GENTNER DRUMMOND
ATTORNEY GENERAL

April 24, 2023

Honorable Members of the Pardon and Parole Board:

I respectfully urge you to recommend clemency for Richard Glossip, who is scheduled to be executed on May 18, 2023. For there to be public faith in our criminal justice system, it is incumbent on me as the State's chief law enforcement officer to not ignore evidence and facts, wherever they may lead.

As you may be aware, I recently filed a pleading with the Oklahoma Court of Criminal Appeals confessing error by the State which would cast reasonable doubt on Mr. Glossip's conviction for first degree murder. I reached this difficult decision after carefully considering new and material evidence that was recently disclosed by the State and personally examining key aspects of the investigation, trial preparation and trial against Mr. Glossip. Additionally, I retained former District Attorney Rex Duncan to conduct an independent review. His report has been publicly released and is included in this packet.

The result of these comprehensive efforts has been troubling. Death penalty cases require the highest standard of reliability. New evidence recently released by my office shows that the prosecution's main witness against Mr. Glossip was not entirely truthful in his testimony. This witness, Justin Sneed, had ample motive to testify against Mr. Glossip. Mr. Sneed confessed to murdering Barry Van Treese and was able to avoid the death penalty himself only by testifying that Mr. Glossip paid for the murder. However, Mr. Sneed made materially false statements under oath when he said that he had not been treated by a psychiatrist and did not know why he had been prescribed lithium. The jury was not informed that he had been diagnosed as bipolar by the Oklahoma County Jail psychiatrist and prescribed lithium to treat this disorder. Instead, based on the testimony in the record, the jury might have been left with the false impression that Mr. Sneed was mistakenly prescribed lithium because he asked for Sudafed and no medical doctor was involved in that decision. As such, the jury was not aware of the entire truth due to Mr. Sneed's false testimony and the State's failure to correct his false testimony. It is widely understood that the known effects of bipolar disorder combined with illicit drug use (methamphetamine) on memory recall goes directly to witness credibility. As such, the mental health disorder of Mr. Sneed was highly relevant for the jury to know. It is my opinion that had the State corrected the testimony and had Mr. Sneed been subjected to a rigorous cross-examination, Mr. Glossip's defense attorney would have sufficiently attacked Mr. Sneed's candor and recollection, resulting in the creation of reasonable doubt as to Mr. Glossip's guilt for first degree murder.

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

recycled paper

So that I am clear and as supported by unimpeachable evidence, I believe that Mr. Glossip is guilty of accessory after the fact. Although he may be guilty of first degree murder, the record (complete with the new evidence that the jury did not hear nor consider in rendering its verdict and death sentence) does not support that he is guilty of first degree murder beyond a reasonable doubt. This undermines the reliability of the conviction for which the State seeks his execution.

I am not aware of an Oklahoma Attorney General ever supporting a clemency application for a death row inmate. This is for good reason. In every previous case that has come before this Board, the State has maintained full confidence in the integrity of the conviction. That is simply not the case in this matter due to the material evidence that was not disclosed to the jury.

Securing justice can sometimes require extraordinary efforts. I believe the greatest exercise of State sovereignty is the State executing another human. Based on the complete record including the new evidence that the jury did not hear, it would represent a grave injustice to execute a man whose trial conviction was impugned by a litany of errors, that when taken in total would have created reasonable doubt. No execution should be carried out under such questionable circumstances.

I thank you for your service to the People of Oklahoma, and I urge you to vote in favor of clemency for Richard Glossip.

Sincerely,

Gentner Drummond
Attorney General

ORIGIN

1054932325

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 6 2023

JOHN D. HADDEN
CLERK

RICHARD GLOSSIP,	)	
Petitioner,	)	
v.	)	Case No. PCD 2023-267
STATE OF OKLAHOMA,	)	DEATH PENALTY CASE
Respondent.	)	

STATE OF OKLAHOMA'S RESPONSE IN SUPPORT OF PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF DEATH PENALTY – EXECUTION SCHEDULED MAY 18, 2023

The Supreme Court has long held that a "prosecutor's role transcends that of an adversary:" A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty… whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Bagley,* 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)). For the reasons set forth below, it is the view of the undersigned on behalf of the State of Oklahoma that setting aside Richard Glossip's conviction and remanding the case to the district court is the fair and just result.

On January 26, 2023, the State appointed an independent counsel to re-examine this case. After a thorough review, the Independent Counsel concluded that Glossip's conviction and sentence should be set aside. The State has reviewed the Independent Counsel's report and conclusions. The State has reached the difficult conclusion that justice requires setting aside Glossip's conviction and remanding the case to the district court.

Before discussing the reasons for the State's difficult conclusion, the State is not suggesting that Glossip is innocent of any charge made against him. The State continues to believe that Glossip has culpability in the murder of Barry Van Treese. Further, the State disagrees with many of the conclusions reached by the Independent Counsel. However, the State has concluded that Justin Sneed ("Sneed") made material misstatements to the jury regarding his psychiatric treatment and the reasons for his lithium prescription. Consistent with its obligations in *Napue v. Illinois,* 360 U.S. 264 (1959), the State is compelled to correct these misstatements and permit the trier of fact the opportunity to weigh Sneed's credibility with the accurate information. Additionally, and even though previously addressed by this Court, the State is concerned that there were multiple and cumulative errors, such as violation of the rule of sequestration and destruction of evidence, that when taken together with Sneed's misstatements warrant a remand to the district court.

