No. 22-7466

IN THE

Supreme Court of the United States

RICHARD EUGENE GLOSSIP,

Petitioner,

v.

OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF VICTIM FAMILY MEMBERS DEREK VAN TREESE, DONNA VAN TREESE, AND ALANA MILETO AS *AMICI CURIAE* IN SUPPORT OF AFFIRMING THE JUDGMENT BELOW

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INTERESTS OF *AMICI CURIAE*[*]

Barry Van Treese
December 3, 1942 - January 7, 1997

On January 7, 1997, petitioner Richard Glossip commissioned the murder of Barry Van Treese. Barry was (among many other important family relationships) the beloved father of Derek Van Treese, husband of Donna

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* *Amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Van Treese, and brother of Alana Mileto (the *amici* "Van Treese family").

Today—10,047 days later—the Van Treese family has an interest in seeing Oklahoma's duly imposed sentence on Glossip carried out without further delay.

SUMMARY OF ARGUMENT

> "[T]he proper administration of the criminal law cannot be left merely to the stipulation of parties."
>
> – *Young* v. *United States*, 315 U. S. 257, 259 (1942).

The Oklahoma Attorney General (General Gentner Drummond) has confessed "error" that two trial prosecutors in this case withheld evidence from the defense. This confession is based on the Attorney General's interpretation of handwritten notes made by the prosecutors during a pre-trial interview with state witness Justin Sneed. But General Drummond fails to give a full and fair description of the notes. The prosecutors' notes merely reflect Sneed recounting that *defense* investigators were questioning him about his lithium usage. The notes do not reflect information withheld *from* the defense but rather information *about* the defense. Accordingly, the prosecutors did not conceal any evidence. No error occurred. And thus, this case presents a cautionary tale about the dangers of courts simply accepting an elected prosecutor's confession of "error."[1]

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1. This brief explains why, if it reaches the merits, the Court should reject General Drummond's confession of "error"

FACTUAL BACKGROUND[2]

On January 7, 1997, authorities found the slain body of Barry Van Treese in a motel located in Oklahoma City that he owned. Van Treese had been missing for several hours that day. The subsequent search for Van Treese consumed everyone associated with the motel … everyone, that is, except Richard Glossip.

Glossip managed the motel and had allowed it to fall into disrepair in the latter months of 1996. Additionally, Van Treese and his wife, Donna, had suspicions that Glossip was embezzling money. Van Treese had planned on confronting Glossip about these issues on January 6, 1997.

But Glossip said that encounter never happened. Instead, Glossip maintained that Van Treese was his normal self on January 6, 1997. Glossip's statements and actions in the time between Van Treese's last known sighting and his discovery in Room 102 at the Oklahoma City motel caused investigators great concern. Before Justin Sneed ever uttered a word to authorities, Glossip provided conflicting statements and sent investigators on false leads with full knowledge that Van Treese was already dead.

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as unfounded. For the reasons explained by the Court-appointed amicus defending the judgment below, amicus Criminal Justice Legal Foundation, and various amici States, the Court should not reach the merits but rather dismiss the case for lack of jurisdiction.

2. *See* J.A. 492-564 (Okla. Crim. App. 2007) (affirming Glossip's conviction on direct appeal).

Later, Sneed would confess that Glossip had commissioned him to murder Van Treese. In 1998, based on testimony from Sneed and many other witnesses, a jury found Glossip guilty of first-degree murder and sentenced him to death.

After reversal of that conviction for ineffective assistance of counsel, in 2004 a second jury trial was held. The prosecution presented significant evidence of Glossip's authority over Sneed. It also established that Glossip had worked against the police, providing inconsistent statements about what he knew regarding Van Treese's location. Glossip also changed his story (twice) about his whereabouts at the time of Van Treese's death. Glossip possessed significant funds of unaccounted origin at the time of his arrest. Thus, the prosecution presented significant evidence linking Glossip to the murder not derived from Sneed.

The prosecution also presented testimony from Sneed. When arrested, Sneed implicated both himself and Glossip in the murder, including testimony about Glossip's insistence that Sneed "do it right now" because he (Glossip) was worried about being fired.

At the close of the trial, the trial judge explained to counsel that "after list[en]ing to the testimony as it was presented and observing the witnesses ... I've got to tell you that one of … [my] observations was about Justin Sneed. And I did find him to be a credible witness on the stand." 2004 Tr. Trans., vol. XV, at 45. Glossip was again convicted of first-degree murder and sentenced to death.

Nearly two decades later, Oklahoma was preparing to execute Glossip when a new Attorney General, Gentner Drummond, was elected. Shortly after assuming office—and perhaps sensing political opportunity—the new Attorney General hastily commissioned an "independent" review of Glossip's conviction. Conveniently, General Drummond hired Rex Duncan, his lifelong friend and a political supporter who possessed limited experience in capital litigation. *See* Carmen Forman, *Oklahoma AG Asks Court to Vacate Richard Glossip's Conviction,* Tulsa World (updated May 11, 2024).[3] Duncan suddenly discovered "new" evidence the prosecution had purportedly concealed from the defense.

As the tale is told in the parties' briefs, the trial prosecutors withheld from Glossip's defense team information about Sneed's lithium usage. This story rests on an interpretation of notes the prosecutors took during a pretrial interview of Sneed. Specifically, General Drummond asserts that the handwritten notes indicated that Sneed told the prosecutors "that he was 'on lithium' not by mistake, but in connection with a 'Dr. Trumpet.'" Resp. Br. 10 (citing JA927).

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3. https://tulsaworld.com/news/local/crime-and-courts/oklahoma-ag-asks-court-to-vacate-richard-glossips-conviction/article_713e254a-d427-11ed-9561-37b12f95536c.html.

Six months earlier, Duncan had been fired as GOP General Counsel for Oklahoma for tweeting comments critical of General Drummond's primary election opponent. *See* Nick Camper, *OK GOP Top Lawyer Fired for Tweets*, Okla. News 4, https://kfor.com/news/your-local-election-hq/ok-gop-top-lawyer-fired-for-tweets-over-controversial-governor-stitt-campaign-ad/.

Armed with this "new" evidence, Glossip filed his fifth successive petition for post-conviction relief in the Oklahoma Court of Criminal Appeals (OCCA). And then, on cue, General Drummond filed a response requesting that the OCCA vacate Glossip's 19-year-old murder conviction and send the case back to the district court for a new trial. JA973-79. General Drummond stated that he was "not suggesting that Glossip [was] innocent of any charge made against him." JA974. But the Attorney General was troubled by the "new" evidence.

The five judges of the OCCA carefully considered General Drummond's confession of error and were unimpressed. In a twenty-two-page opinion, the OCCA observed that a "concession alone cannot overcome the limitations on successive post-conviction review." JA990. After reviewing the arguments and evidence, the OCCA concluded that the Attorney General's concession was "not based in law or fact." JA990.

On May 4, 2023, Glossip sought certiorari, supported by Attorney General Drummond. The Court re-listed Glossip's petition twelve times, then granted review of questions relating to this Court's jurisdiction and the implications of "the State's suppression" of Sneed's "admission he was under the care of a psychiatrist …." Pet. Br. i.

ARGUMENT

The Court lacks jurisdiction, as the Van Treese family explained in their brief opposing certiorari. But if the Court reaches the merits, the Court should affirm the judgment below.

The prosecutors never suppressed anything. The prosecutors' notes on the subject merely reflect Sneed recounting what the *defense team* was asking him. That important context is missing from the parties' briefs. With that context understood, any legal issue about the implications of suppressing evidence vanishes. And, in addition, the parties have not called into doubt the OCCA's factual finding that no information was concealed. Thus, this case illustrates the importance of courts carefully scrutinizing prosecutors' confessions of "error" to prevent possible manipulation of the criminal justice system.

I. The Prosecutors Did Not Conceal Information from the Defense.

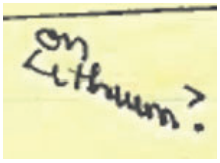
A. The Prosecutors' Notes Reflect What the Defense Knew About Sneed's Lithium Usage—Not What the Prosecutors Knew.

General Drummond (joined by Glossip) argues that the prosecutors' notes prove that information about Sneed was concealed from the defense. Resp. Br. 11. Not true.

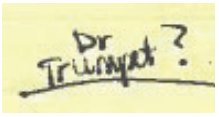
On October 22, 2003, prosecutors Connie Smothermon and Gary Ackley interviewed Sneed, with Sneed's counsel (Gina Walker) present. Smothermon and Ackley *both* took notes. JA939. Read in context, the best interpretation of the notes is that Sneed told the group that members of *Glossip's defense team* had previously visited him (Sneed) and questioned him about being "on lithium?" and a "Dr[.] Trumpet?" The notes written by both Smothermon and Ackley simply record what Sneed told the prosecutors about questions *from Glossip's defense team*.

1. Prosecutor Smothermon's Notes Reflect Information from a Defense Interview.

Turning first to Smothermon's notes, General Drummond argues that the prosecutor had "taken handwritten notes confirming her knowledge of Sneed's diagnosis and treatment"—e.g., treatment for a psychiatric condition by lithium by a Dr. Trumpet. Resp. Br. 10, 18. But General Drummond fails to quote Smothermon's notes accurately, much less discuss their context or meaning in any detail. Smothermon's note regarding lithium contains a question mark—e.g., her note reads, "on lithium?" JA927.



And her related note about "Dr[.] Trumpet" likewise contains a question mark—e.g., Smothermon's note reads, "Dr[.] Trumpet?" JA927.

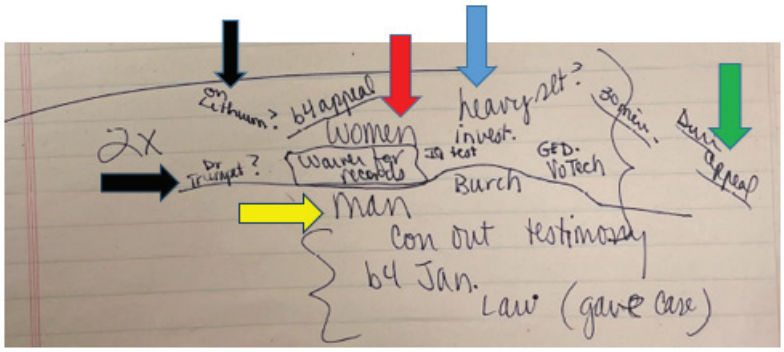


The question mark does not generally appear elsewhere on this page of Smothermon's notes,[4] meaning that she must have had some specific reason for including that punctuation mark in connection with these two specific statements.

4. A question mark appears only one other place on the page, in connection with the phrase "heavy set?" JA927.

Stepping back to examine the surrounding context of these two notes reveals that Smothermon was recording Sneed recounting what Glossip's defense team was questioning him about—hence, the two question marks. Smothermon's adjoining notes reflect two visits ("2X") by defense representatives—with notes about the two visits separated by a curving line. *See* JA927 (notes above the line reflecting a visit by "women" and notes below the line reflecting a visit by a "man").

Turning to the first visit, as shown by the note flagged with a red arrow below, Sneed's visitors were "women." As shown by the notes flagged with a blue arrow, that visit involved an investigator ("invest.") who may have been heavy set ("heavy set?"). As shown by notes flagged by the green arrow, the defense representatives may have been involved in Glossip's earlier direct "appeal." And, finally, as shown by the notes flagged by the two black arrows, the women questioned Sneed about (1) whether he was "on lithium?" and (2) a "Dr[.] Trumpet?"—i.e., questioned by *the women representing Glossip.*



The notes also reflect discussion of a "waiver for records," "IQ test," and "GED. VoTech."

Smothermon also wrote additional notes below a curving line, concerning a separate, second visit to Sneed. These notes, flagged by the yellow arrow above, indicate Sneed was visited by a "man" named "Burch," who tried to "con" him "out" of giving "testimony" and who also "gave" Sneed a "case." JA927.

In sum, read in their full context, the words in Smothermon's notes reveal that Sneed was recounting what the defense team was asking questions about during two visits by defense team members—not what Smothermon had independently learned, much less confirmed.[5]

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5. To the extent that the Court believes it is relevant to look at Smothermon's interpretation of her own notes, she explains in the attached letter that they mean what is recounted above:

> Sneed answered "2X" to my question of whether anyone else had spoken to him which was my usual question at the conclusion of an interview with an in-custody witness. Sneed told us about the two visits. The first visit was from two women before his appeal (of his first conviction). One he described as heavyset investigator. They asked him to sign a waiver for records—IQ test, GED, VoTech, and asked him questions about lithium and Dr. Trumpet. The question marks after those two words indicate that the women asked him those questions. The second visit was before January from a man, Burch, who tried to con him out of testifying by giving him case law.

Smothermon-Ackley Letter, Appendix A, at 9a-10a. Ordinarily, of course, this highly relevant information would be included in

2. Prosecutor Ackley's Notes Likewise Reflect Information from a Defense Interview.

While General Drummond fleetingly (and inaccurately) discusses Smothermon's notes, he fails to substantively discuss the notes taken by the prosecutor seated next to Smothermon during the interview, Gary Ackley. Ackley's contemporaneous notes interlock with Smothermon's and confirm that the prosecutors were merely recording Sneed recounting two meetings with the defense team.[6]

At the top part of his notes, Ackley wrote that the witness (i.e., "W" or Sneed) was "visited by 2 women who said they rep Glossip – heavy 1 'Inv' & 1 'Atty' – Appellate?" This important sentence in Ackley's notes is flagged by the red arrow below:

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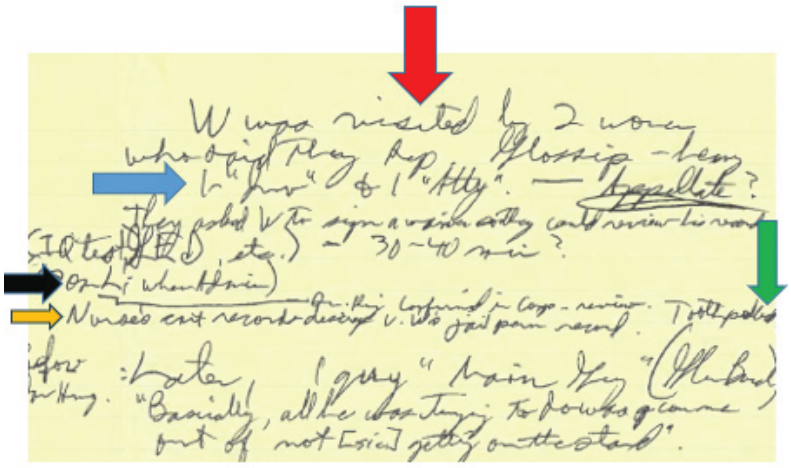
the record by the prosecuting authorities. Unfortunately, in this non-adversarial case, General Drummond has failed to include the information.

6. General Drummond (and Glossip) have also failed to include the full text of these highly relevant notes in the lower court proceedings. But the notes are readily accessible in Box 8 and thus are functionally part of the record here. In addition, the parties have included a reference to a part of Ackley's notes in their joint appendix. *See* JA939-40 (referencing a defense investigator showing Ackley his notes of the Sneed interview and discussing notes); *see also* Resp. Br. 24 (referencing Ackley's affidavit regarding these notes). Accordingly, providing the rest of Ackley's notes to the Court is appropriate under the doctrine of completeness. *See* Fed. R. Evid. 106; Okla. Stat. tit. 12 § 1207. And the accuracy of the image of the relevant part of Ackley's notes during the Sneed interview cannot be reasonably disputed. *See* Smothermon-Ackley Letter, Appendix A, at 8a (reprinting Ackley's notes).



Ackley's notes further indicate, as flagged by the blue arrow, that the two women who "said they rep[resented] Glossip" were "1 'Inv' & 1 'Atty' – Appellate?"—that is, the women who visited Sneed were an investigator and an (appellate?) attorney representing Glossip. Ackley's notes reflect, as flagged by the black arrow, that it was these two women who asked Sneed about lithium ("Li"). And, as flagged by the green arrow, Sneed indicated to Glossip's defense representatives that the lithium was being prescribed in connection with a "tooth pulled."[7] Further, as flagged by the orange arrow, the women asked Sneed about "Nurse's cart record discrepancies v. W's [i.e., Sneed's] jail permanent record."[8] Glossip's defense team also asked Sneed about an "IQ test" and "GED, etc."

7. Sneed said the same thing to Dr. King in an earlier competency evaluation. JA700.

8. The significance of this particular note is discussed at greater length below, in Part I.A.4, *infra.*

Ackley's notes also reflect a "[l]ater" meeting with a "guy" with the name of "Burch." These notes reflect (in a direct quote from Sneed): "'Basically all he was trying to do was con me out of not [sic] getting on the stand'" (quoting Sneed).

That Ackley's notes correspond so closely with Smothermon's notes begs the question why General Drummond fails to discuss them—and has even failed to include them in the record below. General Drummond's (and Glossip's) omission of Ackley's notes is misleading. The text of Ackley's notes clarifies that Sneed was being asked about lithium and a possible doctor *by women representing Glossip.*[9]

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9. To the extent that the Court finds it relevant to look at Ackley's interpretation of his own notes, he explains in the attached letter that they mean what is recounted above:

> The notes reflect that Sneed (W-witness) was visited by 2 women who said they represented Glossip, one was heavy, an investigator and one was an attorney. I noted appellate as a thought to the identity of the visitors. Sneed said the visit lasted about 30-40 minutes. They asked Sneed to sign a waiver so they could review his records regarding IQ tests, GED, etc. With an arrow, I noted Sneed said "on lithium when administered" regarding the visitor's questions about IQ testing. I also noted Sneed had had a tooth pulled that Dr. King confirmed in her competency review. Sneed recounted that later, 3 days before a hearing, a guy "the main guy" came to see him. I took this to be Glen [sic] Burch. Sneed said "Basically, all he was trying to do was con me out of not [sic] getting on the stand."

Smothermon-Ackley Letter, Appendix A, at 8a-9a. Here again, this highly relevant information would ordinarily be included in

3. Smothermon's and Ackley's Notes Correspond with Evidence about Two Defense Team Interviews of Sneed.

For the reasons explained above, during their October 22, 2003, pretrial interview, Smothermon and Ackley recorded in their notes Sneed recounting a first interview by two women representing Glossip and then a later interview by a man, Burch. Did two such interviews by the defense team take place? They did.

In earlier litigation before the OCCA, the Oklahoma Attorney General's Office filed a sixty-two-page opposition to Glossip's Fourth Successive Petition for Post-Conviction Release. JA708-770. That opposition explained that on April 16, 2001, before Sneed's first conviction had been reversed, Glossip's post-conviction attorney, Ms. Wyndi Hobbs, visited Sneed in prison. JA729. Hobbs was with an investigator named Ms. Lisa Cooper. JA729-30. During the meeting, attorney Hobbs told Sneed that it looked like Glossip would get a new trial and that there was a good chance that Sneed would be called to testify again. JA729. Hobbs indicated she was going to "set up a second meeting and take [Sneed] an affidavit to review and sign." JA729. Apparently, Sneed "signed releases for juvenile, jail, prison and criminal records." JA729 (internal quotation omitted).

