

*Independent Investigation of  
State v. Richard E. Glossip*

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**Fifth  
Supplemental  
Report  
Reed Smith LLP**

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March 27, 2023

## Part 1

Since the Reed Smith Independent Investigation report became public on June 7, 2022 (“Report”), we have continued to investigate<sup>1</sup> and submitted the following additional reports: (1) August 9, 2022, Supplemental Report; (2) August 20, 2022, Second Supplemental Report; and (3) September 18, 2022, Third Supplemental Report, and (4) October 16, 2022, Fourth Supplemental Report. Since issuing these reports, we have continued to investigate. Because some of the information we discovered relates to sensitive medical health information, we have redacted portions of this Fifth Supplemental report.

This fifth supplemental report addresses: (1) Box 8,<sup>2</sup> and the relevant guiding principles of law on a prosecutor’s *Brady*<sup>3</sup> and *Napue*<sup>4</sup> obligations; (2) accounting for the \$1757 Richard Glossip possessed when apprehended by police on January 9, 1997, based on the record and new evidence; (3) ethics implications and analysis by Professor and Dean Emeritus at Oklahoma City University Law School, Lawrence Hellman,<sup>5</sup> regarding an Oklahoma Court of Criminal Appeals (OCCA) Judge’s failure to disclose his prior working relationship with ADA Connie Smothermon while a petition about ADA Smothermon’s conduct was pending before the OCCA as well as the Court’s response to the defense’s request for recusal of Judge Hudson’s law clerk, former Assistant Attorney General (AAG) Seth Branham (who worked on the Glossip case when he was an AAG); and (4) Professor Hellman’s ethics analysis of a former Oklahoma Pardon & Parole Board Member failing to disclose her prior working relationship with ADA Connie Smothermon and her position as a criminal prosecutor in the District Attorney’s office while Glossip’s case was being prosecuted.

For context, the State allowed access to Box 8 in February 2023<sup>6</sup> *solely* due to Oklahoma Attorney General Drummond’s reversal of his predecessor’s, former AG John O’Connor, decision

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<sup>1</sup> Individuals from the firms Crowe & Dunlevy LLP and Jackson Walker LLP also continue to partner with Reed Smith in the ongoing investigation.

<sup>2</sup> Box 8 was created by the Attorney General’s Office under former AG John O’Connor. It contained documents removed from boxes 1-7 of the Oklahoma County District Attorney’s Office, over which the AG’s Office was asserting work product and other privileges. This box of 2200 previously withheld documents will be referred to as “Box 8.” We previously addressed information discovered in boxes 1-7 in prior report(s).

<sup>3</sup> *Brady v. Maryland*, 373 U.S. 83 (U.S. Supreme Court, 1963).

<sup>4</sup> *Napue v. Illinois*, 360 U.S. 264 (U.S. Supreme Court, 1959).

<sup>5</sup> When we gained access to Boxes 1-7 of the DA’s Case file and discovered a memorandum written by ADA Connie Smothermon during the 2004 retrial that relayed other witness testimony to two other State’s witnesses (Gina Walker and Justin Sneed), we enlisted the expertise of Professor Hellman to conduct an ethics analysis. We have since asked him to evaluate additional inquiries involving: (1) a May 1997 letter by then Governor Frank Keating to Bob Macy about the Barry Van Treese murder; (2) Oklahoma Court of Criminal Appeals Judge Hudson’s lack of disclosure regarding his prior working relationship with ADA Connie Smothermon while a petition about her conduct during the 2004 trial was pending before the Court as well as the Court’s response to defense’s request for recusal of Judge Hudson’s law clerk, former AAG Seth Branham; and (3) former Oklahoma Pardon & Parole Board member Patricia High’s lack of disclosure regarding her prior working relationship with ADA Connie Smothermon and her being a former Bob Macy prosecutor during the time period that office was prosecuting Glossip.

<sup>6</sup> The Oklahoma Court of Criminal Appeals’ Rule 9.7(g)(3) states that “[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered.”

## Part 1

to withhold box 8 based on attorney work product/privilege assertions. In late August/September 2022, Former AG O'Connor only allowed access to boxes 1-7 of the District Attorney's (DA's) Case File for Glossip. Box 8 contained 2200 pages of materials – some typed, some handwritten. We obtained access to Box 8 in February 2023 due to AG Drummond's authorization.

The withheld information in Box 8 relates to evidence presented at the guilt phase of Richard Glossip's 2004 retrial. The jury did not receive all of the information available at the time due to the State withholding evidence. The U.S. Supreme Court has observed in *Berger v. United States*, that in circumstances where the evidence of guilt is not "overwhelming" the "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence."<sup>7</sup>

Similar to the *Berger* case, the U.S. District Court for the Western District of Oklahoma described Glossip's 2004 retrial as "[u]nlike many cases in which the death penalty has been imposed, **the evidence of petitioner's guilt was not overwhelming.**"<sup>8</sup> This is because:

- "[t]he State's case against petitioner **hinged on the testimony of one witness, Justin Sneed...**"<sup>9</sup>
- "the physical evidence basically all goes to Mr. Sneed;"<sup>10</sup>
- "the specifics about the murder plot came from Mr. Sneed entirely."<sup>11</sup>

The rule of law further dictates that when prosecutorial misconduct occurs, "[i]t is ordinarily incumbent on the State to set the record straight."<sup>12</sup> As discussed in Sections B and C, the governing case law instructs that in this type of situation, where the withheld evidence went to the guilt phase, a new trial should be ordered.

Based on our review of Box 8, we found multiple instances in the 2200 pages that could not arguably be considered work product or otherwise privileged. For example, telephone message slips from third parties, the DA's Case File folder, which would be subject to the DA's open file policy, and other factual information. At best, the information in Box 8 was withheld without an accurate or thorough privilege analysis being conducted, and representations by AG O'Connor's office that the documents all were privileged were not accurate at least as to many of the documents in Box 8. At worst, this is another instance in this case where evidence was mishandled.

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<sup>7</sup> *Berger v. United States*, 295 U.S. 78, 89 (U.S. Supreme Court, 1935). "If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached." *Id.*

<sup>8</sup> *Glossip v. State*, Order ECF Doc. 66, Case No. 5:08-cv-00326-HE at pp. 1-2 (W.D. OK, Sept. 29, 2010)(emphasis added).

<sup>9</sup> Oklahoma Federal District Judge Joe Heaton, *Glossip v. State*, Order, ECF Doc. 66, Case No. 5:08-cv-00326-HE (W.D. OK, Sept. 29, 2010) (emphasis added).

<sup>10</sup> ADA Fern Smith, May 29, 1998 Pre-Trial Hearing Transcript at p. 27:21-25.

<sup>11</sup> Former ADA Gary Ackley, June 2016 Interview at p. 33 (Radical Media).

<sup>12</sup> *Banks v. Dretke*, 540 U.S. 668, 157 L. Ed. 2d 1166 at 1168 (U.S. Supreme Court, 2004). *Banks* was a Texas death penalty case holding that because of prosecutorial misconduct, the defendant did not receive a fair trial and it was remanded.

Regardless of the reason for withholding, the inescapable fact remains that while a petition in this case was pending before a court of law (the Oklahoma Court of Criminal Appeals) alleging *Brady* violations, the State, under former AG O'Connor, was withholding other *Brady* evidence (in Box 8), thereby adversely impacting the defense's post-conviction relief efforts.<sup>13</sup>

At the time, however, the State represented the following to the defense in September 2022:

**From:** Joshua Lockett Joshua.Lockett@oag.ok.gov   
**Subject:** Responses to Recent Correspondence  
**Date:** September 15, 2022 at 2:29 PM  
**To:** Don Knight don@dknightlaw.com, Amy Knight amy@amyknightlaw.com, j.perkovich@phillipsblack.org, John Mills j.mills@phillipsblack.org, Warren Gotcher warren@gotcher-beaver.com, Meri Wright meri@dknightlaw.com  
**Cc:** Jennifer Miller jennifer.miller@oag.ok.gov, Jennifer Crabb jennifer.crabb@oag.ok.gov, John O'Connor john.o'connor@oag.ok.gov



In response to your accusation that the State intentionally withheld exculpatory material in claiming the work-product privilege to documents excluded from your review of the seven boxes of evidence, I asked another attorney familiar with the case to review those privileged materials. **That review concluded no such evidence was excluded.**

Joshua L. Lockett  
Assistant Attorney General  
Criminal Appeals Unit  
Oklahoma Office of the Attorney General  
(405) 522-4404

In *Banks v. Dretke*, the U.S. Supreme Court took issue with the State's conduct before/during the trial in withholding *Brady* material and "[t]hrough direct appeal and state collateral review proceedings, the State continued to hold secret the key witnesses' links to the police and allowed their false statements to stand uncorrected." *Banks v. Dretke*, 540 U.S. 668 (U.S. Supreme Court, 2004).

Additionally, based on several occurrences from Box 8, there appears to have been a repeated practice of the Oklahoma County DA's Office disclosing information that helped the prosecution and which the prosecution intended to present at trial, but withholding evidence that would help the defense or was of little use to the prosecution. Indeed, the disclosure was couched as what the State would present evidence on, but there was no disclosure of any exculpatory or impeachment information. This pattern indicates that the lack of disclosure by the prosecution may not have been inadvertent.

#### **A. Governing Rules of Law**

At least eight rules of law held by the U.S. Supreme Court, the Oklahoma Court of Criminal Appeals, and the Tenth Circuit Court of Appeals guide the evaluation of Box 8's withheld information and the appropriate remedy.

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<sup>13</sup> In 2022, the State opposed the Defense's motion for discovery of Box 8, including a request for a privilege log or a special master to review Box 8 and instead represented there was no *Brady* material. See above excerpt from September 15, 2022 Email from J. Lockett, ccing former AG O'Connor, Jennifer Miller, and Jennifer Crabb.

1. **Brady Material is Exculpatory or Impeachment:** "Due process requires the State to disclose exculpatory and impeachment evidence favorable to an accused." *Brown v. State*, 2018 OK CR 3, ¶¶ 102-104, 422 P.3d 155, 175 citing *United States v. Bagley*, 473 U.S. 667 (U.S. Supreme Court, 1985), *Giglio v. United States*, 405 U.S. 150 (U.S. Supreme Court, 1972), *Brady v. Maryland*, 373 U.S. 83 (U.S. Supreme Court, 1963).  
*Brady* encompasses impeachment evidence, used to undermine a witness's credibility, because "if disclosed and used effectively," such evidence "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (U.S. Supreme Court, 1985)(emphasis added).
2. **It is Incumbent on the State to "Set the Record Straight" When Prosecutorial Misconduct/Withheld Evidence Occurs:** "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668 (U.S. Supreme Court, 2004). *Banks* was a Texas death penalty case that held the defendant did not receive a fair trial because of prosecutorial misconduct and the Court remanded the case. It should be noted that Texas has a nearly identical court system structure to Oklahoma where all criminal matters are heard by the state Criminal Court of Appeals.
3. **Prosecutors Should "Seek Justice, Not Merely Convict":** "The prosecutor is both an administrator of justice and an advocate . . . . The duty of the prosecutor is to seek justice, not merely to convict." *Collis v. State*, 1984 OK CR 80, 685 P.2d 975, 978 (Oklahoma Court of Criminal Appeals, 1984).
4. **Resolve Close Cases/Doubtful Questions "in Favor of Disclosure":** As "the gatekeeper of the state's evidence, and thus the main arbiter of *Brady* material, the prosecutor 'must resolve close cases and doubtful questions in favor of disclosure.'" *Fontenot v. Crow*, 4 F.4th 982, 1073 (10th Cir. 2021). In *Fontenot*, the Tenth Circuit vacated an Oklahoma murder conviction and cited *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). "The prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." See *Banks v. Reynolds*, 54 F.3d at 1517 (10th Cir. 1995)(quoting *United States v. Agurs*, 427 U.S. 97, 108 (U.S. Supreme Court, 1976)).<sup>14</sup> "Due process mandates disclosure." *United States v. Bagley*, 473 U.S. 667, 677, (U.S. Supreme Court, 1985);*United States v. Robinson*, 39 F.3d 1115, 1118 (10th Cir. 1994).

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<sup>14</sup> The U.S. Supreme Court has observed "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." See *Cone v. Bell*, 556 U.S. 449 at 719 fn 15 (U.S. Supreme Court, 2009) citing *Kyles*, 514 U.S., at 439. Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. See *Cone v. Bell* at 719 fn 15 citing *Kyles*, 514 U.S., at 437. In *Cone v. Bell*, because the suppressed evidence tied to defendant's habitual and excessive drug use, the case was remanded for sentencing only. Thus, the remedy turns on the specific evidence improperly withheld, and what stage of the trial the evidence would have gone to.

5. **The Question is Whether Defendant “Received a Fair Trial” in Light of the Withheld Evidence:** “[F]avorable evidence is material, and constitutional error results from its suppression by the government, ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Kyles*, 514 U.S. 419, 433 (U.S. Supreme Court, 1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (U.S. Supreme Court, 1985)). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682. “[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Strickler v. Greene*, 527 U.S. 263, 289-90 (U.S. Supreme Court, 1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434)(U.S. Supreme Court, 1995)(emphasis added).
6. **Review the “Cumulative Impact” of the Withheld Evidence:** “In evaluating the materiality of withheld evidence, we do not consider each piece of withheld evidence in isolation. Rather we review the cumulative impact of the withheld evidence, its utility to the defense as well as its potentially damaging impact on the prosecution’s case.” *Fontenot v. Crow*, 4 F.4<sup>th</sup> 982, 1080 (10<sup>th</sup> Cir. 2021) citing *Simpson v. Carpenter*, 912 F.3d 542, 572 (10th Cir. 2018)(emphasis added).
7. **New Trial Awarded When Weak Case and Brady Violations:** The U.S. Supreme Court has observed that where the evidence is not overwhelming and it is a weak case, that *Brady* violations may have greater impact.<sup>15</sup> “In these circumstances, prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. If the case against [the defendant] had been strong, or, as some courts have said, the evidence of his guilt ‘overwhelming,’<sup>16</sup> a different conclusion might be reached.”<sup>17</sup> Moreover, “we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.”<sup>18</sup>
8. **Vacated Conviction Because of Withheld Mental Health Records:** In *Browning v. Trammell*,<sup>19</sup> the Tenth Circuit held that for *Brady* purposes, a prosecution’s indispensable witness’s mental

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<sup>15</sup> *Berger v. United States*, 295 U.S. 78 (U.S. Supreme Court, 1935).

<sup>16</sup> Similar to the *Berger* case, the U.S. District Court for the Western District of Oklahoma described Glossip’s 2004 retrial as “[u]nlike many cases in which the death penalty has been imposed, **the evidence of petitioner’s guilt was not overwhelming.**” *Glossip v. State*, Order, ECF Doc. 66, Case No. 5:08-cv-00326-HE at pp. 1-2 (W.D. OK, Sept. 29, 2010)(emphasis added). This is because there was no physical, forensic or DNA evidence linking Glossip to the Sneed’s brutal murder of Mr. Van Treese, and no person, other than Sneed, testified about the specifics of the murder plot and that it involved Glossip.

<sup>17</sup> *Berger*, 295 U.S. at 89.

<sup>18</sup> *Id.* (emphasis added)

<sup>19</sup> 717 F.3d 1092, 1101 (10<sup>th</sup> Cir. 2013)(holding that “the OCCA’s determination that the sealed material contained nothing favorable to Browning was an unreasonable application of Supreme Court law to the facts of this case... This evidence is clearly both favorable impeachment and exculpatory evidence.” In 2015, former AG Scott Pruitt and

health records were “material” to the defense in a capital murder trial. With this holding, the Tenth Circuit reversed the Oklahoma Court of Criminal Appeals decision, which was defended by the State (then AG Scott Pruitt and Jennifer Crabb) and vacated the conviction.<sup>20</sup>

**B. Box 8: Withheld Information and Relevance to the Guilt Phase**

**1. Box 8: Prosecutors’ Notes from J. Sneed 2003 Interview discussing Sneed being on “lithium” and “Dr. Trumpet”**

- What is the Evidence: In Box 8, there were interview notes in which ADA Connie Smothermon wrote down what Justin Sneed said during an interview. The notes list “lithium” and the name of a doctor (“Dr. Trumpet”). Using these facts, we were able to ascertain the Oklahoma County Jail psychiatrist in 1997 was Dr. Larry Trombka.
- Relevance to the guilt phase: Justin Sneed testified in the guilt phase only. Per Guilt Phase Jury Instruction No. 13, the jury was instructed “that the witness, Justin Sneed, is what is termed in law as an accomplice to the crime of Murder in the First Degree.”

The U.S. Supreme Court has instructed that when the “reliability of a given witness may well be determinative of guilt or innocence,” nondisclosure of evidence affecting credibility falls within this general rule.<sup>21</sup>

Sneed’s testimony was crucial to the State’s case against Glossip as evidenced by how courts and the prosecutors have described him.

- The Tenth Circuit Court of Appeals described Sneed as the State’s “principal witness.”<sup>22</sup>
- Former ADA Gary Ackley has explained, “the specifics about the murder plot came from Mr. Sneed entirely.”<sup>23</sup>

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Jennifer Miller opposed Glossip’s motion for discovery of Justin Sneed’s medical records, calling it “nothing more than a fishing expedition.” *Glossip v. State*, State’s Response to Petitioner’s Successive Application for Post-Conviction Review, Emergency Request for Stay of Execution, Motion for Discovery, and Motion for Evidentiary Hearing,” Case No. PCD-2015-820, Filed September 16, 2015, at p. 43.

<sup>20</sup> A 2018 OCCA opinion (*Brown v. State*) distinguished *Browning* finding it was not a Brady violation due to the specific mental health condition suffered by the co-defendant did not impact memory recall or overall witness credibility. The OCCA opinion, therefore, distinguished on the specific facts of the case and not the holding or reasoning of *Browning*. See *Brown v. State*, 422 P.3d 155, 175 (Okla. Crim. App. 2018).

<sup>21</sup> *Giglio v. United States*, 405 U.S. 150, 153-54 (U.S. Supreme Court, 1972).

<sup>22</sup> *Glossip v. Trammel*, 530 Fed. Appx. 708, 2013 WL 382219, at 720 (10<sup>th</sup> Cir. July 25, 2013).

<sup>23</sup> June 2016 Interview of Former ADA Gary Ackley at p. 33 (Radical Media).

- Oklahoma federal court judge, the Hon. Joe Heaton described “[t]he State’s case against petitioner ***hinged on the testimony of one witness***, Justin Sneed...”<sup>24</sup>
- Former ADA Ackley further expressed in 2016 that, “**if the jury didn’t believe that testimony that came direct to their ears from Justin Sneed, there’s no way they would have convicted Richard Glossip.**”<sup>25</sup>

Based on the evidence at the 2004 retrial and the descriptions by the courts’ and prosecutors,’ Justin Sneed’s reliability as a witness was determinative of Glossip’s guilt or innocence in the 2004 retrial (guilt phase).

The U.S. Supreme Court has reasoned that *Brady* encompasses impeachment evidence, used to undermine a witness's credibility, because “if disclosed and used effectively,” such evidence “may make the difference between conviction and acquittal.” *United States v. Bagley*, 473 U.S. 667, 676 (U.S. Supreme Court, 1985).

- Other Points from the October 2003 Interview of Sneed Were Disclosed: On October 22, 2003, the State filed an Additional More Definite and Certain Statement and Additional Witness Testimony disclosing other portions (highlighted in yellow) to the defense but did not disclose the “lithium” and “Dr. Trumpet” portions from the same interview.

October 22, 2003 Filing by the State:

As to the third allegation, the State will present evidence in the form of testimony from Justin Sneed that the defendant **was always acting like the victim was going to fire him**. It was important to the defendant not to get fired. Mr. Sneed saw the defendant **mad and afraid** of being fired. One time around the end of **November, first part of December, 1996**, the defendant came to Mr. Sneed’s room and **woke him up in the middle of the night**. The defendant and Mr. Sneed conducted an **inspection** of all the **unoccupied rooms** because the defendant said the victim was coming to do an inspection and the defendant was nervous about the outcome.

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<sup>24</sup> *Glossip v. State*, Order, ECF Doc. 66, Case No. 5:08-cv-00326-HE (W.D. OK, Sept. 29, 2010) (emphasis added).

<sup>25</sup> June 2016 Interview of Former ADA Gary Ackley, Transcript at p. 42 (Radical Media).



- Relevance of Box 8 Facts Withheld:

Using the “Dr. Trumpet” and lithium facts from ADAs Smothermon’s and Ackley’s notes in Box 8, we were able to identify the Oklahoma County jail psychiatrist, Dr. Trombka, in less than a day. The fact that Sneed mentioned to prosecutors in 2003 that he was on lithium and “Dr. Trumpet” is significant because

\_\_\_\_\_ would have been relevant. We were also able to confirm from the recently disclosed 1998 Jail’s Medical Information Sheet from the Sheriffs’ Department to the Department of Correction that Sneed was

- This information would have been highly relevant to impeaching Sneed’s credibility in the guilt phase. Per the Tenth Circuit’s guidance in *Browning v. Trammel*, a **“witness’s credibility may always be attacked by showing that his or her capacity to observe, remember, or narrate is impaired. Consequently, the witness’s capacity at the time of the event, as well as at the time of trial, is significant.”**<sup>26</sup>
- Former ADA Gary Ackley agreed this would have been *Brady* material:<sup>27</sup>

Q. Would that have been an important fact for the defense to know that Sneed was \_\_\_\_\_ ?

A. Yes.

Q. Why would that be relevant?

**A. I think that’s Brady material, impeachment material.** The lithium part of the question **goes to his state of mind** when he was administered. And therefore likewise discoverable.
- There is no evidence that the fact of “Dr. Trumpet” was disclosed by the prosecution to the defense. Yet, based on Box 8 interview notes, they were known to the prosecution at least as of October 22, 2003.<sup>28</sup>
- Per the U.S. Supreme Court, it was also not on the defense to exercise due diligence to obtain this *Brady* impeachment material.

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<sup>26</sup> 717 F.3d 1092, 1105 (10<sup>th</sup> Cir. 2013).

<sup>27</sup> March 10, 2023 Interview of Former ADA Gary Ackley at 47:10-23. Former ADA Ackley has since provided a sworn affidavit providing further detail. We have included a redacted copy of his affidavit as Attachment A.

<sup>28</sup> Please note that Justin Sneed told Dr. Edith King in July 1997 that he was given lithium for a tooth being pulled. Sneed mentioned this to ADAs Smothermon and Ackley (Ackley’s notes documented “tooth pulled?”) on October 22, 2003.

