



**ORIGINAL**

**IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA**

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

NOV 10 2022

RICHARD EUGENE GLOSSIP, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Respondent. )

JOHN D. HADDEN  
CLERK

NOT FOR PUBLICATION  
Case No. PCD-2022-589

**OPINION DENYING SUBSEQUENT APPLICATION FOR  
POST-CONVICTION RELIEF, MOTION FOR EVIDENTIARY  
HEARING AND MOTION FOR DISCOVERY**

**LEWIS, JUDGE:**

Petitioner, Richard Eugene Glossip, was convicted of First Degree (malice) Murder in violation of 21 O.S.Supp.1996, § 701.7(A), in Oklahoma County District Court Case No. CF-1997-244, after a jury trial occurring in May and June 2004, before the Honorable Twyla Mason Gray, District Judge.<sup>1</sup> The jury found the existence of one aggravating circumstance: that Glossip committed the murder for remuneration or the promise of remuneration or employed

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<sup>1</sup> This was Glossip's retrial after this Court reversed his first Judgment and Sentence on legal grounds in *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

another to commit the murder for remuneration or the promise of remuneration and set punishment at death.<sup>2</sup> Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

This Court affirmed Glossip's murder conviction and sentence of death in *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143. Glossip, thereafter, filed an initial application for post-conviction relief, which was denied in an unpublished opinion. *Glossip v. State*, Oklahoma Court of Criminal Appeals Case No. PCD-2004-978 (Dec. 6, 2007). Glossip filed a successive application for post-conviction relief, a motion for evidentiary hearing, a motion for discovery, and an emergency request for stay of execution on September 15, 2015, within twenty-four hours of his scheduled execution. The execution was delayed by this Court for two weeks. Glossip subsequently filed a supplement to his subsequent post-conviction application, and on September 28, 2015 the application was denied by this Court. *Glossip v. State*, Court of Criminal Appeals Case No. PCD-2015-820.

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<sup>2</sup> The jury did not find the existence of the second alleged aggravating circumstance: the existence of the probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

His execution was eventually stayed indefinitely at the request of the State. The stays have now been lifted by operation of law. Glossip's execution is currently scheduled for December 8, 2022.

He is now before this Court with another subsequent application for post-conviction relief along with a motion for evidentiary hearing and motion for discovery. The facts of Glossip's crime are sufficiently detailed in the 2007 direct appeal Opinion. In this, his third application, Glossip raises five propositions in support of his post-conviction appeal.

1. Richard Glossip is factually innocent of the murder of Barry Van Treese.
2. 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.
3. 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.

4. The investigation, trial, and appeal in Mr. Glossip's case failed to meet the demands of due process of law.
5. Mr. Glossip is intellectually disabled and ineligible for the death penalty under Eighth and Fourteenth Amendments and Art. 2, § 9 of the Oklahoma Constitution.

As this is a subsequent post-conviction proceeding, this Court's review is limited by the Oklahoma Post-Conviction Procedure Act. Title 22 O.S.2011, § 1089(D)(8) (provides for the filing of subsequent applications for post-conviction relief.)<sup>3</sup> The Post-Conviction

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<sup>3</sup> It provides,

8. . . . if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent . . . application unless:
  - a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
  - b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

Procedure Act is not designed or intended to provide applicants with repeated appeals of issues that have previously been raised on appeal or could have been raised but were not. *Slaughter v. State*, 2005 OK CR 6, ¶ 4, 108 P. 3d 1052, 1054. The Court's review of subsequent post-conviction applications is limited to errors which would have changed the outcome and claims of factual innocence. *Id.* 2005 OK CR 6, ¶ 6, 108 P.3d at 1054.

This Court's rules also limit issues which can be raised in a subsequent application.

No subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered.

Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2022).<sup>4</sup>

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

<sup>4</sup> These rules have the force of statute. 22 O.S.2021, § 1051(B).

The State has waived any procedural defenses to Proposition One. The procedural defenses are those that require a petitioner to file post-conviction claims in his initial application unless they were unavailable at the time as defined by statute,<sup>5</sup> and unless the subsequent post-conviction application “is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered.” Rule 9.7(G)(3). Glossip has clearly not complied with the sixty (60) day rule.