Except as expressly identified below, the State denies all allegations of error or legal conclusions made by Glossip in his *Successive Application for Post-Conviction Relief Death Penalty – Execution Scheduled May 18, 2023* ("Glossip's Application"). As this Court is well aware, many of the claims in Glossip's Application have been advanced numerous times and have been rejected. However, because the State now believes Glossip's conviction should be set aside and the case remanded to the district court, the State does not believe a thorough rehashing of these arguments is warranted. To the extent that they are consistent with this confession of error, the State adopts and incorporates by reference all prior State briefings to this Court related to Glossip's appeals and multiple applications for post-conviction relief.

Sneed Did Not Accurately Testify as to the True Reason for His Lithium Prescription or the Fact That He Had Been Treated by a Psychiatrist. The State Believes This Warrants Post-Conviction Relief.

The State's key witness at Glossip's second trial, Justin Sneed, appears to have been previously diagnosed with bipolar affective disorder. Sneed was prescribed lithium by a psychiatrist.[1] While it is not clear whether the prosecutor knew of Sneed's precise medical diagnosis, the record indicates that the prosecutor was aware that Sneed had been treated by a "Dr. Trumpet." In his Application, Glossip argues that the prosecutor should have concluded that "Dr. Trumpet" referred to Dr. Lawrence Trombka. The State believes this is a reasonable conclusion. Further, it is the State's understanding that Dr. Trombka was generally known to be the only psychiatrist treating patients at the Oklahoma County Jail in 1997. Moreover, Sneed was administered a competency exam by a psychiatrist, Dr. Edith King, in 1997, which likewise noted a lithium prescription.

Despite this reality, Sneed was able to effectively hide his psychiatric condition and the reason for his prior lithium prescription through false testimony to the jury. Specifically, Sneed testified as follows at the second trial:

> Q. After you were arrested, were you placed on any type of prescription medication?
>
> A. When I was arrested I asked for some Sudafed because I had a cold, but then shortly after that somehow they ended up giving me Lithium for some reason, I don't know why. I never seen no psychiatrist or anything.
>
> Q. So you don't know why they gave you that?
>
> A. No.

---

[1] These conclusions were reached from reviewing the Affidavit of Dr. Lawrence "Larry" Trombka submitted by Glossip along with the "Oklahoma County Sheriff's Office Medical Information Sheet" attached as Attachment A to the Affidavit. Further, the State's Independent Counsel reached the same conclusion.

Trial Transcript Vol. 12, p. 64, l. 3 – 10.

Nevertheless, as shown above, Sneed had in fact been treated by a psychiatrist in 1997. Further, he was not prescribed lithium for a cold. Instead, he was prescribed it to treat his serious psychiatric condition. Therefore, Sneed made misstatements to the jury.

The State believes post-conviction relief is appropriate with respect to Sneed's false testimony to the jury. To obtain post-conviction relief, Glossip needs to show that the issue could not have been raised in a direct appeal and supports a conclusion that the outcome of the trial would have been different. 22 O.S. Supp. 2022 § 1089(C).

Here, at a minimum, Glossip was not made aware of Sneed's treatment by Dr. Trombka at the second trial. Further, Glossip was not made aware of Dr. Trombka's treatment of Sneed until he recently received the prosecutor's notes. Consequently, this issue could not have been asserted in a direct appeal.

The State is also not comfortable asserting that the outcome of the trial would have been the same if Sneed had testified accurately. There is no dispute that Sneed was the State's key witness at the second trial. If Sneed had accurately disclosed that he had seen a psychiatrist, then the defense would have likely learned of the nature of Sneed's psychiatric condition and the true reason for Sneed's lithium prescription. With this information plus Sneed's history of drug addiction, the State believes that a qualified defense attorney likely could have attacked Sneed's ability to properly recall key facts at the second trial. Stated another way, the State has reached the difficult conclusion that the conviction of Glossip was obtained with the benefit of material misstatements to the jury by its key witness. Accordingly, the State believes Glossip is entitled to post-conviction relief.

Trial Transcript Vol. 12, p. 64, l. 3 – 10.

Nevertheless, as shown above, Sneed had in fact been treated by a psychiatrist in 1997. Further, he was not prescribed lithium for a cold. Instead, he was prescribed it to treat his serious psychiatric condition. Therefore, Sneed made misstatements to the jury.

The State believes post-conviction relief is appropriate with respect to Sneed's false testimony to the jury. To obtain post-conviction relief, Glossip needs to show that the issue could not have been raised in a direct appeal and supports a conclusion that the outcome of the trial would have been different. 22 O.S. Supp. 2022 § 1089(C).

Here, at a minimum, Glossip was not made aware of Sneed's treatment by Dr. Trombka at the second trial. Further, Glossip was not made aware of Dr. Trombka's treatment of Sneed until he recently received the prosecutor's notes. Consequently, this issue could not have been asserted in a direct appeal.

The State is also not comfortable asserting that the outcome of the trial would have been the same if Sneed had testified accurately. There is no dispute that Sneed was the State's key witness at the second trial. If Sneed had accurately disclosed that he had seen a psychiatrist, then the defense would have likely learned of the nature of Sneed's psychiatric condition and the true reason for Sneed's lithium prescription. With this information plus Sneed's history of drug addiction, the State believes that a qualified defense attorney likely could have attacked Sneed's ability to properly recall key facts at the second trial. Stated another way, the State has reached the difficult conclusion that the conviction of Glossip was obtained with the benefit of material misstatements to the jury by its key witness. Accordingly, the State believes Glossip is entitled to post-conviction relief.