The Supreme Court has framed the prosecution's duty to disclose as "broad," *Strickler v. Greene*, 527 U.S. 263, 281 (U.S. Supreme Court, 1999), and "has never required a defendant to exercise due diligence to obtain *Brady* material." *Fontenot v. Crow*, 4 F.4<sup>th</sup> 982, 1066 (10<sup>th</sup> Cir. 2021).

*Napue v. Illinois* Obligation: Failure to Correct Sneed's Testimony on Lithium/Psychiatrist

- As a result of the U.S. Supreme Court's holding in *Napue v. Illinois*, the prosecution has a duty to correct the record if testimony provided by Sneed at trial were inconsistent with the facts disclosed by Sneed on October 22, 2003. If *Napue v. Illinois* obligations to correct the record are triggered, **"a new trial is required if the false testimony could have affected the judgment of the jury."**<sup>29</sup>
- Prosecutor's *Napue* Obligation Triggered in 2004 Trial: At the 2004 retrial, when asked on direct examination by Prosecutor Connie Smothermon, Sneed testified that when he was arrested in 1997, he asked for Sudafed "because I had a cold and **was given lithium for some reason, I don't know why. I never seen no psychiatrist** or anything." (Trial 2 Testimony of J. Sneed, Vol. 12, at p. 64:3-8). Further, Sneed testified he did not know why the Jail gave him lithium. (*Id.* at 64:9-10). Neither his \_\_\_\_\_ nor his informing the prosecution of "Dr. Trumpet" was disclosed to the defense.
- Despite being obligated by *Napue v. Illinois* to correct the record, ADA Smothermon did not do so regarding Sneed's testimony that he was placed on lithium because he had a cold and that he never saw a psychiatrist. In *Napue*, the U.S. Supreme Court reasoned:  
"It **is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt.** A lie is a lie, no matter what its subject, and, **if it is in any way relevant to the case,** the district attorney has the **responsibility and duty to correct what he knows to be false and elicit the truth.** . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."<sup>30</sup>

Relevant Tenth Circuit Case Vacated the Murder Conviction Based on *Brady* Violation of Withheld Mental Health Information:

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<sup>29</sup> 360 U.S. 264, 269-70 (U.S. Supreme Court, 1959)(explaining that "[w]hen the reliability of a witness may be determinative of the guilt or innocence of the defendant, nondisclosure of evidence affecting his credibility falls within this general rule. A new trial is required if the false testimony could have affected the judgment of the jury." *Id.*; see also *Reed v. Oklahoma*, 1983 OK CR 12, ¶ 7, 657 P.2d 662, 664. "The deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice.'" *Mooney v. Holohan*, 294 U.S. 103, 112; 55 S. Ct. 340, 79 L. Ed. 791 (U.S. Supreme Court, 1935).

<sup>30</sup> *Napue v. Illinois*, 360 U.S. 264 (U.S. Supreme Court, 1959).

- A 2013 case, *Browning v. Trammel*,<sup>31</sup> is also informative on this specific Box 8 evidence because the case held that sealed mental health records of the State's principal witness were Brady material. For context, the Oklahoma Court of Criminal Appeals had previously determined that the mental health records were not *Brady* material and were privileged doctor-patient information. It should be noted that Jennifer Crabb/former AG Scott Pruitt had represented the State and defended the Oklahoma Court of Criminal Appeals' decision. Due to this *Brady* violation, the murder conviction was reversed on habeas grounds.

We draw your attention to a few points listed on p. 8 from the Tenth circuit's *Browning* decision as they have great similarity to the State's reliance on Justin Sneed's testimony in the Glossip 2004 retrial. Post-trial, the State has taken the position that there is substantial other evidence *without* Justin Sneed proving Glossip's involvement in the murder. However, this does not comport with the evidence presented at the 2004 retrial; nor is this demonstrated by the way that multiple courts after the retrial and even the prosecutors familiar with the record have described Sneed as the State's "principal witness"<sup>32</sup> and stated that the State's murder case relied "entirely"<sup>33</sup> on him.<sup>34</sup> Therefore, Sneed's mental health and impact it has on his credibility and reliability of his testimony were critical to the guilt phase of the State's case against Glossip.

The reason *Brady* encompasses impeachment evidence is precisely for this kind of situation – information used to undermine a witness's credibility, for "if disclosed and used effectively," such evidence "**may make the difference between conviction and acquittal.**" *United States v. Bagley*, 473 U.S. 667, 676 (U.S. Supreme Court, 1985)(emphasis added).

Further, the Tenth Circuit informed in *Browning* that:

- "The sealed mental health records reflect that Tackett, the prosecution's key witness, suffered from severe mental illness which could affect her ability to recount events accurately and she was also prone to manipulate and blame others...This evidence is clearly both favorable impeachment and exculpatory evidence."<sup>35</sup>
- "A witness's credibility may always be attacked by showing that his or her capacity to observe, remember, or narrate is impaired. Consequently, the witness's capacity at the time of the event, as well as at the time of trial, is significant."<sup>36</sup>

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<sup>31</sup> 717 F.3d 1092, 1101 (10<sup>th</sup> Cir. 2013)(holding that "the OCCA's determination that the sealed material contained nothing favorable to Browning was an unreasonable application of Supreme Court law to the facts of this case... This evidence is clearly both favorable impeachment and exculpatory evidence."

<sup>32</sup> *Glossip v. Trammel*, 530 Fed. Appx. 708, 2013 WL 382219, at 720 (10<sup>th</sup> Cir. July 25, 2013).

<sup>33</sup> *Frederick v. State*, 400 P.3d 786, 828 (Okl. Crim App. 2017).

<sup>34</sup> See also *Glossip v. State*, Order, ECF Doc. 66, Case No. 5:08-cv-00326-HE (W.D. OK, Sept. 29, 2010) ("[t]he State's case against petitioner hinged on the testimony of one witness, Justin Sneed, petitioner's accomplice, who received a life sentence in exchange for this testimony."

<sup>35</sup> *Browning v. Trammel*, 717 F.3d 1092, 1101 (10<sup>th</sup> Cir. 2013).

<sup>36</sup> *Id.* at 1105.

## Part 1

- “Evidence is material if ‘there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.’ *Smith*, 132 S.Ct. at 630 (internal quotation marks omitted). ‘A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.’”<sup>37</sup>
- The witness whose mental health records were at issue was “the prosecution’s indispensable witness, and all sides knew that Browning’s fate turned on the credibility.”<sup>38</sup>
- “But the existence of *some* corroborating evidence for Tackett’s testimony does not necessarily vitiate the materiality of her mental health records.”<sup>39</sup>

Similarly, in the 2004 trial guilt phase, Glossip’s fate turned on the credibility of Justin Sneed. As former ADA Gary Ackley has explained, “**if the jury didn’t believe that testimony that came direct to their ears from Justin Sneed, there’s no way they would have convicted Richard Glossip.**”<sup>40</sup> Even if one assumes for argument’s sake that there was some corroborating evidence of Sneed’s testimony presented in the 2004 retrial, per *Browning*, that does not vitiate the materiality of his being evaluated by a psychiatrist and

### **The State AG’s Office under former AG Scott Pruitt and Jennifer Miller Opposed Glossip’s Motion in 2015 for Sneed’s Medical Records**

It should be noted that in 2015, Glossip’s defense counsel submitted a motion as part of post-conviction relief efforts asking for Justin Sneed’s medical records.<sup>41</sup> The then State AG’s Office (Scott Pruitt/Jennifer Miller) opposed, asserting it was “nothing more than a fishing expedition.”<sup>42</sup>

### **Dr. Trombka, the Jail Psychiatrist in 1997, Confirmed that \_\_\_\_\_ Could Affect Memory Recall, Could Cause Mania and Lithium Was the First Line Drug Given to Inmates**

We spoke with Dr. Larry Trombka, a Department of Corrections psychiatrist, in March 2023, and he confirmed that he did work in the Oklahoma County Jail one day a week in 1997.<sup>43</sup> He

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<sup>37</sup> *Id.* at 1106.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1107.

<sup>40</sup> June 2016 Interview of Former ADA Gary Ackley, Transcript at p. 42 (Radical Media).

<sup>41</sup> *Glossip v. State*, Petitioner’s Motion for Discovery, Case No. PCD-2015-820, at p. 2, para. 2, Filed September 2015 (requesting “Sneed’s jail medical records upon his arrest are needed to explore and document his mental condition near the time of the offense and his interrogation.”)

<sup>42</sup> *Glossip v. State*, State’s Response to Petitioner’s Successive Application for Post-Conviction Review, Emergency Request for Stay of Execution, Motion for Discovery, and Motion for Evidentiary Hearing,” Case No. PCD-2015-820, Filed September 16, 2015, at p. 43.

<sup>43</sup> March 17, 2023 Affidavit of Dr. Trombka.

also confirmed that he would not have prescribed lithium for a toothache or a cold, and in 1997, lithium was the first line drug for inmate patients with .<sup>44</sup> In addition, he explained that based on his medical experience and training, that can lead to manic episodes; further, illicit drug use such as methamphetamine (that Sneed testified he was using prior to the murder) would heighten or bring on manic episodes possibly leading the individual to suffer from paranoia and/or violent episodes.<sup>45</sup> Finally, Dr. Trombka said that it would be important for a jury to know whether a witness had as it may affect their memory recall, state of mind and in order to properly assess the witness's credibility.

The 2004 jury was not aware that Justin Sneed had , why he was on lithium, that he had seen Dr. Trombka, that Dr. Trombka had prescribed lithium to him after diagnosing him , or the effects of illicit drug use in combination with this . The coupled with Sneed's methamphetamine use presents an alternative scenario for how the crime occurred – one that did not involve Glossip, and thus is not only impeachment but exculpatory.

The jury was instead left with the impression that Sneed was mistakenly put on lithium when he asked for Sudafed and ADA Smothermon did not correct this testimony.

## **2. Box 8: Bill Sunday Interview Notes disclosing they “spent \$25K for repairs” on the motel when he was managing the motel post-murder**

- What is the Evidence: In Box 8, there were interview notes in which ADA Gary Ackley documented information from Bill Sunday. The notes list that Sunday managed the motel post-murder with Jim Gainey and Ken Van Treese, and that they “hired painters” and “spent \$25K for repairs” of the motel.
- Relevance to the Guilt Phase:
  - One of the State's theories for Glossip's motive for murder in the guilt phase was the disrepair of the motel and that Glossip did not maintain the motel. Specifically, the State presented evidence that the repairs were small and easy enough that Glossip should have been able to do them, did not do so and feared getting fired for that reason. This fear of getting fired was what the State presented as Glossip's motive to encourage Justin Sneed to murder Barry Van Treese.  
Guilt Phase Jury Instruction No. 17 Aiding and Abetting instructed the 2004 jury that “a person concerned in the commission of a crime as a principal is one who whether present or not, advises, and encourages the commission of the offense.”<sup>46</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *State of Oklahoma v. Richard Eugene Glossip*, Instructions to the Jury, Case No. CF-97-244, June 1, 2004.

- Guilt phase evidence presented to the jury:
  - Ken Van Treese testified in the guilt phase only (and not the sentencing phase) to this motive of disrepair and that it cost only \$2000-3000 in repairs to the motel following the murder, indicating that Glossip could have easily made them.<sup>47</sup>

From Ken Van Treese's testimony from the 2004 trial guilt phase:

Q. (BY MR. WOODYARD) The total cost of repairs you had to make were 2 to \$3000 for a quarter-million-dollar motel?

A. Correct.

Further Ken Van Treese testified that:

But as I recall, our total expenditures for maintenance in that two-month period was about \$2,000, and that included fixing 12 air conditioners. Twelve air conditioners don't break on the same day. They just don't. Commodes don't all break the same day.

The stuff that I'm talking about that needed to be done was the replacement of two or three ceramic tiles that are 50 cents apiece. So the amount of money that was involved was not the issue. The issue was the work was not being assigned to anybody and if it was being assigned, it wasn't being checked on after it was assigned and, therefore, it wasn't getting done.

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<sup>47</sup> Ken Van Treese Testimony (Guilt Phase), Vol. 11, 162:4-15; 163:2-4.

- The State also presented Bill Sunday in the guilt phase only and he was specifically asked by the defense how much did total repairs for the motel cost and his response was he did not know (see snippet on next page).<sup>48</sup>

Q. (BY MR. WOODYARD) Sir, do you know how much money was expended by the family who had control of the checkbook for purchases of mattresses and repair items and things of that nature?

A. I really don't. I just -- it would be a guess.

- Relevance of Box 8 Facts Withheld:

The undisclosed fact that Bill Sunday and Ken Van Treese “spent \$25K for repairs” learned by the prosecution from Bill Sunday prior to trial (and noted in the Box 8 interview notes withheld from defense) would have been relevant impeachment material for the defense to know and use with both Ken Van Treese and Bill Sunday. It also contradicts the State’s theory that disrepair was a motive.

For example, with the \$25,000 fact withheld by the prosecution, the defense could have refreshed Bill Sunday’s memory and refuted Ken Van Treese’s testimony that repairs only cost \$2,000-3,000 total. This withheld fact could have also undermined the State’s motive of disrepair. This was an important fact for the jury to know – that the repairs were more substantial and costly than the jury heard because the impression was left from Ken Van Treese’s testimony that Barry Van Treese would have fired Glossip due to the disrepair of the motel. If the repairs had cost \$25,000 in 1997 (around \$46,500 today), this may have been the reason why the repairs were not being done at all because Glossip would have needed to receive those funds from Barry Van Treese and repairs of that scope and magnitude would have exceeded the day-to-day maintenance responsibilities of a motel manager. Thus, this \$25,000 withheld fact goes directly to the motive theory presented by the State in the guilt phase and is not only impeachment but exculpatory.

As “the gatekeeper of the state’s evidence, and thus the main arbiter of *Brady* material, the prosecutor ‘must resolve close cases and doubtful questions in favor of disclosure.’”<sup>49</sup> “The prosecution’s obligation to turn over the evidence in the first instance stands independent of the

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<sup>48</sup> Bill Sunday Testimony (Guilt Phase), Vol. 12, 35:10-14.

<sup>49</sup> *Fontenot v. Crow*, 4 F.4<sup>th</sup> 982, 1073 (10<sup>th</sup> Cir. 2021) vacating an Oklahoma murder conviction and cited *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10<sup>th</sup> Cir. 1995)

## Part 1

defendant's knowledge."<sup>50</sup> Further, the U.S. Supreme Court has observed "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."<sup>51</sup>

### A few additional notes relevant to the evaluation of this withheld fact from Box 8:

- In May 2004, ADA Gary Ackley disclosed some details from his interview of Bill Sunday to the defense.<sup>52</sup> However, this disclosure, while containing other details helpful to the prosecution's case, did not disclose the fact learned from Mr. Sunday that they "spent \$25k in repairs."
- In February 2023, Former ADA Gary Ackley agreed his note of "spent \$25K for repairs" was a fact from Bill Sunday, not Ackley's own mental impression or opinion. Thus, this fact should not have been withheld on work product privilege.
- Former ADA Ackley does not recall ever disclosing this fact to the defense. He agreed it should have been turned over.
- From Former ADA Ackley's 2-28-23 interview:<sup>53</sup>

*Q. Given that one of the motives for the murder the State presented to the jury was this disrepair, and Glossip fell down on his duties as manager to maintain the motel – do you recall that?*

*A. Yeah.*

*Q. Do you think this fact that Bill Sunday had would be relevant or important for the defense to know?*

*A. Yes.* And I suspect they got this information from an alternate source, from us, from an alternate source... Ken Van Treese? Ken Van Treese testified at length, and I assume Connie gave them discovery about his statement before he testified about the repairs and the expenditures....

*Q. But you don't recall, and you're not aware, personally, if this information about Bill Sunday or what he was saying was ever disclosed to the defense, right?*

*A. I have no memory of any of that....*

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<sup>50</sup> See *Banks v. Reynolds*, 54 F.3d at 1517 (10<sup>th</sup> Cir. 1995)(quoting *United States v. Agurs*, 427 U.S. 97, 108 (U.S. Supreme Court, 1976)).

<sup>51</sup> See *Cone v. Bell*, 556 U.S. 449 at 719 fn 15 (U.S. Supreme Court 2009) citing *Kyles*, 514 U.S., at 439. Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. See *Cone v. Bell* at 719 fn 15 citing *Kyles*, 514 U.S., at 437. In *Cone v. Bell*, because the suppressed evidence tied to defendant's habitual and excessive drug use, the case was remanded for sentencing only. Thus, the remedy turns on the specific evidence improperly withheld, and what stage of the trial the evidence would have gone to.

<sup>52</sup> May 4, 2004 Facsimile to Glossip's Defense L. Wayne Woodyard, Summary of Anticipated Testimony of John William Sunday (RGI001430 / LWW 28777).

<sup>53</sup> February 28, 2023 Interview of Former ADA Gary Ackley at p. 66:15-70:18.



A. I don't remember what Ken Van Treese said. I'm pretty sure Connie presented his testimony.

Q. [read Ken Van Treese testimony from 2004 trial, defense cross examination]

Question: The total cost of repairs you had to make was \$2-3000 for a quarter million motel?

Answer: Correct.

Q. So given that information, do you think that this information from Bill Sunday saying he actually did \$25,000 of repairs do you think that would've been important information for the defense to know, as well as the jury?

A. I don't know about its importance, but they should have been given it.

Q. Because \$25,000 is very different than \$2-3000, right?

A. Agreed.

### 3. Box 8: Gary Ackley's Interview Notes of Kayla Pursley Watching the Sinclair Gas Station Videotape to see "when Defendant Sneed came in"

- What is the Evidence: In Box 8, there were interview notes of ADA Gary Ackley of his interview of Kayla Pursley, the Sinclair Gas Station clerk. In these notes, he documents that she informed him that she watched the Sinclair Gas Station surveillance video in order to see when Sneed came in the night of the murder and that she thought Oklahoma City Police Department took the videotape.
- Relevance to the Guilt Phase: Kayla Pursley testified in the guilt phase only. Her testimony in part was relevant to the timeline of the murder, and whether Justin Sneed could have been awake and walking around at the same time Barry Van Treese arrived back at the motel the night of the murder. This is important because the State argued that Sneed only knew Barry Van Treese returned from Glossip.<sup>54</sup> This information would have been relevant to refuting the State's position by showing that Justin Sneed was caught on surveillance video between 2-2:30am and thus could have independently seen or encountered Barry Van Treese.
- Relevance of Box 8 Facts Withheld: Pursley testified that Justin Sneed came in between 2-2:30am to the Sinclair Gas Station.<sup>55</sup> Justin Sneed testified that he went in between 3-4am after Glossip woke him up and told him Barry Van Treese had arrived back at the motel.<sup>56</sup> Oklahoma Turn Pike Pass Records show that Barry Van Treese came back to the motel around 2/2:15am. If Kayla Pursley's testimony was accurate, then Justin Sneed could have

<sup>54</sup> Justin Sneed Testimony (Guilt Phase), Vol. 12, 94:20-22. Q. How was it you found out that Barry Van Treese was there? A. Because Mr. Glossip come to my room banging on my door.

<sup>55</sup> Kayla Pursley Testimony (Guilt Phase), Vol. 9, 27:1-6.

<sup>56</sup> Justin Sneed Testimony (Guilt Phase), Vol. 12, 94:20-22. Q. How was it you found out that Barry Van Treese was there? A. Because Mr. Glossip come to my room banging on my door.

been awake and walking around at the exact time Mr. Van Treese arrived (and Sneed could have, therefore, seen Mr. Van Treese on his own independent of Glossip waking him up and informing him Mr. Van Treese arrived back to the motel).

This would have been critical evidence for the defense in the guilt phase of the trial, because it goes to the reliability of Justin Sneed's testimony as to timeline of events, and counters the State's narrative that, but for Richard Glossip waking Sneed up and telling him Barry Van Treese was back at the motel, Sneed would not have known this information.

This also would have been an important fact because the jury may have viewed Pursley's testimony as more credible than Justin Sneed's testimony if the jury had known that a surveillance video corroborated Pursley's timeline of when Sneed actually came into the Sinclair Gas Station the night of the murder. Moreover, this combined that was not disclosed might have made the jury more likely to believe Pursley than Sneed, but the was not available for the jury to fully assess Sneed's credibility.

- These Box 8 notes indicate, and Former ADA Ackley recalled in a 2-28-23 interview, that "she looked at the video while she was at the store like that morning. I believe that note indicates that she told us she looked at the videos when Sneed came in on January 7. My next fragment indicates she "thinks OCPD took the videotape.""
- This point of information was not disclosed to the defense, though other points of information that Kayla Pursley said during the 10-30-2003 interview, which supported the State's case, were disclosed to the defense.<sup>57</sup> Former ADA Ackley does not know why this specific point of information about her watching the video was not disclosed.
- From Former ADA Gary Ackley's 2-28-23 interview:<sup>58</sup>

Q: Do you think it would have been pertinent information for the jury to know that Kayla Pursley watched the videotape, in terms of weighing credibility and seeing who's accurate?

A. Would have been up to defense counsel, but it could have been important of course.

Q. If it was not in the police report, and first time she said it was at the 10-2003 interview, would that qualify under your rule of thumb to turn over to defense because it's a new statement?

A. I don't know. It would have been required if an inconsistent statement, but our practice and our office policy was open file. So we should have given it anyway whether statute requires it or not.

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<sup>57</sup> See 10-31-2003 Email from ADA G. Ackley to Glossip's Defense Counsel W. Woodyard, re: Additional Discovery and Supplemental Notice of More Definite and Certain Material.

<sup>58</sup> February 28, 2023 Interview of Former ADA Gary Ackley at p. 34:12-21; 35:14-24.

Part 1

In addition, Former ADA Ackley, for the first time on 2-28-23 disclosed that he recalls watching the Sinclair Gas Station video before the 2004 retrial as part of his case preparation. Despite this video being the subject of a motion to compel and the defense asking for it in October 2003, around the same time as the prosecution's interview of Kaya Pursley (and the Box 8 interview notes), the video was never turned over to the defense.

- Ackley agreed that the DA's Office would had to have had possession of the videotape for him to have viewed it.<sup>59</sup> Had he known about the defense motion to compel or the defense asking about it, he agreed the DA's Office should have turned it over to the defense.
- For context, in October 2003, Glossip's defense counsel, Lynn Burch, was asking the State about the Sinclair Gas Station videotape:

-----Original Message-----

From: Lynn Burch [mailto:Lynn@oids.state.ok.us]  
Sent: Thursday, October 23, 2003 12:01 PM  
To: L Wayne Woodyard; ConnieP@oklahomacounty.org  
Subject: RE: Richard Glossip

Connie,

Reports also indicate that a video surveillance tape was seized at the Sinclair station near the motel and taken into OKCPD custody. That tape has never been produced. Any documentation regarding its whereabouts or destruction is requested.