After the visit, Sneed also wrote a letter to defense investigator Cooper. JA730. In the letter, Sneed referenced signing notarized forms for Cooper and ensuring she

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the record below by the prosecuting authorities. Unfortunately, General Drummond has failed to include it.

received information about Sneed's participation in a "vo-tech program." JA730.

Later, after Glossip's (first) conviction was reversed, Glossip's trial attorney Lynn Burch visited Sneed. JA731. The State made a record that:

> Mr. Burch encouraged Mr. Sneed not to testify in this case against his client [i.e., Mr. Glossip], gave [Mr. Sneed] a case that said that even though he had an agreement with the State of Oklahoma, that the law was on his side, that he didn't have to testify and encouraged Mr. Sneed that even though Mr. Glossip was not mad at him that there might be ramifications in the yard there in prison if he testified.

JA731. Burch denied the accusation that he pressured Sneed. JA731. Sneed later confirmed that Burch provided him with a case to give his defense attorney, specifically *Dyer v. State*, 34 P.3d 652 (OCCA 2001), concerning the implications of a witness's refusal to testify as required by a plea agreement. JA732.

These references in the record establish that Glossip's defense team met twice with Sneed—i.e., a first meeting with two women (attorney Wyndi Hobbs and investigator Lisa Cooper) and the second meeting with a man (attorney Lynn Burch). That two such meetings occurred reinforces the conclusion that Smothermon's and Ackley's notes simply reflect Sneed recounting questions from the defense team.

4. The Sheriff's Office's Information Sheet Was Not Known to the Prosecutors and Not Concealed from the Defense.

General Drummond (and Glossip) also argue that "Sneed's medical records—which the State previously withheld over Glossip's adamant objections—confirm a diagnosis of bipolar disorder with a treatment of lithium at the county jail." Resp. Br. 10 (citing JA1005). The citation is to a portion of the record that is under seal. But it appears that the reference to Glossip's "medical records" is, in fact, a reference to a one-page Oklahoma County Sheriff's Office document—with one sentence concerning "medical problems" redacted. The redacted version of the document is found at JA933 and reads as follows:

OKLAHOMA COUNTY SHERIFFS OFFICE
MEDICAL INFORMATION SHEET

INTAKE NUMBER: **IN97502547**

NAME: **SNEED, JUSTIN BLAYNE**

DOB: **09/22/77**

DATE IN CUSTODY: **01/17/97**

DATE TRANSFERRED: **07-08-98**

GENERAL BEHAVIOR: **FAIR**

MEDICAL PROBLEMS: **[REDACTED]**

ALLERGIES: **NKDA**

MEDICATIONS: **PREVIOUS USE OF LITHIUM**

REMARKS: **USE UNIVERSAL PRECAUTION DURING TRANSPORT**

MEDICAL SIGNATURE: **[Signature]**

General Drummond apparently believes that the several-word entry following the words "medical problems" constitutes (1) "medical records" (2) which "confirm a diagnosis of bipolar disorder" with (3) a "treatment of lithium at the county jail." Resp. Br. 10. Each of those three points is inaccurate.

First, the sentence in the document does not constitute "medical records" in the ordinary sense of the term. The document was prepared by the Oklahoma County Sheriff's Office, apparently to assist in housing and transporting prisoners. Whether a single hearsay statement in such a document by an unknown author constitutes "medical records" is dubious. *Cf.* BLACK'S LAW DICTIONARY (10th edition 2014) (defining "medical records" as the "documents that compose a medical patient's healthcare history").

Second, nothing in the Sheriff's Office document "confirm[s]" a "diagnosis". Neither "confirmed" nor "diagnosis" (nor their functional equivalent) appear in the document.

Third, nothing in the Sheriff's Office document reflects "treatment of lithium at the county jail." Indeed, the document states "*previous use* of lithium." Moreover, the document appears to have been written on or after July 8, 1998, since the fact that Sneed had been "transferred" on that date is indicated in the document.

Exactly what the few referenced words in this document prove is unclear. But for present purposes of reviewing an alleged *Brady* violation, the dispositive point is that nothing suggests that the prosecutors had access to the document. Certainly, nothing in the

record shows that the document was in Box 8. And Box 8 was created by identifying materials "thought to be attorney work product." Cert. Pet., App. 62a. Of course, a Sheriff's Office sheet would not fall into that category of documents. Apparently, neither General Drummond nor Glossip alleges that the document was in Box 8 or otherwise possessed by the prosecutors. *See* Resp. Br. 10 (referencing "medical records" rather than Box 8 materials); Pet. Br. 10 (referencing Smothermon's notes followed by "further investigation").[10]

Against this backdrop, it would be interesting to learn exactly how and when the defense obtained this Sheriff's Office sheet. It seems possible that Sneed's defense attorney might have first seen the document and then provided it to Glossip's defense attorney—entirely apart from any later investigation connected to Box 8.[11]

But, in any event, it appears that Glossip's defense team had access to this information before the second trial. As flagged with the orange arrow in Ackley's notes from the interview above, Sneed recounted being questioned about "the nurse's cart record discrepancies v. Mr. Sneed's *jail permanent record*" (emphasis added). *See also* JA939 (Ackley's interpretation of his note). A "jail permanent record" being compared to a nurse

10. Confirming this conclusion, in their attached letter, prosecutors Smothermon and Ackley indicate that they had never seen this document until recent litigation—indeed, they had never seen anything like this document during their long careers. Smothermon-Ackley Letter, Appendix A, at 11a-12a.

11. *Cf.* Smothermon-Ackley Letter, Appendix A, Ex. F, at 44a (stating Sneed's lawyers provided the documents to Glossip).

record would appear to be similar information to that found in the Sheriff's Office document. It is noteworthy that the defense was asking Sneed about "discrepancies" in the records, which makes it difficult to believe that the prosecutors were being given confirmed information about Sneed's medical situation. Nothing in the document suggests that prosecutors concealed anything from the defense.

5. Attorney General Drummond's Failure to Follow Up with Smothermon and Ackley Reflects Willful Blindness to the Truth—No Information Was Concealed.

Read in context, the text of Smothermon's and Ackley's notes demonstrates that Sneed recounted what the defense team was questioning him about—not what the prosecutors had been uncovering. This prompts the question of whether General Drummond has substantively discussed with Smothermon and Ackley what their notes meant. Sadly, General Drummond has not.

Apparently, the Attorney General's "independent investigator," Rex Duncan, interviewed Smothermon twice but never substantively inquired about the details of what her notes meant.

First, on March 15, 2023, Duncan spoke to Smothermon for about thirty minutes. During that interview, Duncan did not ask Smothermon about the "Box 8" attorney notes. Smothermon-Ackley Letter, Appendix A, at 4a.[12]

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12. In his brief asserting that Duncan conducted an "exhaustive investigation" (Resp. Br. 11-12), General Drummond has cited non-record materials. Accordingly, it appears appropriate

Second, on the next day, March 16, 2023, Duncan called Smothermon a second time. During that three-minute call, Duncan conveyed an interpretation of the notes provided by the anti-death penalty law firm, Reed Smith. Duncan asked Smothermon about a reference in her notes to a "Dr. Trumpet." Smothermon then asked to see the note in question, which she had written about two decades earlier. Duncan responded there was "no need." The entire call took about three minutes. Smothermon quickly sent an email memorializing the abbreviated and inconclusive nature of the second call to the Attorney General's Office. *Id.* at 4a-5a & Ex. D.

Since these events, it appears that the Attorney General's Office has been asked (at least) three times to talk to Smothermon and Ackley about what their notes mean—all without success. First, in May 2023, General Drummond was asked directly by district attorneys in the Oklahoma District Attorney's Association to talk to the two prosecutors about their notes. *Id.* at 6a-7a & Ex. F.[13] Second, in May of 2023, on behalf of my pro bono clients (the Van Treese family), undersigned counsel suggested that General Drummond should talk to Smothermon and Ackley about the true meaning of their notes. *See* Cassell Correspondence with Attorney General's Office, Appendix

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to provide the Court with a more complete accounting of the relevant facts, as recounted in the Smothermon-Ackley letter. The letter includes supporting emails with the Attorney General's Office, whose authenticity cannot be reasonably disputed.

13. Reportedly, one of the prosecutors told Drummond that because he had never spoken with Smothermon or Ackley, he did not know what their notes meant, and he needed to speak to them. General Drummond reportedly responded: "I accept that criticism." *Id.*, Ex. F, at 41a.

B (letter of May 25, 2023, at 71a). And third, Smothermon has contacted the Attorney General's Office and asked the Office to discuss the notes with her. Smothermon-Ackley Letter, Appendix A, at 7a. But despite these repeated requests, the Attorney General's Office has not discussed the notes with the prosecutors, much less attempted to discuss what is apparent from the face of the notes—e.g., that Sneed was "visited by 2 women who said that they rep[resented] Glossip."

In short, General Drummond is not seeking to pin down what Smothermon's and Ackley's notes really mean. This suggests he is willfully blind to the fact that the notes reflect information that the defense possessed about Sneed—not information that the prosecutors were somehow concealing.

In light of the best reading of the notes described above, the Court need not tarry over the legal arguments about how to evaluate situations where prosecutors have violated *Brady* (or *Napue*). Nothing was withheld from the defense. Obviously, the prosecutors could not conceal from the defense what the defense itself was questioning a witness about!

Moreover, the notes demonstrate that the defense team was questioning Sneed about a "Dr. Trumpet" sometime before the October 23, 2003, interview. Accordingly, assuming for the sake of argument that the note "Dr[.] Trumpet" is a reference to Dr. Trombka,[14] the defense team knew about him more than two decades ago.

14. Glossip appears to assume that "Dr[.] Trumpet" necessarily refers to Dr. Trombka. *See* Pet. Br. 10. *But cf.* Court-Appointed Amicus Br. 32 (explaining problems with this assumption).

This Court has long held that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young* v. *United States*, 315 U.S. 257, 259 (1942). The proper judicial function in this case is clear. Because the prosecutors did not conceal evidence, the Court should simply reject Glossip's petition resting on a contrary—and false—premise.

B. Information About the Knife and Glossip's Cash Was Not Concealed from the Defense.

Glossip also raises two additional claims about the prosecutors' notes. Apparently, these two claims are so weak that General Drummond chose not to support them. In any event, Glossip's claims are meritless.

1. The Notes About the Knife Were Not Prosecutors' Notes.

In an effort to "situate[]" his allegations about concealed lithium information (Pet. Br. 35), Glossip raises a question about knife wounds. Glossip argues that Sneed had always denied that he had stabbed Van Treese but then surprised the defense by testifying at the trial that "he attempted to stab Van Treese in the chest with the knife." Pet. Br. 13. The defense immediately moved for a mistrial. Prosecutor Smothermon then explained that she did not have advance knowledge of the testimony—"the chest thing we're all hearing at the same time." JA324. After examining the situation, the trial judge denied the defense's motion for a mistrial. JA325.

In his original petition for certiorari (in the separate case No. 22-6500), Glossip accused Smothermon[15] of lying about her lack of advance knowledge. Cert. Pet. (22-6500) at 22. The genesis for Glossip's strong allegation was handwritten notes on a list of questions Smothermon had sent to Sneed's attorney (Gina Walker). Glossip stated in his petition that the "handwritten notes, which reflect answers to the questions, appear to have been made by [Smothermon], in talking either directly with Sneed or with Walker, who had taken those questions to Sneed on [Smothermon's] behalf." Cert. Pet. (22-6500) at 20. Because those handwritten notes "made by [Smothermon]" showed that Sneed said he had tried to stab Van Treese, Smothermon's statement that she was later hearing the testimony for the "first time" was, Glossip assumed, "a lie."

Glossip's assumption, however, rested on a false premise. As Glossip now admits, the handwriting about what Sneed said has been identified *not* as Smothermon's but rather as Walker's. Pet. Br. 13 n.4.

Rather than apologize to Smothermon, however, Glossip stands by his mistaken claim. Glossip still maintains that Smothermon "falsely den[ied]" advance knowledge. Pet. Br. 13-14. But Glossip never explains the basis for adhering to his claim, now that the earlier assumption he relied upon has been shown to be erroneous. To be clear, the notes involving Sneed's anticipated testimony about an attempted stabbing were attorney Walker's, not prosecutor Smothermon's. And absent some proof that Smothermon saw those notes (or attended the meeting

15. In the petition, Glossip refers to Smothermon by her pre-marriage name, Pope.

where Walker made those notes), no basis would exist for Glossip to maintain his position that Smothermon lied. Glossip offers no such proof.[16]

Finally, it is worth observing that this issue of an alleged discovery violation was addressed by the trial court judge immediately at trial when it occurred, after hearing directly from both Glossip's defense counsel and Smothermon. The trial judge found "there's not a discovery violation. Your request [for a mistrial] is denied." JA325. Glossip does not show that this contemporaneous finding was clearly erroneous. Nor does he show that the OCCA's denial of relief on this claim (JA994) was erroneous.

2. Glossip Himself Was Well Aware of Information About His Cash.

Glossip also argues that the prosecutors concealed information about a pretrial interview with motel security guard Clifford Everhart. Pet. Br. 16. According to Glossip, Smothermon's notes of her interview with Everhart included the notations "liquidated," "big screen," "900," and "couch." *Id.* (citing JA949, 951-52). As Glossip interprets these notes, they "suggest[]" that "when Everhart told Smothermon before trial what he knew about Glossip's 'liquidat[ion]' efforts after the murder, he referred to Glossip obtaining $900." *Id.*

16. To the extent that the Court desires further information on the underlying situation, it is available in the Smothermon-Ackley Letter, Appendix A, at 13a-15a. Here again, General Drummond withholds information on this issue from his brief.

At trial, Everhart was asked how much Glossip had earned for his "couch" and "big screen TV." Everhart responded, "I don't really know." JA286. Glossip argues that he could have somehow used the notes to "impeach" Everhart's lack of knowledge with a prior "inconsistent" statement about "900."

Glossip is raising an odd claim: that the prosecutors somehow suppressed information about how much money *he*—Glossip—raised in *his* sudden (post-murder) liquidation of a big screen TV and couch. Presumably, if Glossip had truly raised $900 from that sale, he could have told his counsel, who could have developed that evidence. In any event, Glossip neglects to inform the Court that he had testified to the contrary on this subject. In his first (1998) trial, Glossip testified under oath that he got only $190. JA444.

Glossip also fails to demonstrate that the OCCA's rejection of the factual underpinning of this claim is insufficient: "The notes do not clearly have an amount of money. There is no factual basis for this part of the claim." JA993.[17]

II. The Parties Have Failed to Refute the OCCA's Conclusion that the Attorney General's Confession of Error Lacks Any Basis "in Law or Fact."

For the reasons just explained, the on-the-ground truth in this case is that the prosecutors did not conceal

17. Again, if the Court would like more information on this subject than is provided by the parties, the Smothermon-Ackley Letter provides it. Appendix A, at 15a-16a.

any evidence from the defense. But the Court need not go so far to affirm the judgment below. The Oklahoma Court of Criminal Appeals found that the prosecutors did not conceal evidence. That is a factual finding from Oklahoma's highest court on criminal cases. Glossip has not carried *his* burden to show that this factual finding is clearly erroneous. Thus, this Court should simply affirm the judgment below on this ground.

This case is before the Court on direct review of a state-court judgment. "No statute or rule governs our review of facts found by state courts in cases with this posture. The reasons justifying a deferential standard of review in other contexts, however, apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim." *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion).

Here, the OCCA found that the defense "was aware or should have been aware that Sneed was taking lithium at the time of trial. This fact was not knowingly concealed by the prosecution." JA991. This is a finding of historical fact—by a unanimous state court that had great familiarity with the long history of the case.

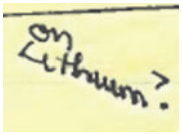
Both Glossip and the State argue the OCCA erred in reaching its fact-based conclusion. Glossip argues that "the OCCA was simply wrong to assert that defense counsel could have corrected Sneed's false testimony after the State failed to do so" because "the State had suppressed the evidence showing that the lithium has been prescribed by a psychiatrist for a serious mental-health disorder." Pet. Br. 29-30. But the allegedly "suppressed evidence" was the prosecution's notes of what *the defense team* was asking the witness! No suppression there.

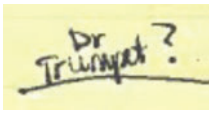
Similarly, Glossip argues that the OCCA erred in relying on the fact that the defense could have corrected the testimony at issue, since a "*Napue* violation lies in the prosecution's 'knowing use of false testimony to obtain a conviction.'" Pet. Br. 29 (quoting *United States v. Bagley*, 473 U.S. 667, 680 n.8 (1985)). But nothing in the record suggests—much less refutes the OCCA's contrary finding that the relevant facts were not "knowingly concealed by the prosecution." Indeed, Smothermon's notes belie this conclusion, as her notes reflect (at a minimum) some uncertainty—indicated by the two question marks: "on lithium?" and "Dr[.] Trumpet?"

Glossip has not even begun to show the prosecution's "knowing" use of false testimony by Sneed denying that he had been prescribed lithium "by a psychiatrist for a serious mental-health disorder." No such diagnosis is contained in the record. For example, nothing shows Dr. Trombka ever made such a diagnosis of Sneed. And even assuming for the sake of argument that Dr. Trombka had done so, nothing shows that the prosecutors *knew* about it. And, in addition, the defense team itself had been asking Sneed questions about "discrepancies" between Sneed's "jail permanent record" and a nursing record. JA939. This defense questioning suggests that the defense knew far more than prosecutors ever did about Sneed's potential mental health issues.

General Drummond similarly recites facts unsupported by the record. He claims that Smothermon failed to disclose the "substantive content" of her notes—that Sneed had been "diagnosed with bipolar disorder and treated with lithium under the care of a psychiatrist." Resp. Br. 11. General Drummond asserts that Smothermon had "knowledge of these facts." But that relies on telepathic

mindreading based on an out-of-context gloss placed on just four words—and two question marks:





General Drummond's confident assertions are, to put it blandly, a stretch.

Finally, Glossip has failed to even begin to provide the kinds of direct evidence he would need to overturn the factual findings below. Conventionally, in *Brady* litigation, defense counsel will provide courts with affidavits and other information concerning exactly what information was concealed from the defense attorneys, when they first learned about it, and how they learned about it. *See, e.g., Boyles-Gray v. Director, TDCJ-CID*, 2014 WL 1049718 at *5 (E.D. Tex. 2014). Here, the record is devoid of such specific evidence. The reason appears to be that the defense cannot provide sworn affidavits stating, for example, that it was unaware until recently of Sneed seeing a doctor. As the discussion above shows, more than two decades ago, a defense attorney and a defense investigator were questioning Sneed about such a possible doctor.