The State believes it must acknowledge Sneed's misstatements on appeal to fulfill its obligations under *Napue*. This Court has recognized a three-prong test to determine a violation of *Napue*:

> (1) The status of a key part (witness or evidence) of the State's case was presented at trial with an element affecting its credibility intentionally concealed. (2) The prosecutor knew or had reason to know of the concealment and failed to bring the concealment to the attention of the trial court. (3) The trier of fact was unable properly to evaluate the case against the defendant as a result of the concealment.

Runnels v. State, 1977 OK CR 146, ¶ 30, 562 P.2d 932, 936

Here, it is undisputed that Sneed was the State's key witness at trial. Further, the prosecutor may have had reason to know of Sneed's misstatements. This is shown by the newly disclosed notes and the fact that Sneed was previously given a competency exam by a psychiatrist.[2] Further, as shown above, the State does not believe that the trier of fact was able to properly evaluate the case against Glossip as a result of the concealment. Therefore, the State believes it must concede error under *Napue*.

Accordingly, the State feels compelled, consistent with *Napue*, to correct these material misstatements and request the case be remanded to the district court.

Glossip's Conviction Should Be Set Aside and the Case Remanded to the District Court.

As explained above, the State has concluded that the conviction can no longer be supported based on Sneed's materially false testimony. In addition to the false testimony issue, Glossip also raises multiple errors in his Application such as violation of the rule of sequestration and the destruction of various pieces of evidence. While the State does not believe that these issues alone warrant reversal, when they are taken together with the incorrect testimony, they establish that

---

[2] While Glossip's defense certainly had access to Dr. King's competency examination, it appears that the defense did not have the information regarding Dr. Trombka.

Glossip's trial was unfair and unreliable. Consequently, the State is not comfortable advocating that the result of the trial would have been the same but for these errors.

In reaching this conclusion, the State is mindful:

> that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 304–305 (1976).

Moreover, in deciding to take this difficult stance, the State has carefully considered the voluminous record in this case, the constitutional principles at stake, and the interests of justice. While the State has previously opposed relief for Glossip, it has changed its position based on a careful review of the new information that has come to light, including its own Independent Counsel's review of the case. Given the admonition that the State has a duty to "use every legitimate means to bring about a just" result (*Viereck*, supra, at 248), it urges this Court to give credence to the State's considered judgment. *See Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.) (vacating judgment of Texas Court of Criminal Appeals that refused to give effect to State's confession of error in successor habeas petition).

Accordingly, the State requests that the Court vacate Glossip's conviction and that the case be remanded to the district court.

Respectfully submitted,

GENTNER F. DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA

Gentner F. Drummond, OBA # 16645
313 N.E. 21st St.
Oklahoma City, OK 73105
Tel: (405) 521-3921

CERTIFICATE OF SERVICE

On this 6th day of April 2023, a true and correct copy of the foregoing was mailed to:

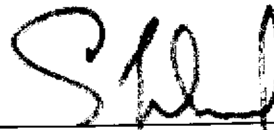
Warren Gotcher
323 E. Carl Albert Avenue
McAlester, Oklahoma 74501

Donald R. Knight
7852 S. Elati Street, Suite 201
Littleton, Colorado 80120

Amy P. Knight
3849 E. Broadway Blvd. #288
Tucson, Arizona 85716

Joseph J. Perkovich
P.O. Box 4544
New York, New York 10163

John R. Mills
1721 Broadway, Suite 201
Oakland, California 94612



Gentner F. Drummond

Rex Duncan
Independent Counsel
P.O. Box 486
Sand Springs, OK 74063

April 3, 2023

Honorable Gentner Drummond
Oklahoma Attorney General
313 NE 21st Street
Oklahoma City, OK 73105

Re: Independent Counsel Report in the matter of Richard Eugene Glossip, Oklahoma County case CF-1997-244

Attorney General Drummond,

Following your January 2023, engagement, I reviewed available materials associated with Oklahoma's prosecution, conviction, sentencing, and post-conviction appeals of Richard Eugene Glossip. His first charge was Oklahoma County case CF-1997-256, Accessory to a Felony, to Wit Murder, and subsequently CF-1997-244, Murder in the First Degree.

Additionally, I have met with and spoken to attorneys, investigators, legislators and others. Additional work products developed by private attorneys, law firms and legal experts were also provided for review.

As promised in January, your office provided full and transparent access to every available document and did not influence my investigation. You also ordered critical case file information previously withheld from Glossip's trial attorneys, referred to as "Box 8" under claims of work product, to be shared with his current attorney, Don Knight, and attorneys with law firms Reed Smith LLP, Jackson Walker LLP, and Crowe & Dunlevy LLP. Box 8 yielded significant discoverable information.

Thousands of hours of investigation and voluminous reports from Reed Smith LLP and Jackson Walker LLP were instrumental in navigating a reported 146,000 pages related to the

case. The scholarly arguments of attorneys Christina Vitale and David Weiss were of particular benefit. Their reports have been provided to your office, legislators and online for public consideration.

Veteran assistant attorneys general (AAG) also contributed in a professional manner to my understanding of the history and nuances of this case from the State's perspective.

Several in-person meetings with Don Knight and Amy Knight, attorneys for Glossip, assisted my understanding of their client's defense.

Finally, my investigation incorporated several legal expert opinions from the Oklahoma City University School of Law Dean Emeritus, Professor Lawrence Hellman. Two of those expert opinions have been incorporated into Glossip's Notice of Conflict and Request for Recusal, filed March 27, 2023, in PCD-2023-267. As that pleading details Professor Hellman's analysis of two separate issues, I will not address them herein, but direct your attention thereto.