- ADA Connie Smothermon represented to the defense that she did not have the video:

**From:** <ConnieP@oklahomacounty.org>  
**To:** <Lynn@oids.state.ok.us>  
**Date:** 10/29/03 8:57AM  
**Subject:** RE: Richard Glossip

OCPD never booked a video tape into evidence. There is some confusion as to whether one was looked at or actually taken by an officer. Either way, it never made it to this case file. The information I have is that any video tape would be of the interior of the station only.

Gary is finishing the HAC response and will file it within the hour.  
Thanks,  
Connie

- From the 2-28-23 interview of Former ADA Ackley:<sup>60</sup>

Q. Do you think that would have been relevant information for the defense to know given the motion to compel and the defense asking for it?

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<sup>59</sup> February 28, 2023 Interview of Former ADA Gary Ackley at p. 20:1-7.

<sup>60</sup> February 28, 2023 Interview of Former ADA Gary Ackley at 78:6-21.

A. I don't recall the motion to compel. I know what the discovery statute says and I've always tried to comply with it and it covers recording. Don't think I'm saying there is any doubt that any recording is discoverable and should have been turned over, because it is and should have been. Discovery was already done by the time I came onto the case. Heavy lifting on discovery had been done before I got into the case.

- On 2-28-23, Mr. Ackley expressed this:  
Q. Does it concern you at all to learn that the DAs had possession of the Gas Station videotape that was the subject of a motion to compel but never turned over to the defense?  
A. Of course. Of course it does. It always concerns me when we have discovery problems and we mishandle things and misplace them and fail to do the best possible job we could do. Always.  
Q. You combine that with the destruction of evidence in this case – kind of a lot going on.  
A. Which infuriates me – but yes that doesn't make me feel any better.

This is a clear example of the State mishandling evidence in this case.

#### 4. Box 8: ADA Connie Smothermon Interview Notes of Cliff Everhart (10/29/2003)

- What is the Evidence: In Box 8, there were interview notes by ADA Connie Smothermon of Cliff Everhart. These notes document Cliff Everhart's discussion of "liquidated big screen 900 couch Jewelry." This referred to Glossip's selling of his possessions on January 8, 1997 to raise funds for an attorney.
- Relevance to the Guilt Phase: Cliff Everhart testified in the guilt phase only and provided testimony regarding motive and flight. Specifically, Everhart testified that Glossip was selling his possessions to leave town. After coming out of an attorney's office (David McKenzie) near the Oklahoma City Police station, Glossip was apprehended by police and later arrested. \$1757 in cash was found on his person.

The significance of the money found on Glossip was tied to his guilt v. innocence as the State (in the guilt phase of the 2004 retrial) argued it was independent corroborative evidence of his involvement in the murder. The State further argued because Glossip could only explain \$1200 worth from his selling his possessions and remaining paycheck, that this money found on him (\$1,757) had to be the fruits of the crime. During the guilt phase of the 2004 trial, witnesses only stated they purchased his possessions for a few hundred dollars, thus not coming close to the \$1,757 Glossip had on him.

- Relevance of Box 8 Facts Withheld:

The 2003 interview notes of Cliff Everhart from Box 8 show that Cliff Everhart discussed with prosecutors the "liquidation sale" that he testified Glossip had on January 8, 1997. ADA Smothermon's notes further indicate that Everhart listed possessions Glossip was selling ("big screen, couch, jewelry") and "900." A reasonable inference of this could be that Glossip received \$900 just for the big screen tv not to mention potentially other amounts for the couch and jewelry. Or it could mean he received \$900 for all three items in total.

In either case, that would be *significantly more* than what witnesses testified to at the guilt phase in the 2004 trial. This would be impeachment and exculpatory given the significance (and negative inference) the State attributed to the money found on Glossip's person and that Glossip could not account for every dollar.

Specifically, ADA Smothermon argued in her closing statement in the guilt phase that:<sup>61</sup>

advance. The money that he's gotten for his futon and his TV, none of that adds up to as much money that he has. But

- During the 2004 trial, Everhart testified to statements similar to what was disclosed to the prosecutors and documented in their notes. However, Everhart was specifically asked if he knew how much money Glossip received for these items and he testified he did not know.<sup>62</sup>

Q. On that day, did you have an occasion to notice whether or not Richard Glossip was selling anything?

A. Richard Glossip was having a liquidation sale.

Q. And who was he selling things to?

A. Anybody that would purchase.

22 | Q. Okay. You said that he was selling other things. Do  
23 | you have any personal knowledge as to what else he might  
24 | have sold or what money he might have gotten for it?

25 | A. He sold, I believe, a couch, big screen TV, couple

<sup>61</sup> State's Closing, 2004 Trial (Guilt Phase), Vol. 15, 168:8-9.

<sup>62</sup> Cliff Everhart Testimony (Guilt Phase), Vol. 11, 199:12-16; 200:20-25; 201:6-7.

Q. And how about the big screen TV and the couch?

A. I really don't know.

"[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. 419, 433 (U.S. Supreme Court, 1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (U.S. Supreme Court, 1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. "[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler v. Greene*, 527 U.S. 263, 289-90 (U.S. Supreme Court, 1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434)(U.S. Supreme Court, 1995)(emphasis added).

This fact from Cliff Everhart told to the prosecutors in 2003 and documented in their notes in Box 8, but withheld from the defense, would have been impeachment material for Everhart. In addition, it could have undermined the State's narrative in the guilt phase that Glossip was involved in the murder because he had the fruits of the crime. Its absence was notable given the significance the State attributed in the guilt phase to the money found on Glossip and that he could not account for all of it.

- It should also be noted that the State disclosed other points learned from their Cliff Everhart interview on 10-31-2003,<sup>63</sup> but not this particular fact regarding what Everhart said about "liquidated big screen 900 couch Jewelry."

Due process mandated disclosure.<sup>64</sup>

**5. Box 8: January 14, 2003 Notes from Fern Smith documenting that Justin Sneed did not want to testify in the retrial**

- What is the Evidence: In Box 8, there were notes from Fern Smith documenting her conversation with Gina Walker (Justin Sneed's attorney) in January 2003. These notes stated that "I talked to Gina Walker about Justin Sneed's testimony...Gina said Justin didn't want to but he knows he made an agreement to do so."

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<sup>63</sup> 10-31-2003 Email of ADA G. Ackley to Glossip's Defense Counsel W. Woodyard, re: Additional Discovery and Supplemental Notice of More Definite and Certain Material.

<sup>64</sup> See *United States v. Bagley*, 473 U.S. 667, 677, (U.S. Supreme Court, 1985); *United States v. Robinson*, 39 F.3d 1115, 1118 (10<sup>th</sup> Cir. 1994).

- Relevant to the Guilt Phase: Sneed was the State’s “principal witness”<sup>65</sup> and the specifics of the murder plot came “entirely” from him.<sup>66</sup> Justin Sneed’s credibility and reliability as a witness determined guilt or innocence of Glossip.
- Relevance of Box 8 Facts Withheld:

Box 8 notes of Fern Smith state in January 2003: “Gina said Justin does not want to [testify] but knows he has an agreement to do so.” This corroborates what was happening behind the scenes – that Justin Sneed was asking his attorney whether he had the chance of “re-canting my testimony” (May 2003), and before the 2004 retrial Sneed informed ADA Smothermon that he did not want to testify and wanted to break his deal because he wanted a new deal. Sneed also wrote after the trial that “somethings I need to clean up” and “it was a mistake” (2007).

- None of this was disclosed by the State to the defense or the Court despite *Brady* obligations, the defense’s requests that any inconsistent statements from Sneed be produced by the State, and the Court’s January 10, 2003 instructions for all parties to inform the Court “immediately” of any potential conduct by Sneed that would be inconsistent with his agreement to testify (*see* snippet on next page from the Jan. 2003 hearing):

10 | Motion In Limine, I'm overruling them, but I think we've had  
11 | a thorough enough discussion to understand that if anyone is  
12 | made aware that Mr. Sneed is refusing to keep the agreement  
13 | that he made with the State of Oklahoma, everyone else has  
14 | to be notified of that immediately. It would affect trial  
15 | preparation, we would obviously need to have hearings and I  
16 | want immediate notice of that.

17 |           MS. SMITH: And, Your Honor, I tell the Court that  
18 | I have writted him from the penitentiary. I writted him for  
19 | the original date for the 13th, so I anticipate he'll be  
20 | here by Monday and I will talk with Ms. Walker and ask her  
21 | to let us know what his feelings are at that time. I'll  
22 | inform the COURT as soon as I know.

23 |           THE COURT: That will be great. Thank you.

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<sup>65</sup> *Supra* notes 22-25.

<sup>66</sup> June 2016 Interview of ADA G. Ackley, Transcript at p. 33 (Radical Media).

## 6. Recently Obtained Affidavits Confirming Gina Walker's Handwriting on Connie Smothermon Memorandum Written During the 2004 Trial

- What is the Evidence: Affidavits from former colleagues of Gina Walker (Sneed's attorney) relating to a memorandum<sup>67</sup> written during the 2004 retrial from ADA Connie Smothermon to Gina Walker (Sneed's attorney, who was herself a witness designated by the State in the 2004 retrial). For context, this Memorandum informed Walker of other witness testimony and stated "[h]ere are a few items that have been testified to that I needed to discuss with Justin." This Memorandum was written after the Rule of Sequestration had been invoked and when Sneed changed his testimony regarding the knife (one of the topics in the Connie Smothermon Memorandum), and the Defense asked for a mistrial, ADA Smothermon neither disclosed her Memorandum nor the substance of the information contained within her Memorandum (*i.e.*, relaying other witness testimony and conveying the "biggest problem is still the knife"). The recently-obtained affidavits prove that the handwriting on the Memorandum was in fact Gina Walker's, which in turn proves she received the Memorandum, and gave it back to ADA Smothermon.
- Relevance to the Guilt Phase: These affidavits confirm that Gina Walker did receive the Connie Smothermon Memorandum and go directly to the credibility of Justin Sneed. It was written during the 2004 trial, after the Rule of Sequestration had been invoked. Justin Sneed reversed his testimony on the knife and for the first time asserted that he did in fact stab the victim in the 2004 trial.<sup>68</sup>
- Both individuals who submitted the affidavits are former colleagues of Gina Walker (Justin Sneed's attorney). Based on their knowledge, familiarity with her writing, and experience working with Ms. Walker, they confirmed that the handwriting on the Connie Smothermon Memorandum is Gina Walker's handwriting. For context, the Connie Smothermon Memorandum was discovered in September 2022 when then AG O'Connor agreed to grant the defense access to a portion of the DA's case files. This Memorandum was also the subject of Glossip's post-conviction relief petition filed before the Oklahoma Court of Criminal Appeals in September 2022.

The affidavits undermine the position the State took outlined in the below snippet:<sup>69</sup>

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<sup>67</sup> Hereinafter referred to as the "Connie Smothermon Memorandum" or "Memorandum."

<sup>68</sup> Justin Sneed Testimony (Guilt Phase), Vol. 12, 102:3-8.

<sup>69</sup> *Glossip v. State*, Case No. PCD-2022-819, State's Objection to Petitioner's Motion for Discovery in Relation to Successive Application for Post-Conviction Relief, Filed October 10, 2022, at pp. 3-4.



The problem for Petitioner lies in his characterization of this document as *Brady* material. The document at issue is a memo which appears to have been prepared by Connie Pope Smothermon, one of the prosecutors, during the course of Petitioner's second trial and possibly sent to Sneed's attorney, Gina Walker, in anticipation of a response. Pet. 4th PC at 56. The portion

- Both of Glossip's 2004 trial counsel confirmed that the prosecution did not disclose this Memorandum to the defense during the 2004 trial. When the defense made a motion for a mistrial, ADA Connie Smothermon only disclosed that she called Gina Walker after the medical examiner testified. Ms. Smothermon did not disclose that she relayed other critical witness testimony to Gina Walker that was intended to be relayed to Sneed before he took the stand (per the Memorandum's first line), (in contravention of the Rule of Sequestration being invoked, Gina Walker herself being a State's witness). Ms. Smothermon also did not disclose this Memorandum to the defense or the Court. Below is what Ms. Smothermon disclosed, which says nothing about relaying other witness testimony or State strategy to Gina Walker and Sneed:

Yesterday after I heard the M[edical] E[xaminer]'s questions[,] I called Ms. Walker. She had conversations 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.

- It should be noted that in October 2022, the AG's Office (Jennifer Miller, Jennifer Crabb, Josh Lockett) asserted this was not a *Brady* violation and opposed discovery including a special master review of the documents in Box 8 which were all withheld as privileged.<sup>70</sup> The AG's Office took the position before the Oklahoma Court of Criminal Appeals that Connie Smothermon "did nothing wrong" as "lawyers are not subject to the Rule of Sequestration." (See 2022 State's Objection to Discovery at p. 4)

Gina Walker was herself, however, a designated State's witness for the 2004 trial, and the first line of the Memorandum states that Sneed (a State's witness) was the intended recipient of the information. The Oklahoma Court of Criminal Appeals agreed with the State and denied the

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<sup>70</sup> State's Objection to Petitioner's Motion for Discovery in Relation to Successive Application for Post-Conviction Relief, Case No. PCD-2022-819, Filed Oct. 10, 2022 ("State's Objection to Discovery")

motion for discovery. The recently-obtained affidavits confirm Gina Walker received, wrote on the Memorandum, and then sent the Memorandum back to ADA Smothermon.

- Finally, Glossip co-prosecutor Gary Ackley informed us in September 2022 he was not aware of this Memorandum but agreed, that if, Sneed had changed his testimony because of an intervening memo from ADA Smothermon to Gina Walker the day before Sneed testified, that would be a problem for the reliability of Sneed's testimony.

**C. The State's Case in the Guilt Phase of Glossip's 2004 Retrial and the Sentencing Phase Are Uniquely Inseparable in Terms of the Evidence and the Case Theory Presented**

Based on *Brady* and its progeny, when withheld evidence is discovered post-conviction, the remedy turns on: (1) the specific evidence improperly withheld by the State, and (2) what stage of the trial the evidence would have gone to. Here, the information withheld in Box 8 goes to the reliability of the State's principal witness (Justin Sneed) testifying about the murder plot, the State's motive presented for the murder, and other elements of the guilt phase. In addition, the Glossip case is unique in that the State's case in the guilt phase significantly overlapped with the State's case in the penalty/sentencing stage. The State's case in the guilt phase was that Richard Glossip pressured/induced Justin Sneed to commit the murder and promised him money to do so. The *sole* death penalty aggravator (at the penalty/sentencing stage) used by the jury to convict Glossip was "murder for remuneration" (*i.e.*, Glossip promised to pay Sneed for murder).

Simply put, the evidence the State presented at the guilt phase in 2004 ties directly to the sole death penalty aggravator (murder for remuneration). As demonstrated in more detail in this Section, the evidence withheld in Box 8 goes to the testimony and evidence presented in the guilt phase, not the sentencing phase. The fact that the State recycled the evidence from the guilt phase into the sentencing phase does not change this analysis because that evidence was clearly and primarily relied upon in the guilt phase of the trial to convict Glossip of murder.

**State's Case in the Guilt Phase: Murder for Hire Masterminded by Glossip**

The State's opening and closing statements to the jury in the guilt phase are informative on this point:

- Glossip "hired" Sneed to commit the murder, State's Closing, Vol. 15, 96:24-25:

## Part 1

sleep after he closes the office at 2 or 2:30 in the morning, within two or three hours there's Justin Sneed being a pain in the neck, tapping and rattling and ringing and everything waking him up. And he says, "I killed the boss. I killed Barry." **This is a man that he hired,** waking him up and telling him that. He tells him, "Well, pick up

- "But for" Richard Glossip, Justin Sneed would never have killed, State's Closing, Vol. 15, 151:21-22:<sup>71</sup>

**But for Richard Glossip, Justin Sneed would never have killed Barry Van Treese.** And you heard that. You heard that the only motive that you have here for the death of Barry Van Treese is Richard Glossip's. You have

- Glossip was the "mastermind" – Sneed would not have committed the murder alone, State's Closing, Vol. 15, 171:15-19

long time, but I wanted to you get to know him and I wanted you to see the two different personalities. And you know, you know. Because you've seen them, not together but you've seen them independently, and **you know who the master mind is.** You know. And you know that **Justin Sneed could not and would not have done this alone.**

### State's Case in the Sentencing Phase: Murder for Hire and Continuing Threat

The *sole* death penalty aggravator used by the jury to find Glossip guilty was "murder for remuneration" (*i.e.*, Glossip hired or promised to pay Sneed for the murder).<sup>72</sup> In the 2004

<sup>71</sup> This theory was also presented by the State in the first trial that was later vacated by the OCCA. See State's Closing from Trial 1, Vol. 9 at p. 57:5-6. ADA Fern Smith explained the case to the Oklahoma County Court: "This case basically rests on the testimony of Mr. Sneed. The physical evidence basically all goes to Mr. Sneed. He's the one who actually committed the murder. Our contention is that Mr. Glossip was the mastermind and that he enlisted Mr. Sneed to carry out the murder." May 29 1998 Pre-Trial Hearing Transcript at p. 27:21-25 (emphasis added).

<sup>72</sup> The only death penalty aggravator the jury found in Glossip's 2004 trial under Oklahoma statute was murder for remuneration. In October 2003, the State amended its Bill of Particulars alleging that Glossip "committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for

sentencing phase, the State presented only two witnesses (family members Barrie Hall and Donna Van Treese) to present victim impact evidence. The defense then put on two witnesses to counter the other aggravator sought of continuing threat to society.

During the sentencing phase, the State admitted all of the evidence presented previously in the guilt phase.<sup>73</sup> Specifically, ADA Smothermon stated:

“Your Honor, at this time the State of Oklahoma would ask to incorporate and thereby put into the second stage of this trial all evidence introduced in the first stage of the trial, testimony by every witness, direct and cross-examination, every piece of evidence that was introduced and the stipulations for the jury's consideration during this, the sentencing phase.”

Further, in the sentencing phase, ADA Gary Ackley told the jury, “[t]hat means that all of the evidence you relied on when you found Mr. Glossip late Tuesday night guilty beyond a reasonable doubt of Murder in the First Degree is still before you and that you can still depend on that evidence and use it in reaching your decision today. That also means that most of the evidence you’ve heard I’ve already spoken with you about.”<sup>74</sup>

Thus, the evidence demonstrates there is functionally no difference between the State’s case during the guilt phase v. the State’s case in the sentencing phase. The only new evidence presented by the State in the sentencing phase was the victim impact statements. The *Brady* material in Box 8 is not relevant to the victim impact evidence presented by the State in the sentencing stage. For the State to take the position now that there was not significant overlap between the State’s case at the guilt phase and the sentencing phase, would be contradictory and unsupported by the evidence presented to the jury in 2004, and the arguments made by the State at trial.

#### Courts Have Described the State’s Case against Glossip as a “Murder for Hire”

It would also be incongruous to how Oklahoma courts reviewing the 2004 trial record have interpreted and described the evidence and case.

For example:

- 2007 Oklahoma Court of Criminal Appeals Direct Appeal Denial (157 P.3d 143 at 148):

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remuneration or the promise of remuneration.” Amended Bill of Particulars in re Punishment, at p. 2, Filed October 20, 2003. The State also unsuccessfully sought two other aggravators: (1) the murder was especially heinous, atrocious, or cruel (which later was dismissed), and (2) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (which the jury did not find Glossip to be). *Id.*

<sup>73</sup> State’s Closing (Sentencing Phase), 2004 Trial Testimony, Vol. 17, 64:1-15; Vol. 16, 69:1-8.

<sup>74</sup> *Id.* at 64: 9-15.

and food. Sneed admitted killing Mr. Van Treese because Glossip offered him money to do it. The events leading up to the killing began with Van Treese's arrival at the motel on January 6.

- OCCA dissenting Judge Chapel referred to the case as a “murder-for-hire killing”.<sup>75</sup>

### State’s Position Taken in 2022: Murder for Hire

It would be further inconsistent with the State’s position recently asserted to the Oklahoma Court of Criminal Appeals and the Oklahoma Pardon & Parole Board (in August 2022) in which the State described the 2004 trial and testimony presented to the jury as Glossip promising Sneed money to kill Mr. Van Treese:

- August 12, 2022 State’s submission to the Oklahoma Court of Criminal Appeals:<sup>76</sup>

Sneed testified that around 3:00 a.m. on January 7, 1997, Glossip came to his room. Glossip was nervous and jittery. Glossip wanted Sneed to kill Van Treese and he promised him \$10,000.00 for killing Van Treese. Sneed testified that Glossip had asked him to kill Van Treese several times in the past and the amount of money kept getting bigger and bigger.

- August 23, 2022 State’s submission to the Oklahoma Pardon and Parole Board:

At trial, Sneed provided details on what led up to the morning of January 7, 1997. Sneed testified that Glossip had approached him multiple times with the suggestion that he kill Van Treese (Tr. XII 78-79, 87-90). On these occasions, Glossip offered Sneed various increasing amounts of money as time progressed (Tr. XII 80, 166-67). Sneed knew that such an act was morally and legally wrong, but he felt pressured due to Glossip’s persistence and saw no way out of it for himself (Tr. XII 88).

Therefore, the evidence the State presented at the guilt phase in 2004 is functionally identical with the sentencing phase/death penalty aggravator (murder for remuneration). The

<sup>75</sup> *Glossip v. State*, 157 P.3d 143 at 174 (Oklahoma Court of Criminal Appeals 2007)(emphasis added).

<sup>76</sup> *Glossip v. State*, State’s Response to Petitioner’s Successive Application for Post-Conviction Relief, Case No. PCD-2022-589, at p. 4 (Statement of Facts), Filed August 12, 2022.

evidence withheld in Box 8 likewise goes to the testimony given in the guilt phase, and is not exclusive to the sentencing phase. The fact that the State introduced the evidence from the guilt phase into the sentencing phase does not alter this analysis since that evidence was clearly and primarily relied upon in the guilt phase of the trial. In other words, without this evidence and the arguments made by the State in the guilt phase regarding this evidence, it is unlikely the jury would have convicted Glossip of murder, and there never would have been a penalty phase at all.

#### **D. Conclusion**

Box 8 revealed numerous *Brady* and *Napue* violations, and each of them relate to testimony and evidence presented in the guilt phase of the 2004 trial against Glossip.

Courts have found *Brady* violations when either exculpatory or impeachment material is withheld. The Tenth Circuit has specifically found that withheld mental health records are both exculpatory and impeachment material that should be disclosed. Here, ADA Smothermon's notes containing information learned from Sneed in October 2003 about his being medicated with lithium and "Dr. Trumpet" (Dr. Trombka, the Jail psychiatrist who ) was withheld from the defense. The credibility of Justin Sneed was so critical to the State's case that Sneed's testimony was determinative of Glossip's guilt or innocence. The U.S. Supreme Court has instructed that when the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.<sup>77</sup> This *Brady* violation alone warrants a new trial, per the U.S. Supreme Court in *Giglio* and *Bagley*, and the Tenth Circuit guidance in *Browning*.