In sum, petitioner Glossip must carry the heavy burden of overturning the OCCA's factual conclusions that the prosecutors never knowingly used false evidence—a burden that he has not even remotely begun to satisfy.

III. A Prosecutorial Confession of "Error" Demands Judicial Scrutiny to Maintain Public Confidence in the Criminal Justice System and Avoid Inflicting Harm on Crime Victims.

A. Leaving Prosecutorial Confessions of "Error" Unreviewed Would Reduce Public Confidence in the System.

Lacking anything meaningful in the text of the prosecutors' notes, the parties' joint argument to overturn Glossip's conviction ultimately rests on only one thing—that the current Attorney General for Oklahoma has "confessed error." The Court should not accept this confession for at least three reasons.

First, General Drummond has not established that the experienced prosecutors in this case suppressed anything. He simply offers his unsupported opinion on the subject. But General Drummond can no more validly opine that the prosecutors agreed to hide evidence than he could that they conspired to rob a liquor store. His unfounded opinion is entitled to no weight.

Second, General Drumond had essentially outsourced the project of evaluating a potential error. Drumond released work-product notes to his lifelong friend and political supporter as part of a purported "independent" investigation. Then, his friend drafted a report with unsupported conclusions about what the notes meant. Next, General Drummond accepted those conclusions. And then, armed with the confession of "error," Glossip parroted these dubious "facts" to the lower courts and, ultimately, to this Court—cloaked in the claim that they

represented the "considered judgment of the State officer chiefly responsible for enforcing Oklahoma's laws …." Cert. Petn. at 1.

This bizarre sequence cannot launder the fact that no credible evidence of prosecutorial misconduct exists. The so-called "independent" report of Rex Duncan is not reliable evidence. On the key points (e.g., what happened when Smothermon and Ackley interviewed Sneed), Duncan has not carefully examined the prosecutor's notes. Indeed, Duncan's acclamatory tone reveals the true, political nature of his project. Cert. Pet., App. 66a ("Your decision to seek a stay of execution and more thoroughly examine this case may be the bravest leadership decision I've ever witnessed.").

Third, the Court should not blind itself to the potential political motivations that might underlie confessions of error. Death penalty cases and other high-profile criminal prosecutions can evoke strong feelings and even a tendency to distort the factual record. *Cf.* Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121 (1988) (discussing claims of "innocent" persons being executed used to support abolition of the death penalty). It would not be surprising to find that one politically elected official might view the facts of a case one way, while another might go in a different direction. But if officials are free to simply confess "error" because they disagree with a case's outcome, trust in the criminal justice system becomes the casualty.

This Court should take a strong position against the possibility of such politically calculated maneuvering. This

Court has long held that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young* v. *United States*, 315 U. S. 257, 259 (1942). And "it is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained." *Sibron v. New York*, 392 U. S. 40, 58 (1968). The rationale underlying these holdings is that the public interest in an appropriate outcome in a criminal case must ultimately reflect not the transient views of one individual but rather the underlying facts—in short, the truth. The truth here is that no evidence was suppressed … and Glossip commissioned the murder of Barry Van Treese.

B. The Attorney General's Unsupported Confession of Error Is Inflicting Harm on the Van Treese Family.

Closely examining confessions of error is particularly important in violent crime cases, where victims (and, in homicide cases, their families) have vital interests at stake. In this case, the Van Treese family has waited patiently for justice for 10,047 days. And yet, they are now witnessing the spectacle of their case being stalled by the Attorney General for their home state confessing an error where none exists.

The Third Circuit recently confronted a similar situation, where a prosecutor attempted to undo a capital sentence by confessing "error." The Circuit explained why a heightened duty of candor must apply in such situations:

> Candor is especially critical when proceedings are non-adversarial.… Courts must rely on the lawyers because their submissions are one-sided. But that leaves courts "vulnerable to being misled, whether by affirmative misrepresentation or by half-truths that deceive[] through their incompleteness." *Ark. Tchr. Ret. Sys. v. State St. Corp.*, 25 F.4th 55, 65 (1st Cir. 2022). So lawyers must be particularly candid in cases like this one, where both sides agree.

Wharton v. Superintendent Graterford SCI, 95 F.4th 140, 149 (3d Cir. 2024) (rejecting confession of error in death penalty case).

The Van Treese family commends the Third Circuit's heightened-standard-of-candor approach to the Court's attention. The family also recommends that, as a prophylactic measure, in future cases involving prosecutorial confessions of "error," this Court should require the prosecutor to "marshal the evidence" on the other side so that a court will have a fair understanding of the issues at stake. *Cf. Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 222 P.3d 1164, 1169 (Utah 2009) (requiring the appealing party to marshal the evidence on the opposing side as a condition of appeal). Such a general rule would have the benefit of ensuring that courts make fully informed decisions in evaluating allegedly defective criminal convictions.

But in the meantime, in considering how to resolve this case, the Court should consider the effects of further delay on Barry Van Treese's family and bring this case to a rapid conclusion.

The academic literature confirms what the experiences of families like the Van Treeses make painfully clear: long after the immediate loss and physical trauma are over, crime victims and their loved ones continue to suffer from psychological wounds that refuse to heal. It is well known that violent crime inflicts various immediate psychological traumas on victims and those close to them. Most obviously, Post-Traumatic Stress Disorder (PTSD) is commonly documented among violent crime victims. See Otano, *Victimizing the Victim Again: Weaponizing Continuances in Criminal Cases*, 18 Ave Maria L. Rev. 110, 122 (2020); Parsons & Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Trauma. Stress 182, 182 (2010); Kilpatrick & Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Trauma. Stress 119, 119 (2003). PTSD can afflict not only the direct victims of violent crimes but also those who experience its profound repercussions indirectly, such as family members and friends. *See* Kilpatrick & Acierno, 16 J. Trauma. Stress, at 125–127. Depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and suicide also number among the consequences of violent crimes. Parsons & Bergin, 23 J. Trauma. Stress, at 182.

The harm caused by drawn-out criminal justice proceedings is especially acute in capital cases. Death cases often involve decades of false stops and starts. Delay in death penalty cases means that "[c]hildren who were infants when their loved ones were murdered are now, as adults, still dealing with the complexities of the criminal justice system." Levey, *Balancing the Scales of Justice*, 89 Judicature 289, 290 (2006). "The automatic appeals, and often repeated appeals," in death penalty cases "are continually brutal on victim family members."

Id. "Year after year, survivors summon the strength to go to court, schedule time off work, and relive the murder of their loved ones over and over again .... The years of delay exact an enormous physical, emotional, and financial toll." *Id.* at 290-91.The delays also keep family members from experiencing a sense of "closure"—the hope that they will be able to put the murder behind them. See Cook, *Stepping into the Gap: Violent Crime Victims, the Right to Closure, and A Discursive Shift Away from Zero Sum Resolutions*, 101 Ky. L. J. 671, 679 (2013).

In suffering the harm from delay, the Van Treese family does not stand alone. Across the Nation, victims' families suffer immeasurable injury from decades-long delays in executing sentences. U.S. Dept. of Justice, Office of Justice Programs, Capital Punishment, 2020– Statistical Tables (2021) (table 12) (as of 2020, the average elapsed time from sentence to execution is 227 months). These delays rob victims' families of even a modicum of peace and closure.

As former Supreme Court Justice Lewis F. Powell, Jr., wrote after a close study of the problem: "[O]ur present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermines public confidence in our criminal justice system." Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989), reprinted in 135 Cong. Rec. 24,694-24,698 (1989). This Court should bring finality here.

CONCLUSION

This Court should dismiss the case for lack of jurisdiction. If it reaches the merits, the Court should affirm the judgment below.

Respectfully submitted,

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July 15, 2024

APPENDIX

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APPENDIX A — SMOTHERMON-ACKLEY LETTER

APPENDIX A

Smothermon-Ackley Letter

Mr. Cassell,

We, the prosecutors who tried Richard Glossip in 2004, write to let you know facts about the allegations in the Petitioner's brief and the Attorney General's brief filed with the Court.

Before we address the facts of the specific allegations, we need to address background for the Petitioner's current claims and the claims in the Attorney General's brief as it addresses one of the Petitioner's three claims.

Both the Petitioner and the Attorney General rely on a report written by Reed Smith as the basis for their latest allegations. An Oklahoma state legislator with an anti-death penalty agenda hired Reed Smith to write a report about Glossip's conviction. This legislator has authored six failed bills in favor of death-row inmates and has vowed to abolish the death penalty if Glossip's sentence is upheld. He submitted an amicus brief to the Court authored by an anti-death penalty law firm which displays its beliefs on its firm website. https://www.macarthurjustice.org/about-us/ .

Unfortunately, Reed Smith is not an independent source. The Reed Smith website touts the work it does as an effective advocate for anti-death penalty positions.

Reed Smith has a team of lawyers who "assist individuals facing the death penalty in the United States" and the firm regularly assists anti-death penalty organizations such as Amicus and Reprieve in their legal representation of those facing the death penalty. Justice for prisoners | Pro Bono | Reed Smith LLP. Reed Smith won a service award from the American Bar Association because "Reed Smith has been representing inmates on death row for twenty (20) years. The firm's attorneys are doing this work in Pennsylvania, Illinois, and Alabama, and are currently representing seven men on death row." https://www.americanbar.org/groups/committees/death_penalty_representation/get_involved/volunteering/volunteer_firms/previous_winners.

Attorney General Drummond took office in January 2023. The Office of the Attorney General, through the two previous Attorneys General supported the conviction and sentence of Mr. Glossip for twenty-five years, including after the release of the Reed Smith report. Three months before the Attorney General Drummond took office, seasoned prosecutors in his office, some of whom who had worked on this case since the direct appeal in 2007, filed a detailed clemency packet to the Pardon and Parole Board and a brief to the Oklahoma Court of Criminal Appeals describing the inaccuracies and contradictory evidence in the Reed Smith Report. https://www.oscn.net/dockets/GetDocument.aspx?ct=appellate&bc=1052967034&cn=PCD- 2022-819&fmt=pdf at 40-49.

One of the state's leading newspapers reports that Drummond hired his childhood friend, Rex Duncan to

write a report on the Glossip case. (Exhibit A – *Tulsa World* 5-9-23). Duncan was employed by Attorney General Drummond, not as an independent evaluator, but hired to work for him. Duncan was on a $120,000 contract with Drummond—not just $30,000 ($15,000 a month) for his "independent" report, but also continuing on Drummond's payroll for at least a year. (Exhibit A).

Rex Duncan was hired on January 26, 2023, and filed his report on April 3, 2023—sixty- seven days later. Duncan stated in the clemency hearing that he worked 600 hours on the report which would be nine hours every single day. (Exhibit B – *Clemency Hearing* 4-26-23 excerpts). Duncan's own report touts his reliance on Reed Smith: "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 (Reed Smith attorneys) were of particular benefit." (*Duncan Report,* 4-2-23 at 1-2). Duncan told prosecutor Gary Ackley that he relied on Reed-Smith because he had no one else to help him. (Exhibit C – Ackley notes of call with Duncan, March 2023). Duncan told prosecutor Connie Smothermon that he spoke often to attorneys for Reed Smith whom he characterized as "anti-death penalty" and that he also spoke often with Glossip's defense attorneys while working on his report. (Exhibit D – Contemporaneous notes of Smothermon 3-15-23).

Duncan is a registered legislative lobbyist and has worked with the legislators who hired Reed Smith.

(*Oklahoma Ethics Commission*, www.ok.gov and https://okwnews.com/news/whatzup/whatzup-politics/legislators-attack-beef-problems. Additionally, Duncan has an axe to grind with the previous Attorney General. Duncan was fired as General Counsel of the state Republican party on June 7, 2022 for tweets disparaging Drummond's Republican primary opponent who was the sitting Attorney General O'Connor. OK Republican Party top lawyer fired for tweets over controversial Governor Stitt campaign ad (kfor.com) As such, he has a motive to disparage the twenty-five years of work the Attorney General's office has poured into this case.

The most unfortunate aspect of the Duncan report is its lack of relevant information from us, the prosecutors who tried the case. Duncan did speak to us briefly, but he did not ask nor seek answers to the specific issues presented to the Court. On March 15, 2023, Duncan called Smothermon who kept contemporaneous notes which were immediately emailed to Drummond's office. The notes detail how the thirty-minute conversation was mostly about how murder cases were handled in general. During that conversation, Duncan never once asked Smothermon about the issues being alleged because he said that most of the Glossip facts had been talked about with others. (Exhibit D). Duncan contacted Smothermon again and during that three-minute phone call, Duncan said attorneys for Reed Smith had shown him a note in Smothermon's handwriting that mentioned a Dr. Trumpet. Duncan said Reed Smith told him Dr. Trumpet was a Dr. Trompka. Smothermon said she did not know a Dr. Trompka and asked if Duncan would email her the note so she could see

it and maybe answer his question. Duncan told her there was "no need" to show her the note. Smothermon sent her contemporaneous notes of that phone call immediately to the Attorney's General's office. (Exhibit D). Duncan has never provided the notes he was referencing and has never spoken to Smothermon about his observations of them. Likewise, Duncan's conversation with Ackley lacked any specifics on the issues. Duncan spoke generally about office innerworkings and how he believed Glossip's failed polygraph was a "sham." Duncan never showed Ackley his notes regarding Dr. Trumpet (Exhibit C).

The connection between Duncan and Reed Smith was evident to prosecutors. Attorneys from Reed Smith contacted prosecutors and lawyers saying they were helping Duncan with his report. For example, a Reed Smith attorney emailed Ackley 2-24-23 requesting an interview "at the request of Rex Duncan." In another example, a Reed Smith attorney told prosecutor Ackley on 2-22-23 that they were coordinating the release of their report with the Duncan report to eliminate "noise." These conversations were either recorded or are in email form and available. (Exhibit C).

The Attorney General's reliance on Reed Smith was never more evident than at the clemency hearing when Attorney General Drummond ceded thirty-five minutes of the State's forty minutes before the Board to Reed Smith attorney Vitale and five minutes to Rex Duncan. (Exhibit B). Drummond told the Board that this was at the "request of legislators" (Exhibit B), although he confirmed there is "no law that requires lawmakers to be represented in a

clemency hearing." (Exhibit A). Drummond also asked the legislator who hired Reed Smith to speak to the clemency Board which we have never seen before.

We repeatedly tried to speak with Drummond after the release of the Rex Duncan report because the contents shocked us as inaccurate and incomplete, but Drummond would not speak with us. In March 2022, Assistants with the former Attorney General's office reached out to Smothermon asking for her help, "You obviously possess a great deal of knowledge about the case and I am sure would be able to provide details that cannot be learned from just reading the trial transcripts. We would greatly welcome any assistance you would be willing to provide!" (Exhibit E – Email from AG's office 3-20-22). However, Drummond cut off all contact with us. Numerous elected district attorneys asked Drummond to call us, the prosecutors on the case—because we had information he needed. He promised them he would, but he never did. Several elected District Attorneys attended the clemency hearing in support of the family and in opposition to Drummond's position. David Prater, who was the District Attorney for most of Glossip's appeals had a candid conversation with Drummond explaining that Drummond's position was 100% false. Prater repeatedly asked Drummond to speak with us. Drummond said he wasn't saying the prosecutors were bad actors. Drummond said, "I should meet with Connie (Smothermon). I believe I have left her in this lurch. So bad on me for that." "I don't have any reason to have ill will toward Connie or say bad things about Connie and maybe I should have moderated my words." (Exhibit F – Prater Email). It is also our understanding that you,

Mr. Cassell, and the victim's family asked Drummond to contact us. We have also emailed and called in attempts to get a meeting. One such example is an email sent March 1, 2024, right before Drummond filed his latest brief with the Court. (Exhibit G – Email from ADA to AG's office 3-1-24). This email was never answered. Drummond has never spoken to either of us about the Glossip case.

Finally, one email was answered by the Solicitor General who summarily dismissed Smothermon as "a private citizen." (Exhibit H – Email chain Smothermon to AG's office and return from Gaskins) and did not discuss the issues further. We would have gladly spoken to Drummond if he had asked, in fact we wanted to speak with him because we sadly believe his alignment with the Petitioner on one of the three issues is incorrect.

As to the three allegations in Petitioner's brief, examination of the record indicates the assumptions are false.

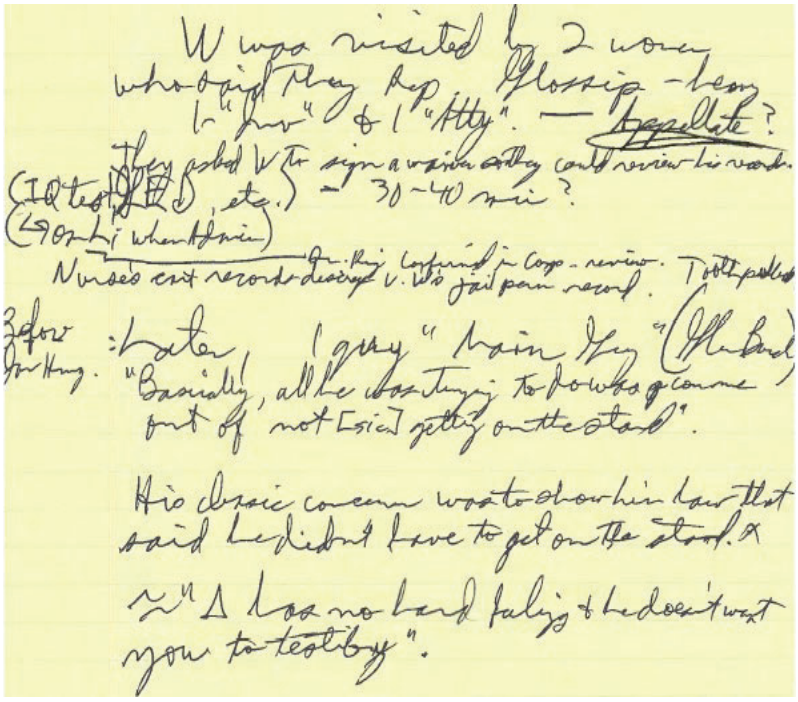
Notes about Lithium

On October 22, 2003, we visited Sneed in prison along with Gina Walker, Sneed's attorney. At that meeting, we both took notes reflecting that Sneed was first told to be truthful with us. Both the Petitioner and the Reed Smith report describes multiple interview notes from both Ackley and Smothermon. The notes at issue here are a memorialization of what Mr. Sneed told us during the visit, using his words and from his recollections. The notes indicate Sneed conveyed information at the end of

the interview that he was told during two visits—one from Glossip's appellate attorney and investigator while the first conviction was on appeal and one from Glossip's 2004 trial defense attorney who later had to recuse because of this visit. The notes reflect words and questions from Glossip's own attorneys.

