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IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 6 2023

JOHN D. HADDEN
CLERK

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

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.

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,

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CERTIFICATE OF SERVICE

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