Courts have also found *Napue* violations when a prosecutor fails to correct the record, as ADA Smothermon did here when she did not correct Justin Sneed's testimony that he "never saw a psychiatrist," he was put on lithium for a cold when he asked for Sudafed, and he did not know why he was put on lithium. The remedy for a *Brady* or *Napue* violation is a new trial. "When the reliability of a witness may be determinative of the guilt or innocence of the defendant, nondisclosure of evidence affecting his credibility falls within this general rule. A new trial is required if the false testimony could have affected the judgment of the jury."<sup>78</sup>

In the context of *Brady*, courts have also factored in the strength of the State's cases against the defendant and weighed that against the prejudice caused by the withheld evidence. Similar to the *Berger* case, the fact that the evidence of Glossip's guilt in the 2004 trial was "not overwhelming" as indicated by federal district court Judge Heaton is a significant factor weighing

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<sup>77</sup> *Giglio v. United States*, 405 U.S. 150, 153-54 (U.S. Supreme Court, 1972).

<sup>78</sup> *Napue v. Illinois*, 360 U.S. 264, 269-70 (U.S. Supreme Court, 1959); see also *Reed v. Oklahoma*, 1983 OK CR 12, ¶ 7, 657 P.2d 662, 664. "The deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice.'" *Mooney v. Holohan*, 294 U.S. 103, 112; 55 S. Ct. 340, 79 L. Ed. 791 (U.S. Supreme Court, 1935).

in favor of a new trial. The rule of law dictates “[in] these circumstances, prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence.”<sup>79</sup>

Here, the prejudice to the defense from not having impeachment material to counter testimony from multiple witnesses who testified to the motive of disrepair (*e.g.*, Box 8 interview notes documenting Bill Sunday and Ken Van Treese spent \$25,000 for motel repairs) or explaining the money Glossip had on him when arrested came from lawful sources rather than the fruits of the crime (*e.g.*, Box 8 interview notes documenting Cliff Everhart’s knowledge of Glossip’s sale of possessions and how much money he got for those items - 900) is significant. None of this *Brady* evidence goes to the sentencing phase, but rather is highly relevant to the veracity of the evidence presented by the State during the guilt phase of the 2004 trial.

Finally, courts have instructed that a *Brady* analysis must look to the cumulative effect of the withheld information. Here, the sheer number of instances of exculpatory and impeachment material withheld in Box 8 is substantial. The cumulative effect of these violations and the prejudicial impact on the jury cannot be disregarded and thus warrant a new trial for Glossip.<sup>80</sup> As the Tenth Circuit has instructed, the analysis should not be taking each piece of withheld evidence in isolation. “Rather we review the cumulative impact of the withheld evidence, its utility to the defense as well as its potentially damaging impact on the prosecution’s case.”<sup>81</sup> Because the withheld information from Box 8 went to the credibility of Justin Sneed, the State’s “principal” witness, whether Sneed could have run into Mr. Van Treese and therefore had knowledge of his arrival to the motel independent of Glossip, whether contributed to the murder/his state of mind/ his memory recall, the disrepair motive theory presented by the State, and other facts, the cumulative effect was significant and irreversibly damaging to the defense.

But for the decision of Attorney General Drummond to reverse his predecessor’s decision and allow access to Box 8, this *Brady* evidence and prosecutorial misconduct would have never been exposed. The ultimate question is whether the defendant “received a fair trial” in light of the withheld evidence. In light of all the *Brady* and *Napue* violations recently discovered through Box 8, it is reasonable to conclude that there is a lack of confidence in the 2004 trial, and had the evidence been disclosed to the defense, the result of the proceeding would have been different.<sup>82</sup>

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<sup>79</sup> *Berger*, 295 U.S. at 89.

<sup>80</sup> Should the State file its own notice or motion requesting for the conviction to be set aside, join in or not oppose a Defense petition requesting the same relief due to the Box 8 *Brady* violations, *Escobar v. Texas*, Case No. 21-1601 (Jan. 9, 2023) (a recent Texas death penalty case decided on by the U.S. Supreme Court) may be informative. There, the State supported the defendant’s request for a new trial but the Texas Court of Criminal Appeals sustained the conviction, despite there being no party opposing the request for the new trial. The U.S. Supreme Court vacated the decision and sent it back down to the Texas Court of Criminal Appeals for proper consideration.

<sup>81</sup> *Fontenot v. Crow*, 4 F.4<sup>th</sup> 982, 1080 (10<sup>th</sup> Cir. 2021) citing *Simpson v. Carpenter*, 912 F.3d 542, 572 (10<sup>th</sup> Cir. 2018).

<sup>82</sup> *Kyles*, 514 U.S. 419, 433 (U.S. Supreme Court, 1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (U.S. Supreme Court, 1985)).

## Part 1

When this type of prosecutorial misconduct occurs, the U.S. Supreme Court has mandated that the remedy is a new trial.<sup>83</sup>

It is incumbent on the State to set the record straight and ask for or support a new trial.

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<sup>83</sup> *Banks v. Dretke*, 540 U.S. 668, 157 L. Ed. 2d 1166 at 1168 (U.S. Supreme Court, 2004). *Banks* was a Texas death penalty case holding that because of prosecutorial misconduct, the defendant did not receive a fair trial and it was remanded.





retrial, but, given that I was utterly powerless to change that fact, I had no choice but to confront it and proceed with the job at hand.

8. It is my opinion that destruction of evidence by the police in this capital murder case should not have happened. The Oklahoma County District Attorney's Office had a longstanding agreement with the Police Department to preserve all evidence in a capital murder case. That this happened horrifies me.
9. Based on my knowledge and experience, the Oklahoma Criminal Discovery statute covers recordings and requires production of any recording to the opposing party in criminal proceedings.
10. As part of my obligations and standard practice as a prosecutor, I would disclose any new or inconsistent statements made by witnesses to the defense.
11. After my assignment to the Glossip case in about October 2003 and before the 2004 retrial, I may have viewed a surveillance video from the Sinclair Gas Station ("Sinclair Gas Station Video" as part of general case preparation. I have discussed this video with Reed Smith attorneys, especially Christina Vitale, on at least 2 occasions. I have been very clear that, while at times I have thought I recalled certain portions of the video, that I am by no means certain. I stated to them at one point that I may even be recalling descriptions of the video from reports rather than the video itself.
12. I do not state that I did not see the video. At times I felt somewhat confident that I remembered certain passages of it. At other times, I entirely lack confidence that I saw it. I can only say that it has been a long time, almost 20 years, and that I have viewed dozens of convenience store/gas station video tapes, usually in connection with robbery. On 2-28-23 I pointed out that "I think I saw it, I think I remember seeing it". On 6-2-22 I said "In all honesty I don't remember seeing or handling that video. I vividly remember references to its existence. 18 years after the fact I lack confidence that I remember the video or the police reports about the video." I wish my memory was more clear.
13. I feel, now, that it is highly significant that no notes prepared by me have been produced regarding the contents of the video. As video became more common in my cases, I soon realized that merely viewing the video was a luxury my schedule could not afford. It was my practice to memorialize my viewing in a handwritten memorandum on legal pads, identifying date and the video viewed. I then took notes summarizing the contents of the video, with the counter reading to allow fast access to specific portions of videos.
14. According to police reports, the Sinclair Gas Station Video was a surveillance tape that depicted the inside of the Sinclair Gas Station in the early morning hours of January 7, 1997, before, during and after the murder of Barry Van Treese at the Best Budget Inn, which was next to the Sinclair Gas Station. Witness Kayla Purseley was on duty in the gas station during that time and testified.

15. If I viewed the Sinclair Gas Station Video prior to the 2004 retrial, it is highly unlikely that I went to the police station merely to view the videotape. Most likely, if I viewed the video it was either in my office or in the Oklahoma County District Attorney's conference room.
16. I do not recall at any time before May 2022 being aware that the Sinclair Gas Station Video was the subject of a motion to compel by Glossip's defense. I was not aware that Glossip's defense had been asking for the video in fall 2003. I was not aware that ADA Connie Smothermon had informed Glossip's defense prior to the 2004 retrial that the video never made it into the DA's case file nor did Oklahoma City Police Department ever book it into evidence. My present sense of those events is that they took place before I entered the case and that my duties dealt with the case in the state in which I found it.
17. I stated in March of 2023 that I thought the Sinclair Gas Station Video was of poor quality, that Kayla Pursley, the Gas Station clerk, may have even been visible in the video, and that it was boring (meaning that it had long periods of inactivity).
18. Reviewing my Kayla Pursley witness interview notes refreshed my memory that Ms. Pursley stated that she looked at the video while she was at the store that morning (of the murder) to see when Mr. Sneed came in
19. Based on my interview notes I believe Kayla Pursley must have seen Mr. Sneed on the Sinclair Gas Station Video coming into the Sinclair Gas Station at some point before the January 7, 1997 murder though I did not recall that fact until reviewing my notes. Based on my interview notes, Ms. Pursley indicated that the Oklahoma City police took the videotape. The Reed Smith investigators in February 2023 refreshed my memory that Ms. Pursley testified at trial regarding the time when Mr. Sneed came into the Sinclair Gas Station.
20. Kayla Pursley was ADA Smothermon's assigned witness at the 2004 retrial.
21. In May 2022, pursuant to an open records request by Reed Smith, then District Attorney David Prater requested that I come to look for the Sinclair Gas Station Video. As part of my search for the Sinclair Gas Station Video, I went through the DA's case file boxes on three occasions in the summer of 2022.
22. Though I was ultimately unable to locate the Sinclair Gas Station Video, I do believe it existed at the DA's office at one time.
23. Based on my knowledge and experience of the Oklahoma Discovery statute, I believe that the Sinclair Gas Station Video qualified as a recording, and should have been turned over to the defense.
24. I was also shown my notes from an October 22, 2003 interview of Justin Sneed.
25. ADA Smothermon, Gina Walker, Justin Sneed, and myself were present at this October

2003 interview. Based on my recollection, Gina Walker was Mr. Sneed's attorney at the time. Based on my interview notes, either Gina Walker or Justin Sneed indicated that he had been on lithium when his IQ test was administered.

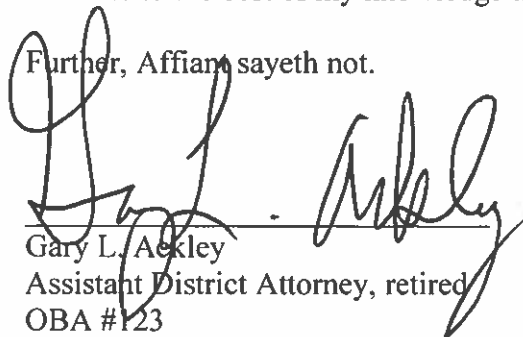
26. Based on my interview notes, either Gina Walker or Justin Sneed also indicated and I wrote down that "the nurse's cart record discrepancies v. Mr. Sneed's jail permanent record."
27. In my interview notes, I also wrote down "tooth pulled?" I am not sure why I wrote that down other than to note that it was stated during the interview. Based on my general knowledge, I do not believe that lithium is a pain medication.
28. Justin Sneed was Connie Smothermon's assigned witness at the 2004 retrial.
29. I do not recall knowing or discussing with anyone that Justin Sneed was on lithium at any time  
I do believe that would have been an important fact for the defense to know and think it is *Brady* impeachment material. I think this condition was disclosed to the parties to the litigation by filing of a written report in the case by Dr. King in a competency evaluation of Justin Sneed on July 17, 1997 per the OSCN Appearance Docket for this case, CF-97-244.
30. Based on my knowledge and experience, being administered lithium, if at a relevant time, goes to Mr. Sneed's state of mind and, depending on when he was administered the lithium, would have been discoverable.
31. I was not aware that Justin Sneed's attorney filed an application for mental health evaluation and competency prior to my being assigned the Glossip case.
32. I also recently reviewed my notes taken during the 2004 retrial, including when the medical examiner, Dr. Chai Choi was testifying. Dr. Choi was one of my assigned witnesses.
33. I remember and these notes document my concern during the cross examination of Dr. Choi regarding the lacerations and puncture wounds she found during the autopsy, and testimony by Dr. Choi about those wounds being caused by a knife.
34. My writing during the cross examination of Dr. Choi stating "reverse Dr. Choi" was my note to myself noting my perception that Dr. Choi did not testify regarding the laceration/puncture knife wounds consistent with my understanding of her report, but upon reflection I realized she had not contradicted her report. The laceration/puncture wounds were caused by a knife. At the time, I did not understand her statement. I misunderstood the circumstances of those wounds because of their unique nature. The victim was stabbed with a knife, but the sharp point of the knife had been broken off, apparently some substantial time before the fatal attack, creating wounds not typical of stab wounds in my experience.
35. There are post-it notes attached to my notes from the trial testimony of Dr. Choi which state "could cut be made by sharp furniture? Glass? Cut on elbow and hand," "cuts [do not equal]

knife cuts,” and “cuts or splits in skin from impact?”. I assume that ADA Smothermon passed them to me to try to help me understand and help me out of the quagmire (of my not understanding the laceration/puncture wounds came from a blunt knife) I had created. I recall ADA Smothermon being concerned at the time about my mishandling of Dr. Choi’s testimony, as was I.

- 36. I also recently reviewed my interview notes from witness Bill Sunday’s interview. Based on my notes, during the interview, Mr. Sunday indicated that he helped Ken Van Treese and Jim Gainey manage the motel after the murder. Mr. Sunday also indicated that they hired painters and spent \$25,000 in repairs.
- 37. I was not aware this fact was not disclosed to the defense and thought it would have been disclosed through alternative sources, like Ken Van Treese. Mr. Sunday was my assigned witness and Mr. Van Treese was ADA Smothermon’s assigned witnesses.
- 38. One of the State’s motives for murder presented to the jury was disrepair of the motel, that Gossip neglected his duties to maintain the motel, and was concerned about being confronted or fired over that failure.
- 39. I do not recall that Ken Van Treese testified in the 2004 retrial that they spent \$2,000-3,000 in repairs total for the motel following the murder. I agree that \$25,000 is different than \$2,000-3,000, and I consider this information that I would have given over to the defense though I do not specifically recall doing so. I have not seen any written communications disclosing such information.

I swear upon penalty of perjury that the statements in the foregoing are true and accurate to the best of my knowledge and recollection.

Further, Affiant sayeth not.

  
\_\_\_\_\_  
Gary L. Aekley  
Assistant District Attorney, retired  
OBA #123

Subscribed and sworn before me on this 21<sup>st</sup> day of March, 2023.



  
\_\_\_\_\_

My commision expires - - 12/04/23

## Part 2: Facts about the \$1757 Found on Richard Glossip on January 9, 1997

### A. Evidence Demonstrating Why Glossip Had this Amount on January 9, 1997

- Oklahoma Criminal Defense attorney David McKenzie told Richard Glossip by phone on January 8, 1997 to bring \$1500 retainer to their January 9, 1997, meeting. *See* 11-14-2022 Affidavit of D. McKenzie, at paragraph 4 (snippet below).

Note: David McKenzie was never called to testify before the jury.

4. Prior to this in-person meeting on January 9, 1997, I had spoken with Mr. Glossip via telephone and informed him I would need a retainer of \$1500.

- After this phone call with McKenzie, Glossip started selling some of his larger possessions (futon, tv, fish tank, entertainment center, vending machines, etc.) to raise funds for the McKenzie meeting. Glossip took that money with him to the attorney's office.<sup>1</sup>

#### **1. Rich Glossip testified in trial 1 about what he sold (Trial 1 volume 7, page 101)**

5 Q And isn't it true when you were arrested that you had  
6 \$1700 in your possession?  
7 A Yes, ma'am.  
8 Q Isn't it true that you began to sell your possessions the  
9 day after you were questioned or released by police?  
10 A Yes, ma'am.  
11 Q Isn't it true that you only got \$130 for your television  
12 set, your futon and your stereo cabinet?  
13 A No, ma'am.  
14 Q How much did you get?  
15 A I got 190 for the TV and the futon. I got, like I said,  
16 \$200 for my vending machines, then the money I got out of the  
17 vending machines. Then I sold an aquarium to Cliff Everhart  
18 for \$100.  
19 Q And isn't it true that you never told police that you  
20 sold an aquarium or vending machines to Cliff Everhart?  
21 A The question was never asked.

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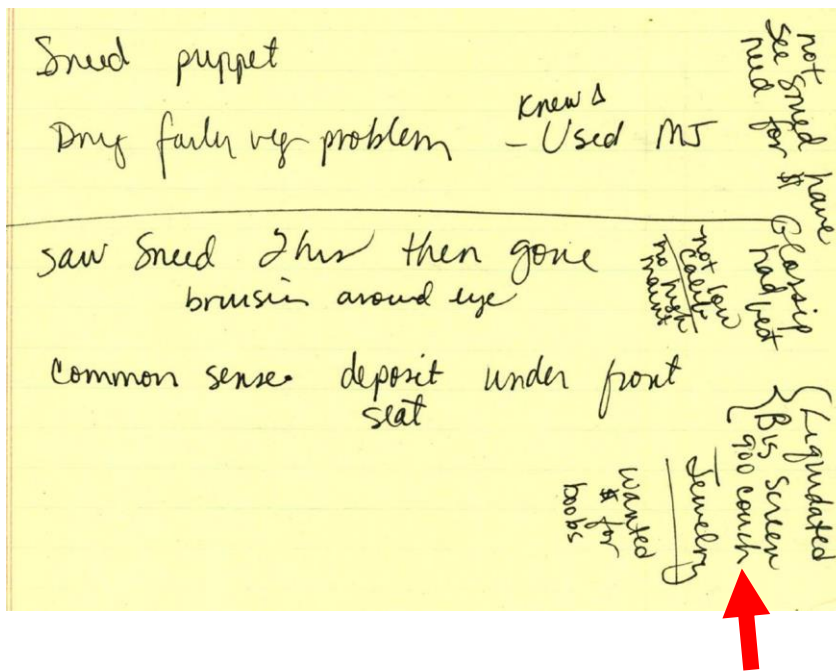
<sup>1</sup> The fact Glossip had to sell his possessions to raise funds for the attorney retainer does not align with him already having money from the robbery of Mr. Van Treese. The purchases he made on January 7, 1997 were all covered by his January 6<sup>th</sup> paycheck (*see* section D for a detailed accounting) so if the State's theory is true, Glossip should have had more money than \$1757 found on his person if he was involved in the murder/split the robbery proceeds.

**2. Cliff Everhart also testified in both trials that he purchased some possessions from Glossip**

- Box 8 notes of Connie Smothermon from her interview with witness Cliff Everhart shows discussion of “liquidated big screen, 900 couch, jewelry” (see 2003 Interview Notes of Cliff Everhart, snippet, bottom right corner).

There is no evidence that this fact was disclosed to the defense despite other facts supportive of the State’s case being disclosed (see Ackley email dated 10-31-2003).

This appears to be additional impeachment (*Brady*) material withheld by the State until February 2023, when AG Drummond authorized release of Box 8. When asked about this at the 2004 retrial, Cliff Everhart did not remember the amount. At the very least, these notes could have been used to refresh Mr. Everhart’s recollection.



Trial 2 Testimony of Cliff Everhart:

- Q. On that day, did you have an occasion to notice whether or not Richard Glossip was selling anything?
- A. Richard Glossip was having a liquidation sale.
- Q. And who was he selling things to?
- A. Anybody that would purchase.

Trial 2 Testimony of Cliff Everhart:

22 | Q. Okay. You said that he was selling other things. Do  
23 | you have any personal knowledge as to what else he might  
24 | have sold or what money he might have gotten for it?  
25 | A. He sold, I believe, a couch, big screen TV, couple

1 | vending machines.

2 | Q. Do you know how much money he might have gotten for any  
3 | of those items?

4 | A. The vending machines, I don't recall if it was 150 or  
5 | \$200.

6 | Q. And how about the big screen TV and the couch?

7 | A. I really don't know.

Note: this also triggered a *Napue* duty of the prosecution to correct if Cliff Everhart had disclosed to the State during the 2003 interview the fact that the couch was sold for \$900.

**3. Billye Hooper testified in trial 1 about Glossip's vending machines**

Hooper testified that there were 3 vending machines owned by Glossip. Hooper further testified that she had seen the daily report record where Glossip documented he sold them back to the motel after the murder. (*See* Trial 1 Testimony of Billye Hooper, Vol. 4, 18:13-19:2 – snippet on p. 3).

These daily reports would have been part of the financial records that were subpoenaed by Glossip's defense but Donna Van Treese stated were lost in a flood before the 2004 retrial.

Billye Hooper Testimony Trial 1:



10 Q And then in the office area there is a vending machine,  
11 right?  
12 A Yes, sir.  
13 Q How many vending machines were there?  
14 A There was one, two, three.  
15 Q Who owned those vending machines?  
16 A Rich.  
17 Q To your knowledge, did Mr. -- now when you say Rich  
18 you're talking about?  
19 A Richard Glossip.  
20 Q Okay. To your knowledge, did Mr. Glossip sell those  
21 vending machines to Mr. Van Treese?  
22 A My knowledge was only after the fact when I did the daily  
23 reports and Donna had me going through the business and  
24 getting it together, I came across the report that Mr. Glossip  
25 had made that day where he had signed out on the daily reports  
1 as having sold the vending machines to the Best Budget  
2 This was after the fact.

#### 4. Ken Van Treese also testified he paid Glossip for the vending machines on January 9, 1997

Ken Van Treese testified that the motel bought back the vending machines, and he paid Glossip for a couple days' work. (Vol. 11 at 128:14-17; 129:3-7)

14 | Q. Okay. Do you know whether or not Richard G.  
15 | paid for the futon and these other items before I  
16 | A. I don't know about the futon. I know that I  
17 | he sold a vending machine back to the company.  
  
3 | A. No, ma'am. He said that he was going to take  
4 | out of the till to pay himself for that machine,  
5 | didn't have an objection to at that juncture.  
6 | Q. Okay. Do you know how much he took?  
7 | A. I think it was \$150.

**5. Ken Van Treese testified Glossip took the cash count from the vending machines**

Ken Van Treese Testimony, Vol. 11 at 129:24-125:6

24 | Q. Any other property or any other money that you know of  
25 | that he got during that time period?

1 | A. I want to say that he took the -- they did a cash count  
2 | on the vending machines. There were several vending  
3 | machines on the property and I don't recall, I'd have to  
4 | check the daily report to see, if that cash was actually  
5 | reported as revenue for the motel or if something else  
6 | happened to it.

**6. Ken Van Treese paid Glossip for two days' work on Jan. 9, 1997**

Ken Van Treese Testimony, Vol. 11 at 130:7-15

7 | Q. We heard that he had been paid his normal salary  
8 | some cash advances on the 6th of January. Do you  
9 | know if he was paid or did you pay him for, I guess, what was  
10 | paid on the 7th and the 8th?