These time limits are in place because, the law favors the legal principal of finality of judgment. *Sporn v. State*, 2006 OK CR 30, ¶ 6, 139 P.3d 953, 954, *Malicoat v. State*, 2006 OK CR 26, ¶ 3, 137 P.3d 1234, 1235, *Massaro v. United States*, 538 U.S. 500, 504 (2003). This Court, however, will take claims of factual innocence seriously. This Court’s rules and our case law do not bar the raising of a claim of factual innocence at any stage of the appeal process. *Slaughter*, 2005 OK CR 6, ¶ 6, 108 P.3d at 1054. Innocence claims are the Post-Conviction Procedure Act’s foundation. *Id.*

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<sup>5</sup> Section 1089(D)(9) of Title 22.

Claims of factual innocence must be supported by clear and convincing evidence. 22 O.S.2021, § 1089(D)(8)(b)(2). Factual innocence claims are the method to sidestep procedural bars in order to prevent the risk of a manifest miscarriage of justice. *Cf. Herrera v. Collins*, 506 U.S. 390, 404 (1993) (holding that bars to federal habeas corpus claims can be overcome by a claim of actual innocence). The evidence of factual innocence must be more than that which merely tends to discredit or impeach a witness without the probability that the outcome would be different. *See Moore v. State*, 1995 OK CR 12 ¶ 6, 889 P.2d 1253, 1258; *Smith v. State*, 1992 OK CR 3, ¶ 15, 826 P.2d 615, 617-618; *Robinson v. State*, 1997 OK CR 24, ¶ 7, 937 P.2d 101, 106. We weigh any evidence presented against the evidence as a whole, in a light most favorable to the State, to determine if Glossip has met his burden. *See Slaughter*, 2005 OK CR 6, ¶ 21, 108 P.3d at 1056.

In order to prevail on his factual innocence claim, Glossip attempts to show by clear and convincing evidence that the testimony of co-defendant Justin Sneed was untrue, unbelievable, or uncorroborated. He argues that the trial evidence was weak, and the evidence against him is weaker today than it was at trial.

Glossip's theory that he is factually innocent is based on his conclusion that Sneed, either acting alone, or with his girlfriend (or someone else) planned and carried out a "robbery gone wrong." The evidence he proffers to support this theory consists of affidavits from jailhouse informers, drug dealers, exotic dancers, and residents of the Best Budget Inn. The most recent affidavit of these is from July 27, 2020. At the least, Glossip argues that sufficient controverted evidence exists so that the case should be remanded to the district court for an evidentiary hearing.

Six jailhouse informants have provided affidavits. Two of these informers provided affidavits which were included in Glossip's prior (2015) post-conviction application. These affiants generally claim to have heard Sneed admit to killing Van Treese, on his own or with another person, after he tried to rob Van Treese of his money.<sup>6</sup> The affiants claim that Sneed never mentioned Richard Glossip or claim that Sneed said he set Richard Glossip up to take the fall. Other information contained in affidavits claim that Sneed was a violent methamphetamine addict at the time of the crime and he was not

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<sup>6</sup> The other person possibly being Sneed's girlfriend who may have been a dancer at a nearby strip club.



dependent on Glossip.<sup>7</sup> The evidence regarding Sneed's possible violent personality and his drug use are not contradictory to evidence of his dependence on Glossip.

Much of this information was presented in his previous, 2015, application. At trial and in previous appeals, Glossip argued that Sneed lied about his involvement in order to escape the death penalty. He claimed that Sneed was a severe, thieving, methamphetamine addict, desperate for drugs. He also claimed then, as he does now, that Sneed is an admitted liar, drug abuser, and thief. Clearly, all of these affidavits contain claims that were known, or could have been developed with due diligence earlier.