My opinions and recommendations are my own. On issues calling for a determination of compliance, disclosure is presumed appropriate, especially in death penalty cases.

The overriding consideration by a prosecutor should always be (i) what charge(s) is supported by the evidence and (ii) whether a jury can be convinced, unanimously, beyond a reasonable doubt, that admissible evidence proves each element of a crime. In this prosecution, Glossip was initially charged, in case CF-1997-256, with Accessory After the Fact to Murder. That case was subsequently dismissed, and Glossip was added as a co-defendant to Justin Sneed's murder case, CF-1997-244, by Amended Information.

As you know, in general some witnesses are reluctant to testify, while others can have credibility problems. The State is required to disclose information in its possession about its witnesses. For example, in my view, the defense is entitled to know if a jail psychiatrist has

diagnosed the State's star witness with bipolar affective disorder and prescribed lithium shortly after his arrest. Such a fact would raise questions about that witness' mental health condition prior to arrest. In my view, withholding such information could be a violation of *Brady,*[1] and in my opinion, could change the outcome of a trial.

The prosecutor is, without exception, a minister of justice. When prosecutors lose sight of that duty, justice is the first casualty. When due process failures result from mere indifference, negligence or policy, justice is still a casualty.

FINDINGS

There was sufficient evidence of Glossip's involvement in the murder of Barry Van Treese to support his 1997 prosecution. Glossip incriminated himself as an accessory after the fact, both during 1997 custodial interviews and 1998 sworn jury trial testimony. Circumstantial evidence, tenuous as it was, also supported the State's argument that Glossip was a principal, subject to prosecution for Murder in the First Degree.

The State's prosecution of Glossip for first-degree murder hinged almost entirely on co-defendant Justin Sneed. Sneed testified against Glossip, basically to save himself from the death penalty.[2]

The State's murder case against Glossip was not particularly strong and would have been, in my view, weaker if full discovery had been provided. Given the passage of 26 years, death of witnesses, destruction and loss of evidence, and 2023 evidentiary disclosures, it is, in my view, less tenable today.

Concurrently, I believe Glossip was deprived of a fair trial in which the State can have confidence in the process *and* result. What I believe are violations of discovery mandates under

---

[1] *Brady v. Maryland,* 373 U.S. 83 (U.S. Supreme Court, 1963). The State must disclose exculpatory, mitigating and impeachment evidence.

[2] The State offered Sneed a plea agreement in return for his testimony against Glossip.

Brady[3] and disclosure requirements of *Napue*[4] prevent such confidence. Further, I believe Glossip was deprived of a fair clemency hearing in 2014 before the Oklahoma Pardon and Parole Board (PPB) and in his subsequent Successive Applications for Post-Conviction Relief. The cumulative effect of errors, omissions, lost evidence, and possible misconduct cannot be underestimated.

HISTORY OF THE CASE

On January 7, 1997, Barry Van Treese was murdered at the Best Budget Inn, an Oklahoma City motel located at 301 S. Council Road, owned by Barry and his wife Donna. The investigating agency was the Oklahoma City Police Department (OKCPD). Several OKCPD officers and detectives were involved, and the lead investigators were Inspectors Bob Bemo and Bill Cook.

The initial investigation was brief and immediately focused on Glossip and Sneed, to the exclusion of all others. Sneed was arrested January 14, 1997, after a week on the run and charged the following day with the murder of Van Treese.

Glossip, after making self-incriminating statements over the course of two interviews, was arrested and charged with the crime of Accessory to Murder. On January 15, 1997, the Oklahoma County District Attorney's Office, under District Attorney Bob Macy, charged Glossip with Accessory to Murder, in Oklahoma County Case CF-1997-256.

Bemo and Cook employed interrogation tactics to get Sneed to identify Glossip as a principal rather than a mere accessory. In addition, Bemo told Glossip that Sneed was pointing the finger at him, stating, "The people involved in this are going to get the needle."[5] Sneed

[3] *Supra.*
[4] *Napue v. Illinois,* 360 U.S. 264 (U.S. Supreme Court, 1959). The State has a duty to correct known false testimony by its witnesses.
[5] January 8, 1997, Police Interrogation of Glossip, at p. 111.

eventually claimed the murder was Glossip's idea and he (Sneed) finally went along with it because he saw no other way out.

Bemo and Cook interviewed Glossip over the course of January 7 and January 9, 1997. Glossip initially denied any knowledge of, or participation in, the disappearance of Barry Van Treese. During the first interview, Bemo and Cook asked Glossip to submit to a polygraph exam. Glossip agreed to do so later, tentatively scheduled for January 9, 1997.

On January 9, 1997, Glossip met with David McKenzie, an Oklahoma City criminal defense attorney. Upon exiting McKenzie's office, the OKCPD detained Glossip and placed him in a police vehicle. Glossip's girlfriend, DeAnna Wood, had accompanied him to the law office; she was also detained and placed in a separate police vehicle. Glossip and Wood were transported to OKCPD.

Bemo and Cook accused Glossip of failing to appear for his scheduled polygraph exam, advising him he was under arrest and not free to leave. Glossip then expressed a desire to take the polygraph, and after repeatedly waiving his right to remain silent, submitted to an exam of some sort, administered by the OKCPD.

Bemo and Cook subsequently advised Glossip he failed the polygraph. Interestingly, Glossip maintains he was not administered a polygraph, but fitted only with a simple fingertip device like an oximeter. No reports or graphs were ever provided to the State or to Glossip. On January 9, 1997, following the "polygraph exam," Glossip was arrested and jailed.