11 | A. As I recall, I did. I paid him cash for what  
12 | would have been a pro-rata amount of his -- what would  
13 | have been his payroll.

14 | Q. Okay. For two days?

15 | A. For two days, that is correct.

Glossip's salary was \$1500 per month.  
\$1500 divided by 30 days = \$50 per day so Glossip got \$100

**7. The Pursleys paid rent money that Glossip had loaned to them (\$150)**

On January 6, 1997, the Pursleys paid \$150 to Glossip for rent money that he loaned them previously to make their rent. *See* April 22, 1997 Preliminary Hearing Testimony of Michael Pursley.

**B. No Independent Evidence (i.e., not stemming from Justin Sneed) that Glossip's Money Was Fruits of the Crime<sup>2</sup>**

In *Cummings v. State*, the Oklahoma Court of Criminal Appeals noted that “independent evidence merely consistent with the main story is not sufficient to corroborate it if it requires any part of the accomplice's testimony to make it tend to connect the defendant with the crime.” *Cummings v. State*, 1998 OK CR 45, 968 P.2d 821, cert. denied, 526 U.S. 1162, 119 S.Ct. 2054, 144 L.Ed.2d 220 (1999) *citing* *Rutledge v. State*, 1973 OK CR 107, ¶ 6, 507 P.2d at 552; *see also* *L.E.Y. v. State*, 1982 OK CR 4, ¶ 6, 639 P.2d 1253, 1255 (“Corroborating evidence must tend to connect the defendant with the commission of the offense absent the accomplice's testimony.”) (*citing* *Jones v. State*, 1976 OK CR 261, 555 P.2d 1061).

- No blood found on Glossip's money (Justin Sneed's money had blood on it).

*See* Court's Exhibit 2, Stipulation of Melissa Keith at p. 3. Notably, the money (\$1757) found on Glossip's person when he was arrested was found to be clean (“Item 54, money taken from Richard Glossip, was examined, and blood was not observed.”)

- Denominations were not similar (Glossip's was mostly 100s, while Sneed's was mostly 20s.)
- The amount of money is only significant because of Justin Sneed's testimony (exact amount he stole, he split half with Glossip).

The Oklahoma Court of Criminal Appeals held in *Pink v. State* that evidence regarding Pink's knowledge about how much money the victim would have been carrying on the night of the robbery was inadequate corroborating evidence because it did not tend to connect Pink to the robbery, **absent the testimony of the accomplice**. *See* *Pink v. State*, 104 P.3d 584, 591-92 (2004) (emphasis added).

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<sup>2</sup> As noted above, the only independent evidence is Glossip obtaining the money from other sources.

- Sneed initially informed police he had stolen a higher amount of money (\$5000) but then lowered it to \$4000 after Det. Bemo questioned the \$5000 amount. (See Jan. 14, 1997 Police Interrogation of J. Sneed, at p. 37:5-14 – snippet on p. 7).

Jan. 14, 1997 Interrogation by Police of Sneed:

BY MR. BEMO: How much money did you get?

BY MR. SNEED: Like about \$1900. \ I mean, he told me that the guy was sitting on like 7,000 but it only come up to being a little less than five, I think.

BY MR. BEMO: 5,000?

BY MR. SNEED: No. A little less than four, right at four.

BY MR. BEMO: Right at 4,000. So

**C. Evidence Shows Barry Van Treese Picked Up \$2848 on Jan. 6<sup>th</sup>, Much Less than the \$4000 Justin Sneed Told Police He Stole from Mr. Van Treese**

- Existing motel financial records and fact witness statements to police on January 7-9, 1997, show Mr. Van Treese actually picked up substantially less money (\$2848 v. \$4000) than what Sneed told police and testified to.

- i. **\$2877 - Billye Hooper's statements to police on January 9, 1997 after looking at the motel financial records (daily reports)** (See Detective Cook's Police Report – snippet below)

Billye said that before she left for the day, Barry had him the money. She said that later after Barry's body was discovered was asked by Cliff to run a tally on how much money Barry had. She said that **if the dailies were correct**, she figured **\$2877**.

- ii. **\$2855 - Cliff Everhart's statements to police on January 7, 1997:** (See Officer Julie Wheat's Police Report – snippet on p. 8)

AT WEOKIE CREDIT UNION AND STEADMAN HAD BEEN ADVISED BY BANK EMPLOYEES THAT VICTIM'S CAR WAS IN THE LOT AT 0730 WHEN THEY ARRIVED. VICTIM HAD SPENT THE NIGHT AT THE MOTEL, WHICH HE OWNS, AND HAD A LARGE AMOUNT OF CASH, AT LEAST \$2855.00, IN HIS POSSESSION. STEADMAN ADVISED VICTIM'S CAR WAS UNLOCKED. HE HAD GOTTEN INTO IT TO ATTEMPT TO FIND SOME I.D. INSIDE, FINDING A BEST BUDGET RECEIPT. THE SECURITY GUARD HAD THE MAINTENANCE MAN CHECK ALL THE ROOMS TO ENSURE VICTIM WASN'T INSIDE. SGT. WHEAT BRIEFLY THIS MAINTENANCE MAN, BUT NOTICED NOTHING UNUSUAL FROM A DISTANCE.

iii. **About \$3000 - Richard Glossip's initial statement to police on January 7, 1997:** (See Officer Tim Brown's Police Report 3 – snippet below)

AT 2100 HRS., I SPOKE AGAIN WITH MR. GLOSSIP ABOUT VICTIM VANTREESE AS I WAS STILL CHECKING IN THE AREA FOR HIM. AT THAT TIME MR. GLOSSIP ADVISED ME THAT THE LAST TIME HE SAW VICTIM VANTREESE WAS AT 2000 HRS., 1/06/97, AS HE WAS LEAVING FOR TULSA, AND THAT VICTIM VANTREESE HAD JUST PICKED UP ABOUT \$3,000.00 IN CASH FROM HIM.

iv. **\$2848.65 - The motel daily reports from January 1-6, 1997**

These daily reports showed a total of \$3100.69 collected by the motel - \$252.24 (amount of payments made with credit cards) = \$2848.45 which would represent the at most total amount of cash picked up by Barry Van Treese.

- **Why this Matters:** If Sneed only picked up at most \$2848, and he took \$1900, then that left Glossip with \$948, which is contradicted by Sneed's statement/testimony that Glossip took half of the money Sneed stole from Mr. Van Treese.

**D. Glossip made \$15,371 net in a year and had \$0 in rent/utilities**

- Glossip's rent was covered by the motel. So he only had to pay for food and personal spending. He could have easily had small amounts of savings.

From 1996 Motel Financial Records: Glossip's Payroll

1st Qtr.	\$ 4,500.00	\$ 344.28	\$ 240.00	\$ 72.84	\$ 657.12	\$ 3,842.88
2nd Qtr.	\$ 4,500.00	\$ 344.28	\$ 240.00	\$ 72.84	\$ 657.12	\$ 3,842.88
3rd Qtr.	\$ 4,500.00	\$ 344.28	\$ 240.00	\$ 72.84	\$ 657.12	\$ 3,842.88
4th Qtr.	\$ 4,500.00	\$ 344.28	\$ 240.00	\$ 72.84	\$ 657.12	\$ 3,842.88
<b>Year End Total =</b>	<b>\$ 18,000.00</b>	<b>\$ 1,377.12</b>	<b>\$ 960.00</b>	<b>\$ 291.36</b>	<b>\$ 2,628.48</b>	<b>\$ 15,371.52</b>



## Accounting

\$429.33 paycheck [note: says 1996 but it was an error by Barry Van Treese]

--\$42.93 (10% fee @ National Check Cashers)

--\$172 (for Glossip's eye glasses at 20/20 Optical – provided by D-Anna Wood on Jan. 20, 1997)

--\$107.73 (from Lorain's Jewelry – provided by D-Anna Wood on Jan. 20, 1997)

--\$45 (misc @ Walmart – provided by D-Anna Wood on Jan. 20, 1997)

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\$61.67 left from Jan. 6<sup>th</sup> paycheck

Amount from vending machine sales (per Ken Van Treese's and Glossip's testimony, *see* below)

\$61.67 (remaining after Jan. 7<sup>th</sup> purchases from Jan. 6<sup>th</sup> paycheck)

\$150-\$200 (for vending machines back to motel – per multiple witnesses' testimony)

\$190 (TV and futon) - note: possible \$900 for big screen tv or all items sold per Cliff Everhart interview notes (Box 8)

\$100 (fish tank per Cliff Everhart testimony)

\$150 (from Pursleys for loaned rent money)

\$100 (for two days' work pro-rata per Ken Van Treese testimony)

Amount of savings from prior months<sup>3</sup>

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801.67 +

Amount from vending machine sales (per Ken Van Treese's and Glossip's testimony)

If you have two-three vending machines of 354 cans each, and charging \$.75 each can = range of

\$531 (for two vending machines) -\$796.50 (for 3 vending machines)

801.67 + 796.50 = \$1598.17. Note: That would leave \$158.33 from any savings.

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<sup>3</sup> In her second police interview, D-Anna Wood told police that while they were sitting in the Waffle House after Wal-Mart, Glossip mentioned to her that he had some money. He had been saving it in a cookie jar. He did not tell her how much, and did not show her any. Wood also stated they lived paycheck to paycheck as far as she knew, but that Glossip generally kept her "in the dark" about their finances. January 24, 1997 Police Report of B. Cook, Interview of D-Anna Wood, at p. 1.

Lawrence K. Hellman  
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March 12, 2023

David E. Weiss,  
Attorney at Law  
ReedSmith LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94117

Re: Independent Investigation of State v. Richard E. Glossip

Dear Mr. Weiss:

This is in response to your request for my professional opinion regarding two issues of concern to the Independent Counsel (“IC”) reviewing the fairness and integrity of Oklahoma’s prosecution and conviction of Richard Glossip, including post-conviction proceedings, namely:

- (1) Did then-Governor Frank Keating’s letter of May 1, 1997, to Oklahoma County District Attorney Bob Macy urging him to use “maximum effort” in seeking the death penalty for “those responsible for [Barry Van Treese’s] murder soon after Richard Glossip had been charged with that murder improperly affect Glossip’s prosecution?
- (2) Should Judge Robert Hudson of the Oklahoma Court of Criminal Appeals (“OCCA”) have recused himself from participating in Glossip-related matters brought before the OCCA after his appointment in March of 2015? Should he at least have disclosed his previous professional association with Connie Pope Smothermon in proceedings where Ms. Smothermon’s conduct was at issue? Did he and the OCCA properly respond to Glossip’s request for the recusal of his law clerk, Seth Branham?

### **Summary**

Based on information currently available, Governor Keating’s letter on its own was a permissible communication that presented no legally cognizable concerns related to the professional conduct of prosecutors who were involved with the Glossip prosecution at any stage. While it is conceivable that the letter spawned other communications at the beginning or later stages of the Glossip prosecution that would raise questions about prosecutorial decisions that have been made along the way, without evidence that such conversations took place or knowing their content there is presently no basis for viewing Keating’s letter as having had an inappropriate effect on the prosecution.



Judge Hudson’s failure to recuse from OCCA proceedings in matters in which the prosecutorial conduct of Connie Pope Smothermon was at issue presents a closer question. At a minimum, he should have timely disclosed his prior professional association with Ms. Smothermon and carefully considered a subsequent motion to recuse if one were filed, but his failure to make a disclosure precluded any such motion from being filed. Further, Hudson and the OCCA as a whole inadequately responded to Glossip’s request for the recusal of Hudson’s clerk, Seth Branham. Consequently, the court’s consideration of Glossip’s 2022 successive applications for post-conviction relief is suspect and its rulings on those applications are of questionable authority.

### **1. Governor Keating’s letter of May 1, 1997, to DA Bob Macy<sup>1</sup>**

Governor Keating “urge[d]” DA Macy “to pursue this case with maximum effort. . . .” He told Macy that, “[t]hose responsible for [Barry Van Treese’s] murder should, upon conviction, be sentenced to death.” Though written on official gubernatorial letterhead, the letter indicates that Governor Keating had a *personal interest* (as opposed to an official interest) in there being a vigorous prosecution resulting in capital punishment for the perpetrator(s) of Barry Van Treese’s (“BVT’s”) murder. This can be seen in Keating’s statement that it was a letter from a longtime *personal friend* that had motivated him to contact Macy and urge him to pursue the death penalty in connection with BVT’s murder. That personal friend was Ken Van Treese (“KVT”), the murder victim’s brother. Keating’s personal interest in the case was further emphasized when he urged Macy to “bring justice to [BVT’s] family . . . .”

Notably, although at the time Keating sent his letter it was widely known that Richard Glossip and Justin Sneed had been arrested and formally charged with BVT’s murder; Keating’s letter mentioned neither by name.

#### **a. Was it improper for Keating to write the letter and send it to Macy?**

Keating’s letter was protected by the First Amendment. He was writing to an elected public official concerning a matter of public interest in which he had a personal interest. The letter by itself does not ask or pressure Macy to prosecute a specific person, nor does it ask Macy to do anything improper or beyond the scope of a DA’s well-recognized prosecutorial discretion.

There is nothing from the current record to suggest that Keating had leverage over Macy with which to pressure him to exercise his prosecutorial discretion in a manner with which he disagreed.<sup>2</sup> In general, a District Attorney is in no sense accountable to the Governor. Unlike in

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<sup>1</sup> Governor Keating’s letter is included as Attachment A.

<sup>2</sup> Although the governor has a role in the legislative process that sets district attorneys’ budgets, his power is checked by the Legislature.

the federal system,<sup>3</sup> I am aware of no laws, regulations, or even norms (at least in Oklahoma) that restrict the right of a sitting governor to communicate his or her opinions or desires to elected district attorneys, whether related to general matters or specific investigations or prosecutions.

Based on facts currently known, there is no information upon which I can conclude that it was improper for Keating to write the letter and send it to Macy.

**b. Did Keating’s letter create a “personal interest” conflict for Macy?**

Even though there is no current basis to conclude it was improper for Keating to send the letter to Macy, it is necessary to consider whether the *source* and *content* of the letter might have caused Macy to abuse his prosecutorial discretion in a manner that violated his constitutional, legal, or ethical responsibilities. I understand the IC’s concern to be whether the letter might have led Macy, as well as his subordinates and successors, to justify or rationalize charging Glossip with Murder I and seeking the death penalty against him – regardless of considerations that, but for the letter, might have led to a lesser charge, a recommendation for a less severe sentence, or even a fresh evaluation of the evidence resulting in dismissal of the charges against Glossip.

Putting this concern in terms of legal ethics and the professional responsibilities of prosecutors in the American/Oklahoma criminal justice system, and using the terminology of the Oklahoma Rules of Professional Conduct (“ORPC”),<sup>4</sup> the question is whether Keating’s letter created for Macy a “personal interest” that might have “materially limit[ed]” his representation of the State in the Glossip prosecution.<sup>5</sup> The “material risk” to Macy’s client, the State, would be that he would fail to exercise his prosecutorial power and discretion *disinterestedly*, that is, with no consideration of how his decisions might affect him personally. The United States Supreme Court has long held that, in exercising prosecutorial discretion, a prosecutor’s *sole* interest must be the *public* interest.<sup>6</sup> If Macy’s job security or career success depended on Keating’s approval, the letter theoretically might have caused Macy’s decisions to be influenced by his desire to gain Keating’s approval, rather than by what he objectively considered to be in the public interest. However, as noted in Section 1. a., there is no information suggesting that Macy’s professional success was in any sense dependent on Keating’s approval. Thus, there is currently no basis to conclude that the

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<sup>3</sup> See Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction From the President?*, 87 Fordham L. Rev. 1817, 1853 & n. 156 (2019): “The DOJ [which includes U.S. Attorney Offices] has adhered to norms and regulations designed to protect prosecutorial independence from White House interference since Watergate.”

<sup>4</sup> Oklahoma Rules of Professional Conduct (“ORPC”), 5 O. S. Ch. 1 - App. 3-A. From time to time, the ORPC are amended by the Oklahoma Supreme Court. This report will refer to the provisions in place at the time of the conduct being evaluated.

<sup>5</sup> “A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, *or by the lawyer’s own interests*[.]” *Id.* Rule 1.7(b) (as it was worded from January 1, 1988, through December 31, 2007) (emphasis added).

<sup>6</sup> *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803-04, 807 (1987).

letter had this effect of creating for Macy a personal interest that affected his prosecutorial decision making.<sup>7</sup>

Furthermore, Keating's was but one of several letters Macy received regarding the case and the appropriate punishment in the event of a conviction. There is no available evidence that Macy even read Keating's letter, was aware of it, thought about it, or discussed it with anyone. Nor is there any available evidence tending to show that Keating's letter distorted Macy's decision-making in the Glossip case. Even before he received Keating's letter, Macy had already charged Glossip with Murder I and had personally signed the bill of particulars setting the prosecution up to be a death case. While Keating's letter might have influenced Macy's (or his successor's) decision not to withdraw the bill of particulars, or to be less lenient in plea negotiations, there is no evidence to that effect from which to draw any conclusion.

To be sure, there are cases where a prosecutor's personal interest has been found to be so strong as to disenable the prosecutor to exercise prosecutorial discretion in an objective, disinterested manner. One such case involved DA Macy himself. In 2000, while Macy was leading the State prosecution of Terry Lynn Nichols for his role in the Oklahoma City Bombing, an Oklahoma County District Court disqualified him from participating further in the case.<sup>8</sup> Macy's disqualification was premised on the court's finding that he had developed an almost obsessive identification with those families of the victims of the bombing who wanted Nichols to be executed. After a daylong evidentiary hearing, the district court found that Macy's identification with those families had caused, and could be presumed to continue to cause, him, consciously or unconsciously, to use the Nichols's prosecution to serve his own personal interest rather than the public interest.<sup>9</sup> The OCCA affirmed the district court's order.<sup>10</sup> In the Glossip prosecution,

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<sup>7</sup> Macy held an elective office. It is conceivable that he might have calculated that in order to have Keating's support (or at least to avoid Keating's opposition) it would be politically prudent for him to handle the Glossip prosecution in a manner that would be pleasing to Keating. However, I am aware of no evidence to suggest that Macy made this calculation. In any event, a criminal justice system utilizing elected district attorneys accepts the risk that consideration of prosecutors' personal political interest will influence prosecutorial decisions of all types. There are influential professional guidelines that seek to discourage prosecutors from taking political considerations into account when exercising prosecutorial discretion. *See, e.g.*, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.7(f) (AM. BAR ASS'N 2015) ("The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships."). However, the opacity of prosecutorial decision making renders these guidelines virtually unenforceable. Because I am aware of no evidence that Keating's letter caused Macy to make inappropriate politically influenced decisions in the Glossip case, there is, at least currently, nothing more than speculation to suggest that it did.

<sup>8</sup> State v. Nichols. Case No. CF-99-1845 (District Court of Oklahoma County, Linder, J. ), Order signed Nov. 6, 2000.

<sup>9</sup> *Id.* The *Nichols* case illustrates four points that are relevant to the evaluation of Keating's letter. First, it is possible for a prosecutor's personal interests in a prosecution to be disqualifying and, presumably, if not caught before a verdict, such a conflict can result in the reversal of a conviction. Second, the source of a personal interest conflict can come from within the prosecutor herself or from an external influence. Third, to be disqualifying, a personal interest must be intense, powerful, beyond the normal human interests prosecutors bring to their work. Fourth, there must be clear evidence that the personal interest exists, even if the prosecutor is unaware of it.

<sup>10</sup> A published opinion from the OCCA cannot be located.

however, I have seen no evidence that Keating’s letter, even though it expressed empathy for his friend, KVT, led Macy to see himself as if he were related to the murder victim so as to acquire a personal stake in the outcome. Significantly, whereas the evidence in the Nichols case showed that, over a considerable period of time (and even after a gag order had been imposed restricting public comment), Macy had made numerous passionate public statements demonstrating his personal animus toward Nichols that were likely to heighten public condemnation of the accused, there is no record of public comment by Macy regarding Glossip.<sup>11</sup>

In an earlier expert opinion related to the Glossip case, I cited evidence that suggested that the Oklahoma County District Attorney’s Office engaged in several types of prosecutorial misconduct in Glossip’s prosecution.<sup>12</sup> However, while it may exist, I have seen no evidence suggesting that any of that prosecutorial misconduct occurred because of Keating’s letter to Macy in 1997. Where there is evidence of prosecutorial misconduct, such as *Brady* violations, document destruction, and violations of sequestration orders, it is of little moment whether the misconduct happened because of a conflict of interest or not. That evidence standing on its own should warrant corrective action regarding a conviction, including vacating convictions where such serious constitutional violations have been demonstrated.<sup>13</sup>

Based on the evidence currently available to me, it is my opinion that Governor Keating’s May 1, 1997, letter to DA Macy on its own did not create for Macy a personal interest that was substantially likely to material affect his exercise of prosecutorial discretion in the Glossip case.

**c. Did Keating’s letter have “follow-on” effects after Macy’s retirement in 2021 that improperly affected prosecutorial decisions in the Glossip case?**

I have reviewed evidence that paints a troubling picture of the degree of involvement and influence that KVT had in the Glossip prosecution – especially in the 2004 re-trial. That evidence should be evaluated to determine if the ADAs who handled the case committed

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<sup>11</sup> At the time Keating’s letter was sent, the phrase “bring justice to the families of murder victims” was being used publicly by both Keating and Macy that could be interpreted as code to convey the view that families of murder victims only “receive justice” when the perpetrator of their family member’s murder is convicted, sentenced to death, and executed. Because Keating’s letter implored Macy to “bring justice” to the family of BVT, it is conceivable that an intensive fact investigation would uncover evidence indicating that the letter led Macy to an excessive identification with the Van Treese family as he was found to have required his disqualification in Nichols. At present, however, I am aware of no evidence of this.

<sup>12</sup> My earlier opinion is included in Reed Smith’s Fourth Supplemental Report (dated October 16, 2022) of its ongoing independent investigation, available at <https://www.reedsmith.com/en/news/2022/10/reed-smiths-glossip-investigation-supplemented-ethics-prof-responsibilities>.