These affidavits do not provide the clear and convincing evidence that Glossip would like this Court to believe. Contrary to Glossip's assertion, there is no evidence that Sneed has ever sought to recant his testimony in any meaningful way. Further, none of the other witnesses against Glossip have changed their story. Far from making a claim of factual innocence, Glossip actually raises a theory of a defense that has been his claim from the beginning.

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<sup>7</sup> Glossip also argued during his initial application for post-conviction relief, PCD-2004-978, that Sneed was an "untrained vicious dog."

While it is true that Sneed provided a lion's share of the evidence against Glossip, the evidence of Glossip's involvement was sufficiently corroborated by compelling evidence. The link between Glossip and the murder was thoroughly discussed in Glossip's direct appeal. Glossip was trapped in his own web of deceit and deception when authorities were urgently trying to find Van Treese.<sup>8</sup> This Court need go no further in discussing these facts. No trial is perfect, but Glossip's guilt was proven beyond a reasonable doubt before a jury of his peers. Nothing in his current application causes this Court to contradict the jury verdict.

In each criminal trial, a factfinder determines guilt or innocence beyond a reasonable doubt. In most trials there may be some doubt, and some questions may remain unanswered. Very rarely, a conviction may later be shown to be wrongful by subsequent evidence of actual innocence such as DNA testing or a confession by a third party.

*Torres v. State*, 2005 OK CR 17, ¶ 5, 120 P.3d 1184, 1187.

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<sup>8</sup> Glossip told authorities that he was deceitful because he felt like he was involved in the crime; he said he wasn't trying to protect Sneed.

In viewing Glossip's application as a whole, he has not met his burden in showing by clear and convincing evidence that he is "factually innocent." This proposition is denied.

In his next four propositions Glossip raises issues which clearly could have been raised earlier with due diligence; or were not raised within sixty days of their discovery. In order to overcome procedural bars, Glossip argues, citing *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11, that this Court has the power to grant relief any time an error "has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." None of the remaining propositions raise error of this magnitude.

The basis of Glossip's claim, in Proposition Two, that the State destroyed evidence during the pendency of his first direct appeal and before his ultimate retrial, was known before the second trial. This proposition is clearly waived under the post-conviction procedure act.

Glossip's claim of ineffective counsel, in Proposition Three, based on claims that counsel did not conduct an independent investigation; investigate his mental impairments; interview the State's witnesses; and pursue the destruction of evidence claim; as

well as others, is also waived. These facts could have been raised with due diligence in prior appeals.

Glossip's claim, in Proposition Four, that the investigation, trial and appeal failed to meet the demands of due process is based on information that was known or could have been discovered, by attorneys in his first two post-conviction applications. The Reed-Smith report relied upon by Glossip is a compilation of information that has been available to Glossip for many years. It contains information that was discoverable well before the State asked for his punishment to be carried out.<sup>9</sup> This claim is waived.

Finally, Glossip's claim, in Proposition Five, that he is intellectually disabled and ineligible for the death penalty is not supported by clear and convincing evidence. Moreover, this claim is one which could have been discovered with due diligence. It is also waived.

Petitioner's reliance on *Valdez*, to overcome these procedural bars is not persuasive. None of his claims convince this Court that these alleged errors have resulted in a miscarriage of justice or

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<sup>9</sup> It seems that the only impetus for this report is the State's request for a date for the punishment of death to be carried out.

constitute a substantial violation of a constitutional or statutory right. *Valdez*, 2002 OK CR 20, ¶ 6, 46 P.3d at 704.

Glossip's application for post-conviction relief is denied for the foregoing reasons. We find, therefore, that neither an evidentiary hearing nor discovery is warranted in this case.

### **CONCLUSION**

After carefully reviewing Glossip's subsequent application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Glossip's subsequent application for post-conviction relief is **DENIED**. Further, Glossip's motion for an evidentiary hearing and motion for discovery are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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**OPINION BY: LEWIS, J.**

HUDSON, V.P.J.: Concur

LUMPKIN, J.: Concur

MUSSEMAN, J.: Concur

WINCHESTER, J.<sup>10</sup>: Concur

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<sup>10</sup> Supreme Court Justice James R. Winchester sitting by special designation.