeper, and of the children or boyfriend of the maid who lived on-site with them and were likely present during the murder. The State also failed to follow up with Kim Hooper, and her boyfriend, who was reportedly at the motel on the night of the murder

and had relevant information. Perhaps most astonishingly, the State failed to investigate Sneed's brother, Wes Taylor, who Sneed claimed had set up the murder prior to being led to identify Mr. Glossip.

Beyond failing to interview key witnesses, the State failed to obtain and secure important physical and documentary evidence. Those failures are detailed in the Statement of Facts, section VI(C)(4)(2), and those allegations are incorporated as if set forth fully herein. They include failing to conduct any search for a murder weapon or any effort to ascertain the source of the shower curtain taped over the window in Room 102. The police also failed to collect the motel's records despite having been told—and the prosecution ultimately going forward on the theory—that Van Treese was upset because of the terrible state of the records at the motel.

The police also failed to retain and inventory the $23,100 of cash found in Van Treese's trunk, including cash stained with blue dye, suggesting it was obtained as part of a robbery. They then returned it to the family, along with Van Treese's car. Attachment 3 at 85-86. Ms. Van Treese testified that the cash was part of a balloon payment owed on a mortgage. Instead of investigating and verifying this claim, the State did nothing. Had they done so, they would have learned, as the Reed Smith investigation unearthed, that the Van Treeses did not have a mortgage that carried a balloon payment. Attachment 3 at 155. That information was available to the prosecution, as well, had they made any attempt to verify the claim before presenting it as evidence in a capital murder trial. The ready availability of this information suggests the State knew or should have known it was presenting false or misleading evidence as forbidden by basic due process principles. *Napue v. Illinois*, 360 U.S. 264 (1959).

Also highly troubling is the fact that police collected a security video from the gas station right next to the motel, which Sneed visited shortly before the murder—and then appear to have

lost it. Attachment 3 at 81-84. Reviewing that video would have been a crucial step in preparing Mr. Glossip's defense and subjecting the State's version to adversarial testing, but the OCPD's failure to keep track of it or properly log it into evidence made that impossible.

These omissions, both with regard to the witness interviews and the collection and maintenance of evidence, are particularly problematic in light of the gaping holes in the State's investigation. These include nearly two hours of un-accounted for time in which Van Treese was in Tulsa before appearing at his motel there. They also fail to explain why Van Treese wanted to mislead his wife about when he left the motel—which they may have been able to explain had they investigated his role as Sneed's girlfriend's "sugar daddy."

Individually and collectively these omissions by the State prevented the case that they did present from being meaningfully tested. The defense was unable to challenge the State's theory for motive because the motel's financial records were never provided. The jury did not learn that Van Treese had a relationship with the girlfriend of the person who killed him because the State failed to follow up on obvious leads. These failures rendered Mr. Glossip's trial fundamentally unfair, violating his constitutional rights. *See Crane*, 476 U.S. at 690.

B. At Mr. Glossip's Trial, the State Presented Unreliable, Unsubstantiated, and Distorted Testimony

The State's case at trial was marked by unreliability and distorted evidence. The three pillars of the State's case were its attempt to establish a motive, a portrayal of Sneed as helpless and dependent on Glossip, and evidence concerning actions taken after the murder not reflecting any involvement in the crime itself. *See* statement of facts § VI(C).[36] Each of these pillars suffers from problems with reliability such that individually and collectively the jury's reliance on them

[36] The facts set forth in this section are incorporated by reference as if set forth fully herein.

to convict Mr. Glossip violates his constitutional rights.

As for motive, the prosecution's theory was that Glossip wanted Sneed to kill Van Treese because Glossip had been caught mismanaging the motel and was about to be fired. The prosecution presented the testimony of Ms. Van Treese that the motel was short $6,000 over the prior year and that she and Van Treese attributed the shortfall to Glossip's embezzling. Her testimony lacked any support by independent financial records because the State had destroyed such records in late 1999 and failed to secure copies of other such records before they were destroyed in a flood in her home. The Reed Smith investigation rightly concluded that, lacking any independent evidence of embezzlement, the prosecution should not have presented that theory. Attachment 3 at 135-37. Moreover, that theory is belied by Mr. Glossip consistently having received bonuses during the very time period in which the supposed shortage accrued. Such speculative evidence of motive is insufficiently reliable to meet the constitution's demands. And again, the availability of cross-examination does not permit the State to present evidence it knows or should know is unreliable.