<sup>13</sup> In my years of studying the causes of wrongful convictions in Oklahoma and beyond, I have come to believe that prosecutors who commit misconduct rarely, if ever, require encouragement from outside the office to do so. This is certainly the record of the Oklahoma County District Attorney’s Office under Bob Macy. *See* Defendant’s Motion for Sanctions for Violations of the Court’s Gag Order and To Disqualify the Oklahoma County District Attorney’s Office, *State v. Nichols*, Oklahoma County District Court, Case No. CF-99-1845 (April 25, 2000) at 3-7 (containing eleven (11) examples of judicial rebukes directed at Mr. Macy and his office, none of which was attributed to the operation of a conflict of interest). An excerpt from this motion is included as Attachment G.

constitutionally cognizable prosecutorial misconduct that taints Glossip's conviction. If asked, I would be pleased to evaluate KVT's involvement in Glossip's prosecution in a separate report. At present, although it may exist, I am aware of no evidence that the outsize role that the DA's office gave to KVT was due to Keating's letter to Macy or any communications about it by Macy to his successor, Wes Lane, or any ADA in the office.<sup>14</sup>

## **2. Recusal questions related to Judge Hudson**

### **a. Background**

Judge Robert Hudson was appointed by Governor Mary Fallin to the Oklahoma Court of Criminal Appeals ("OCCA") on March 11, 2015. Earlier in his career, in 1996, Governor Frank Keating appointed Hudson to fill an unexpired term as District Attorney for Payne and Logan Counties. In June 1996, Hudson hired a new law school graduate, Connie Pope (now Smothermon), to serve as an assistant district attorney in the Logan County branch of his District Attorney's Office. I understand that, at that time, there was only one additional ADA working under Hudson in the Logan County branch office.<sup>15</sup> That was Richard Smothermon, who had been hired by Hudson's predecessor just shortly before Hudson's appointment. Hudson went on to be re-elected four times as DA for Payne and Logan Counties, serving in that position until 2011. Pope and Smothermon, however, transferred to the Oklahoma County District Attorney's Office around 1999 and subsequently married. Richard Smothermon was elected to serve as District Attorney for Lincoln and Pottawattamie Counties beginning in January 2005, a position in which he served until January 2021.

### **b. Glossip-related proceedings before the OCCA since Hudson's appointment**

Glossip's retrial in 2004 ended with a conviction for Murder I and a death sentence. On direct appeal, the OCCA affirmed on a 3-2 vote, with one of the judges who voted to affirm writing

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<sup>14</sup> It is worth noting that, in 2001, a few months before the OCCA reversed Glossip's initial conviction that had resulted from his 1998 trial, Macy resigned as Oklahoma County DA and Governor Keating appointed Wes Lane as his hand-picked choice to succeed him. As far as I know, at the time of Lane's appointment, neither Keating, Lane, nor KVT would have known that the OCCA was about to reverse the conviction obtained by Macy's office. However, the reversal in this timeframe meant that Macy's successor would be tasked with deciding whether to retry Glossip and, if so, what charges to pursue and trial strategy to employ in the retrial. Lane did go forward with a retrial of Glossip on a Murder I charge. The retrial took place in 2004, under Lane's leadership. Glossip was once again convicted and sentenced to death. Given Keating's friendship with KVT and the sentiments he expressed in his 1997 letter to Macy, it is conceivable that Keating may have discussed the Glossip prosecution with Lane before or after Lane's appointment and, in so doing, encouraged Lane to see to it that Keating's friend, KVT, was satisfied with the efforts undertaken in the retrial. However, I am aware of no evidence that Keating discussed Glossip's re-prosecution or KVT's interest in it with Lane at any time. Further, it is unclear that any such discussion would have been improper. I mention this chain of events only to suggest that if Keating's friendship with KVT and his resulting interest in the Glossip case created a personal interest conflict for an Oklahoma County DA, it is as likely that Keating compromised Lane's disinterestedness as it is that he compromised Macy's.

<sup>15</sup> There are currently only two (2) ADAs in the Logan County branch office, although there is one open position. Telephone call with Debra Vincent, First Assistant District Attorney for Logan County, March 8, 2023.

a concurring opinion.<sup>16</sup> A major issue in the direct appeal was alleged prosecutorial misconduct (allegedly improper use of demonstrative exhibits during trial) by the State’s prosecutors, Connie Pope Smothermon and Gary Ackley. The affirmance on direct appeal was handed down on April 13, 2007. Glossip then filed an application for post-conviction relief alleging, *inter alia*, additional prosecutorial misconduct (allegedly improper comments to the jury) by Connie Pope Smothermon. The OCCA denied this application in December 2007.<sup>17</sup> In 2015, Glossip filed a successive application for post-conviction relief. This was the first Glossip-related matter to come before the OCCA after Hudson joined the court.

The successive application was denied by the OCCA on a 3-2 vote, with two of the judges who voted with the majority filing concurring opinions.<sup>18</sup> One of the concurring opinions was issued by Judge Hudson.<sup>19</sup> In his concurring opinion, Hudson drew from the OCCA’s denial of Glossip’s direct appeal in 2007, in which the court had rejected Glossip’s argument that was based on allegations of prosecutorial misconduct by Smothermon and Ackley. Therefore, although Hudson was not on the court in 2007, his concurring opinion in 2015 shows that he was aware of and considered the record that was before the court in 2007.<sup>20</sup>

In 2022, Glossip filed with the OCA two additional applications for post-conviction relief. The second of these raised yet another claim of prosecutorial misconduct by Connie Pope Smothermon (violation of sequestration order and *Brady* violations). This claim was based on evidence that had only been discovered in 2022 after apparently having been wrongfully withheld by the State during Glossip’s trial, direct appeal, and all of his previous applications for post-conviction relief. Hudson participated in the OCCA’s consideration and unanimous denial of Glossip’s 2022 successive applications for post-conviction relief, including those portions of one application that addressed the conduct of Connie Pope Smothermon.

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<sup>16</sup> Glossip v. State, 2007 OK CR 12, 157 P.3d 143 (2007).

<sup>17</sup> Glossip v. State, Case No. PC 2004-978, OCCA Unpublished Opinion Denying Post-Conviction Relief (Dec. 8, 2007).

<sup>18</sup> Glossip v. State, Case No. PCD-2015-820, OCC Opinion Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing, Motion for Discovery And Emergency Request for Stay of Execution (Sept. 23, 2015).

<sup>19</sup> *Id.* at 13.

<sup>20</sup> Later in 2015, Glossip requested a rehearing of the OCCA’s denial of his second application for post-conviction relief, but this was denied.

### **c. Understanding and interpreting the Oklahoma Code of Judicial Conduct**

Since he took his seat on the OCCA, Hudson has been subject to the Oklahoma Code of Judicial Conduct,<sup>21</sup> as promulgated by the Oklahoma Supreme Court.<sup>22</sup> The public’s trust and confidence in the fairness and impartiality of the judicial system – and in the rule of law itself – depends on the *voluntary, non-begrudging* compliance of all judges with the rules set forth in the Code.<sup>23</sup> The rules set forth in the Code are “not intended as an exhaustive guide for the conduct of judges . . . .”<sup>24</sup> Like the Rules of Professional Conduct for lawyers, they set minimum standards that judges should strive to exceed.<sup>25</sup> They are meant to guide judges to conduct their judicial and personal lives in a manner that will justify the public’s confidence that our judiciary is fair and impartial.<sup>26</sup> Fairness and impartiality in fact are insufficient to achieve that goal; there must also be the *appearance* of fairness and impartiality,<sup>27</sup> as perceived by reasonable observers.<sup>28</sup> Indeed, judges are *required* to “avoid impropriety and the appearance of impropriety.”<sup>29</sup>

With these principles in mind, I will address the questions raised by the Independent Counsel.

### **d. Should Judge Hudson have recused from participation in Gossip-related matters in which the prosecutorial conduct of Connie Pope Smothermon was at issue?**

Rule 2.11(A) in the Oklahoma Code of Judicial Conduct provides the framework for determining when a judge should not sit on a case. It is stated in mandatory terms: “A judge *shall* disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.”<sup>30</sup> This overriding standard embodies the policies and principles discussed in the

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<sup>21</sup> Oklahoma Code of Judicial Conduct (“Code”), 5 O.S. Chpt. 1, App. 4. Provisions of the Code that are most relevant to this analysis are included in Attachment B.

<sup>22</sup> In re: Oklahoma Code of Judicial Conduct, 2010 OK 90, 285 P.3d 1080.

<sup>23</sup> Code, Preamble, para. [1].

<sup>24</sup> *Id.* Preamble, para. [3].

<sup>25</sup> *Id.* Scope, para. [4].

<sup>26</sup> *Id.* Preamble, para. [2].

<sup>27</sup> *Id.* Canon 1 and Rule 1.2.

<sup>28</sup> *Id.* Canon 1, Comment 5. Of course, the rules of the Code should not be interpreted so as to prevent the judiciary from functioning efficiently, as well as fairly and impartially.

<sup>29</sup> *Id.* Canon 1 and Rule 1.2. “*Actual improprieties* include violations of law, court rules or other specific provisions of this Code. The test for *appearance of impropriety* is whether the conduct would create in *reasonable minds* a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.” *Id.* Canon 1, Comment [5] (emphasis added).

<sup>30</sup> *Id.* Rule 2.11(A) (emphasis added).

previous section, which must be considered when considering how Rule 2.11(A) applies to specific situations. That is, judges must consider the purposes of the Code when considering whether Rule 2.11(A) requires their recusal in a particular proceeding. They should ask themselves: “Is it necessary for me to recuse from this proceeding in order to ensure there will be public confidence that the outcome was determined by a fairness and impartial tribunal.” Note that the touchstone is *public confidence*. Of course, the parties to the proceeding must have confidence, too. Thus, Rule 2.11(A)’s standard must be complied with in order for both the parties *and* the public to accept that the result was reached in accordance with the rule of law and is deserving of respect.

In considering whether there are facts and circumstances that would lead the parties and the public to *reasonably* question a judge’s impartiality, an *objective* analysis is contemplated. The outlook of a cynic is inappropriate. The leading treatise on judicial ethics puts it this way:

“The test for an appearance of partiality is meant to be an objective standard, that is, whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial. This is objective in the sense that the standard is filtered through the eyes of a reasonable observer, rather than through the subjective view of the judge in question or a party or lawyer appearing before the judge. This standard calls for disqualification when objective appearance casts reasonable doubt upon impartiality even though the judge in question subjectively feels that he or she can act fairly and even-handedly.”<sup>31</sup>

Rule 2.11(A) includes a *non-exclusive* list of circumstances when this objective test is conclusively presumed to require disqualification. However, the Code emphasizes that the overriding question as to whether a judge’s impartiality reasonably can be questioned must be asked even when one of the listed circumstances does *not* exist.<sup>32</sup>

Based on the foregoing, it is my opinion that Rule 2.11(A) more likely than not required Judge Hudson to recuse from the OCCA’s consideration of Glossip’s 2015 and 2022 successive applications for post-conviction relief. I have used the phrase “more likely than not” at this time because facts exist, though presently unknown to me, that could tip the question one way or the other.

The matters before the court squarely alleged prosecutorial misconduct on the part of Connie Pope Smothermon, a lawyer whom Hudson may be assumed to have mentored at the very beginning of her career as a prosecutor. While Hudson and Smothermon were not professionally

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<sup>31</sup> James H. Alfini, Steven Lubet, Jeffrey M. Shaman & Charles Gardner Geyh, *Judicial Conduct and Ethics* 4-11 (4<sup>th</sup> ed. 2007) (citations omitted).

<sup>32</sup> “Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.” Code, Rule 2.11 Comment [1].



associated at the time of her alleged misconduct,<sup>33</sup> as her very first mentor as a prosecutor, Hudson's professional reputation, ego, and personal relationship with Smothermon were likely at stake in these applications. By rejecting Glossip's applications for an evidentiary hearing and post-conviction relief, the OCCA (and Hudson) prevented Smothermon's professional conduct from being judicially examined and subjected to public scrutiny. Yes, if there had been an evidentiary hearing, the alleged misconduct might be disproved. But it is also true that such a hearing might have established that she *did* commit prosecutorial misconduct, and that would be spread on the record. None of the judges on the OCCA, including Hudson, could have known what the facts would show if it ordered an evidentiary hearing. By denying Glossip's application, the possibility of adverse findings regarding Smothermon was removed. Therefore, "an objective, disinterested observer fully informed of the relevant facts [might well] entertain a significant doubt that the judge in question was impartial."<sup>34</sup>

This is not to say that recusal is necessary whenever a lawyer appearing in a case, or whose professional conduct is at issue in a case, was once professionally mentored (perhaps years before) by a sitting judge. Such an interpretation would make the Code unworkable for both courts and law firms.<sup>35</sup> My opinion here is premised on the unique facts and circumstances of this case, some of which I must presume. Hudson was the first mentor Smothermon had as a prosecutor. He (presumably) oversaw her work at the very beginning of her career in a very small prosecutor's office. He was responsible for imbuing her with a sense of fidelity to the Rules of Professional Conduct applicable to prosecutors.<sup>36</sup> Her adherence to those Rules was clearly at issue in Glossip's applications for post-conviction relief. Thus, Hudson was being asked to review the ethical conduct of a lawyer whose ethics the judge is presumed to have played a key role in instilling. A black eye for Smothermon might also be felt by Hudson, particularly if he had a sense of pride in having trained her.

As noted above, additional facts might change my opinion, because the assumptions on which it is based, though well-founded, might be disproved.<sup>37</sup> It would be helpful to know more about the specific relationship between Hudson and Smothermon. How close were these two? Did they socialize? Are they still friends? How active was Hudson in laying the foundation for Smothermon's professional development and giving her feedback on situations implicating the Rules of Professional Conduct? Do they stay in touch?

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<sup>33</sup> Therefore, Rule 2.11(A)(6) does not apply to these circumstances.

<sup>34</sup> *Alfini et al.*, n. 31 *supra* at 4-11.

<sup>35</sup> The problem might be even more acute in smaller communities. Therefore, it would be inappropriate to interpret the Code in a manner that will lead to frequent disqualification every time a lawyer junior to the judge at the judge's former firm or law office enters an appearance and is accused by an opponent of (perhaps exaggerated) misconduct.

<sup>36</sup> See Oklahoma Rules of Professional Conduct Rules ("ORPC") Rules 5.1, 3.8, and 8.4. The ORPC are found at 5 O.S. Chpt. 4, App. 3-A. The provisions cited here establish training and supervisory responsibilities for a lawyer in Hudson's position (Rule 5.1), professional obligations exclusively applicable to prosecutors (Rule 3.8), and defined categories of misconduct that all lawyers are required to avoid (Rule 8.4).

<sup>37</sup> For example, even though the Logan County DA's Office was tiny and a satellite of the Payne County Office, it is possible that, rather than training and mentoring Connie Pope personally, Hudson had little contact with her.

Additional facts may also establish (or refute) that Hudson’s recusal was separately required by Rule 2.11(A)(1), that is, if Hudson had a personal bias<sup>38</sup> or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding before the Court. This would be true *only if* the nature of Hudson’s professional relationship with Smothermon created in him a (recognized or unrecognized) personal bias in her favor.<sup>39</sup> This Rule would become even more relevant if Hudson and Smothermon maintained a *professional or social relationship* after Smothermon left the Logan County DA’s office following her three years under Hudson’s mentorship. I am not aware of the facts that are necessary to consider the applicability of Rule 2.11(A)(1) to Gossip-related matters. Therefore, my opinion is not premised on the application of this Rule. It is my opinion that recusal was required even if none of the circumstances described by Rule 2.11(A)(1)-(6) applied. Nevertheless, there are specific and unique circumstances that justify an inquiry into the possibility that there was a professional or personal relationship between Hudson and Smothermon after Smothermon left the Logan County DA’s Office that should have led Hudson to realize that Rule 2.11(A)(1) required his recusal.<sup>40</sup> Such an inquiry would clarify whether Rule 2.11(A) also required his recusal.<sup>41</sup>

**e. Should Judge Hudson have notified counsel for Gossip and the State of his prior professional relationship with Connie Pope Smothermon?**

Although the Code presumes the existence of a disciplinary mechanism to deal with violations of its rules, its provisions are intended first to guide judges so that they do not engage in conduct warranting discipline.<sup>42</sup> Consequently, Rule 2.11(A)’s disqualification standard is

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<sup>38</sup> Bias may reflect either ill-will or favoritism toward its subject. Alfani *et al.*, supra n. 31, 4-15.

<sup>39</sup> Recent social science research into cognitive behavior has raised awareness of the concept of *unconscious bias*. That is, people may be biased even though they are not aware of it. Unconscious bias may lead a person to favor or disfavor groups or particular individuals. The fact that a person does not believe he or she is biased is not controlling. See Bruce A. Green and Rebecca Roiphe, *Rethinking Prosecutors Conflicts of Interest*. 58 B.C. L. Rev. 463, 479-484 (2017).

<sup>40</sup> I do not know whether such a relationship continued; however, this may have been the case. Hudson supervised both Richard Smothermon and Connie Pope from 1996 to 1999. Richard Smothermon subsequently was elected as District Attorney for Lincoln and Pottawattamie Counties. For a number of years, Hudson and Richard Smothermon were simultaneously members of the Oklahoma District Attorneys Association. Facts are not available to me regarding the extent of their professional or social interaction during those years or thereafter. (The IC, a former District Attorney himself, may have a sense of this.) In addition, after Richard Smothermon and Connie Pope left the Logan County DA’s Office, they were married. However, I have no information regarding the continuing relationship between Hudson and the Smothermons. If this were looked into, it could lead to facts cutting either way regarding the application of Rule 2.11(A)(1) to this recusal question.

<sup>41</sup> My opinion is *not* based on Rule 2.11(A)(6) because its terms do not apply to the circumstances of this case. That is, Smothermon was not participating in the Gossip prosecution when she and Hudson were associated with one another in the Logan County DA’s office. Therefore, the perception of bias or partiality associated with Rule 2.11(A)(6) situations does not come into play here.

<sup>42</sup> Code, Preamble, para. [3]. The Rules of Professional Conduct for lawyers are framed to operate the same way. ORPC Scope, para. [16] (“Compliance with the Rules, as with all law in an open society, depends primarily upon

meant to be considered, first, by judges on their own, regardless of whether an issue has been raised by a party or otherwise. However, the Code, authorizes judges to notify parties and lawyers coming before them of the existence of a required disqualification and to seek their consent to waive the disqualification through a remittal procedure.<sup>43</sup> Each party is given an opportunity to consult with counsel to decide whether to agree to remittal. If either party declines, the judge is prohibited from learning which party that was. In such a case, the judge must recuse.

In acknowledgement of the fact that there are many close questions as to when the Code requires a judge to disqualify himself or herself, Comment [5] to Rule 2.11 encourages judges to bring those close questions to the attention of the parties before them and their lawyers.

“A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”<sup>44</sup>

Following this guidance may provoke a recusal motion by one or both parties. The filing of such a motion requires the judge to consider it in good faith, applying the terms of the Code and the policies underlying it, as discussed above in Section 2.c. Although judges are not *required* to employ this disclosure procedure, a judge “should” employ it, because doing so furthers the confidence-preserving purpose of the Code. And, although a judge cannot be disciplined for declining to invoke this disclosure procedure,<sup>45</sup> the failure to do so risks the later discovery of facts that should have led the judge to recognize that, rather than a close question, he or she was, in fact, confronted with a mandatory Rule 2.11 recusal situation. The axiom “better safe than sorry” applies here, for a judge’s failure to recognize that recusal was required risks reversal on appeal, at significant cost to the parties and the court.<sup>46</sup> While Hudson was not

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understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.”)

<sup>43</sup> “A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.” Code, Rule 2.11(C). Note, this remittal procedure is not available if the reason for disqualification is bias or prejudice under Rule 2.11(A)(1).

<sup>44</sup> Code, Rule 2.11, Comment [5].

<sup>45</sup> “Where a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge. . . in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.” *Id.* Scope, para. [2].

<sup>46</sup> On a multi-judge court, the participation of one judge who should have recused from participating in the court’s consideration of a matter renders the court’s disposition of the matter suspect. This is because of the impenetrability

required to disclose his relationship with Pope, he should have done so, for his failure to do so prevented Glossip’s counsel from considering an investigation to determine whether was a basis in fact (as opposed to presumption) for alleging that Hudson was biased in favor of Smothermon.

**f. Did Judge Hudson and the other judges of the OCCA properly handle Glossip’s request seeking the recusal of Hudson’s clerk, Seth Branham?**

On August 22, 2022, after Glossip filed his two most recent successive applications for post-conviction release, he filed with the OCCA a “Request for Recusal of Law Clerk”<sup>47</sup> in connection with the pending applications. The request respectfully noted that one of Judge Hudson’s clerks, Seth Branham, had previously been a lawyer with the Oklahoma Attorney General’s Office, where he “represented the State against Mr. Glossip in this case . . . from [Glossip’s] first appeal in 1999 through the 2014 clemency proceedings.” The OCCA addressed Glossip’s request in an Order issued on September 1, 2022.<sup>48</sup> The Order, signed by all of the OCCA judges, including Hudson, neither granted nor denied the request. Rather, it simply declared that the OCCA follows the Oklahoma Code of Judicial Conduct and will continue to do so in this case.

In my opinion, Glossip’s request was well-founded and warranted by the demands of due process and the principles embodied in the Oklahoma Code of Judicial Conduct, as discussed in Section 2.c. In contrast, the OCCA’s Order reveals (hopefully unintentionally) an insensitivity to those demands and principles, inasmuch as the Court declined to address the request on the merits. The core purpose of the Code is “to maintain and enhance confidence in the legal system.”<sup>49</sup> The Code *requires* that judges do their judicial work and conduct their personal lives in a manner that “ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”<sup>50</sup> To assist judges in achieving this goal, the Code contains rules, both general and specific, compliance with which is calculated to achieve the Code’s core purpose. The rules most relevant to assessing the OCCA’s (and Hudson’s) disposition of Glossip’s request for the recusal of Hudson’s clerk are:

**Rule 1.2**

A judge *shall* act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety.

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of the court’s deliberative process and knowledge produced by the behavioral sciences regarding the dynamics of group decision-making. *Cf.* 12 Angry Men (MGM 1957).

<sup>47</sup> The recusal request is included as Attachment C.

<sup>48</sup> The Order is included as Attachment D.

<sup>49</sup> Code, Preamble para. [1].

<sup>50</sup> *Id.*, Preamble para [2].

## Rule 2.11

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

...

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and members of the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

## COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

If Branham were a judge on the OCCA, the rules set out above would have *prohibited* his participation in *any* Glossip-related matter. Further, if he were a judge on the OCCA and he *did* participate in Glossip-related matters, not only would he violate the Code, but any court action or decision in which he participated would violate Glossip's right to due process of law. Of course, these rules address the conduct of judges, not their clerks. Nevertheless, it is my professional opinion that a judge would violate the rules set out above by allowing (knowingly or negligently) one of the judge's clerks in Branham's position to be involved in any way with the court's work on Glossip-related matters. Moreover, such a judge would also violate the rules set out above and due process if he or she failed to require a clerk in Branham's position to be appropriately screened from all judges and other clerks who were involved in Glossip-related matters.