Glossip's 1998 trial for Murder in the First Degree resulted in a conviction and death sentence. The Oklahoma Court of Criminal Appeals (OCCA) reversed the conviction due to ineffective assistance of counsel. His 2004 retrial also resulted in a conviction and death sentence

for the same charge. Glossip appealed the conviction and sought post-conviction relief in state and federal courts.

Specific concerns include:

1. ***Whether a police polygraph examiner conducted an actual polygraph exam of Glossip on the day of his arrest, and whether a reference thereto was wrongfully employed against Glossip during his 2014 clemency hearing***

The alleged polygraph results were not provided to and secured by the DA's Office, but instead were purportedly destroyed by the OKCPD after two years. Failure to secure, transfer and safeguard the polygraph results opened the door to defense claims of discovery violations.

Throughout the pendency of Glossip's first case number, second case number, first jury trial, second jury trial and all appellate review, the OKCPD, DA, and later the Office of the Attorney General (OAG) maintained Glossip had been administered a legitimate polygraph exam by a qualified OKCPD employee examiner.

Bemo, Cook, the OKCPD and the DA had an obligation to retain the results as evidence and make them available to Glossip. The results were never provided and were allegedly destroyed well prior to the July 17, 2001, reversal and 2004 retrial.

Glossip's first attorney, Wayne M. Fournerat, filed proper Motions to access discovery materials. Prior to the first jury trial, Fern Smith, the prosecuting assistant district attorney (ADA), maintained the polygraph results were in evidence – although she had not personally seen them – and while she did not plan to admit them, they were available for Fournerat's examination.

No ADA or defense attorney stated on the record he or she saw the polygraph results. It is still disputed whether a polygraph was conducted. In my view, evidence in murder cases is to be maintained in perpetuity.

The State argued against clemency during Glossip's 2014 clemency hearing. An AAG referenced Glossip's polygraph results, telling the Pardon and Parole Board that "he (Glossip) failed it miserably." Polygraph exams are inadmissible at trial, yet the State weaponized such "results" to deny Glossip clemency from a death sentence. Regardless of whether the Rules of Evidence apply, the State's reference to never-seen evidence contributed, in my belief, to the cumulative unfairness of the State's handling of this case.

2. ***Items of physical evidence, including a box containing ten (10) items, lost or destroyed by the DA's Office or the OKCPD***

This box contained the victim's wallet, which Sneed testified had been handled by Glossip while retrieving a $100 bill; two motel receipt books and one deposit book; a shower curtain allegedly handled by Glossip; and other items that should have been maintained in the property room.

It is undisputed these items were destroyed while Glossip's first conviction was on direct appeal, and therefore prior to his 2004 retrial. While attorneys in the second trial were aware of these missing items of evidence, no modification was made to the plea offer. In my view, evidence in murder cases is to be maintained in perpetuity.

3. ***Evidence returned to the Van Treese family prior to the first trial***

Barry Van Treese's wallet was either returned to his brother, Ken Van Treese, at Ken's request, or left among the 10 items destroyed in the evidence box. In either scenario, failure by

the State to preserve evidence cannot be dismissed as inconsequential or without harm to the defense. In my view, evidence in murder cases is to be maintained in perpetuity.

4. ***Missing security camera footage from the Sinclair gas station adjacent to the Best Budget Inn crime scene***

Various explanations have been provided over the years as to why this footage is not among the existing evidence. Former ADA Gary Ackley stated he believes he viewed the video and found it boring, notwithstanding his memory of events in 2003-2004. Ackley cannot state definitively whether the video was ever in the possession of the DA's Office, but he admits it should have been secured and made available to Glossip.

Former ADA Connie Pope Smothermon, the lead prosecutor in the second trial, stated the security video was not provided to the State. The video was never made available to the defense. While memories fade over time, in my view, evidence in murder cases is to be maintained in perpetuity.

5. ***Failure of Glossip's second trial attorneys to challenge Sneed's 1998 plea agreement***

That agreement was used as leverage to compel Sneed's reluctant testimony in the 2004 retrial (to avoid the death penalty). It is my opinion the 2001 OCCA decision in *Dyer*[6] entitled Sneed to a new plea agreement or, in the alternative, relief from testifying at Glossip's retrial. Neither Glossip's defense attorneys in the 2004 retrial nor Sneed's attorney, Gina Walker, challenged the post-*Dyer* use of the 1998 plea agreement. The record is silent on this issue.

---

[6] *Dyer v. State*, 2001 OK CR 31, 34 P. 3d 652, decided in 2001, held plea agreements not specifically waiving double jeopardy protections are not enforceable if a retrial is ordered and co-defendant's testimony is again needed. Sneed's 1998 plea agreement did not waive his double jeopardy protections. Sneed testified again, in 2004, without benefit of a renegotiated plea agreement or conversation about that possibility.

Smothermon stated her demand of Sneed to appear as a witness for the State was pursuant to a trial subpoena. During direct examination, Sneed was asked the following:

> Question by Smothermon: "Mr. Sneed, do you believe that in order to escape the death penalty, there are certain things you have to say today or to escape the death penalty, you have to testify today?"
>
> Answer by Sneed: "To escape the death penalty, I have to testify today."[7]

The 2001 *Dyer* case, big news among criminal law practitioners at the time, was featured in the November 10, 2001, edition of the *Oklahoma Bar Journal*. Yet the Court, the ADAs and both defense attorneys (all State employees) were silent in 2004, failing to make a record with respect to Sneed's 1998 plea agreement.