The last page of Ackley's notes records what Glossip's attorneys told Sneed:

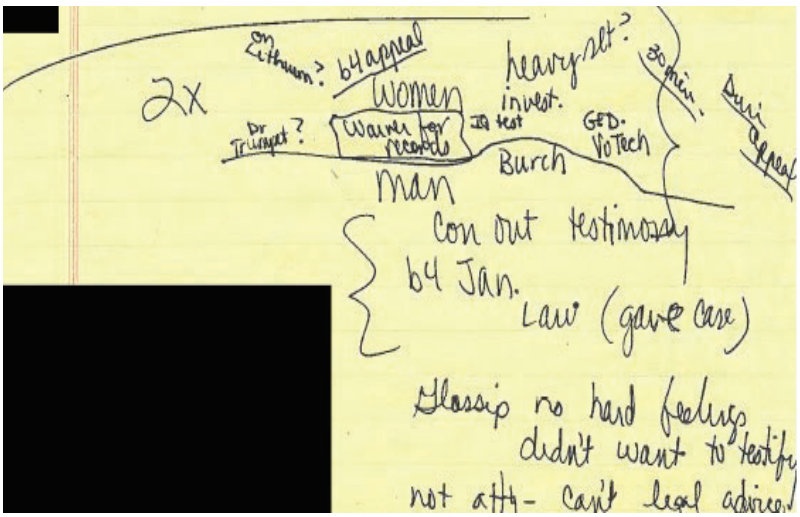
From Ackley: The notes reflect that Sneed (W-witness) was visited by 2 women who said they represented Glossip, one was heavy, an investigator and one was an attorney. I



noted appellate as a thought to the identity of the visitors. Sneed said the visit lasted about 30-40 minutes. They asked Sneed to sign a waiver so they could review his records regarding IQ tests, GED, etc. With an arrow, I noted Sneed said "on lithium when administered" regarding the visitor's questions about IQ testing. I also noted Sneed had had a tooth pulled that Dr. King confirmed in her competency review. Sneed recounted that later, 3 days before a hearing, a guy "the main guy" came to see him. I took this to be Glen [sic] Burch. Sneed said "Basically, all he was trying to do was con me out of not [sic] getting on the stand." The attorney showed Sneed law that said he didn't have to get on the stand and stated in gist that the "Defendant (Glossip) has no hard feelings and doesn't want you to testify."

The end of page 4 of Smothermon's notes records what Glossip's attorneys told Sneed:

From Smothermon: Sneed answered "2X" to my question of whether anyone else had spoken to him which



was my usual question at the conclusion of an interview with an in-custody witness. Sneed told us about the two visits. The first visit was from two women before his appeal (of his first conviction). One he described as heavyset investigator. They asked him to sign a waiver for records—IQ test, GED, VoTech, and asked him questions about lithium and Dr. Trumpet. The question marks after those two words indicate that the women asked him those questions. The second visit was before January from a man, Burch, who tried to con him out of testifying by giving him case law. Burch told Sneed that Glossip had no hard feelings and didn't want him to testify. Burch told him that he was not his attorney and could not give legal advice.

These two visits have been well documented in the record and in the Reed Smith report as visits from Glossip's attorneys and an investigator and confirmed that the notes reflect questioning from Glossip's attorneys and investigator. The notes accurately reflect information everyone has known – members of Glossip's defense team visited Sneed.

The first meeting reflected in the notes occurred on April 16, 2001 when Glossip's first conviction was on appeal and appellate attorney Wyndi Hobbs and investigator Lisa Cooper visited Sneed. Sneed followed up this visit with letters to both women about the waivers and his Vo-Tech grades. *See* State's response to Fourth PC App. at 16-17 https://www.oscn.net/dockets/GetDocument.aspx?ct=appellate&bc=1052967034&cn=PCD-2022-819&fmt=pdf ; and Sneed's letters to Hobbs and Cooper, Attachment

C to Reed Smith Second Supplemental Report 8-20-22 (describing waivers and Vo-Tech grades and the visit).

The second meeting reflected in the notes occurred in January 2003 when attorney Lynn Burch visited Sneed before the second trial. *See* State's response to Fourth PC App. at 17-18 https://www.oscn.net/dockets/GetDocument.aspx?ct=appellate&bc=1052967034&cn=PCD-2022-819&fmt=pdf. The Burch meeting was the subject of a pre-trial hearing in 2004 where Burch withdrew from the case because Walker said Burch "pressured Mr. Sneed concerning his testimony" which in turn caused us to endorse Walker to rebut allegations of Burch in case he testified. JA vol. 1 at 323, 361; and JA vol 3 at 777-778, 810.

Our notes are a memorialization of Sneed's recounting of his conversations with members of Glossip's defense team.

The Petitioner mentions a transport order which appears to be an internal jail document created in 1998 and signed by an unknown person who did not designate any medical degree or medical knowledge. The two of us, in a combined over fifty-five years of prosecuting cases, have never seen a transport order like this document. The first time we saw this specific document was when it was attached to a defense filing in 2022. Initially, Petitioner filed it under seal, and when Smothermon attempted to obtain a copy from the Attorney General's office, she was told that, while she was entitled to everything in the State's possession, this document was not in any of the State's evidence and could not be given to her because it was

in the defendant's possession and filed by the defendant under seal. (Exhibit I – 4-18 and 19-23 email between AG office and Smothermon 4-18 and 19-23). Eventually, the document was attached to another pleading where we could see it. We do not know where this document came from, but it did not come from the State's files and we have never had possession of it.

As to Sneed's medical records, we only had Dr. King's competency evaluation which the Petitioner also had. We never had any information that Sneed saw a Dr. Trompka and never had any information that he might have been diagnosed as bipolar. We still have not seen any proof of these things. Of note is that the confidential medical records of an inmate could not have been disclosed by Dr. Trompka or by anyone. *See* Tit. 12 O.S. § 2503. What we do know from Dr. King's report, also referenced in the Trompka affidavit, is that a competency evaluation would include Dr. King having access to Sneed's medical records maintained at the jail. The Petitioner has had access to Dr. King's report since before both trials, and has referenced it in several pleadings, including his direct appeal. *Glossip v. State,* 2007 OK CR 12, 157 P.3d 143, cert. denied, 552 U.S. 1167 (2008). Sneed told Dr. King he was given lithium for tooth pain and that he had not received psychiatric treatment and had not ever been hospitalized or received outpatient counseling. Dr. King does not dispute these statements from Sneed. Dr. King never diagnoses or mentions a diagnosis of bipolar. Sneed told Dr. King that the lithium makes him feel not so angry. Dr. King stated that in her professional opinion, Mr. Sneed may have had ADHD or an atypical mood swing disorder, and the lithium

might help with mood stability and with his feelings of depression. (JA Vol. 2 at 700-02 – Dr. King's Evaluation). We have seen nothing to indicate Sneed believed anything different when he testified.

Petitioner attempts to use item 29 of an affidavit by Ackley as support. Petitioner's use is misleading. Ackley explains: I certainly told the Reed-Smith attorneys that I felt Sneed's comments were "Brady impeachment *materia*l." However, my statement was in no way an admission of an actionable Brady *violation*. The information about lithium was disclosed to all interested parties in writing in the court files some roughly six years before my involvement in the case. I never had knowledge that Sneed was on lithium for a bipolar disorder. There is no Brady violation.

Testimony about the knife

The Petitioner alleges that he would have impeached Sneed about his trial testimony about the knife if he had known about a note between prosecutors and Sneed's attorney, Gina Walker. Petitioner misrepresents the truth about the two versions of a note written by Smothermon—one clean copy that was in the State's Box 4 and one copy with handwriting that neither of us ever saw until Reed Smith pulled it from Sneed's files at the Public Defender's office. Glossip was represented by the Oklahoma Indigent Defense System. Sneed was represented by the Oklahoma Public Defender's Office. These are two separate agencies. Apparently, Reed Smith was given access to Sneed's files in 2022—something the State would have never been

able to do. The Oklahoma County Public Defender told DA Prater that he gave Glossip's defense team access to Sneed's files. (Exhibit E) (*See also* footnotes 12 and 13 on page 25 of Petitioner's Reply to State's Response to Successive Application for PC relief, 8-22-22 where Petitioner admits that "Reed Smith has gained increasing access to materials from the Public Defender.") The version with the handwriting has never been in the State's files, only the clean copy. (Exhibit J – Email from AG Investigator). The AG investigator told Smothermon that the version of the note with the handwriting was not in any of the State's files and he did not know where it came from. The Petitioner misleads the Court when he conflates the two versions of the note. Neither of us ever saw the note with the handwriting, and it was not in the State's evidence.

The Petitioner knew at the time of trial, in fact prior to cross-examination of Mr. Sneed, that Smothermon had communicated with Ms. Walker. Sneed has always admitted he had an open knife with a broken tip. He told law enforcement that he did not stab the victim. At trial, Sneed testified that he had attempted to stab the victim, but he didn't penetrate. As was conveyed in a hearing during the 2004 trial when Sneed was testifying, Smothermon called Walker after the medical examiner testified. Walker conveyed that she had spoken with Sneed and confirmed that Sneed had the knife open during the attack but that he did not stab him with it. (Exhibit K – 2004 Tr. XII 107-08). The prosecutor said she was hearing the testimony about attempting to stab the victim for the first time as well. (Exhibit K). Neither of us had access to a document with

handwriting and we do not remember law enforcement or us ever asking Sneed whether he had attempted to stab the victim. *See* OCCA 11-17, 2022 at 12-14 and 15-16 https://www.oscn.net/dockets/GetDocument.aspx?ct=appellate&bc=1053898824&cn=PCD- 2022-819&fmt=pdf. Petitioner did know about the conversation between Smothermon and Walker because the conversation about the issue in the note was the subject of a hearing during trial and an issue in a previous successive post-conviction application. Importantly, defense counsel vigorously covered this issue on cross-examination and in closing. (2004 Tr. X Ill 7, 14-15, 35-36, 99; Tr. XV 141-142).

Glossip's money

The Petitioner alleges the number 900 in one of Smothermon's notes represented money that Glossip received for a television and sofa and was therefore a source of his $1757 he had on his person upon arrest. This contradicts Glossip's own testimony under oath.

Petitioner only attached one page of Smothermon's notes to his brief. The page has "Clifford Everhart" at the top, and a line all the way across the page about two-thirds of the way down. 900 is written at the bottom of the page. Smothermon asked for her notes, but unfortunately the Solicitor General denied Smothermon access to the notes claiming that she was only an ordinary citizen. (Exhibit G). Petitioner now claims the notation about 900 in Smothermon's notes must mean Glossip sold his couch for $900. At trial, Glossip testified that he spent his paycheck on glasses, an engagement ring, and items at Walmart,

leaving him with $61.67 until his next payday two weeks later. The only other income was from selling items which Glossip testified to was $490, including $190 for the TV and couch. (Exhibit L – 1998 Tr. VII 110-111):

Q Isn't it true that you began to sell your possessions the day after you were questioned or released by police?

A Yes, ma'am.

Q Isn't it true that you only got $130 for your television set, your futon and your stereo cabinet?

A No, ma'am.

Q How much did you get?

A I got 190 for the TV and the futon. I got, like I said, $200 for my vending machines, then the money I got out of the vending machines. Then I sold an aquarium to Cliff Everhart for $100.

It is notable that the former Attorney General's office, after a thorough investigation of the Reed Smith report, and from visiting Sneed in prison after the release of the Reed Smith report, issued this statement months before Drummond took office: "Sneed has stood by his testimony at all times since, including when the Reed Smith law firm interviewed Sneed in August and September of 2022." (Exhibit M – Attorney General's Press Release, 10-6-22, ¶ 6).

Even though Petitioner and Reed Smith tried to get Sneed to recant, Sneed told investigators with the Attorney General's office that he would not. "It is abundantly clear from the September 18, 2022 Reed Smith supplemental, the transcripts of Reed Smith's interviews with Justin Sneed, and the transcript of the State's recent interview with Mr. Sneed, that Mr. Sneed's testimony at both trials was truthful. "I tried to tell them the only legal way that I ever really seen being able to go home would be if I recanted the story about everything that I already had happened [sic] which is really impossible because I told the truth."). *See* State's response to Fourth PC App. at 12-14. https://www.oscn.net/dockets/GetDocument.aspx?ct=appellate&bc=1052967034&cn=PCD- 2022-819&fmt=pdf.

Mr. Cassell, we hope this information provides insight into the facts in this case. While this information was available to Petitioner and the Attorney General through the record and their files, we thought you might also find it helpful. We have shown this letter to the Oklahoma District Attorneys Association, and they continue to join us in support of the denial of Petitioner's claims.

Please do not hesitate to reach out if you have any questions.

Thank you,

Connie Smothermon and Gary Ackley

With attachments

[ATTACHMENTS FOLLOW]

Appendix A

EXHIBIT A

Tulsa World May 9, 2023 updated (first reported on May 7)

Barbara Hoberock

OKLAHOMA CITY — Newly minted Oklahoma Attorney General Gentner Drummond's handling of a high-profile death penalty case set off alarm bells in some prosecutor's offices across the state.

They believe a victims' family was treated poorly and that he is neglecting his duty.

Shortly after taking office, Drummond hired former district attorney and former Republican lawmaker Rex Duncan to review the case of Richard Glossip.

Glossip was twice convicted and sentenced to die for the 1997 death of Barry Van Treese, who owned an Oklahoma City motel where Glossip worked. Justin Sneed, a motel handyman, testified that Glossip hired him to kill Van Treese, something Glossip denied.

Sneed got a life without parole sentence for his testimony against Glossip.

Glossip had been scheduled to be put to death on May 18 despite arguments he did not receive a fair trial, but a U.S. **Supreme Court decision Friday** blocked Glossip's execution.

Duncan's 19-page report noted numerous trial and appellate defects in Glossip's case. He recommended a new trial.

Duncan was paid under a $120,000 contract, of which $30,000 was for the report, according to a Drummond spokeswoman. Duncan is on retainer for a year with Drummond's office to handle events including when a local prosecutor recuses from a case.

Duncan is a Drummond childhood friend and $4,400 donor to his campaigns.

For decades, staff at the Oklahoma Attorney General's office have represented victims at clemency hearings, arguing for the death penalty to be carried out.

But in a highly unusual move, Drummond personally appeared at the April 26 clemency hearing and advocated for a clemency recommendation, which failed on a 2-to-2 vote after one member recused.

"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," Drummond wrote.

Drummond ceded his remaining time to an out-of-state anti-death penalty firm, Reed Smith, that did a report at the request of lawmakers that attempted to tear apart the conviction. Dozens of lawmakers have advocated on Glossip's behalf.

The 343-page report was released in June 2022.

The firm's website said it is attempting to shed light on issues about the death penalty in the state of Oklahoma and the country as a whole.

Prosecutors say Drummond's ceding of his remaining time to the firm's attorneys left the family in the untenable situation of not having an attorney pick apart the defense's case.

"His (Drummond's) statement at the Pardon and Parole Board meeting didn't really fit with what our impression of what was going to happen," said Derek Van Treese, the victim's son.

Van Treese, who spoke at the hearing, called Drummond's actions a betrayal of the family's respect. He said the Pardon and Parole Board clemency hearing provided two sides for the defense and no one acting as prosecutor.

The family was given time to speak at the hearing.

"We have always been reliant on our Attorney General's Office to zealously advocate on behalf of the victims of those crimes, as well as upholding the rule of law," said Tulsa County District Attorney Steve Kunzweiler, who attended the clemency hearing. "The attorney general's actions have certainly given me pause, and I am going to make inquiry of the attorney general as to what his intentions may or may not be with regard to Tulsa County cases."

Former Oklahoma County District Attorney David Prater said after the courts and Pardon and Parole Board have denied relief, Drummond needs to follow the law and pursue the jury's decision.

He accused Drummond of giving anti-death penalty advocates fodder to attack the death penalty.

In 2016, Oklahomans approved State Question 776 dealing with methods of execution. The vote was 942,504 for the measure and 477,717 against it.

Mike Fields — district attorney for Canadian, Grant, Garfield, Kingfisher and Blaine counties — is among those prosecutors who showed up at the clemency hearing because they felt the Van Treese family was not going to be represented and to show support.

Fields said that in 2018, the voters amended the state constitution to include the rights of victims. It is called Marsy's Law.

"In that constitutional amendment, it specifically states victims' rights are to be protected in a manner no less vigorous than the rights of a defendant," Fields said.

He said the way Drummond handled the hearing ensured that the family would not have an attorney present to counter point by point the claims being made by Glossip's lawyers.

"And in doing so, I believe he violated their rights under the Oklahoma Constitution," Fields said.

Fields said he understood why the Van Treese family felt like it had been stabbed in the back.

"He can have whatever personal opinion he wants to have," Fields said. "There are ways he could have handled the way it was conducted and done right by the Van Treese family. That is what I take exception to. That concerns me going forward."

Jason Hicks — district attorney for Caddo, Grady, Jefferson and Stephens counties — said a recent Court of Criminal Appeals decision denying relief said the issues raised by Glossip are not new, adding that multiple attorneys and courts have looked at the case.

"This court has thoroughly examined Glossip's case from the initial direct appeal to this date," according to the April 20 Court of Criminal Appeals opinion. "We have examined the trial transcripts, briefs, and every allegation Glossip has made since his conviction.

"Glossip has exhausted every avenue and we found no legal or factual ground which would require relief in this case."

Drummond said his objective it to seek justice.

He said he ceded his time to Reed Smith attorneys at the request of members of the Legislature, though he confirmed there is no law that requires lawmakers to be represented in a clemency hearing.

He said he visited several times with members of the Van Treese family and they were well-aware of how the hearing was going to go.

He said he has carefully reviewed Marsy's Law before the hearing and ensured the family would have a full 20 minutes to speak.

He said Duncan is a highly skilled former district attorney with years of experience. He said Duncan is also a distinguished combat veteran.

Drummond said the person who brutally murdered Barry Van Treese will be in jail for the rest of his life.

"I have reviewed every death penalty case for which there is a defendant on death row and in every occasion, with the exception of Glossip, I feel like it was justly adjudicated and I support the death penalty and their execution," Drummond said.

Don Knight is Glossip's attorney.

"I think they are afraid that if he doesn't support this conviction, there are other convictions he may not support," Knight said. "I think if anybody looks at this conviction and looks at the Reed Smith report and the report from Rex Duncan, they will see so many problems with this conviction.

"Attorney General Drummond is a courageous man and smart man, and he can see a terrible conviction."

Meanwhile, newly elected Oklahoma County District Attorney Vicki Behenna recently instituted policies and created a Capital Case Review Committee, made up of experienced homicide prosecutors, to determine when the death penalty would be considered an appropriate punishment in homicide cases. The new capital punishment procedures are based on guidance from the U.S. Department of Justice, Behenna said.

Under those policies, Glossip's case would not qualify for the death penalty, she told the Pardon and Parole Board in an April 25 letter.

Behenna said it wasn't until she took office that she realized the District Attorney's Office didn't have any policies, protocols or guidelines to determine when a prosecutor should seek the death penalty.