The other evidence of motive fairs no better. Cliff Everhart's testimony to his belief that Glossip had been stealing fails to establish motive for the simple reason that there was no evidence that this belief had been conveyed to Glossip. Even worse, none of the witnesses purporting to have concerns about Glossip's management of the motel and plans to fire him conveyed those concerns to the police when they learned of Van Treese's disappearance—an enormous red flag that should have given police and prosecutors serious pause. For these reasons, as well as reasons related to Everhart's own behaviors, the Reed Smith report concluded

that Everhart's testimony was inherently unreliable.[37] Attachment 3 at 166-77.

The evidence that Sneed was helpless and reliant on Glossip should have been excluded as improper lay witness opinion testimony regarding an ultimate issue in the case. *Cf. Day v. State*, 2013 OK 8, ¶11, 303 P.3d 291, 297 (noting permissibility of *expert* opinion on ultimate questions "as long as it does not tell jurors what result to reach."). Here, the evidence of Sneed's character—and specifically that he would not have committed the crime outside the influence of Glossip—was, as the Reed Smith report put it "speculative and unreliable." Attachment 3 at 202. That evidence should not have been admitted at Mr. Glossip's trial.

Finally, Sneed's testimony contained numerous discrepancies from statements he had made both before and after Glossip's second trial. These statements are cataloged over 20 pages in the Reed Smith report (Appendix 5 to Attachment 3) and include the conflicting accounts over why Glossip supposedly wanted Van Treese dead and how much Glossip would pay. Especially given the lack of evidence to corroborate Sneed's testimony, the State should not have relied on on it in its prosecution of Mr. Glossip. The State's awareness of the conflicting theories raises concerns that it knowingly presented false or misleading evidence and, for that reason, this Court must reverse. *Napue v. Illinois*, 360 U.S. 264 (1959).

C. Appellate Counsel Failed to Raise an Obvious, Prejudicial Error

At Mr. Glossip's trial, among the only objections the defense lodged was to the hearsay testimony of William Bender, the spouse of the Tulsa BBI's manager, who provided the key (but as discussed above incredible) evidence that Van Treese was upset because of the terrible state of the records at the Oklahoma City motel. His testimony, as recounted in the Reed Smith report,

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[37] William Bender's testimony that Van Treese was upset over the state of the financial records was, as discussed *infra*, unreliable hearsay and, as noted by the Reed Smith report, also should have been excluded for a host of reasons. Attachment 3 at 193.

was both baseless and plainly inadmissible hearsay. Attachment 3 at 130-35. It contradicted the testimony of other witnesses—including Ms. Van Treese who testified about her ability to make an accounting—and was internally consistent. *Id.* at 132 ("If several daily reports were missing, Ms. Van Treese would not have been able to make her year-end shortage calculations."). Tragically for Mr. Glossip, it also played an important role in establishing the State's theory of motive.

The Sixth Amendment guarantees the right to effective assistance of counsel on any appeal as of right. *Evitts v. Lucy,* 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.). Appellate counsel have an obligation to raise a "significant but obvious error." *Chase v. Macauley*, 971 F.3d 582, 593 (6th Cir. 2020) (appellate counsel constitutionally insufficient for failing to raise error related to *Alleyne v. United States*, 570 U.S. 99, 103 (2013), which was decided three days after the defendant's sentencing proceedings concluded). Here, the error was both significant and obvious. There was no sound basis for admitting Bender's testimony about what Van Treese relayed to him. And the basis relied upon by the trial court—a present sense impression—has absolutely no relevance to the context to which Bender testified. Attachment 3 at 124. Indeed, the only basis the Court gave for accepting the "present sense impression" theory was the notion that Van Treese was referring to a document when he spoke to Bender—but that document, if it ever existed, was among those intentionally destroyed by the State prior to the trial, as discussed in Proposition Three. It was also significant for the role it played in establishing the State theory for why Mr. Glossip supposedly committed the crime in question. *See* statement of facts at VI(C)(1).