6. ***Following the medical examiner's (ME) 2004 trial testimony, a written communication by Smothermon to the attorney for Sneed, an endorsed witness for the State***[8]

In 1998, Gina Walker represented Sneed and had secured for him a Life Sentence Without Possibility of Parole (LWOP), avoiding the death penalty. Smothermon's memo to Walker during the second trial read, "Our biggest problem is still the knife," relating to the use of a knife during the murder.

In the first jury trial, Sneed testified he did not stab Barry Van Treese. However, during the second trial, the ME testified some injuries on the body of the victim were consistent with stab wounds from a blunt tip knife (broken tip). A pocketknife with a broken tip was found under Van Treese's body. Sneed admitted that the pocketknife belonged to him.

A plausible purpose of Smothermon's memo to Walker was to communicate the ME's previously unheard testimony and coach Sneed's testimony to match the ME's opinion. The next

[7] 2004 Trial Transcript, Volume XII, 62.

[8] "Smothermon Memo." ADA Connie Pope Smothermon's memo to endorsed State's witness Gina Walker, who was also Justin Sneed's attorney, regarding testimony by the Medical Examiner.

day, Sneed testified he stabbed Van Treese, but that the knife failed to penetrate the victim's chest.[9] My investigation found no other explanation for the memo or change in Sneed's trial testimony.

Handwritten notes in the margin of the memo have been independently verified as those of Walker, confirming Smothermon's memo was received and presumably shared with Sneed (a violation of the Rule of Sequestration). Sneed's testimony the next day conformed with Smothermon's "Our biggest problem is still the knife" memo by testifying he had stabbed Van Treese.

7. ***Violations of Brady for failing to disclose actual repair expenditures by the Van Treese family***[10]

This fact was handwritten on a legal pad, made contemporaneously during a pre-trial meeting with State's witness Bill Sunday.

Sunday, responsible for overseeing motel repairs following the murder, told ADA Ackley that $25,000 was spent on repairs and maintenance. This is material to the guilt phase of the trial. Glossip never had access to $25,000 for motel maintenance. Ackley did provide a summary of Sunday's proposed testimony as discovery. However, that summary excluded reference to the $25,000 expenditure.

On cross-examination of Sunday, however, defense attorney Wayne Woodyard asked the following:

---

[9] 2004 Trial Transcript, Volume XII, 102.

[10] State's witness Ken Van Treese testified delinquent motel repairs were $2,000 to $2,500. However, State's witness Bill Sunday told ADA Gary Ackley he spent approximately $25,000 on repairs during the 60-90 days following the murder. This fact was noted on ADA Ackley's handwritten legal pad, but not disclosed to Glossip's attorneys. The only death sentence aggravator found by the jury was remuneration, from three alleged aggravators available. Money was central to the State's theory Glossip killed Barry Van Treese for financial gain and to prevent discovery of $2,000 to $2,500 neglected motel maintenance.

Question by Woodyard: "Sir do you know how much money was expended by the family who had control of the checkbook for purchases of mattresses and repair items and things of that nature?"

Answer by Sunday: "I really don't. I just…it would be a guess."[11]

In my view, failure to correct Sunday's false testimony also constituted a violation of *Napue*.[12]

8. ***Prosecutorial failure to correct false testimony from Sneed about his medical condition and treatment by a psychiatrist constituted a violation of Napue.***[13]

Sneed testified he had asked Oklahoma County jail personnel for Sudafed for a cold or dental work. He claimed he did not know why subsequently he was prescribed lithium, and he denied ever seeing a psychiatrist. In 1997, a prescription for lithium in a county jail was treatment for mental health issues, and it could only be prescribed by a medical doctor.

In handwritten notes from an interview with Sneed, ADA Smotherman referenced lithium and "Dr. Trumpet" adjacent to each other. The notes were found in Box 8. If the defense knew Dr. Lawrence "Larry" Trombka, (spelled in Smothermon's notes as Dr. Trumpet) had diagnosed Sneed as bipolar and prescribed lithium, Glossip's attorneys could have impeached Sneed's credibility, memory and truthfulness.

During all relevant dates, Dr. Trombka was the only medical doctor at the jail diagnosing mental health issues and prescribing lithium.[14] Mental health issues, including bipolar affective disorder and lithium, go hand in hand.

---

[11] Trial Transcript Volume XII, 35.

[12] *Supra.*

[13] *Supra.*

[14] March 17, 2023, Affidavit of psychiatrist Dr. Larry Trombka, who diagnosed Sneed as bipolar and prescribed lithium. Notations about "Dr. Trumpet" and lithium were not disclosed to Glossip's attorneys. The State presented

Instead, Sneed testified falsely why he was on lithium and denied being seen by a psychiatrist – and the jury never heard the truth. During direct examination of Sneed, the following discussion took place:

Question by Smothermon: "After you were arrested, were you placed on any type prescription medication?

Answer by Sneed: "When I was arrested I asked for some Sudafed because I had a cold, but then shortly after that somehow they ended up giving me Lithium for some reason, I don't know why. I never seen no psychiatrist or anything."

Question by Smothermon: "So you don't know why they gave you that?"

Answer by Sneed: "No."[15]

In my opinion, these are *Brady*[16] and *Napue*[17] violations that go to the guilt phase. At a minimum, Smothermon's notes prove the State's knowledge that Sneed was on lithium and, in the same conversation, had disclosed the name of "Dr. Trumpet" (believed to reference Dr. Trombka). I believe that seasoned capital homicide prosecutors in the DA's Office could be expected to make the connection between the jail psychiatrist and prescriptions (lithium) for mental health issues. Dr. Trombka was the only psychiatrist on staff.