"Everybody just needs to be treated equally," she said. "If there aren't policies and guidelines, I fear that sometimes emotion might drive decisions rather than facts."

barbara.hoberock@tulsaworld.com

Appendix A

EXHIBIT B

Glossip's Clemency Hearing April 26, 2023

Covered by KOTV News in Tulsa

https://www.facebook.com/NewsOn6/videos/richard-glossip-clemency-hearing-%EF%B8%8F/1291182415166640/

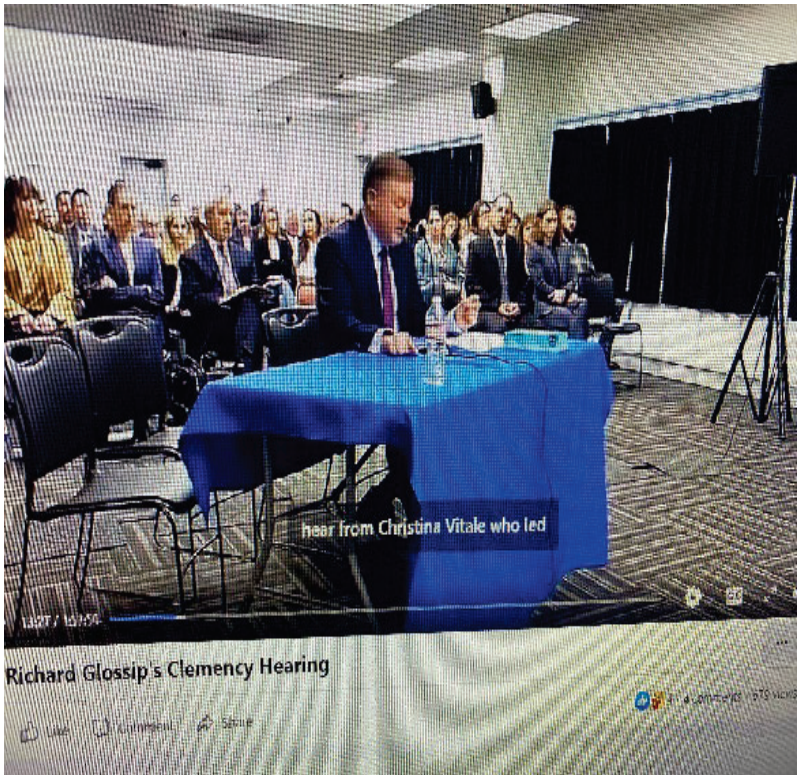
CHAIR: The chair recognizes Attorney General Drummond for 40 minutes. Before we start, Mister Attorney General, will you please introduce who will be speaking along with you today?

DRUMMOND: I would like to reserve three minutes at the end. Also presenting will be at the request of the legislature Christina Vitale. And then followed by my independent counsel engaged by my office Rex Duncan.

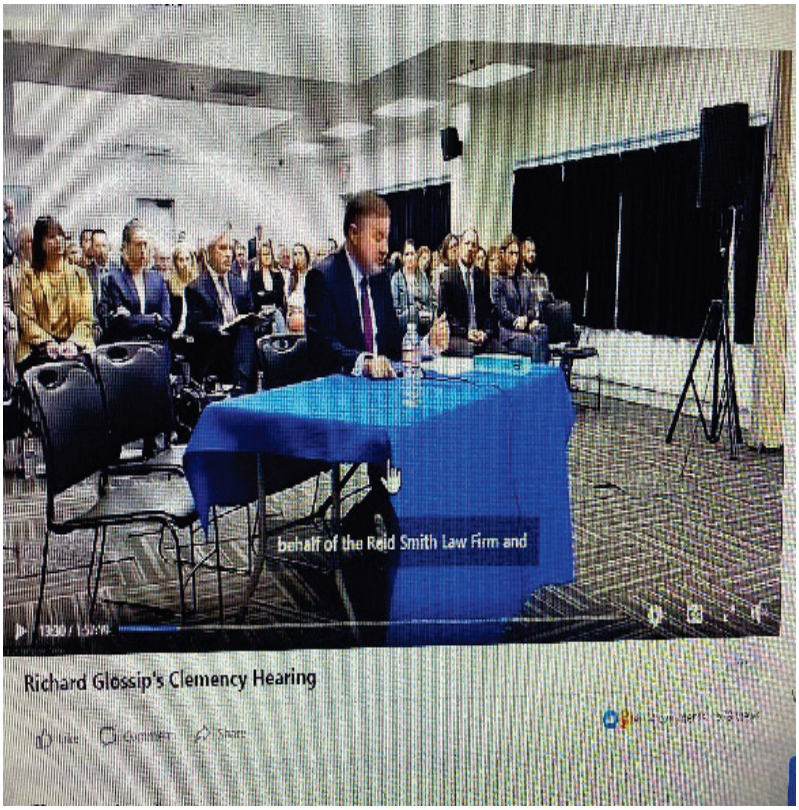
After Duncan spoke for a few minutes:

DRUMMOND: Not hear from Christina Vitale on behalf of Reed Smith Law Firm

Appendix A


hear from Christina Vitale who led
Richard Glossip's Clemency Hearing

Appendix A



Statement of Rex Duncan begins 1:22:35

DUNCAN: "After 600 hours of review in this matter . . ."

Appendix A

EXHIBIT C

Re my phone call with Rex Duncan:

We arranged a phone call by appointment in March of 2023

We exchanged pleasantries as fellow prosecutors and he mentioned that he had never prosecuted a capital case, although he had filed a Bill of Particulars in a murder case shortly before he left office.

Mr. Duncan was very forthright about the large extent to which he was relying on the work of the Reed-Smith inquiry. He said something to the effect of "It's the only help I have so I'm going to rely on it".

I specifically offered to help in any way he wished, to emphasize that the trial prosecutors were available and willing resources.

I believe Mr. Duncan asked me about "Dr. Trombone, or Tromley, something like that?". I believe that was the full extent of his inquiry about the entire matter of Sneed's mental health/mental health circumstances.

Mr. Duncan was largely interested in sharing his theories about the Glossip case. He articulated in considerable detail his theory that the polygraph examination of Glossip was a ruse by the homicide detectives. He felt that in fact there was no polygraph examination at all and cited the

fact that no polygraph examination strips were booked into the property room as support for his theory.

I pointed out that OCPD had typically had a full time polygraph examiner on staff who spent a large percentage of work time conducting background investigations for police academy recruits. I also mentioned that I thought polygraph examiners NEVER shared the actual strip graphs produced by the testing instrument with anyone and never surrendered the possession of those items.

Mr. Duncan stood on his opinion that it was all a sham.

Soon after our conversation I was contacted by the attorneys from Reed-Smith who asked me to sign an affidavit, representing that they were helping Mr. Duncan. I declined, asserting that Mr. Duncan and I were in contact, that he knew I was cooperative, and that I was confused why he'd have advocates for Glossip intervene with me.

The next day Mr. Duncan called me and asked me to sign an affidavit. I agreed.

About 10 days later Mr. Duncan called me about the affidavit, stating that he needed it soon. I agreed to do it promptly.

I received a draft Affidavit from Mr. Duncan the next day.

Appendix A

I prepared my own Affidavit and delivered it to Mr. Duncan and the AGs on March 21, 2023.

I received a phone call from Reed-Smith attorney Christina Vitale on March 22, 2023. She already had a copy of the Affidavit I had given Mr. Duncan the previous afternoon.

She told me her firm would be filing a supplemental report but "we've been asked to hold it until the Independent Counsel is done so it doesn't create noise". That conversation was recorded.

Gary Ackley

Appendix A

EXHIBIT D

Emails regarding Smothermon's conversations with Rex Duncan in March 2023

SECOND CONVERSATION 3-16-23

From: Smothermon, Connie
Sent: Thursday, March 16, 2023 12:38 PM
To: Joshua Lockett
Subject: [EXTERNAL] Fwd: Quick follow up question

See the email below. I asked him to send me a picture of the note. He said no need. But he was more than willing to ask me about it. I told him I didn't remember ever speaking to the jail dr, but maybe I did. I explained that everyone, including the defense would have had Sneed's medical records so this was obviously not new evidence. I asked him why he thought it was Dr Trombka and not Dr Trumpet the jazz musician and I was making a personal note or something else. He said Reed Smith was able to make that assumption within an hour after FINALLY getting Box 8 after Glossip's attys had asked FOR SOOOO LONG. I told him I never liked making assumptions and wasn't willing to do that here just because Reed Smith was. I think I laughed and said Reed Smith was sure making a lot of logical leaps which I disagreed with.

The whole conversation made me mad. Took about three minutes. Call if you want this afternoon.

Appendix A

Begin forwarded message:

From: Rex Duncan
Date: March 16, 2023 at 8:56:44 AM CDT
To: Smothermon, Connie
Subject: Quick follow up question

Connie,

Any chance you could take a short call this morning for a single follow up question?

Specifically, I forgot to ask yesterday about the jail psychiatrist, Dr. Larry Trombka.

Thank you.
Rex

FIRST CONVERSATION

From: Smothermon, Connie
Sent: Wednesday, March 15, 2023 11:07 AM
To: Joshua Lockett; Kyle Crusoe
Subject: Smothermon Conversation with Rex Duncan

Josh,

See my attached notes. Call today if available so I can fill in any missing places while I can still remember. He didn't ask me a single question about the allegations in the post-convictions. Odd.

405-[redacted]

Connie

Appendix A

Attached: Conversation with Rex Duncan March 15, 2023 9:00a.m. ended 10:10a.m.

Email on March 14 from Duncan asking to speak with me re: Glossip. I responded that day and this phone conversation was scheduled.

He does not think he can master everything that has happened. He is the last person to the dance. He has put in about 400 hours. Knows Reed Smith and Don Knight have put in many, many more. I did remind him that the AGs office has also put in many hours. I also told him he is better equipped than the Reed Smith attys since he knows criminal law; Oklahoma; and are not coming into this predisposed to a conclusion.

First questions were concerns about the atmosphere of the office working under Bob Macy and Wes Lane; the homicide committee and Fern Smith.

I told him Macy not involved in cases after I started working there.

Wes Lane was involved in certain cases—never Glossip's case

Homicide committee was really not a formal committee, but all BOP had to be vetted by senior attorneys before they were filed and any pleas to had to be vetted.

Asked questions about a possible plea deal. I told him that there were some discussions, but no real offers that had

been accepted by both sides. He asked if the Van Treese family had agreed to a life sentence. I told him I didn't remember, but as he knew, I would have discussed all plea conversations with them as required by the victim's rights laws.

He wanted to know if I would have taken an Alford plea. I told him I couldn't remember if that was a discussion. There are lots of reasons not to take Alford pleas on cases involving victims (no finality which they are entitled to) and does not foreclose avenues of appeal that would also keep a case from final resolution. I also wasn't sure Judge Gray would have accepted an Alford plea on a murder case.

Duncan said he has never heard of an Alford plea on a murder case. He has only heard of them very rarely and only when there was a pending civil case that would be impacted by a guilty plea.

Duncan wanted to talk about the 2001 Dyer case. He said he spoke to Gary a couple of weeks ago who couldn't answer anything about Dyer and he spoke to Ravitz a few weeks ago. He said Ravitz went to Joe Harp to meet with Sneed pre-Dyer and told him he had to testify. Ravitz did tell Duncan that even post- Dyer his office didn't rock the boat. Even after Dyer was in Bar Journal and in CLEs so Dyer not a secret, Ravitz didn't take that approach. Duncan understood Ravitz to say that even today, Given caseload and number of death cases—they triaged the goal –save from death penalty. Ravitz was concerned if gone back post Dyer might have filed BOP. I told him I never knew of a case that was filed vindictively or out of

retribution because a defendant backed up on testifying. Also, I didn't know of any cases that were renegotiated because of Dyer.

I told him that Burch had spoken to Sneed about Dyer without Gina present telling Sneed he didn't have to testify. I was present when Gina was angry at Burch for speaking with Sneed without her present—not because of Dyer, but because she was not there.

I said we never told Sneed he had to testify because of the plea agreement. He had to testify because he was under subpoena. We introduced plea agreement because we believed the law required us to do so, but we would have put him on the stand even if he had refused to say a word.

He asked if Gina or a private attorney had come to us and tried to renegotiate Sneed to Life in exchange for his second trial testimony (in light of Dyer) if we would have consider it. I told him absolutely not because we could not in good faith give one defendant who swung the bat life and ask for death for the other one. He said Gary said the same thing. Gary said couldn't imagine given Sneed a better deal. Duncan asked if Lawyer brought up Dyer or SOL on perjury to avoid going back as a snitch, would we have Tried without Sneed.

He asked (and said he also asked Gary) if we would have tried the case without Sneed's testimony. I said absolutely, but we would have put him on the stand and had him refuse to answer there. I mentioned two things that would have been possibilities if Sneed had not testified.

1. Gray would have given whatever lesser includes she felt were reasonable, so I am confident he would have been convicted of something—especially since he admitted to being an accessory after the fact, but more importantly,

2. All the evidence about accessory after the fact along with all the testimony and evidence that wasn't from Sneed was AMPLE circumstantial evidence to convict Glossip of Murder and I believe we would have gone forward on the murder charge with all of that evidence—even if we didn't have Sneed.

   Duncan said Gary said basically the same thing. I also said Sneed was asked so many questions on cross-examination about his prior statements to police and prior testimony that I didn't consider Sneed's testimony the crux of the case.

Duncan asked about the bevy of BOP filed in the Macy and Wes Lane years. I reminded him that Glossip was after the Macy involvement years and that Wes was not involved with Glossip. He asked whether Fern filed lots of death cases. Duncan said he spoke to one lawyer who worked in that courthouse during that era, that Fern would be common to file BoP to extract LWOP. He wanted to know if that was the way it was done. I told him it was never done that way while I was in that office. Duncan only filed one BOP, but he agreed with me that the amount of work that goes into bill is so huge and thorough that it would be bad practice to file a Bill just to get someone to plead to LWOP. I also said the last thing you ever wanted to have in a case was OIDS Capital involved because they could

drag a case out for years. He agreed and told me how his one case never made it to prelim even after a year and a half. We talked about how that is what OIDS Capital sees as their job—to prolong and wear down—avoid the DP. He agreed that it does not make sense to file a BOP just to try to negotiate to LWOP.

He mentioned Tim Tarzan Wilson was an early atty before Gina. He said there was nothing to that other than he saw Tarzan's name and remembered him.

He mentioned that Reed Smith and Don Knight might be nationwide anti-death penalty folk. I told him I wished they would have a debate on the death penalty and not keep on trying to prove people were not convicted correctly. Duncan asked me about my thoughts on the definition of justice in this case. I told him I believe in the jury trial system and believe the jury in this case heard all of the evidence and made a reasoned decision. I also told him that I was always glad that there were mandatory appeals in death cases and was glad Glossip had exhausted all of his appeals and that his attorneys (even the insurance defense attorneys in California) had left no word untouched. It gave me peace with the finality of the case. He asked me if I would be at peace if the conviction was vacated or overturned. I asked him how that could happen outside of the courts? He did not answer.

He said he has read "lots" of the testimony and some of the post-conviction documents, but he isn't an expert on PC. I took it he is reading whatever anyone send him and maybe nothing more.

He said he watch the P&P board hearing from 2014 when Glossip was up. He said Pattye High asked lots of questions and didn't disclose her prior relationship with me since she and I tried a case together (I think it was 2000 or 2001). I told her Pattye had left the DA office and I didn't have any contact with her in 2014 and didn't know (or forgot) that she was even on the P&P board. I told him I was at OU and blissfully (intentionally) unaware of the Glossip case and its way through the appellate courts or P&P. It wasn't until Reed Smith got involved that I even started thinking about it.

He asked why Fern didn't try the case the second time. I told him because Fern left the DA's office before the second trial. She was pulling out of all her cases at the time it was sent back for retrial which is how I got it.

He asked me if I had any questions for him. I asked him if he had any questions about the facts or my involvement during the trial? He said, I know you have been asked about this memo and that memo and talked about several times so no questions about facts, but he will contact me if he has any. I told him that I was frustrated that Reed Smith had reported so inaccurately and made leaps in assumptions that were not factually accurate and asked him not to believe everything he was being told as I was sure he wasn't.

The conversation was pleasant.

Appendix A

EXHIBIT E

Email from Attorney General's Office requesting Smothermon's help March 30, 2022

From: [redacted]@oag.ok.gov>
Sent: Wednesday, March 30, 2022 12:55 PM
To: Smothermon, Connie
Cc: [redacted]oag.ok.gov>
Subject: Glossip Clemency Proceeding

Ms. Smothermon,

My name is [redacted] and I work within the Criminal Appeals Unit of the Oklahoma Office of the Attorney General. Ms. Caroline Hunt (included in this email) and I are slated to handle the anticipated clemency hearing of Richard Glossip following the resolution of the federal case and an expected opinion issuing from Judge Friot. I am writing to you to gauge your willingness to assist in our preparation of the clemency proceeding. You obviously possess a great deal of knowledge about the case and I am sure would be able to provide details that cannot be learned from just reading the trial transcripts. We would greatly welcome any assistance you would be willing to provide!

Best,

[redacted]

Assistant Attorney General
Criminal Appeals
Oklahoma Office of the Attorney General
(405) 522-4404
[SEAL]

Appendix A

EXHIBIT F

Email from David Prater regarding conversations with Drummond and Ravitz

From: Prater, David
Sent: Tuesday, July 2, 2024 3:39 PM
To: Connie Smothermon
Subject: Re: Request for information

Connie,

I had several conversations with Gentner Drummond concerning the Glossip case. I had one very public confrontation regarding his unethical behavior in matters related to the Glossip case in May 2023 with other elected District Attorneys present. I specifically noted his misstatements of facts to him in this encounter. The following is some of what I remember.

I began by questioning his alignment with the defense team and an anti-death penalty law firm, Reed- Smith, out of San Francisco. He had only been sworn into office two weeks when he hired his old friend and ally, Rex Duncan to "investigate" the Glossip case and to report his supposed findings. I told him I could not believe he hired Rex Duncan since he had only tried one murder case during his legal career; a case that he lost due to calling only 1/10 of the endorsed witnesses. Duncan had never prosecuted or investigated a death penalty case.

Duncan's appointment was also suspicious due to Duncan's recent election defeat by one of his own Assistant District

Attorneys. Duncan, while in office was constantly working against those in the DA system. Duncan's report relied almost completely on the Reed-Smith report. Duncan actually cut and pasted sections from the Reed Smith report. I told Drummond that there was no way Duncan's report could be considered objective or independent. I noted to Drummond that Duncan asked Connie Smothermon about her notes, but refused to show her the notes when she requested to see them for a point of reference and context. I told Drummond that If he had spoken with Connie, like I had, he would have learned that the notes were what Sneed remembered about his meetings with defense attorneys. Drummond did not respond to this concern.