D. Conclusion

This claim was incapable of being raised on direct appeal. Indeed, part of the claim is that appellate counsel was herself ineffective. Thus the claim necessarily cannot be raised on direct review. Section 1098(C). And while this individual error by appellate counsel could theoretically have been raised in a prior application for post-conviction relief, it is asserted here not as a basis for relief under the Sixth Amendment, but as part of a larger due process violation the full scope of which was not apparent prior to the issuance of the Reed Smith report in June, 2022.

Moreover, if the trial had been fair in the ways discussed above, the jury would not have convicted Mr. Glossip because much of the information the State presented would have been contradicted by the results of more thorough investigation, and because if they had limited themselves to reliable information that was not hearsay, they would have lacked critical information purporting to support his motive for committing the crimes. Without that information, Mr. Glossip would have been found to be factually innocent. Regardless of the requirements of § 1089, this Court should hear the merits of this claim to avoid a grave injustice: the execution of an innocent man.

PROPOSITION FIVE: Mr. Glossip is intellectually disabled and ineligible for the death penalty under the Eighth and Fourteenth Amendments and Art. 2, § 9 of the Oklahoma Constitution.

Atkins v. Virginia, 536 U.S. 304 (2002) established the constitutional prohibition against capital punishment for the intellectually disabled. At the time of Mr. Glossip's 2004 retrial, this Court had enunciated a definition and procedural rule for determining "mental retardation" for capital sentencing purposes that included a bright-line cutoff for IQ scores of 70. *Murphy v. State*, OK 2002 CR 32, ¶31, 54 P.3d 556 567-68. The Oklahoma Legislature enacted a statutory definition and procedure for death sentencing purposes in 2006, which modified the Court's

initial cut-off of 70, moving it to 76. 21 Okla. Stat. tit. 21 § 701.10b; Laws 2006, SB 1807, c. 290 §1, emerg. eff. July 1, 2006; *but see Hall v. Florida*, 572 U.S. 701 (2014) (overturning Florida Supreme Court's statutory interpretation of threshold IQ score of 70 created unacceptable risk that individuals with the disability will be executed).

In subsequent post-conviction applications, this Court may entertain whether a death-sentenced prisoner is ineligible for the death penalty due to intellectual disability. *Ochoa v. State*, OK 2006 CR 21 ¶7, 136 P.3d 661, 665 (remanding second application for post-conviction relief for evidentiary hearing on "mental retardation," which requires petitioner to "prove [intellectual disability] by a preponderance of the evidence"). Further,

> In the context of post-conviction jurisprudence, a miscarriage of justice sufficient to avoid procedural default has been defined as the conviction of a person who is actually innocent, or the sentencing to death of a person who is not eligible for the death penalty. *Sawyer v. Whitley,* 505 U.S. 333, 346-47 (1992). We adopt this standard for our analysis of post-conviction claims. Hawkins raises a colorable claim of ineligibility for the death sentence which we will address on the merits.

Hawkins v. State, No. PC 96-1271 (Okla. Crim. App. Mar. 18, 1998) (unpublished) (quoted in *Black v. Workman*, No. CIV-02-225-C, 2010 WL 565285, at *8 (W.D. Okla. Feb. 10, 2010), *aff'd in part*, 682 F.3d 880 (10th Cir. 2012), and *aff'd in part sub nom. Black v. Tramwell*, 485 F. App'x 335 (10th Cir. 2012)).