The Code does not set out screening procedures for recused judges or clerks. To accomplish the confidence-preserving purposes of the Code, the procedures set out in Rule 1.11 of the

Oklahoma Rules of Professional Conduct should be followed.<sup>51</sup> These procedures represent the Oklahoma Supreme Court's view of the detailed efforts that must be taken in order for a screen to be deemed effective and, thus, satisfactory to (1) prevent inadvertent misconduct by the screened or associates and (2) provide assurance to affected parties and the public that purposeful or inadvertent misconduct will not occur. In addition, to achieve the confidence-preserving purpose of the Oklahoma Code of Judicial Conduct, the screening procedures set out in the ABA's Model Rules of Professional Conduct are recommended.<sup>52</sup> Of particular relevance to the Branham

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<sup>51</sup> ORPC Rule 1.11 (b): "When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Also relevant are the Oklahoma Supreme Court's definition of "screened" and related Official Comments in the Terminology section of the ORPC:

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

### **Screened**

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

<sup>52</sup> Model Rules of Professional Conduct, Rule 1.10(a)(2):

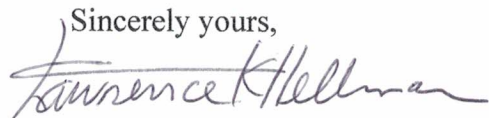
- (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
- (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
- (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

situation, those procedures would call for (1) notifying the affected party (here, Glossip) of all of the details of the screening procedure, including when the screen was established, (2) providing periodic assurances to the affected party that the screen is still in place and being adhered to, and (3) providing reasonable opportunities for the affected party to inquire or object regarding the adequacy of the procedures that have been put in place.

I have no information as to whether Branham was, in fact, recused from participating in the court's consideration of Glossip's 2022 successive applications for post-conviction relief. Nor do I have any information regarding whether, and, if so, how, Hudson and the OCCA implemented a screen to protect against any inappropriate influence by Branham on the court's consideration of Glossip-related matters, including his 2022 successive applications for post-conviction relief. I do not doubt the good faith of the judges on the OCCA. Nevertheless, by failing to address the request for Branham's recusal on the merits and assure Glossip and the public that the court had taken measures to prevent purposeful or inadvertent misconduct by Branham, the court has created a serious question as to whether the court or Judge Hudson has created an objectively recognizable appearance of impropriety or partiality. To avoid such questions, judges routinely issue an order informing the parties and the public when they recuse themselves from a matter. By not issuing an order in response to Glossip's request for Branham's recusal, the court has rendered its disposition of Glossip's 2022 supplemental applications for post-conviction relief vulnerable to distrust and constitutional challenge as a violation of Glossip's right to due process of law.

I would be happy to discuss my opinions and answer questions you may have.

Sincerely yours,

A handwritten signature in cursive script that reads "Lawrence K. Hellman". The signature is written in black ink and is positioned above the printed name.

Lawrence K. Hellman



*Frank Keating*  
Governor

May 1, 1997

Mr. Bob Macy  
Office of the District Attorney  
320 Robert S. Kerr  
Oklahoma City, OK 73102

Dear Mr. Macy, *Bob*

I recently received a most heartfelt letter from Kenneth VanTreese, a longtime friend from Tulsa. His brother Barry Alan VanTreese was viciously murdered in January, and as I am sure you are aware, your office is prosecuting the two suspects in this crime, who had been employed at Mr. VanTreese's business.

The nature of this crime -- involving as it does the brutal killing of a decent family man who was simply trying to run his business -- makes it especially vital that every possible effort be pursued to bring to justice the individuals involved. Those responsible for this murder should, upon conviction, be sentenced to death. I would urge you to pursue this case with maximum effort, not just to bring justice to a family which has suffered a terrible loss, but to send a message that says such actions are beyond the pale of a civilized society.

Sincerely,

*Frank Keating*  
Frank Keating

fak/mb

cc: Mr. Kenneth VanTreese



## Oklahoma Statutes Citationized

### Title 5. Attorneys and the State Bar

#### Chapter 1 - Attorneys and Counselors

#### Appendix 4 - Code of Judicial Conduct

#### Section Rule 1.2 - Promoting Confidence in the Judiciary

Cite as: 5 O.S. § Rule 1.2 (OSCN 2023), Appendix 4 - Code of Judicial Conduct

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### Preamble

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Oklahoma Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by this Code. This Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

### Scope

[1] The Oklahoma Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying this Code. An Application section establishes when the various Rules apply to a judge or judicial candidate.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons and Comments provide important guidance in interpreting the Rules. Where the Rules use the term "shall" or "shall not" they establish mandatory standards to which judges and candidates for judicial office will be held. The enforcement of these standards is affected through appropriate disciplinary procedures. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term "must," it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5] The Rules of the Oklahoma Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] The Rules are binding and enforceable, however, it is not contemplated that every violation of a Rule will result in imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rule(s), and should depend upon factors such as the seriousness of the violation, the facts and circumstances that existed at the time of the violation, the extent of any pattern of improper activity, whether there have been previous violations of the Rules, and the effect of the improper activity upon the judicial system or others.

[7] The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

...

## **Canon 1**

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

...

### **RULE 1.2**

#### **Promoting Confidence in the Judiciary**

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety.

#### **Comment:**

...

[5] Actual improprieties include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

...

## Canon 2

A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently.

...

### RULE 2.11

#### Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse, a member of the judge's household, or a person within the third degree of relationship to any of them, or the spouse of such a person is:

...

(d) likely to be a material witness in the proceeding.

...

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

...

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and members of the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may

participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

#### **COMMENT**

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

. . .

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

. . .

ORIGINAL



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

IN THE COURT OF CRIMINAL APPEALS  
THE STATE OF OKLAHOMA

AUG 22 2022

JOHN D. HADDEN  
CLERK

RICHARD GLOSSIP,

*Petitioner,*

v.

STATE OF OKLAHOMA,

*Respondent.*



Oklahoma County  
Case No. CF-97-256

Court of Criminal Appeals  
Direct Appeal Case No. D-2005-310

Post-conviction Case No. PCD-2004-978  
Post-conviction Case No. PCD-2015-820

No. PCD 2022-589

**REQUEST FOR RECUSAL OF LAW CLERK**

**EXECUTION SCHEDULED DECEMBER 8, 2022**

Warren Gotcher, OBA # 3495  
Gotcher & Beaver  
323 E Carl Albert Avenue  
McAlester, OK 74501  
918-423-0412  
warren@gotcher-beaver.com

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7852 S. Elati Street, Suite 201  
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Phillips Black, Inc.  
1721 Broadway, Suite 201  
Oakland, CA 94612  
888-532-0897

j.perkovich@phillipsblack.org j.mills@phillipsblack.org

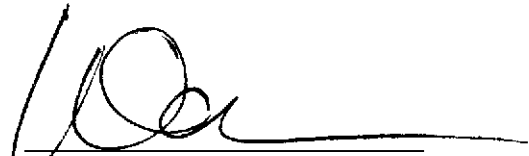
\* Temporarily Admitted

Applicant Richard E. Glossip, through undersigned counsel, submits this Request for Recusal of Law Clerk. Petitioner respectfully requests that court staff member Seth Branham have no participation in this case.

It has recently come to Mr. Glossip's attention that Vice-Presiding Judge Hudson employs as a law clerk attorney Seth Branham, a former employee of the Oklahoma Attorney General's Office. Mr. Branham personally represented the State against Mr. Glossip in this case for many years, from his first appeal in 1999 through the 2014 clemency proceedings. The Due Process Clause of the Fourteenth Amendment and Article 2, Section 6 of the Oklahoma Constitution, which guarantees that "justice shall be administered without sale, denial, delay or prejudice," both preclude the participation in this adjudication of this former assistant attorney general, as Mr. Branham's residual bias from his sustained role in Mr. Glossip's prior proceedings "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Col.*, 556 U.S. 868, 872 (2009). As *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016), provides, such an intolerable probability of bias arises when the same person once served as the State in defending a prosecution and would now serve as staff for the adjudication in a subsequent challenge to that very judgment. *In re Murchison*, 349 U.S. 133, 136-37 (1955). Further, it is well established that "even if there is no showing of actual bias . . . due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (quoted in *Fort v. State*, 2022 OK CR 12, ¶ 8).

Mr. Glossip assumes Mr. Branham realizes all this and has walled himself off from any participation in this case, but files this request out of an abundance of caution to ensure that his long-time opponent has no role in the judicial resolution of his case.


Wherefore Mr. Glossip respectfully requests that Seth Branham be recused in this matter and not discuss the case with the judges of this Court, court personnel, or, in his official capacity, the public.



Warren Gotcher, OBA #3495

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21 day of August, 2022, a true and correct copy of the foregoing Request for Recusal of Law Clerk was delivered to the Clerk of this Court, with one of the copies being for service on the Attorney General, Counsel for Respondent.



Warren Gotcher



**ORIGINAL**

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

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

RICHARD EUGENE GLOSSIP, )

Petitioner, )

v. )

THE STATE OF OKLAHOMA, )

Respondent. )

SEP - 1 2022

JOHN D. HADDEN  
CLERK

Case No. PCD-2022-589

**ORDER ADDRESSING JUDICIAL STAFF  
CONFLICT OF INTEREST**

Petitioner has filed a “request for recusal of law clerk” with this Court. Petitioner recognizes that a staff attorney employed by the Court has previously represented the State against him as an Assistant Attorney General.

As always, this Court continues to follow the Oklahoma Code of Judicial Conduct, 5 O.S.2021, Ch. 1, App. 4, in regard to conflicts and implied or actual bias of its judges and staff members. This Court ensures that staff members who have previously represented parties in criminal cases are exempt from participating in those cases while at the Court. The code of judicial conduct has been, and will continue to be, followed in this case.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

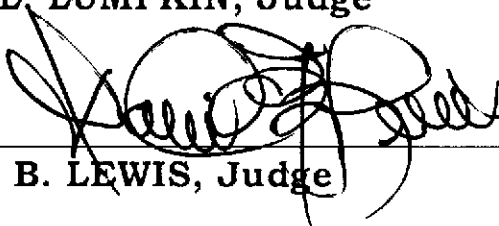
1st day of September, 2022.



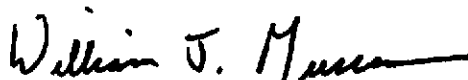
ROBERT L. HUDSON, Vice Presiding Judge



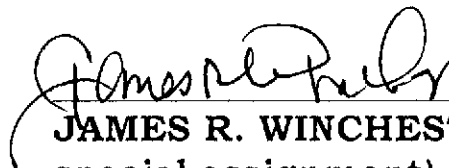
GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge



WILLIAM J. MUSSEMAN, Judge



JAMES R. WINCHESTER, Justice (by special assignment)

ATTEST:



Clerk

**LAWRENCE K. HELLMAN**  
**CURRICULUM VITAE**  
**August 20, 2022**

**EDUCATION:**

J.D., Northwestern University (1970) - 2nd Place, Hyde Prize Writing Competition (International Law).

M.B.A., Northwestern University (1967) - Distinguished Scholar; Beta Gamma Sigma.

B.S., Washington & Lee University (1966) - *cum laude*.

**BAR ADMISSION:**

Oklahoma (1970).

**PROFESSIONAL EMPLOYMENT:**

Oklahoma City University School of Law, 1977 – 2018.

- Professor Emeritus, 2018 – present
- Dean Emeritus, 2011 – present.
- Director, Center for International Programs, 2013 – 2015.
- Executive Director, Oklahoma Innocence Project, 2011 – 2015.
- Dean, 1998 - 2011.
- Professor, 1980 - 2018.
- Associate Dean, 1978 - 80.
- Associate Professor, 1977 - 80.

Washington & Lee University School of Law, 1974-1977.

- Assistant Professor, 1974-1977.

United States Department of Justice, 1970 – 1974.

- Attorney, Evaluation Section, Antitrust Division, 1970 - 74.

**COURSES TAUGHT:**

Administrative Law

Antitrust Law

Civil Procedure

Comparative Legal Ethics

Introduction to the American Legal System

Legal Profession/Professional Responsibility

Professional Responsibility in the Legal Intern Experience  
Regulated Industries  
Seminar: Selected Topics on the Legal Profession

### **INTERNATIONAL TEACHING**

Stetson University Autumn in London Program (2011, 2013)  
Beijing Normal University, Zhuhai Campus (2012)  
University of Toulouse (2012)  
Stetson University Summer Program in Buenos Aires (2009)

### **VISITING PROFESSORSHIPS**

Southern Methodist University Dedman School of Law

- Visiting Professor, Fall Semester 2020

### **PROFESSIONAL ACTIVITIES:**

American Law Institute

- Consultative Group, Restatement of The Law of American Indians, 2017 – 2021.
- Consultative Group, Restatement (Third) of the Law Governing Lawyers, 1996 - 1999.
- Elected member, 1996 - present.

American Judicature Society

- Awards Committee, 2007 – 2014.
- Program Committee, 2007 - 2008.
- National Advisory Council, 2005 - 2014.
- Board of Directors, 2003 - 2005.

Association of American Law Schools

- Committee on Libraries and Technology, 2004 - 2006.

American Bar Association

- Section of International Law Legal Education Committee, 2011 – 2018.
- Section of Legal Education and Admissions to the Bar Professionalism Committee, 2004 - 2009.
- Ethics 2000 Commission, Advisory Council, 1998 - 2002.

Legal Aid Services of Oklahoma (formerly Legal Aid of Western Oklahoma)

- Board member 1979 – 2013.

Oklahoma County Bar Association

- Professionalism Committee, 1999 - 2000.

Oklahoma Bar Association

- Rules of Professional Conduct Committee, 1992 - 2015 (co-chair 2000 - 2008).
- Disciplinary Task Force, 2002 - 2005.
- Diversity Committee, 2000 - 2003.
- Task Force on Professionalism and Civility, 1998 - 2000 (co-chair 1999).
- Legal Ethics Subcommittee on Restructuring, 1998.
- Legal Ethics Committee, 1996 - 1999 (vice-chair 1999).
- Legal Internship Committee, 1988 - 1990; 1993 - 1998 (vice-chair, 1998).

Oklahoma Fellows of the American Bar Foundation

- Elected member, 2002 - present.

Oklahoma Justice Commission, 2011- 2013.

Oklahoma Legislative Task Force on Judicial Selection, 1999 - 2000.

Ruth Bader Ginsburg American Inn of Court, Honorary Master, 1998 – present.

William J. Holloway, Jr. American Inn of Court, Honorary Master, 1998 - present.

**HONORS:**

Oklahoma Association of Black Lawyers Award for Excellence (2012)

Oklahoma County Bar Association Professional Service Award (2011).

Oklahoma City University School of Law Beacon of Justice Award (2011).

The Journal Record's Leadership in Law Award (2011).

Oklahoma Bar Association President's Award for Outstanding Service (2006).

American Bar Association Judge Edward R. Finch Law Day Speech Award, 3<sup>rd</sup> Place, (2004).

Oklahoma County Bar Association *Briefcase* Award (2003).

Ruth Bader Ginsburg American Inn of Court, President's Award for Service (2003).

Ruth Bader Ginsburg American Inn of Court, John E. Shipp Professionalism Award (2001).

Oklahoma County Bar Association President's Award for Service (1998).

Oklahoma Bar Association Award for Ethics (1998).

## **PUBLICATIONS:**

### ➤ *Monographs and Book Chapters*

CARNEGIE'S MISSING STEP: PRESCRIBING LAWYER RETRAINING, in REID MORTENSEN ET AL. EDS., REAFFIRMING LEGAL ETHICS, at 129-142 (Routledge Pub. Co. 2010).

MARKETING CONDITIONS IN SWITZERLAND (Adolf Wirz, A. G. 1968).

A GENERAL REVIEW OF THE PURCHASING ACTIVITIES OF THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO (with T. Schwegal) (1967).

### ➤ *Academic Publications*

*Chinese Scholarship and Oklahoma City University School of Law*, 36 OKLA. CITY U. L. REV. 423 (2011).

*Conceptualizing a Law School as an Integral Part of the Legal Profession*, 36 TOLEDO L. REV. 73 (2004).

*The Oklahoma Supreme Court's New Rules on Attorneys' Trial Publicity: Realism and Aspiration*, 51 OKLA. L. REV. 1 (1998).

*A Better Way to Make State Legal Ethics Opinions*, 22 OKLA. CITY U. L. REV. 973 (1997).

*When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317 (1996).

*The Effects of Law Office Work on The Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991).

*"Entrenchment" Under Section 7 of the Clayton Act: An Approach for Analyzing Conglomerate Mergers*, 13 LOY. U. CHI. L. J. 225 (1982).

*The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal, and Policy Questions*, 31 OKLA. L. REV. 509 (1978).

*Considering the Future of Legal Education: Law Schools and Social Justice*, 29 J. LEGAL EDUC. 170 (1978).

*An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered*, 65 NW. U. L. REV. 260 (1970).

### ➤ *Appreciations*

*Art LeFrancois: An Appreciation*, 42 OKLA. CITY U. L. REV. 131 (2018).

*Top O' the Day t'Ya, Professor von'Creel*, 36 OKLA. CITY U. L. REV. 515 (2010).

*The Perpetual Influence of the Master of the Rule Against Perpetuities: A Tribute to Fred Schwartz*, 35 OKLA. CITY U. L. REV. 543 (2010).

*In Appreciation of Judy Morgan*, 35 OKLA. CITY U. L. REV. 515 (2010).

*Have Intellect, Charm, Curiosity, and Courage – Will Travel: A Tribute to Norwood Beveridge*, 35 OKLA. CITY U. L. REV. 243 (2010).

*Richard E. Coulson: The Indispensable Link Between the Past and the Future of a Developing Law School*, 34 Oklahoma City U. L. Rev. 1 (2009).

*Reflections on the Career of Nancy I. Kenderdine*, 29 OKLA. CITY U. L. REV. 481 (2004).

*Memorial to Bob Lyman*, 29 OKLA. CITY U. L. REV. 5 (2004).

➤ **Commentary**

*Open Letter to the Editor: Gov. Kevin Stitt can support death penalty, still spare Julius Jones*, The Oklahoman (Nov. 14, 2021)

*State AG can right 2 wrongs*, The Oklahoman (January 6, 2021).

*MAPS thinking matures with city*, The Oklahoman (August 18, 2019).

*A case of unfinished justice*, The Oklahoman (October 2, 2015)

*Bill being considered would serve to protect criminals*, The Oklahoman (March 22, 2015).

*Exonerating the Wrongfully Convicted Should Be a Shared Responsibility*, OK Policy Blog, Oklahoma Policy Institute (October 22, 2014).

*How Many Innocent People are in Oklahoma Prisons?* The Oklahoman (September 13, 2014).

*How Law Schools Can Contribute to Public Policy on Human Rights*, Proceedings of the 2013 Annual Meeting of the International Association of Law Schools, Mysore, India (2013), available at <http://www.ialsnet.org/services/conferences/annual-meeting/>.

*At the Intersection of Curricular and Pedagogical Choices in Legal Education: Collision or Harmonious Merger?* International Association of Law Schools Conference, Buenos Aires, Argentina (April 13-15, 2011).

*What is the Role of the Dean Externally?* International Association of Law Schools, Canberra, Australia (May 27, 2009).

*Seeking a Professional I.D.*, NAT'L. L. J., March 24, 2008.

*Yom Kippur Lessons for Lawyers*, NAT'L. L. J., October 3, 2005, at 31.

*Basics of Legal Ethics Remain Constant Even as Rules Evolve*, 50 OKLA. B. J. 2567 (2004).

- **Ethical Considerations**,<sup>©</sup> (a 1200-word column published monthly from January 1986 through November 2013 in the Oklahoma County Bar Association newspaper, BRIEFCASE.)

### 2013

Jan.	Listening to Clients Is Important, Even During Appeals
Feb.	Hear No Evil, See No Evil = A Bad Plan for Lawyers
Mar.	Head in Sand Can Lead to Kick in Rear
Apr.	Lawyers, Cleanse Thy Selves
May	Those Who Cut Slack for Partners May Nick Their Own Professional Reputations
June	Forgiveness of Colleague Can Be Professionally Irresponsible
Aug.	What Does <i>Gideon</i> Mean for Legal Ethics Today I?
Sept.	What Does <i>Gideon</i> Mean for Legal Ethics Today II?
Oct.	What Does <i>Gideon</i> Mean for Legal Ethics Today III?
Nov.	What Does <i>Gideon</i> Mean for Legal Ethics Today IV?