I asked Drummond multiple times to speak with the prosecutors, Connie Smothermon and Gary Ackley. Drummond said, "I should meet with Connie. I believe I have left her in this lurch. So bad on me for that. I don't have any reason to have ill will of Connie or say bad things about Connie and maybe I should have moderated my words." I told him that he had attacked Connie and that he had stood by while others attacked Connie. Drummond said he agreed with that and he said that was a fair criticism. I told him that he couldn't read Connie's mind and since he had never spoken with Connie or Gary, he did not know what the notes meant. I told him he needed to speak with them. His response was "I accept that criticism."

Additionally, I told Drummond how ridiculous it was that he was accusing Connie and Gina Walker (Sneed's attorney, staunchly anti-death penalty, and ethically sound) of

working together to have Sneed testify untruthfully. I told Drummond about a conversation I had with Bob Ravitz, the Public Defender in Oklahoma County, where Ravitz agreed that there was no way Gina would have conspired with Connie to get Sneed to lie on the stand. I reminded Drummond that Sneed was cross-examined on all these issues.

I told Drummond that I had lived this case for sixteen years of the appeals and knew the evidence and that he was 100% wrong. I reminded him that numerous attorneys and investigators in his office had reinvestigated this case after the Reed Smith report was disclosed. As recently as July 2022, they had completely rebutted the Reed Smith report in their brief to OCCA and in the clemency packet.

I asked Drummond what prosecutors knew that they did not disclose. He could not articulate anything. I asked him what specifically he was basing his confession of error on. He said "totality of things." I asked him to tell me specifically. He paused for quite a while and then said prosecutors should have disclosed that Sneed was bipolar. I asked him what prosecutors knew about Sneed being bipolar? I reminded him that meth usage and a lithium prescription were discussed before the jury on direct and cross- examination during the latest trial. He said there was a transport order that said "bipolar." I asked him if that was in the DA's files and he at first answered "no" and then changed it to "I don't know." I told him a transport order was a jail record filled out by a detention officer to transport defendants from one facility to another and not a medical record. I asked him if he had a medical record that

prosecutors knew or should have known about. He said no, just the transport order. I asked him what would have changed if the defense knew about the transport order and reminded him that the Court of Criminal appeals said defense strategy was not to make Sneed out to be more vulnerable since that was the State's theme. Drummond did not respond to that.

Further, I advised Drummond that he violated Marsey's Law by the way he treated the victim's family, especially at the clemency hearing when he ceded 34 of his 40 minutes before the Board to the defense team, leaving no one to present what had been two dozen years of evidence supporting the conviction and sentence. Drummond did not allow anyone from his office to present the State's clemency packet that detailed the inaccuracies in the Reed Smith report and Glossip's claims. I thought he violated Marsey's Law by being dishonest with the family that he would stand with them if the Oklahoma Court of Criminal Appeals affirmed the conviction. That turned out to be false because he just aligned himself more with Reed-Smith and certain legislators who he pandered to for political support, after OCCA's opinion. He said he "accepted that criticism."

I told Drummond that I was concerned that he could not have gone through all the evidence before he made his decision. That was crystal clear since he had never talked with Connie Smothermon or Gary Ackley. I asked him to please just sit down and talk with them face-to-face. I told Drummond that he had irreparably harmed the criminal justice system in Oklahoma and the reputation of prosecutors.

Finally, I reminded Drummond that before his office created "Box 8", everything was contained in only 7 boxes. Boxes 1-7 and all of the information contained therein was available to defense team for years.

Other District Attorneys conveyed similar thoughts to Drummond. I had other conversations as well which were basically the same.

Regarding Mr. Ravitz giving Reed-Smith Gina Walker's Sneed defense file; in mid-2023, Bob Ravitz contacted me and said that he wanted to give me a "heads up" that he had turned over Sneed's files from the Public Defender's office to Glossip's team. I asked his if he gave the same to the State of Oklahoma's attorneys. He indicated that he had not.

That is what I remember about my confrontation of Drummond.

David Prater

From: Smothermon, Connie
Date: June 28, 2024 at 9:04:30 AM CDT
To: Prater, David
Subject: Request for information

David,

I hope you are well. I have a request if you have time.

I remember you and other DAs telling me about a Oklahoma District Attorneys Association meeting a while

ago where Attorney General Drummond and the DAs discussed the Glossip case and Drummond's position. I believe contacting the prosecutors was also discussed. Would you send me your memories of that meeting?

Let me know if you have any questions.

Thank you in advance,

Connie Smothermon

Appendix A

EXHIBIT G

Email sent to Smothermon regarding an email sent on her behalf asking the AG's office to contact her. 3-1-24

Connie,

I sent the e-mail below to Caroline Hunt at the AG's office today based on our conversation at lunch. She's the new Jennifer Miller[emoji]. As you can see I gave them your cell number and I didn't want you to be surprised if you get a call on your cell. Hopefully you'll hear something soon.

From: [redacted]
Sent: Friday, March 1, 2024 1:17 PM
To: Caroline Hunt [redacted]
Subject: glossip

Hey Caroline,

I had lunch with Connie Smothermon today and the Glossip case came up. She mentioned that she has some information on the potential discovery issues the defense has brought up and can explain why those aren't valid issues. She has called the AG's office but hasn't gotten a call back. If you could pass this along to whoever is working on that case she would love a call back. Her cell number is [redacted]

Thanks,

[redacted]

Assistant District Attorney

Appendix A

EXHIBIT H

Email chain between Smothermon and Solicitor General

From: Garry Gaskins [redacted]@oag.ok.gov>
Sent: Friday, May 3, 2024 4:22 PM
To: Smothermon, Connie
Subject: Re: Glossip Case Requests

Ms. Smothermon:

Thank you for reaching out. Your request was forwarded to me because the Solicitor General Unit is now handling this matter at the Supreme Court. There is no formal policy of providing information from the state's files to prosecutors on the underlying matter. Regardless, you are now a private citizen. Thus, the comity this office shares with prosecutors does not apply to this request.

Garry M. Gaskins, II
Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street, Oklahoma City, OK 73105

From: Smothermon, Connie
Sent: Thursday, May 2, 2024 1:48 PM
To: Joshua Lockett: Caroline Hunt
Subject: [EXTERNAL] Glossip Case Requests

Caroline and Josh:

I hope you are both doing well. I understand it is the policy of your office to send information from the state's files to

the prosecutors on the case, and I appreciate the numerous transcripts, pleadings, and reports that you have sent me in the past regarding the Glossip case.

As I review what you have sent me in the past, I have a couple more requests. Please send the following at your earliest convenience.

1. Transcript of the pre-trial hearing on 11-04-2003 before Judge Gray.

2. Smothermon's notes (in their entirety) of interview with Clifford Everhart

Again, thank you both for your work on this case.
Connie Smothermon

Appendix A

EXHIBIT I

From: Joshua Lockett [redacted]oag.ok.gov>
Sent: Wednesday, April 19, 2023 10:26 AM
To: Smothermon, Connie
Subject: RE: Med records?

I'm sorry Connie, but without a court order I'm unable to share those with you. I realize your role in the case as the prosecutor but I don't think that changes my obligations. But If I'm remembering correctly, their filing and attachments were only redacted in a very limited way, removing only references to Sneed's specific diagnosis. So it's not really earth-shattering information that's contained in the sealed documents.

From: Smothermon, Connie
Sent: Wednesday, April 19, 2023 9:54 AM
To: Joshua Lockett [redacted]oag.ok.gov>
Subject: [EXTERNAL] Re: Med records?

Thank you Josh. Ok, one more request. I am just trying to gather all facts in case there is an evidentiary hearing. In case PDF 2023-267, defense filed a Motion to file medical records under seal – granted by Ct Crims.
Have you seen those records? Will you send them to me? Thank you!!!

On Apr 19, 2023, at 8:25 AM, Joshua Lockett [redacted]
oag.ok.gov> wrote:

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From: Smothermon, Connie
Sent: Wednesday, April 19, 2023 6:51 AM
To: Joshua Lockett [redacted]oag.ok.gov>
Subject: [EXTERNAL] Re: Med records?

One more request (maybe the last??). Will you send me Dr King's report from her 1998(?) eval of Sneed?

On Apr 18, 2023, at 2:25 PM, Joshua Lockett [redacted] oag.ok.gov> wrote:

It's attached to the end of their PC application. PDF pages 36-37.

From: Smothermon, Connie
Sent: Tuesday, April 18, 2023 2:23 PM
To: Joshua Lockett [redacted]oag.ok.gov>
Subject: [EXTERNAL] Re: Med records?

Thanks. Will you send me Tromka's affidavit?
The attachments aren't on OSCN.
Thank you!

On Apr 18, 2023, at 2:17 PM, Joshua Lockett [redacted] oag.ok.gov> wrote:

You're correct to note the lack of proof. In my view, they only have the transport order and Trombka's affidavit, which in my mind is all supposition on his part.

Appendix A

From: Smothermon, Connie
Sent: Tuesday, April 18, 2023 2:00 PM
To: Joshua Lockett [redacted]oag.ok.gov>
Subject: [EXTERNAL] Re: Med records?

I will stop obsessing over this soon, but I don't see any records, medical or otherwise apart from the transport order, that mention bipolar. So in their PC claim, they say Dr. Lawrence Trombka diagnosed Sneed, but they offer no proof??? If he were bi-polar I would have expected 1. Dr. king to diagnose in 1997 or 2. There be medications or therapy somewhere and even the transport order lists no current meds. Or maybe an actual medical diagnosis. So two final thoughts: 1. The transport orders are often wrong because some minimum wage jailer fills in info on top of the previous transport order. Why are we buying the premise that he is bi-polar without a med diagnosis? 2. The transport order and Dr King's report are and have always been in the court files. And the defense has been aware of Sneed's drug and mental issues since 1997. No new evidence.

Thanks for listening.

On Apr 18, 2023, at 11:28 AM, Joshua Lockett [redacted]
oag.ok.gov> wrote:

I have seen no records, medical or otherwise apart from the transport order, that mention a bipolar diagnosis. According to their PC claim, Dr. Lawrence Trombka diagnosed Sneed.

Appendix A

From: Smothermon, Connie
Sent: Monday, April 17, 2023 7:05 PM
To: Joshua Lockett [redacted]oag.ok.gov>
Subject: [EXTERNAL] Med records?

Josh,
Are there any medical records (or anything other than the transport order) that mentions bi-polar? If Dr. King didn't diagnose Sneed bi-polar, who did?
Thanks,
Connie

Appendix A

EXHIBIT J

Email from AG investigator regarding note to Gina Walker NOTE there is no handwriting on this copy in the State's files.

From: Kyle Crusoe
Sent: Monday, September 26, 2022 10:14 AM
To: Smothermon, Connie
Subject: Gina Walker Letter

Mrs. Smothermon,

I found the original letter in box 4 of 7 that I obtained from the DA office. It was in a folder titled Justin Sneed. It does not appear to be an email. I have attached it for your review. Please touch base and let me know your thoughts.

Thank you
Agent Crusoe

Kyle Crusoe, Agent
Special Investigations Unit
State of Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Office: [redacted]
Mobile: [redacted]
Fax: (405)522-0085
Email: [redacted]
[SEAL]

See attached on next page

Appendix A

Gina,

Here are a few items that have been testified to that I needed to discuss with Justin -

1 - Officer Vernon Kriethe says in his report that after he arrested Justin and was transporting him downtown Justin voluntarily said -

> It was my job to take him out and his to clean up
> The evidence -he didn't do a very good job

Does Justin remember making that statement?

2. -Kayla Pursley says she saw Justin leave in Glossip's car about 5:30 or 6:00 and she doesn't know how long he was gone or where he went. ?????

3 - Our biggest problem is still the knife. Justin tells the police that the knife fell out of his pocket and that he didn't stab the victim with it. There are no stab wounds, however the pocket knife blade is open and the knife is found under the victim's head. The victim and Justin both have "lacerations" which could be caused from fighting/ falling on furniture with edges or from a knife blade. It doesn't make much sense to me that Justin could have control of the bat and a knife, but I don't understand how/ when the blade was opened and how/when they might have been cut. Also, the blade tip is broken off. Was the knife like that before or did that happen during?

4 - Justin's clothes were found in the canister in the laundry room. There was a small piece of duct tape stuck on one of the socks. I understand that he hid the clothes while everyone was looking at the car which was well after Glossip was with him and they were taping up the shower curtain - is that right?

5 - Officers testified that the shower curtain to room I02 was missing. ls that the room where they got the shower curtain? I have it listed as room I02 one place in my notes and room 101 in another place????

6 - Did they tum down the air conditioner in room 102? If so, when?

They have listed the statements in the PSI has a potential impeachment document. There doesn't seem to be anything inconsistent in them. Justin didn't make any statements - it is mostly family history that he and I are going to talk about.

Thanks - we should get to him this afternoon. Tina wasn't here on Monday so Justin may not get to the old jail until noon.

Connie

Appendix A

EXHIBIT K

Transcript 2004 Trial CF-97-244

Volume 12 March 23, 2005, pages 107-108

[107] Mr. Burch and I think an OIDS investigator went to see Mr. Sneed without Ms. Walker.

Again, I am not privy to that con- – I do know parts of it, obviously, because we've had some pretrial discussions, but I don't know everything that was said in that conversation. As an Offer of Proof, though, Mr. Sneed would tell me that everything he did say – he answered every question asked and that he answered truthfully.

I talked to Ms. Walker about five weeks ago when I went to see Mr. Sneed and asked her if these attorneys had been to see Mr. Sneed. She told me that they had not. That, I guess, Mr. Lyman had actually talked to her, I think it was Mr. Lyman, one of them had talked to her, not about the facts but about the posture and the procedure but that she was not asked if they could talk to Mr. Sneed.

I asked her if they made that request, would she allow it, would Mr. Sneed talk to them and she said, yes, as long as she was present. To my knowledge, that request has not been made.

I asked Mr. Sneed about this knife one time and that was last year. He told me that he had the knife open during

the attack, that he did not stab Mr. Van Treese with it. I knew all the wounds to be blunt force trauma and so I didn't pursue it any further.

Yesterday after I heard the ME's questions. I [108] called Ms. Walker. She had a conversation with Mr. Sneed and conveyed to me that – the same thing that I knew, that he had the knife open during the attack but that he did not stab him with it. The chest thing we're all hearing at the same time.

THE COURT: Okay.

MR. LYMAN: So as I understand it, you didn't know that he was going to say that he tried to force the knife into Mr. Van Treese's chest until just now?

MS. SMOTHERMON: No. In fact, I had given these pictures to Gina. She, I think showed the pictures to me –

THE COURT: Gina is also known as Ms. Walker.

MS. SMOTHERMON: Ms. Walker.

THE COURT: And that's fine here. I just want the record – because we've referred to her in both ways.

MS. SMOTHERMON: Because the pictures seemed to indicate that it happened more than once and I thought that he had told me last year that he has just, you know, tried once to attack him with it. That's what he told Ms.

Walker. I think that's what he's testified to, that he lunged once at him. So I think that's probably fertile ground for cross-examination because there's, obviously, more than one wound. But he, as far as I know, is only going to recall once.

So I don't believe there's a discovery violation.

Appendix A

EXHIBIT L

Transcript of Richard's Glossip testimony at trial on June 9, 1998. Glossip's testimony starts on page 78. On page 111, he answers questions from the prosecutor regarding amounts he received for TV and couch.

[DEATH PENALTY]

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY

STATE OF OKLAHOMA

CASE NO. CF-97-244

THE STATE OF OKLAHOMA,

Planitiff [sic],

VS.

RICHARD EUGENE GLOSSIP,

Defendant.

* * * * * * * * *

TRANSCRIPT OF PROCEEDINGS,
JURY TRIAL,
HAD ON JUNE 9, 1998,

Appendix A

BEFORE THE HONORABLE
RICHARD W. FREEMAN,
DISTRICT JUDGE.

* * * * * * * * *

VOLUME 7

REPORTED BY:

THERESA L. REEL, RPR
321 PARK AVENUE, SUITE 805
OKLAHOMA CITY, OK 73102

[78] MR. FOURNERAT: Yes, Your Honor and he is here.

THE COURT: You can release him then if he's under subpoena. Anything else?

MR. FOURNERAT: No, Your Honor.

THE COURT: Do you want to call your client right now?

MR. FOURNERAT: Yes, sir.

(Thereupon, the following was had in open court.)

THE COURT: Call your next witness.

MR. FOURNERAT: Your Honor, at this time we would call the Defendant, Richard Glossip.

RICHARD GLOSSIP

Called as a witness, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FOURNERAT:

Q Please state your name for the record.

A Richard Eugene Glossip.

Q And where do you reside?

A The Oklahoma County Detention Center.

Q And how long have you been there?

A Approximately 17 months.

Q And prior to being incarcerated in the Oklahoma County jail, where did you reside?

A At 301 South Council.

[109] A Yes, ma'am.

Q Isn't it true that on the very day that Mr. Van Treese was murdered and robbed of his money, you bought D. Anna an engagement ring?

A A $100 ring, yes, I did, ma'am.

Q And isn't it true that on the very day Mr. Van Treese was robbed and murdered you spent $177 on eyeglasses for yourself?

A My money, ma'am.

Q Isn't it true that your January the 5th, 1997 paycheck was only a litter over $400 instead of your usual 640?

A Yes, because I had withdrawn some money.

[111] Q Isn't it true on January the 8th you spent your entire paycheck except for approximately $120 on the engagement ring and the glasses for yourself?

A No, I spent roughly $285 that day.

Q And isn't it true when you were arrested that you had $1700 in your possession?

A Yes, ma'am.

Q Isn't it true that you began to sell your possessions the day after you were questioned or released by police?

A Yes, ma'am.

Q Isn't it true that you only got $130 for your television set, your futon and your stereo cabinet?

A No, ma'am.

Q How much did you get?

A I got 190 for the TV and the futon. I got, like I said, $200 for my vending machines, then the money I got out of the vending machines. Then I sold an aquarium to Cliff Everhart for $100.

Q And isn't it true that you never told police that you sold an aquarium or vending machines to Cliff Everhart?

A The question was never asked.

Q Isn't it true you kept baseball bats in the motel office?

A I kept one in my office, yeah.

Q Isn't it true that baseball bats are your weapon of choice, sir?

Appendix A

EXHIBIT M

Attorney General's press release regarding inaccuracies in Petitioner's brief and flaws with Reed Smith Report Oct 6, 2022

[SEAL]

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA

FOR IMMEDIATE RELEASE

October 6, 2022

Attorney General O'Connor Responds to Lawmaker's Call for Glossip Evidentiary Hearing

OKLAHOMA CITY - Attorney General John O'Connor released the following statement, "Barry Van Treese was murdered with a baseball bat in the middle of the night in a room of the hotel he owned. Richard Glossip managed that hotel and received an apartment in the hotel as part of his compensation. After meeting with Mr. Van Treese about mostly financial issues, Glossip had reason to fear that he would be fired the next day.

"Justin Sneed was an 18-year-old maintenance man at the hotel. He also received a room at the hotel as part of his

compensation. The evidence at trial showed that Glossip had significant influence over Sneed.