Mr. Glossip possesses "diminished intellect" and "cognitive deficits consistent with intellectual disability," as reflected, in part, in a neuropsychological battery conducted in 2011 but scored at that time as a full-scale IQ of 78. Attachment 23 at 2. Mr. Glossip was administered a Weschler Adult Intelligence Scale, Third Edition ("WAIS-III") test, and the original forensic neuropsychologist's scoring included a Verbal IQ of 85 and a Performance or Nonverbal IQ of 74. *Id.* The 2011 testing was not adjusted for the inflation, in effect, of the score between the date

the test was normed and when it was administered to Mr. Glossip, many years later, per the phenomena known as the "Flynn effect." *Id.* While this Court has ruled that it need not apply the Flynn effect because the statute itself provides for the SEM but does *not* mention the Flynn effect, *Smith v. State,* 2010 OK CR 24, ¶ 10, n. 6, 245 P.3d 1233, 1237, n. 6, that ruling is incorrect and should be overruled, because clinicians, applying their training and clinical judgment, apply this adjustment during the scoring process, and thus, the "intelligence quotient" they are reporting is in fact the already adjusted one. Moreover, the constitutional jurisprudence since *Atkins* has repeatedly relied upon "clinical definitions for intellectual disability" as controlling the standards states may apply in determining the existence of the condition with respect to capital sentencing. *Hall*, 572 U.S. at 719

A current review of original neuropsychologist's report, including the recitation of the WAIS-III results, raised questions about the large gap between verbal and nonverbal scores and thus a request for the raw data from this 2011 testing. Mr. Glossip's current forensic neuropsychologist, Robert H. Ouaou, Ph.D., rescored the testing data (after correcting for errors in the verbal portion that accounted for an unduly high score in the initial reporting). After adjusting for the Flynn effect, the rescoring yielded a full-scale IQ of 72 for Mr. Glossip. *Id.* at 3. This places his intelligence quotient well within Oklahoma's statutory parameters.

Intellectual disability also requires the existence of "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports, 12th Ed., American Association of Intellectual and Developmental Disabilities ("AAIDD 12th Ed."). As the Supreme Court has noted, "In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in *any*

of the three adaptive skill sets (conceptual, social, and practical)." *Moore v. Texas*, 137 S. Ct. 1039, 1046 (2017) (emphasis added). Courts are cautioned not to "overemphasize[] perceived adaptive strengths," when assessing deficits. *Id.* at 1050. Further, the AAIDD expressly notes in its definition of IDD that "[w]ithin an individual, limitations often coexist with strengths." AAIDD 12th Ed. The Oklahoma statute enumerates eleven adaptive functioning areas and requires a finding of deficits in at least two of those domains. Okla. Stat. tit. 21 § 701.10b(A)(2). This deviates from well-established clinical standards, which approach adaptive functioning via the three adaptive skill sets (*supra*).

Nonetheless, Mr. Glossip exhibits significant limitations in multiple domains. Exceedingly poor performance in education often evidences the requisite deficits in conceptual skills to satisfy that element of the intellectual developmental disorder diagnosis. *See, e.g., Brumfield v. Cain*, 526 U.S. 305 (2015). Mr. Glossip's poor educational performance and attainment, as reflected in his school records denoting successful completion up to only the seventh grade (with failure of the eighth grade entailing a determination for him to repeat the grade), clearly reflect a deficit in functional academics, establishing a significant deficit in the conceptual domain. Attachment 22, ¶ 17. And Mr. Glossip is gullible and easily manipulated by others, which is a significant deficit in social skills. *Id.,* ¶¶ 35, 38.

The final factor for diagnosing this disorder is the determination that its age of onset occurred during the developmental period, which, in January 2021, was "defined operationally as before the individual attains age 22." AAIDD 12th Ed.[38] Mr. Glossip's deficits appeared during this period, whether defined as prior to age 18 or prior to age 22. Attachment 23, ¶ 13.

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[38] 21 Okla. Stat. tit. 21 § 701.10b(C) (requiring that "onset of the intellectual disability was manifested before the age of eighteen (18) years."). Previous clinical standards defined that period as 18 years and below.

PRAYER FOR RELIEF

Wherefore Mr. Glossip respectfully requests that this Court enter an order granting the requested discovery, remand the case for an evidentiary hearing in the district court, enter an order reversing his conviction and sentence, and any other relief as may be just and appropriate.

____
Warren Gotcher, OBA #3495

VERIFICATION

I, Warren Gotcher, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Date	Warren Gotcher, OBA #3495

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2022, a true and correct copy of the foregoing Successive Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the Clerk of this Court, with one of the copies being for service on theAttorney Counsel for Respondent.

____
Warren Gotcher