I also believe that Glossip's experienced capital defense attorneys easily would have made the connection between "Dr. Trumpet" and lithium if they had been provided full discovery. Any reference to "Dr." (any name whatsoever) in conjunction with lithium would have been a red flag, irrespective of the doctor's identity or medical specialty.

Sneed, its star witness in a light far more favorable than he was entitled, and his false testimony went unchallenged. The State's case primarily relied on Sneed's credibility, his perception of reality and memory recall.

[15] 2004 Trial Transcript of ADA Smothermon's direct examination of Sneed, page 64.

[16] *Supra.*

[17] *Supra.*

The 1998 trial disclosed Sneed was given lithium, but not why, or by whom, leaving the impression it was for dental work or a cold, and merely administered by a jail nurse. Smothermon (now retired) stated she is not convinced Dr. Trombka and "Dr. Trumpet" are the same person, and that she and ADA Ackley tried a "clean" case.

9. ***PPB Member Patricia "Pattye" High's failure to disclose, during Glossip's 2014 clemency hearing, her professional relationship with ADA Smothermon***

Both High and Smotherman had served concurrently as ADAs in the Oklahoma County DA's Office. In 2001, then-ADAs High and Smothermon tried a death penalty case together.[18] Despite her lack of disclosure, High asked Glossip two dozen cross-examination questions and voted against clemency.

After viewing the video of the clemency hearing, I believe High had an interest in the outcome and should have recused. Asked for an expert legal opinion, Professor Lawrence Hellman opined:

> "High had a conflict of interest that required disclosure and her recusal from the 2014 proceeding. It is my professional opinion that Patricia High's participation in Glossip's 2014 clemency hearing resulted in (a) proceeding in which neither Glossip nor the public could have been assured that no member of the decision-making body was predisposed to vote against him."[19]

10. ***2015 pleadings by Glossip seeking, among other relief, an evidentiary hearing for discovery of Sneed's medical records***

[18] *Harris v. State*, 2004 OK CR 1.
[19] Professor Lawrence K. Hellman's professional opinion. March 21, 2023.

In opposition, then-Attorney General E. Scott Pruitt called the pleadings "nothing more than a fishing expedition."[20]

In 2013, the 10th Circuit Court of Appeals reversed the OCCA decision in *Browning,*[21] in which Pruitt defended the trial court's refusal to compel production of (a witness') mental health records. Regarding mental health records of the State's star witness, the 10th Circuit held,

> "We only inquire whether the Oklahoma courts could have reasonably decided that the mental health evidence would not have mattered. The answer is no. This evidence would have mattered, even in light of the State's corroborating evidence."[22]

This investigation leads me to believe the State should not be so quick to oppose discovery of mental health records of the State's star witness, especially when other evidence against the defendant is slim. In *Browning,* as in Glossip's case, "what the jury did not know – and the defense attorneys also did not know – was that (witness), who became the most important witness at trial, had been diagnosed with a severe mental disorder."[23]

Death penalty cases must receive the greatest scrutiny of discovery compliance, erring on the side of transparency and disclosure.[24] In my view, such was not the case herein, and too much – everything – is at stake.

11. ***Former Attorney General John O'Connor exercised dominion over boxes 1-7, bringing them to the OAG and making them available to Glossip's attorneys in the final days of August 2022, years after Glossip's earliest scheduled execution date.***

---

[20] State's Response to Petitioner's Successive Application for Post-Conviction Review, Emergency Request for Stay of Execution, Motion for Discovery, and Motion for Evidentiary Hearing. PCD-2015-820, at p. 43. However, *Brady* materials were found in Box 8, sourced from Boxes 1-7.
[21] *Browning v. Trammell,* 717 F.3d 1092 (2013).
[22] *Id,* at 33.
[23] *Id,* at 2.
[24] *See Cone v. Bell,* 556 U.S. 449 (U.S. Supreme Court, 2009).

However, prior to that release, O'Connor directed an AAG to scour boxes 1-7, identifying materials thought to be attorney work product, thereby creating Box 8.

Box 8 materials were never provided to Glossip during O'Connor's administration. In my view, materials found in Box 8 represented violations of *Brady, Napue* and the Oklahoma Rules of Professional Conduct.

RECOMMENDATIONS

In my view, the State must vacate Glossip's conviction due to its decades-long failure to disclose what I believe is *Brady* material, correct what I believe was false trial testimony of its star witness, and what I believe was a violation of the Court ordered Rule of Sequestration of witnesses (The Rule). In my view, this case is also permeated by failures to secure, safeguard and maintain evidence in a capital murder case.

In my view, this case demonstrates why withholding entire documents is dangerous. Legal pads with contemporaneously handwritten witness-interview notes are documents.

Trying any case a third time is unfortunate and rare, but I believe it is appropriate in this case.

In my view, *Brady* facts were found in handwritten interview notes belonging to both ADAs. Full disclosure is, in my opinion, the only guarantee of complete discovery compliance. This case would have benefited from the appointment of a Special Master, or independent review, to exclude privileged information from boxes 1-7. The easier solution would have been an actual open-file policy in 2004, or every year since.

ADDITIONAL OBSERVATIONS

DA Macy signed the Bill of Particulars in the 1997 case. DA Wes Lane signed the Bill of Particulars for the 2004 retrial. In each case, subsequent pleadings were signed by various

ADAs. The respective records do not indicate involvement by either elected DA after signing the Bill of Particulars.