"Sneed testified that Glossip offered him money to kill Mr. Van Treese at Glossip's first jury trial in 1998. The jury unanimously convicted Glossip of murder for hire and recommended the death penalty. The judge imposed the death penalty.

"The Oklahoma Court of Criminal Appeals sent that conviction back for a second jury trial, because the court did not believe Glossip's attorney adequately represented him.

"Before the second jury trial, Glossip's new attorney met with Sneed in an apparent attempt to get Sneed to not testify against Glossip at his second trial. Glossip's attorney admitted that he met face-to-face with Sneed. It's on the record before Glossip's second trial that Glossip's attorney gave Sneed a copy of a court decision that would allow Sneed to keep his sentence even if he refused to testify against Glossip in the second trial.

"Despite these efforts by Glossip's attorney to influence him, Sneed again testified in the second jury trial in 2004 that Glossip offered Sneed money to kill Mr. Van Treese. The second jury unanimously convicted Glossip of murder for hire in 2004 and recommended the death penalty. Again, the judge imposed the death penalty. The State did not make any kind of additional deal with Sneed in respect to his testimony in the 2004 trial.

"Sneed has stood by his testimony at all times since, including when the Reed Smith law firm interviewed Sneed in August and September of 2022.

"Representative Kevin McDugle's letter raises many of the same issues that Glossip has been presenting to the Oklahoma Court of Criminal Appeals since his conviction in 2004. He currently has two cases pending before the Court. The State's responses to these two cases address these issues and are based upon the record and evidence. The State's responses summarize the evidence, which demonstrates that Glossip enlisted Sneed to kill Mr. Van Treese.

"Any characterizations of misconduct by the State are false and concern issues that were known by Glossip and his team prior to Glossip's second trial. Further, these allegations have no bearing on the evidence establishing Glossip's guilt. Sneed has continued to affirm his testimony is the truth. The prosecutor did not violate any rules regarding witnesses. The Sinclair Station video had no reach into a hotel room across the street. Further, the video camera only viewed the inside of the gas station store. Glossip's failed polygraph test is irrelevant; after failing the test, he admitted he knew more than what he originally said, thus, evidencing that he lied during the test. Moreover, the polygraph test was not admitted at trial as it was not admissible under the law. And even without Cliff Everhart's testimony, multiple witnesses testified that Glossip provided false accounts of seeing Mr. Van Treese after Glossip knew Mr. Van Treese was

already dead in the hotel room; Glossip himself admitted as much.

"Glossip's two most recent claims—that the State withheld evidence that Sneed wished to 'recant' his testimony and the State improperly fed Sneed testimony from other witnesses—are false:

"First, Sneed has consistently, and most recently this past September, affirmed the truth of his trial testimony against Glossip and explained that he was hoping to secure a better plea deal with the State when he used the word 'recant.' Although Sneed did not get a better deal, he still testified against Glossip.

"Second, the State announced on the record to the Court and Glossip's attorneys during Glossip's second trial in 2004 that it had reached out to Sneed's attorney to get clarification on other testimony which had been heard in the trial. Glossip's defense team did not raise any alarm then, likely because such discussions between attorneys are allowed by the court rules.

"The Court of Criminal Appeals is the proper tribunal to hear the claims of innocence and requests for hearings. My office is confident that the Court will consider the issues raised and render a decision according to the law."

###

APPENDIX B — CASSELL CORRESPONDENCE WITH ATTORNEY GENERAL'S OFFICE

APPENDIX B

Cassell Correspondence with Attorney General's Office

PAUL G. CASSELL
Utah Appellate Clinic
Ronald N. Boyce Presidential Professor of Criminal Law
S.J. Quinney College of Law at the University of Utah
383 S. University St.
Salt Lake City, UT 84112
Telephone: 801-585-5202
cassellp@law.utah.edu*

May 25, 2023

Garry Gaskins
Solicitor General
Amie Ely
First Assistant
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, OK 73105
(via email)

Re: Inaccurate Information Presented to the Supreme Court in *Glossip v. Oklahoma*, No. 22-7466 (U.S. May 4, 2023)

Dear Solicitor General Gaskins and First Assistant Ely:

---

* This daytime business address is provided for identification and correspondence purposes only and is not intended to imply institutional endorsement by the University of Utah.

Appendix B

I write on behalf of my clients—the Van Treese family—in connection with the U.S. Supreme Court case above. My "ask" is that you correct inaccurate information your Office presented to the U.S. Supreme Court—specifically, that recently released notes show that prosecutors withheld information from the defense in this case. No information was withheld.

First, thank you for arranging the conference call with the Oklahoma Attorney General yesterday. I know that the family appreciated the opportunity to talk to the Attorney General, even though, as you heard, they felt "betrayed" by him when he told them one thing (that he would fight for the family) and then immediately did another (opposed the family).

Second, as indicated on the call, I now write to ask the Attorney General's Office to correct what (in light of recent information) is a false statement it presented to the Supreme Court in its Response to Unopposed Application for Stay of Execution in the *Glossip* case. The Response refers to evidence that was "previously withheld" by prosecutors. Resp. at 8. Specifically, the State's response indicates that "[b]ased on newly released interview notes that were *previously withheld* by the State, *the prosecutor was aware that Sneed had been treated by a 'Dr. Trumpet'*"—purportedly for bipolar affective disorder. *Id.* The newly released interview notes show no information was "previously withheld" from the defense about the prosecutors' knowledge. To the contrary, based on evidence I have recently reviewed, the interview notes by prosecutors Connie Smothermon and Gary Ackley

show only what information was possessed by *Glossip's own defense team.*

To briefly recap the background: Yesterday, at the Van Treese family's request, the Attorney General's Office held a conference call with me, co-counsel Kent Scheidegger of the Criminal Justice Legal Foundation, and the Van Treese family (Derek Van Treese, Donna Van Treese, and Alana Mileto). The call concerned issues surrounding the Glossip case.

The call began with several preliminary points, including the Attorney General's statement (reiterating a statement to the Oklahoma District Attorney's Association) that the Attorney General's Office is not accusing any of the dedicated prosecutors who worked on Glossip's prosecution of misconduct (other than "indirectly" through a *Napue* argument).

The call then moved to the question of how to interpret notes taken by prosecutors Connie Smothermon and Gary Ackley in the course of an interview of Justin Sneed—an important witness in the Glossip prosecution. In its filing with the U.S. Supreme Court earlier this month, the Attorney General's Office indicated that "new information" has come to light calling into question Glossip's conviction for directing the murder of Barry Van Treese—a crime for which Glossip has received a death sentence. The Attorney General's Office referred to a (purportedly) independent report from Rex Duncan, a political supporter and long-time friend of the Attorney General hired to reevaluate the evidence in the case. According to Duncan, a new trial

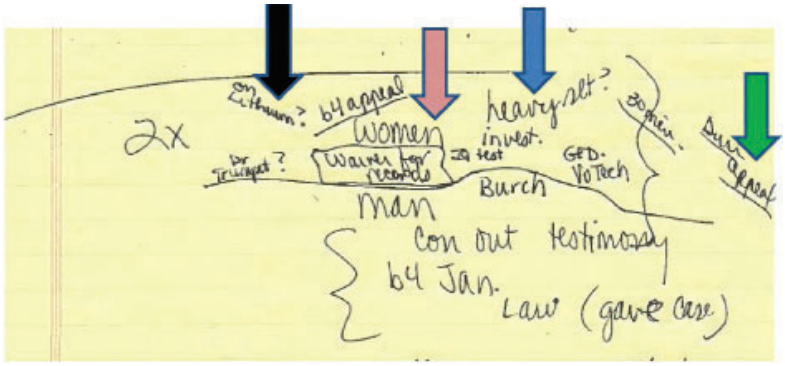
is required in this case because of prosecutor's "decades-long failure" to correct "false trial testimony by its star witness." Resp. at 4.

The Attorney General's Office's response relies on the Duncan Report to claim that evidence that was "previously withheld" by the State shows that Sneed was being treated with lithium for some sort of mental disorder. *Id.* at 8. The supposedly new evidence is described as coming from "newly released interview notes previously withheld by the State." *Id.* But these interview notes show no new information about what the prosecution knew—and most assuredly do not reflect information withheld from the defense. I believe that if you talk to the prosecutors who took the notes (Connie Smothermon and Gary Ackley), you will be able to quickly confirm that the notes recount what *the defense* knew—not what prosecutors knew.

On October 22, 2003, Ms. Smothermon and Mr. Ackley (prosecutors on the case) and Ms. Gina Walker (defense counsel for Justin Sneed) visited Sneed. The notes from Smothermon and Ackley reflect that Sneed told the group (Smothermon, Ackley, and Walker) that members of *Glossip's defense team* had visited him (Sneed) two times. The notes written by Smothermon and Ackley both indicate what Sneed told them about the two visits from *Glossip's defense team.*

First, it is useful to examine Ms. Smothermon's notes. The note reflect two visits ("2X") by defense representatives – separated by a curving line. As shown by the notes indicated by the pink arrow below, the first

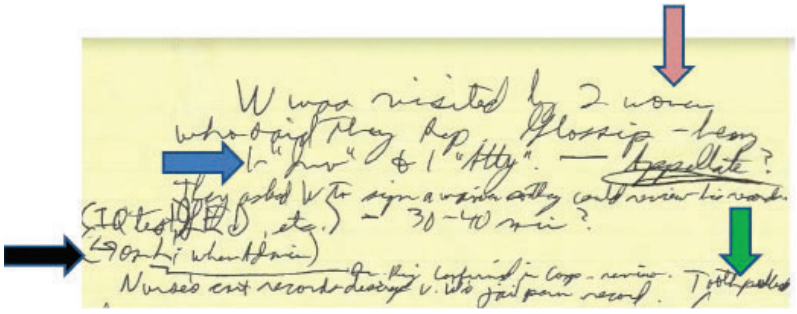
visit involved "women." As shown by the notes, indicated by the blue arrow, the visit involved an investigator ("invest.") who may have been heavy set ("heavy set?"). As shown by notes indicated by the green arrow, the defense representatives may have been involved in Glossip's earlier appeal. And, finally, as shown by the notes indicated by the black arrow, Sneed had a conversation about the lithium and a "Dr. Trumpet" with *the women representing Glossip.*



Following these notes about the first visit from Glossip's defense team, Ms. Smothermon's notes reflect a second visit by Glossip's defense team by a "man" Sneed identified as "Burch." Sneed said that Burch was basically trying to "con" him out of testifying. The notes indicate that Sneed said Burch gave him a law—a "case." (A short time later, it is my understanding that attorney Burch recused himself because of his contact on behalf of Glossip with a represented party, i.e., with Sneed.)

Next, turning to prosecutor Ackley's notes, they reflect the same thing—i.e., a visit *by Glossip's defense*

team. As shown in the notes below by the pink arrow, Sneed ("W", presumably witness) "was visited by 2 women who said they rep[resented] Glossip." Those two women were "1 'Inv' & 1 'Atty' – Appellate?"—that is, they were an investigator and an (appellate?) attorney. It is these women, as Ackley's notes reflect Sneed recounting, with whom Sneed discussed the lithium ("Li")—as indicated by the black arrow. And Sneed indicated to Glossip's defense representatives that the lithium was being prescribed in connection with a tooth issue—as notes indicated by the green arrow below show.



This interpretation is plain from the interlocking consistency in two sets of contemporaneous notes taken during the meeting. If there is any doubt about this interpretation, an interview with Ms. Smothermon and Mr. Ackley would likely quickly confirm what the notes indicate on their face. Remarkably, it does not appear that Duncan substantively discussed the notes with either of the prosecutors—and yet astonishingly he offers an interpretation about what their notes mean.[1]

1. Rather than talking to the two prosecutors, Duncan jumped to the conclusion that "[i]n handwritten notes from an

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In our call yesterday, I was also surprised to hear the Attorney General say that he had not interviewed Ms. Smothermon and Mr. Ackley about their notes. I was even more surprised to hear him decline to commit to interviewing Smothermon and Ackley about what their notes meant. At the very least, it is hard for me to see how the Attorney General's Office could have a good faith basis for interpreting the notes contrary to their text without even interviewing Smothermon and Ackley.

Against this backdrop, I believe your Office now has duty to correct the claim that it conveyed to the Supreme Court that the prosecutors' notes somehow contain "previously withheld" information from the defense. To the contrary, the notes show exactly the opposite—that the defense was asking Sneed about lithium and "Dr. Trumpet", and the prosecutors notes from a later interview *simply recorded what Sneed had discussed with the defense.* There was no "withholding" of information from the defense—the prosecutors were recording information from Sneed that the defense was itself developing!

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interview with Sneed, ADA [Smothermon] 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 [redacted] and prescribed lithium, Glossip's attorneys could have impeached Sneed's credibility, memory and truthfulness." Duncan Rep. at 11 (emphasis added). As discussed in text above, the defense indisputably knew as much (and likely much more) than the State, since the State's notes merely reflect Sneed recounting what defense attorneys had asked him.

It also appears that the reasonable conclusion from this information is that Sneed was consistent in his information about being prescribed lithium (1) when he spoke with Dr. King,[2] (2) when he spoke to prosecutors in October 2003 (as reflected in the notes above), and (3) when he spoke to two female members of Glossip's defense team (as also reflected in the notes above). Against this backdrop, there was no basis for the prosecution to believe Sneed lied to the jury when he testified to the same in 2004. And there is no suggestion that prosecutors ever had any medical records indicating Mr. Sneed was not being truthful about his drug usage or lithium. Of course, this is not just my conclusion, but also the conclusion of the (unanimous) Oklahoma Court of Criminal Appeals. *See* Glossip v. State, PCD-2023-267 at 15 (Apr. 20, 2023) (the report noting the lithium prescription "was available to previous counsel" and it is "likely counsel did not want to inquire about Sneed's mental health due to the danger of showing that he was mentally vulnerable to Glossip's manipulation and control").

But however one interprets the notes, there can be no suggestion that the notes reflect information being "previously withheld" from the defense. That claim—which your Office presented to the U.S. Supreme Court through erroneous reliance on Mr. Duncan's report—is indisputably false.

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2. In a January 1, 1997, report by Dr. Edith King and submitted to the court (and defense counsel), it is reflected that Sneed said that "[h]e is currently taking lithium at the jail and said it was administered after his tooth was pulled. He was not on lithium before coming to the jail and was started on it in March."

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* * *

I ask you to confirm that, *by noon on Tuesday, May 30*, that you will correct the false information you previously provided to the Supreme Court in your forthcoming response to Mr. Glossip certiorari petition. The Supreme Court is entitled to accurate information in making its determination as to how to rule in this case. And the Van Treese family respectfully asks that, at a minimum, you provide accurate information to that Court.

Sincerely,

/s/ Paul G. Cassell
Paul G. Cassell
For Derek Van Treese, Donna Van Treese, and Alana Mileto

cc: Oklahoma District Attorney's Association
(via email)

[SEAL]
Office of Attorney General
State of Oklahoma
May 30, 2023

Paul G. Cassell
Utah Appellate Clinic
Ronald N. Boyce Presidential Professor of Criminal Law
S.J. Quinney College of Law at the University of Utah
383 S. University St.
Salt Lake City, UT 84112

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Re: May 25, 2023 Letter Alleging Inaccurate Information Presented to the Supreme Court Glossip v. Oklahoma, No. 22-7466 (U.S. May 4, 2023)

Dear Mr. Cassell:

Thank you for arranging a call with the Van Treese family. While the State has made the difficult decision to confess error in the Richard Glossip ("Glossip") case, this does not change the fact that the Van Treese family is the victim of a brutal murder committed by Justin Sneed ("Sneed"). The Attorney General will continue to be a zealous advocate for all victims, including the Van Treese family. The Attorney General will also continue to uphold his ethical obligations as a prosecutor and oath to "support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma."

As you are aware, the Supreme Court has long held that "the prosecutor's role transcends that of an adversary: he '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)). Using this guiding principle, the State recently reached the essential conclusion that Glossip's capital conviction is unsustainable and a new trial imperative. This Office understands that this is not what the Van Treese family wanted to hear, but this Office is ethically and constitutionally mandated to take this action to uphold the integrity of the judicial system.

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Before I respond to your allegation, I think it is important to point out some basic facts in the record that are undisputed.

1. Sneed brutally murdered Barry Van Treese.

2. In exchange for Sneed (the actual murderer) not facing the death penalty, he agreed to testify against Glossip.

3. Glossip would not have been convicted of murder in the first degree without Sneed's testimony.

4. Sneed had been a user of methamphetamines.

5. Sneed had been treated by Dr. Lawrence Trombka, who was the sole psychiatrist treating patients at the Oklahoma County Jail in July 1997.

6. Sneed had been prescribed lithium to treat a serious psychiatric condition.

7. Glossip's prosecutors knew, or should have known, that Sneed had been treated by a psychiatrist and prescribed lithium to treat a serious psychiatric condition prior to Glossip's second trial in 2004.

8. Despite this reality, Glossip's prosecutors allowed Sneed to effectively hide his serious psychiatric condition and the reason for his prior lithium prescription through false testimony to the jury. The State elicited th.is line of questioning on its direct examination of Sneed. At the

second trial in 2004, Sneed testified as follows on direct examination by the prosecutor:

> 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 l had a cold, bur 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 anythin**g.
>
> Q. So you don't know why they gave you that?
>
> A. No.
>
> 2004 Trial Tr. Vol. 12, 64:3-8. (emphasis added).

9. Glossip's prosecutors took no action to correct Sneed's false testimony during or after the 2004 trial.

The foregoing clearly constitutes a·violation of the Fourteenth Amendment as interpretated by *Napue v. People of State of Illinois*, 360 U.S. 264 (1959). The prosecutors knew or should have known that Sneed provided false testimony to the jury and did nothing to correct the false testimony. Further, Sneed was the central witness at Glossip's trial. As a result, the violation of *Napue* is unfortunately clear grounds to vacate the conviction. Therefore, the analysis should encl there.[1]

Your allegation that the Attorney General's Office has submitted false information or made a misrepresentation to the Supreme Court in this matter is specious. In his capacity as the chief law enforcement officer of the State of Oklahoma, the Attorney General has viewed the evidence in the record, including the previously withheld evidence and executed his ethical and constitutional duties as required by law. Simply because you do not agree with these actions does not equate to a misrepresentation or false evidence being provided to the Supreme Court.

Further, it appears that you have misunderstood the record in this case. In your letter, you state: "I believe that if you talk to the prosecutors who took the notes (Connie Smotherman and Gary Ackley), you will be able to quickly confirm that the notes recount what *the defense* knew – not what prosecutors knew."[2] You inaccurately allege that the Independent Counsel did not talk with Ms. Smotherman and Gary Ackley. I have confirmed with the Independent Counsel that he had lengthy interviews with both of Glossip's prosecutors, Ms. Smotherman and Mr. Ackey, regarding the newly disclosed notes. Further, it is my understanding that an entire interview with Ms.