Prior to the 2004 retrial, the State offered Glossip a plea agreement requiring a guilty plea to Murder in the First Degree for a Life sentence, with the possibility of parole. The Van Treese family, by and through Donna Van Treese, was consulted by the State, and agreed to the plea offer of Life, with the possibility of parole. Glossip agreed to a Life sentence but wanted an Alford Plea.[25] Judge Gray may not have accepted an Alford Plea. Negotiations ceased, and the trial began.

The killer, Justin Sneed, is serving a sentence of Life, without the possibility of parole (LWOP). Prior to Glossip's 1998 trial, the State, by and through ADA Smith, spared Sneed's life in exchange for his testimony against Glossip. Sneed pleaded guilty and is in prison. As Glossip would not plead guilty and accept a Life sentence, the DA asked the jury to recommend death, bypassing LWOP altogether. This disparate sentencing is permissible, at the discretion of the DA.

Unaware the Van Treese family agreed to Life, jurors subsequently heard their Victim Impact statements and recommended death. If this murder was deserving of the death penalty, I believe the wrong co-defendant is on death row.

Members of the jury served honorably and undertook the tasks before them with the due diligence required by law. No criticisms of the jury were identified as causes of the failures herein.

---

[25] Allows a defendant to avoid pleading guilty but requires acknowledgment the evidence is sufficient to support a finding of guilt. The Court finds the defendant guilty and can impose the sentence agreed upon pursuant to plea negotiations.

Your predecessor released boxes 1-7 in late August 2022, but never released Box 8 materials. After taking office, you directed the release of Box 8 materials. *Brady* materials were among Box 8 documents withheld until January 2023.

Staff attorneys at the OAG have worked this case for years pursuant to Oklahoma statute and guidance from previous Oklahoma Attorneys General. They have diligently defended Glossip's 2004 conviction. Each has supported my investigation to understand the State's defense of the conviction and have identified what they describe as legal and factual errors with my analysis. All OAG policy decisions were made by the elected Attorneys General at the time, and I find no deviation from those policies by the OAG's staff attorneys. They were simply following orders.

Specific discussions with the AAGs revealed points with which I agreed. For example, Glossip having $1,757 on his person at the time of his arrest, coupled with his inability during his statements to police, or the during the 1998 trial, to account for that sum is an indicator of his involvement in the murder. Glossip's attorneys and Reed Smith attorneys disagree with this opinion.

The AAGs and I agree Glossip made false statements regarding his knowledge of Barry Van Treese's whereabouts after he was murdered, and his lies incriminated him therein. Glossip's attorneys disagree with our opinion.

The AAGs and I agree Glossip is not actually innocent of criminal culpability in this case. Glossip's attorneys disagree.

On other points, the AAGs and I disagree. For example, there were allegations Glossip planned to flee the jurisdiction in 1997. In my experience, suspects in criminal investigations intending to flee, generally flee. They don't keep appointments with criminal defense attorneys

before fleeing. It is my belief Glossip's appointment with a criminal defense attorney undermines the State's theory he was planning to flee. On this point, I find myself agreeing with Glossip's attorney and Reed Smith attorneys.

The AAGs and I disagree regarding the nature of Sneed's release of his jail records. Until March 2023, it was the State's position that Sneed's release of records included medical, psychological, and psychiatric records, and that Glossip had access thereto. As it turns out, Sneed's release specifically excluded his medical, psychological, and psychiatric records. A release of all Sneed's records would have made a monumental difference in his cross-examination, and possibly, the jury's verdict.

There are many more points of debate, but suffice it to say, the AAGs zealously represent the State, Glossip's attorneys zealously represent their client, and my investigation sought to reach unbiased conclusions and opinions. Other than discovering the truth, I don't have a vested interest in the outcome.

The State's first case file against Glossip, Oklahoma County case CF-1997-256, (Accessory to Murder) was provided in March 2023, by the Oklahoma County DA's Office, following Glossip's February 2023, request. The file contained handwritten summaries of witness statements - information that I believe Glossip was always entitled to receive. These notes indicate additional interviews were conducted of Donna Van Treese and Cliff Everhart, after discovery of the murder. Material facts within these summaries were not provided to Glossip, prior to the 1998 trial. Unfortunately, the State's case file summaries were first provided in 2023.

As Chairman of the Oklahoma House of Representatives Judiciary Committee, 2006-2010, I supported pro-death penalty legislation, guided pro-death penalty bills through

committee and co-authored such a bill signed into law by then-Governor Brad Henry. In 2010, I witnessed an execution at Oklahoma State Penitentiary in my capacity as Judiciary Chairman. As District Attorney, I signed and filed one Bill of Particulars. With 34 years of courtroom experience in criminal law cases, I am an advocate for the death penalty in the "worst of the worst" cases.

However, I believe the numerous trial and appellate defects throughout the history of this case can be remedied only by remand for a new trial. Such remand is, in my view, required.[26] In my view, further advocacy in support of the case's current posture does not serve the interests of justice; instead, it rewards the defects and errors in the process. In my view, a new trial is necessary to restore integrity to the process herein. Given Box 8 revelations, a dispassionate review of this case cannot reach a different conclusion.

But for your election last year, the State of Oklahoma likely would have executed Richard Glossip on February 16, 2023. Your decision to seek a stay of execution and more thoroughly examine this case may be the bravest leadership decision I've ever witnessed, and it was absolutely the correct legal decision.

Respectfully,

Rex Duncan
Independent Counsel

[26] *Banks v. Dretke*, 540 U.S. 668 (U.S. Supreme Court, 2004). When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.