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1. Your letter curiously copies the Oklahoma District Attorney's Association even though it was not a party to the telephone conversation and does not represent the State in this matter. However, this Office has no doubt that district attorneys in Oklahoma understand that it is improper to permit witnesses to provide false testimony to the jury. This error is even more pronounced when the testimony is from the only witness that directly connects the defendant to the murder and the sole death penalty aggravator in this case.

Smotherman was devoted to the newly disclosed notes. Your proffered explanation was not provided to the Independent Counsel by Ms. Smotherman or Mr. Ackley. Therefore, it appears that you have mistaken information or are making assumptions not supported by the factual record.

Additionally, while Ms. Smotherman recognized that her memory had faded, it is my understanding that the only issue she took with the notes was whether "Dr. Trumpet" referred to Dr. Trombka. However, Dr. Trombka was the sole psychiatrist treating prisoners at the Oklahoma County jail. Therefore, this Office believes it is likely that the notes are referencing Dr. Trombka.

Glossip's legal counsel, Wyndi Hobbs, has confirmed that she was unaware of Sneed's psychiatric condition and was told by Sneed that he was given lithium by mistake. This is further reinforced by the fact that Glossip's defense was not provided access to Sneed's medical and psychiatric records. Therefore, in addition to Ms. Smotherman and Mr. Ackley not supporting your posited interpretation of the notes, the evidence in the record demonstrates that the defense was not aware of Sneed's treatment by Dr. Trombka or the true reason for his lithium prescription.

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2. Even assuming this were true, this still means the prosecutors knew about the psychiatrist and the reason for the lithium prescription prior to the 2004 trial. As a result, it is still inexcusable for the prosecutors to not correct Sneed's false testimony.

As a result, this Office does not believe that the newly disclosed notes discuss what *the defense* knew.

Accordingly, no misrepresentation or false statement has been made by this Office, and there is nothing to correct.

Sincerely,

/s/ Garry M. Gaskins, II
Garry M. Gaskins, II
Solicitor General

cc: Oklahoma District Attorney's Association
(via email)

Appendix B

PAUL G. CASSELL
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May 31, 2023

Garry Gaskins
Solicitor General
Amy Ely
First Assistant
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, OK 73105
(via email)

Re: Follow Up Regarding Inaccurate Information Presented to the Supreme Court in *Glossip v. Oklahoma*, No. 22-7466 (U.S. May 4, 2023) – Record Citations Requested – Correction of the Record Requested

Dear Solicitor General Gaskins and First Assistant Ely:

I write in response to your letter of May 30, 2023. To jump right to the decisive issue—you are representing

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* This daytime business address is provided for identification and correspondence purposes only and is not intended to imply institutional endorsement by the University of Utah.

various facts exist in this case. To be direct, I don't believe your representation are accurate or supported. I request your specific record citations for four purported "basic" and "undisputed" facts. And I also request that you correct the record in your upcoming filing June 5 filing in the Supreme Court.

The Alleged "Undisputed" Facts

Specifically, your May 30 letter recites the following four "basic facts in the record that are undisputed":

> 5. Sneed had been treated by Dr. Lawrence Trombka, who was the sole psychiatrist treating patients at the Oklahoma County Jail in July 1997.
>
> 6. Sneed had been prescribed lithium to treat a serious psychiatric condition.
>
> 7. Glossip's prosecutors knew, or should have known, that Sneed had been treated by a psychiatrist and prescribed lithium to treat a serious psychiatric condition prior to Glossip's second trial in 2004.
>
> 8. Despite this reality, Glossip's prosecutors allowed Sneed to effectively hide his serious psychiatric condition and the reason for his prior lithium prescription through false testimony to the jury.

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I don't believe that record citations exist for any of these four points—much less, undisputed facts.

Let's take a look at each of the four alleged facts.

5. Alleged Fact - Sneed Had Been Treated by Dr. Trombka.

Where does this purported fact come from? You told the U.S. Supreme Court that "[e]vidence that was previously withheld by the State reveals that Sneed *appears* to have been diagnosed with bipolar affective disorder in 1997 after the murder while in the custody of Oklahoma County Jail. Resp.App.33a-38a." Okla. Resp. to Stay App. at 8 (emphasis added). Your citations for this alleged fact are to two documents: (1) Ms. Smothermon's notes; and (2) Dr. Trombka's affidavit. Let's look at each of those.

Regarding Ms. Smothermon's notes: In your May 30 letter, I notice that you make no substantive defense of any interpretation of Ms. Smothermon's and Mr. Ackley's notes. Instead, you pass the issue to "Independent" Counsel Rex Duncan. But this pass- the-buck effort quickly collapses. You state that "I have confirmed with Independent Counsel that he had lengthy interviews with both of Glossip's prosecutors, Ms. Smothermon and Mr. Ackley, regarding the newly disclosed notes. Further, it is my understanding that an entire interview with Ms. Smothermon was devoted to the newly disclosed notes."

In fact, your Office is aware that the call with (for example) Ms. Smothermon regarding the notes was perfunctory, at best. During the call, Duncan stated that there was "no need" for Ms. Smothermon to look at the notes and explain what they meant. Moreover, the call was not "lengthy"—it was only three minutes long. Finally, the call did not concern any new evidence. All these points can be confirmed by contemporaneous notes sent to your Office by Ms. Smothermon immediately after Duncan's call. If Duncan has told you that he had a "lengthy interview" with Ms. Smothermon about the notes, I suggest to you that he is either mistaken or is providing you with inaccurate information.

I also cannot understand your statement your May 30 letter that my interpretation of the prosecutors' notes "was not provided to [Duncan] by Ms. Smothermon or Mr. Ackley." Duncan specifically told Ms. Smothermon there was "no need" for her to look at the notes and explain what they meant.

Apparently there is now a "need" to look at the notes and see what they mean— particularly in light of your representation to the U.S. Supreme Court that "Resp. App.33a-38a" demonstrate that information was concealed from the defense. No such concealment occurred. To the contrary, as I explained at length in my earlier letter, the prosecutors' notes on their face make clear that the *defense* was exploring these topics.

Regarding Dr. Trombka's affidavit: Dr. Trombka's affidavit does not state that he treated Sneed. Apparently,

there are no treatment records from Dr. Trombka. All you have, as I understand it, is a transport log with a brief, unexplained reference to a mental health condition. That transport order does not mention Dr. Trombka. All that the transport log from July 1998 states is that Sneed had a "previous prescription for lithium" (does this indicate he was only given lithium for a few months at best?). The transport log also reportedly lists the words bi-polar, but not as a diagnosis as the log is obviously not a medical record.

In short, my understanding is that there are no records that the prosecutors had access to with Dr. Trombka's name listed before or during Glossip's second trial. The only document identifying Dr. Trombka is his (much later) affidavit, which does not state he actually treated Sneed or contradict Dr. King. In fact, Dr. Trombka says Dr. King would have known about any such mental health issue.

The prosecutors would not have had any reason to ever see a transport order like the July 1998 transport order. The transport order appears to be an internal administrative document and not a medical record. It seems likely that the earliest the prosecutors ever saw this document would have been in recent filings by Glossip. And it is hard to understand how, even recently, the prosecutors could have even formed an opinion about its accuracy or knowledge of the jailer who completed it.

Surely this scant information is not enough to render a claim about Sneed being treated by Dr. Trombka a "basic fact" that "undisputed." And the Supreme Court

is entitled to know that the State possesses no records of the diagnosis or the lithium prescription—-much less records somehow hidden from the defense.

6. Alleged Fact - Sneed Had Been Prescribed Lithium to Treat a Serious Psychiatric Condition.

Again, I don't know where you are obtaining this purported "undisputed" fact. Dr. King's competency evaluation from July 1, 1997, states that "Sneed denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling." In addition, the same report states that Sneed said he "is currently taking lithium at the jail and said it was administered after his tooth was pulled. He was not on lithium before coming to the jail and was started on it in March." My understanding is that you have no record indicating that Sneed was taking lithium "to treat" a psychiatric condition, much less establishing a "serious" psychiatric condition such as bi-polar disorder.

7. Alleged Fact - Glossip's prosecutors knew, or should have known, that Sneed had been treated by a psychiatrist and prescribed lithium to treat a serious psychiatric condition prior to Glossip's second trial in 2004.

Here again, I do not understand how you can possibly assert that prosecutors "knew" that Sneed had been treated by a psychiatrist and prescribed lithium to treat a serious psychiatric condition" when there is

no documentation of any prescription or any diagnosis. Indeed, your own formulation of the "basic" facts here is confusing. Are you asserting that the prosecutors "knew"? Or that the prosecutors "should have known"? Those are two dramatically different points. The fact that you are formulating these points in the alternative confirms that the Office itself does not believe that the "undisputed" record establishes that the prosecutors "knew" this (alleged) fact, so at most you allege some sort of negligence.

Turning to whether the prosecutors "should have known," it isn't at all clear how they should have known. The question becomes, why should they have known. You do not point to any fact that would lead a reasonable prosecutor to have reached this conclusion. My understanding is that you possess no facts that the prosecutors should have known about a diagnosis.

Moreover, you have not cited any reason for believing that the State had a medical release from Mr. Sneed to access any of his medical records—something that was within Sneed's control. So far as I have been able to determine from the record, the prosecutors never had any medical records indicating Sneed was not being truthful about his drug usage or lithium. And so far as I have been able to determine, the prosecutors never had any medical records indicating Sneed had been diagnosed with a mental condition—other than the very limited information contained in the report from Dr. King discussed above (which was in the possession of the defense).

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In Judge Gray's 2001 Findings of Facts after the first trial, she correctly points out that, absent a release from Sneed, Dr. King's report could not be presented at trial. The prosecutors and defense attorneys were aware of her position on this issue during the 2004 trial.

It also seems unlikely that prosecutors, while working at the District Attorney's Office, would have needed to speak with anyone at the Oklahoma County jail. As a result, prosecutors would have had no reason to know the names of any medical personnel, jailers, or staff at the Oklahoma County jail during the Glossip case. Likewise, it seems unlikely that the prosecutors would have known the names of any of the medical personnel or staff members at the prison where Sneed was being housed. In other words, so far as appears in the record—including the logical inferences therefrom—the name "Dr. Trumpet" (as a possible reference to a "Dr. Trombka") would have held no significance to the prosecutors. And—it bears repeating—there is nothing in the record suggesting that the prosecutors ever saw any medical records of Mr. Sneed except for the July 1, 1997, competency evaluation by Dr. King—which was given to both the State and the defense.

It also would seem reasonable to conclude that Dr. King would have had access to Sneed's medical records. Dr. King appears to have been thorough in her evaluations. If there had been a medical diagnosis regarding a mental disorder or if Sneed had been under the care of a mental health professional, the prosecutors could have reasonably expected that to be reflected in Dr. King's report. There is

no such reference. And, likewise, Dr. Trombka's affidavit reflects the same about Dr. King—that she would have been expected to have access to any medical records associated with Sneed.

In light of these facts, there is no foundation whatsoever for the suggestion that the prosecutors "should have known" about some psychiatric condition of Sneed.

> *8. Despite this reality, Glossip's prosecutors allowed Sneed to effectively hide his serious psychiatric condition and the reason for his prior lithium prescription through false testimony to the jury.*

Outrageously, you allege that the prosecutors "allowed Sneed to effectively hide his serious psychiatric condition." How so? His testimony always remained the same— that, as Dr. King recounted in 1997, he denied any psychiatric history. You have no proof of psychiatric treatment. And the only evidence that even begins to provide a basis for further investigation (Dr. King's report) was fully disclosed and available to the defense. Indeed, both Ms. Smothermon's and Mr. Ackley's notes (properly interpreted) definitively show the defense had access to the information and was investigating.

Of course, the OCCA reviewed this issue. It stated: "Sneed, in 1997, underwent a competency examination by Dr. Edith King. The State avers that this examination noted Sneed's lithium prescription. This report was available to previous counsel, so [defense] counsel knew

or should have known about Sneed's mental health issues." OCCA Op. at 15.

You suggest that "Glossip's legal counsel, Wyndi Hobbs, has confirmed that she was unaware of Sneed's psychiatric condition and was told by Sneed that he was given lithium by mistake." Please send that report, as I have not seen it. But, in any event, my understanding is that Ms. Hobbs was not lead counsel for the defense. And it is not clear when she was "told by Sneed" information. When did that meeting occur?

You also state that "in addition to Ms. Smothermon and Mr. Ackley not supporting your posited interpretation of the notes, the evidence in the record demonstrates that the defense was not aware of Sneed's treatment by Dr. Trombka or the true reason for his lithium prescription." I'm confused—I believe your Office is continuing to refuse to talk to Ms. Smothermon and Mr. Ackley about their notes. So how is that you conclude that the two prosecutors are "not supporting [my] posited interpretation of the notes"? I believe that, if you contact them, they will support my interpretation—directly contrary to your assertion. And, in any event, the prosecutors' notes are clear on their face.

And what is the "true reason" for the "lithium prescription"? It appears that there is no record information on that subject.

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Record Citations Requested

In view of your representation that facts 5, 6, 7, and 8 discussed above are "basic facts in the record that are undisputed", I ask that you promptly provide record citations supporting these facts. Contemporaneously with sending this letter, I also plan to file a public records request for those citations.

An Accurate Recitation of Facts

Your letter concludes that "no misrepresentation or false statement has been made by this Office [to the Supreme Court], and there is nothing to correct." To the contrary, there is much to correct in your filing next Monday to the Supreme Court. The Van Treese family respectfully requests that you provide the Supreme Court with the following information on the subject of Sneed's mental health issues—so that the Court will have a complete record on which to rule:

> 1. On about July 1, 1997, Glossip's defense team (e.g., George Miskovsky III, Asst. Public Defender) received Dr. Edith King's report about Sneed's competency, which stated that Sneed "denied any psychiatric treatment in his history and said he has never been hospitalized or had outpatient counseling. … He is currently taking lithium at the jail and said it was administered after his tooth was pulled." Dr. King could have reasonably been expected by the prosecutors to reference previous diagnoses

and prescriptions regarding Sneed. There are no such references. And, in any event, that report was immediately provided to both prosecutors and Glossip's defense team.

2. The July 1998 transport log does not mention Dr. Trombka. Nor is the log a medical record of any type. The transport log was never seen by prosecutors in this case. Nothing in the record suggests that the prosecutors knew (or should have known) who "Dr. Trumpet" (or the similar-sounding "Dr. Trombka") was at the time of Glossip's second trial.

3. On October 22, 2003, Ms. Smothermon and Mr. Ackley (prosecutors on the case) and Ms. Gina Walker (defense counsel for Justin Sneed) visited Sneed. The notes from Smothermon and Ackley reflect that Sneed told the group (Smothermon, Ackley, and Walker) that members of *Glossip's defense team* had visited him (Sneed) two earlier times. The notes written by Smothermon and Ackley both indicate what Sneed told the group about the two earlier visits from *Glossip's defense team.*

4. Ms. Smothermon's and Mr. Ackley's notes, on their face, indicate that Glossip's defense team (two women) had previously visited Sneed and had a conversation about the lithium and a "Dr. Trumpet." At that time, Sneed indicated to Glossip's defense team that

the lithium was being given to him in connection with a "tooth pulled" issue.

5. Ms. Smothermon's and Mr. Ackley's notes do not indicate the prosecutors had any awareness of either an actual diagnosis of a specific mental health condition or that Sneed's explanation for why he was being given lithium was inaccurate. The notes do indicate that the defense was actively exploring the issue and was aware of the mental health issue—and also specifically aware of Dr. Trombka. The prosecution team was not aware of Dr. Trombka or even who he was.

6. The prosecutors had no record of any prescription for lithium from Dr. Trombka or anyone else to Sneed. The prosecutors never had further medical records of Sneed.

7. Dr. Trombka has no records reflecting any prescription for lithium to Sneed or any diagnosis of bi-polar disorder or similar condition.

8. The State has no record indicating the prosecutors were aware of a prescription for lithium to Sneed for mental health conditions. And the Attorney General's Office has no record indicating that the prosecutors knew about Dr. Trombka—other than the reference in the prosecutors' notes to what the defense team knew about a "Dr. Trumpet."

9. Mr. Ackley has provided an affidavit indicating that he does "not recall knowing or discussing with anyone that Justin Sneed was on lithium at any time as treatment for bipolar disorder." The State does not possess any contrary information to this sworn statement.

10. The Attorney General's Office has not talked to Ms. Smothermon and Mr. Ackley about their notes.

11. Rex Duncan interviewed Ms. Smothermon twice. On March 15, 2023, he spoke to Ms. Smothermon for about thirty minutes. During that interview, Duncan did not ask Ms. Smothermon about the "Box 8" attorney notes.

12. On March 16, 2023, Duncan spoke to Ms. Smothermon a second time. During that interview, Duncan relied on information provided by the (anti-death penalty) law firm Reed Smith concerning notes taken by Ms. Smothermon. Duncan asked Ms. Smothermon about a reference to a "Dr. Trumpet." Ms. Smothermon asked to see the note in question. In response to the request to look at the note, Duncan said there was "no need." No substantive discussion of the notes occurred.

13. This second interview lasted only about three minutes.

12. The Attorney General's Office was aware of all the foregoing information when it filed its acquiescence to Glossip's request for a stay on May 1, 2023.

13. Duncan has since stated to the Attorney General's Office—falsely—that he had a "lengthy" discussion with Ms. Smothermon about her notes.

* * *

In light of the pending briefing schedule, I ask you to confirm that, *by 3:00 p.m. Central Time on Friday, June 2, 2023*, that you will correct the inaccurate information you previously provided to the Supreme Court in your forthcoming response to Mr. Glossip certiorari petition. The Supreme Court is entitled to accurate information in making its determination as to how to rule in this case. And the Van Treese family respectfully asks that, at a minimum, you provide accurate information to that Court.

Sincerely,
/s/ Paul G. Cassell
Paul G. Cassell
For Derek Van Treese, Donna Van Treese, and Alana Mileto

cc: Oklahoma District Attorney's Association
(via email)

Appendix B

[SEAL]
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
June 2, 2023

Paul G. Cassell
Utah Appellate Clinic
Ronald N. Boyce Presidential Professor of Criminal Law
S.J. Quinney College of Law at the University of Utah
383 S. University St.
Salt Lake City, UT 84112

Re: May 31, 2023 Letter Alleging Inaccurate Information Presented to the Supreme Court Glossip v. Oklahoma, No. 22-7466 (U.S. May 4, 2023)

Dear Mr. Cassell:

I'm writing in response to your letter dated May 31, 2023. No inaccurate information has been provided. At most, it appears that you disagree with the Attorney General's interpretation of the evidence. The State refers you to its prior pleadings and the evidence set forth in the record. The State will continue to set forth its positions in briefing to the court..

Sincerely,

/s/ Garry M. Gaskins, II
Garry M. Gaskins, II
Solicitor General

cc: Oklahoma District Attorney's Association
(via email)