### 2012

Jan.	The Legislature's Role in Regulating Lawyers
Feb.	The Supreme Court's Use of Legislation in Regulating Lawyers
Mar.	Stupid (But Not Funny) Lawyer Tricks
Apr.	Some Thoughts on Counseling Clients
May	Being Candid with Clients Can Be Emotionally Difficult
June	Reporting Juror Dishonesty: Duty or Discretion?
July	A Little Honesty about Dishonesty
Aug.	Making It Easier to Follow Our Better Instincts
Sept.	Better Confirm That
Oct.	Can Lawyers Be Whistleblowers?
Nov.	The Lawyer/Whistleblower: An Oxymoron?
Dec.	The Client-Lawyer Relationship during Appeals

### 2011

Jan.	Toyota's Nightmare = Ethics Professors' Dream
Feb.	Regulatory Reform for Lawyers
Mar.	Toward a More Proactive System of Lawyer Regulation
Apr.	Does Professional Self-Assessment Work?
May	Self-Interest Often Leads to Self-Deception
June	Do Ethics Rules Take Human Nature into Account?
July	Bias, Self-Interest, and Judges



Aug. The Jerk Factor: It's Getting Rough Out There  
Sept. Those Pesky "Side Effects"  
Oct. An Old Time Revival for Lawyers?  
Nov. What's the Oath Got to Do with It?  
Dec. Taking a Look at Oklahoma's Attorney's Oath

## 2010

Jan. Ethics Lessons from The Beijing Lawyers Association  
Feb. Inspiration from Courageous Chinese Lawyers  
Mar. "Torture Memos" Inquiry Demonstrates That, in Giving Legal Advice, Objectivity Can Be Elusive  
Apr. Can a Lawyer Ever Really Be Objective?  
May What Not to Do  
June Are Lawyers Their Partners' Keepers?  
July Slovenia v. USA = Bush v. Gore? Soccer Lessons for Lawyers  
Aug. Former Prosecutor's Case Focuses Attention on Purposes of Professional Discipline  
Sept. What Not to Do – Two  
Oct. Is It Professional Misconduct to Be a Creep?  
Nov. Is He Creepy, or Is He Sick?  
Dec. The Oklahoma Justice Commission: Fulfilling the Bar's Responsibility

## 2009

Jan. A Prof Who Linked Legal Education to the Legal Profession  
Feb. Should Clients Be Told of Better Representation Elsewhere?  
Mar. Lessons for Lawyers from Chinese Jaywalkers  
Apr. What's the Matter with Yoo?!  
May Lessons from the Prosecution of Senator Stevens  
June International Conference Casts Light on Role of Lawyers in Society  
July Should Disclosure of Malpractice Insurance Be Required?  
Aug. So Many Topics, So Little Time: An Avalanche of Ethics Issues  
Sept. Who's Responsible for Fixing Wrongful Convictions?  
Oct. Are Things Getting Better or Worse?  
Nov. Shortcomings by Defense Lawyers, Police, and Prosecutors Can Produce Wrongful Convictions  
Dec. Get Ready for Ethics 20/20, the Sequel to Ethics 2000

## 2008

Jan. What Lawyers Could Teach Some Doctors about Ethics  
Feb. Give Me Confidentiality or Give Me Death???  
Mar. Are Lawyers Their Clients' Keepers?  
Apr. Do You Have Your Professional I.D.?  
May Must Prosecutors Seek to Rectify Wrongful Convictions?  
June Be Nice. Or Else! Civility Becomes Enforceable

July The Lawyers and the Law Schools Should be Friends  
 Aug. An International Conference Looks at Legal Ethics  
 Sept. Looking Back From 08.08.08 to 08.08.74  
 Oct. Possible Lessons from Watergate for Today's Lawyers  
 Nov. Is Pro Bono Work "Self-Serving" and "Anti-Social"?  
 Dec. There Must Be 50 Ways for Judges to Get into Trouble

2007

Feb. Wishing the Rules Away Won't Work  
 Mar. The Duty to Speak Out  
 Apr. Conduct Unbecoming a Member of the Bar  
 May In Lawyer Advertising, It Should Be Truth or Consequences  
 June Client Trust and Public Trust: Priceless  
 July Lessons from the Duke Prosecutor's Disbarment  
 Aug. Explaining the Essence of Lawyering  
 Sept. What to Look for in New Ethics Rules  
 Oct. What to Look for in New Ethics Rules – II  
 Nov. What to Look for in New Ethics Rules – III  
 Dec. What to Look for in New Ethics Rules – IV

2006

Jan. Lawyers Should Keep Judges Out of J.A.I.L.  
 Feb. "I Love My Lawyer:" Client Testimonials in the 21<sup>st</sup> Century  
 Mar. What Does it Really Mean to Be a Lawyer?  
 Apr. Law Schools, Military Recruiters, and Legal Ethics  
 May Don't Forget that the Internet Is Not Private  
 June Courage as a Core Professional Value  
 July Competition among Lawyers Is Not Unethical  
 Aug. Lawyers Should Trade "3 Rs" for "7 Cs"  
 Sept. What Will Your Clients Say about You?  
 Oct. These Are Times that Should Try Lawyers' Souls  
 Nov. Tortured Statutory Construction May Lead to Torture

2005

Jan. What the ABA Recommended and Oklahoma Rejected (so far) on Judicial Ethics  
 Feb. Amendments to Model Code of Judicial Conduct Considered  
 Mar. In Giving Advice, Consider Collateral Consequences  
 Apr. Research on Law and Lawyering Yields Valuable Insights  
 May Week of Hope Spoke to Lawyers, Too  
 June Defending the Independence of the Judiciary  
 July Supreme Court Speaks to Prosecutors and Public Defenders  
 Aug. Confidentiality Rules Aren't What They Used to Be  
 Sept. To Disclose or Not to Disclose: That Is the Question  
 Oct. The Roberts Confirmation, Judicial Duties, and Disqualification  
 Nov. Your "First Class Ticket" to Professional Responsibility

Dec. Revamping of Legal Ethics Rules under Consideration

2004

Jan. Ethics Lessons from Rodney King and the Beatles  
Feb. Why Some Lawyers Are Disinclined to Try Cooperation First  
Mar. The Making of a Supreme Court Justice: Sandra Day O'Connor  
Apr. Bob Dylan Weighs in on Legal Ethics  
May Remembering the Real Meaning of Law Day  
June The Role of Lawyers in Preserving the Rule of Law  
July The Geneva Conventions, Abu Ghraib, and Legal Ethics  
Aug. Treat Your Clients Well, or They Will Tell  
Sept. As Maine Goes, So Goes ... Legal Ethics?  
Oct. Yom Kippur Lessons for Legal Ethics  
Nov. Stamping out Those Pesky Frivolous Claims  
Dec. Professional Responsibility Includes Attention to Judicial Ethics Rules

2003

Jan. Do the SEC's Sarbanes-Oxley Rules Go too Far?  
Feb. When Does Criticism of Judges Go too Far?  
Mar. Professional Responsibility and Legal Education  
Apr. IP Firms Do not Have Patent on Legal Ethics  
May New 9/11 Fallout: ABA's Confidentiality Rule?  
June The Ethics World of Government Lawyers  
July When Government Lawyers Discover Wrongdoing  
Aug. Knowledge of this Rule Can Keep You out of Jail  
Sept. Legal Ethics and the Law Student Debt Burden  
Oct. Is it Time to Consider Mandatory IOTA Again?  
Nov. U.S. Supreme Court Gives Mandatory IOLTA Green Light  
Dec. Mandatory IOLTA Proposal Readied for Oklahoma Supreme Court

2002

Jan. Restrictions on Out-of-State Practice May be Eased  
Feb. An Action Plan for Professionalism  
Mar. Oklahoma's Answer to MDP: Law-Related Businesses  
Apr. Certification Plans Receive Limited Recognition  
May Evidentiary Issues Have Ethical Dimensions  
June Courts Can Police Trial Conduct  
July Assessing the Perceived Malaise of Lawyers  
Aug. If You're Happy and You Know It, Are You a Lawyer?  
Sept. Lawyers and Corporate Disclosure: Back to Basics  
Oct. New Rules Due Regarding Corporate Disclosures  
Nov. New Rule Provides Guidance for Law-Related Businesses  
Dec. SEC's Proposed Rules Put Squeeze on Lawyers

## 2001

Jan.	Civil Pro 101 Applies to Legal Ethics (with V. Creel)
Feb.	Opprobrium is Sometimes Only Available Sanction
Mar.	Are Limits on Former Government Attorneys Sufficient? (with A. Spiropoulos)
April	The Bar's Odyssey: Returning to our Ideals (with D. Morgan)
May	Law Schools Want to Help Bar Improve Access to Justice
June	Lawyers Must Be Careful What They Wish For
July	Giving Independent Advice Poses Challenges (with F. Schwartz)
Aug.	Probate Practice Presents Professional Challenges (with N. Kenderdine)
Sept.	Revision of Ethics Rules May Be Nearing
Oct.	Overview of Rule Changes Proposed by Ethics 2000
Nov.	Additional Rule Changes under Consideration
Dec.	Competition and Technology Prompt more Rule Proposals

## 2000

Jan.	Search for Truth Must Be Balanced with Ethical Duties
Feb.	Sanctions for Incivility? It Can Happen
Mar.	How One Lawyer Brought Calm after the Tulsa Race Riot (with A. Brophy)
Apr.	Sanctions Imposed for Gender-Based Remarks to Opposing Counsel (with P. Hatamyar)
May	An Ethical Temptation for the Public-Interest Litigator (with D. Arrow)
June	Lawyers Providing Tax Advice Must be Realistic (with J. Temple)
July	Dealing with Perjury in a Commercial Law Context (with P. Dillon)
Aug.	The Advocate's Duty to Disclose Adverse Legal Authority: An Historical Perspective (with T. Odom)
Sept.	Counseling Debtors on Bankruptcy Options Presents Tough Ethical Issues (with R. Coulson)
Oct.	Uncivil Courtroom Behavior Can Be Costly (with M. Gibson)
Nov.	Lessons from Representing Indigents in Criminal Appeals (with B. Johnson)
Dec.	Taking Stock in Clients: Risk or Reward? (with P. Dalley)

## 1999

Jan.	Suppose Your Client Violates a Court Order
Feb.	Professional Rules are Still Evolving
Mar.	Lawyers Have Reasons to Celebrate Legal Education
Apr.	"Professionalism" and Reporting Misconduct
May	Even Lawyers Should Know They Aren't Above the Law
June	Professionalism Forums Reveal Common Theme
July	Competence May be the Most Important Issue
Aug.	Y2K May See Clarification of Client/Lawyer Relationship
Sept.	Seeking to Resolve Ethical Dilemmas for Multi-State Lawyers
Oct.	Regulating Attorneys' Comments on Judges

Nov. Regulating Judicial Election Campaigns is Difficult  
Dec. Examining the Role of the Bar in Judicial Selection Debate

1998

Jan. Legal vs. Ethical vs. Professional - I  
Feb. Legal vs. Ethical vs. Professional - II  
Mar. Sex Scandals Threaten Legal Profession Too  
May Courts Are Becoming Intolerant of “Fudging”  
June Incivility Can Sometimes Become Sanctionable  
July Beginning a Dialog on Professionalism and Civility  
Aug. Viewing Lawyers as Composers  
Sept. When is Conduct “Prejudicial to Administration of Justice”?  
Oct. New Rule 4.2 Limits Contacts with Represented Persons  
Nov. Rule 4.2’s Simplicity Can Be Deceptive  
Dec. Clinton Investigation Offers Teaching Opportunity

1997

Jan. Why Did Newt Gingrich’s Lawyer Quit?  
Feb. Conflicts Lurk Among Joint Clients  
Mar. Delay May Not Be Negligent, But It’s Not Good Either  
Apr. Learning Legal Ethics Is a Life-Long Mission  
May Avoiding the Race to the Bottom  
June What If Michael Fortier Were a Lawyer?  
July Learning from Victims of Lawyer Misconduct  
Aug. Is Distance between Rules and Ethics Growing?  
Sept. Our Firm Erred; Now What?  
Oct. Lawyers as Paparazzi: The Ethics of Media Contracts  
Nov. All’s Fair in Love & War, But Not in Litigation  
Dec. Multi-State Practice Presents Ethical Uncertainty

1996

Jan. Duties to Nonclients Must Temper Zeal  
Feb. The Ethics of Mandatory CLE  
Mar. Crime-Fraud Exception Clarifies Attorney’s Role  
Apr. Migrating Lawyer Must Think of Clients First  
May Probing the Core Issues of Legal Ethics  
June Legal Ethics Is More than Rules  
July Restatement of Law on Lawyers Takes Shape  
Aug. Restatement Takes Some Controversial Positions  
Sept. A Tale of Intimidation, Manufactured Conflicts, and Rule 11  
Oct. Sometimes Lawyers Just Have to Say “No”  
Nov. Lawyers Are Not Always Allowed to Be “Nice”  
Dec. What’s Up with Trial Publicity Rules?

## 1995

Jan.	Some Interesting Ethics Opinions from Near and Far
Feb.	When Duties Conflict, Something Must Give
Mar.	Trial Publicity: Is It Susceptible to Regulation?
Apr.-May	Bar Must Support Court-Appointed Lawyers
June	“Deadbeat Dads” and Legal Ethics
July	Who Will Look after Legal Aid Clients?
Aug.	Is It Unethical to Make a Sexist Comment?
Sept.	ABA Tinkers with some Model Rules
Oct.	You Don’t Have to Enter Appearance to Be Accountable
Nov.	When Is a Settlement Offer Unethical?
Dec.	Ethics Opinions Sometimes Spawn Confusion

## 1994

Jan.	When a Client Seeks to Subvert the Discovery Process
Feb.	Exploring the Reach of the Duty of Loyalty
Mar.	Fee Simple? Absolutely Not Anymore
Apr.	Defining the Limits of Permissible Cross-Examination
May	Read Supreme Court’s Malpractice Decision with Care
June	Some Standard Retainer Agreements May Be Flawed
July	Supreme Court Subtly Relaxes Notion of “Frivolous”
Aug.	Must Lawyer Preserve Evidence the State May Want?
Sept.	Threatening a Bar Complaint in Course of Negotiations
Oct.	Positional Conflicts: Do Clients Have a Veto Power?
Nov.	Is It Time to Look at Advertising Again?
Dec.	Government Service and Conflicts of Interest

## 1993

Jan.	Proposed New Rule 11 Concept of “Frivolous”
Feb.	Rule 11 Sanctions Process May be Altered
Mar.	Cellular Phones May Harm Your Ethics Too
Apr.	Resisting Temptation: Handling Mis-delivered Documents
May	Perils of ADR: Settlement Malpractice
June	Some Conflicts Are neither Foreseeable nor Waivable
July	New Guidance from ABA on Waiving Conflicts
Aug.	Considering the Possibility of Rehabilitation
Sept.	New Horizons for the Contingent Fee
Oct.	Loans to Clients: Time for a Change?
Nov.	Update on Taping and Accidental Disclosures
Dec.	Client Fraud: It’s More Than a Question of Ethics

## 1992

Jan.	Additional Guidelines for Regulating Temporary Lawyers
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Feb.	Tip to Avoid Fee Dispute: Get It in Writing
Mar.	Resolving Ambiguities in Attorney Fee Agreements
Apr.	Avoiding Unintended Contractual Obligations
May	Suing for Fees: Will Courts Enforce the Contract?
June	Guidelines for Determining a Reasonable Fee
July	When May Courts Adjust Fee Contracts?
Aug.	There's Room for Legal Ethics in Bankruptcy Analysis
Sept.	Four New Ethics Opinions from the ABA
Oct.	ABA Speaks Out on Sex and Criminal Threats
Nov.	OBA Considers Serious Proposal for Mandatory IOLTA
Dec.	Major Changes to Federal Rule 11 Proposed

### 1991

Jan.	Applying the Substantive Standards in Rule 11
Feb.	The Unanswered Questions under Rule 11
Mar.	Conflicts of Interest Generated by Rule 11
Apr.	Considering the Future of Federal Rule 11
May	Considering Changes in Code of Judicial Conduct
June	Proposed Rules on Judges' Adjudicative Duties
July	Regulating Non-Adjudicative Activities of Judges
Aug.	Rules Limiting Financial Activities of Judges
Sept.	The Matter of Judicial Disqualification
Oct.	Limits on Judges' Professional and Political Activities
Nov.	Guidelines for Temporary Lawyers
Dec.	Confidentiality and Supervisory Issues with Temporary Lawyers

### 1990

Jan.	Supervisory Responsibilities of Lawyers - II
Feb.	Supervisory Responsibilities of Lawyers - III
Mar.	Supervisory Responsibilities of Lawyers - IV
Apr.	Supervisory Responsibilities of Lawyers - V
May	Supervisory Responsibilities of Lawyers - VI
June	Developments on the Pro Bono Front
July	The Rationale for the Pro Bono Duty
Aug.	The Legality of Mandatory Pro Bono
Sept.	Law Schools and the Pro Bono Concept
Oct.	Contacts with an Adversary's Current and Former Employees
Nov.	Searching for Guidance in Interpreting Rule 11
Dec.	The Supreme Court Begins to Lead the Way on Rule 11

### 1989

Jan.	"Professionalism" and Reporting Misconduct
Feb.	Issues in Reporting Misconduct
Mar.	The Consequences of Not Reporting Misconduct
Apr.	The Disciplinary System: What Happens after Reporting?

May Lawyers, Sex, and Romance  
 June Problems Associated with Lawyer-Relatives  
 July Analyzing the Responsibilities of Lawyers for Organizations  
 Aug. Deciding When to Question a Corporate Officer's Decision  
 Sept. Lawyers' Options When Organization Is Disserved by Agents  
 Oct. When an Organization and Its Constituents Are Both on the Line  
 Nov. Lawyers, Lies, and Tape Recorders  
 Dec. The Supervisory Responsibilities of a Lawyer – I

1988

Jan. Complying with the Duty to Reveal Adverse Law  
 Feb. Guidelines for Lawyers' Out-of-Court Statements  
 Mar. Mandatory IOLTA? Why Not?  
 Apr. Scope of Court's Power to Regulate Lawyers  
 May A Survey of the New Ethics Rules  
 June New Rules on Client-Lawyer Relationship  
 July New Rules on Conflicts and Confidentiality  
 Aug. Special Client-Lawyer Relationships: Organizations and Impaired  
 Clients  
 Sept. Client Funds, Withdrawing, and Counseling  
 Oct. New Rules Guide Lawyer as Advocate  
 Nov. Rules Governing Relations with Non-Clients  
 Dec. New Rules on Duties to Public and Bar

1987

Jan. A Duty to Counsel?  
 Feb. Avoiding Counseling Pitfalls - Part 1  
 Mar. Counseling Pitfalls - Part 2  
 Apr. Understanding Obligation of Confidentiality  
 May The Scope of the Obligation of Confidentiality  
 June Justifications for Disclosing Confidences  
 July More Justifications for Disclosing Confidences  
 Aug. Exercising Discretion in Disclosing Confidences  
 Sept. Disclosing Confidences to Protect the Lawyer  
 Oct. Disclosing Confidences to Prevent a Crime  
 Nov. The Duty to Disclose Adverse Legal Authority  
 Dec. Reasons for the Duty to Disclose Adverse Cases

1986

Jan. Referral Fees  
 Feb. Divisions of Fees among Attorneys  
 Mar. The Regulation of Contingent Fees - Part 1  
 Apr. The Regulation of Contingent Fees - Part 2



May	Opposing a Former Client
June	Imputed Disqualification
July	Lawyer Advertising Remains Hot Topic - Part 1
Aug.	Lawyer Advertising Remains Hot Topic - Part 2
Sept.	Withdrawing from a Client
Oct.	Two Categories for Justified Withdrawal
Nov.	Frivolous Pleading - Part 1
Dec.	Frivolous Pleading - Part 2

### **PRESENTATIONS AND PAPERS:**

Organizer and moderator: “Assessing the Value of Law School Course on Professional Responsibility,” International Legal Ethics Conference 2022, Los Angeles, UCLA School of Law (August 15, 2022).

Presentation: “Legal Ethics for Government Lawyers: Some Perennial Issues,” Judicial and Legal Services Division, Oklahoma Corporation Commission, Oklahoma City, Oklahoma (May 14, 2021).

Presentation: “Does a Corporate Lawyer Have a Duty to Try to Save a Corporate Client from Itself? Knowing When to Climb the Ladder and Blow the Whistle,” Oklahoma Bar Association Section of Business and Corporate Law, Oklahoma City, Oklahoma (November 3, 2016).

Presentation: “A Proposal for Pro-active Management-Based Regulation of Prosecutor Offices,” International Legal Ethics Conference VII, New York, NY (July 14, 2016).

Organizer and moderator: “Shaken Baby Syndrome: How an Un-Validated Medical Hypothesis Leads to Miscarriages of Justice in Criminal and Family Courts,” Forensic Science Institute, University of Central Oklahoma, Edmond, Oklahoma (April 11, 2016).

Presentation: Introduction of Dr. Waney Squier of Oxford University as recipient of Champion of Justice Award, Innocence Network Annual Conference, San Antonio, TX (April 8, 2016).

Presentation: “An Overview of the Innocence Movement,” Fortune Club, Oklahoma City, Oklahoma (November 10, 2015).

Presentation: “An Overview of the Innocence Movement,” Wednesday Study Club, Nichols Hills, Oklahoma (October 21, 2015).

Presentation: “An Overview of the Innocence Movement,” Temple B’Nai Israel, Oklahoma City, Oklahoma (October 9, 2015).

Organizer and presenter: “Introduction to Professional Expectations of Law Students and Lawyers, Oklahoma City University School of Law, annually each August 2000 – 2016.

Prepared testimony opposing HB 1045, Judiciary Committee, Oklahoma Senate, Oklahoma City, Oklahoma (March 24, 2015) (not delivered but distributed as talking points).

Organizer, presenter, and moderator: “The Reality of Wrongful Convictions: Real Stories from Real People,” Rotary Club of Oklahoma City, Oklahoma City, Oklahoma (February 24, 2015).

Organizer, presenter, and moderator: “Freedom Lost: A Conversation with the Innocent,” Distinguished Speaker Series, Heritage Hall School, Oklahoma City, Oklahoma (February 23, 2015).

Organizer, presenter, and moderator: “Wrongful Convictions,” Mayflower Congregational Church, Oklahoma City, Oklahoma (February 22, 2015).

Presentation: “Duties of Supervisory and Subordinate Lawyers in a Corporate Legal Department,” Hot Topics for In-House Counsel, Oklahoma County Bar Association, Oklahoma City, Oklahoma (December 5, 2014).

Presentation: “The Oklahoma Innocence Project,” Rotary Club of North Oklahoma City, Oklahoma City, Oklahoma (October 27, 2014).

Testimony: Interim Study regarding mandatory DNA testing of arrestees, Oklahoma House of Representatives, Public Safety Committee, Oklahoma City, Oklahoma (October 7, 2014).

Presentation: “The Causes of Wrongful Convictions in the United States,” United States Department of State Visitor Leadership Program for Pakistani Judges and Lawyers, Oklahoma City, Oklahoma (August 25, 2014).

Presentation: “Contemporary Challenges in Teaching Legal Ethics: A Sino-American Comparison,” Vrije Universiteit Brussel Ph.D. Students’ Workshop, Brussels, Belgium (July 15, 2014).

Presentation: “Contemporary Challenges in Teaching Legal Ethics: A Sino-American Comparison,” International Legal Ethics Conference VI, London, England (July 12, 2014).

Presentation: “The Oklahoma Innocence Project,” Payne County Bar Association, Stillwater, Oklahoma (May 6, 2014).

Moderator and presenter: “Legal Education in the United States,” United States Department of State International Visitor Leadership Program for international delegation, Oklahoma City, Oklahoma (March 31, 2014).

Presentations: “The Role and Regulation of Lawyers in the United States,”

- Shenzhen Bar Association, Shenzhen, Guangdong Province, China (December 27, 2013).
- South China University of Technology and Law, Guangzhou, Guangdong Province, China (December 25, 2013).
- Wuhan University School of Law, Wuhan, Hubei Province, China (December 24, 2013).
- Zhongnan University of Economics and Law School of Criminal Justice, Wuhan, Hubei Province, China (December 23, 2013).
- Chongqing University School of Law, Chongqing, China (December 20, 2013).
- Southwest University of Political Science and Law School of Law, Chongqing, China (December 19, 2013).
- Chengdu University School of Law, Chengdu, Sichuan Province, China (December 18, 2013).

- Southwest University for Nationalities School of Law, Chengdu, Sichuan Province, China (December 17, 2013).
- Sichuan University School of Law, Chengdu, Sichuan Province, China (December 16, 2013).
- Beijing Normal University School of Law, Beijing, China (December 12, 2013).
- China Youth University of Political Sciences School of Law, Beijing, China (December 11, 2013).

Presentation: “The Selection, Training, and Regulation of Judges in the United States,” National Judges College, Beijing, China, December 11, 2013.

Organizer and moderator: Second International Symposium on Sino-American Comparative Law, Oklahoma City University, Oklahoma City, Oklahoma (May 1-3, 2013).

Presentation: “Contemporary Challenges in Teaching Legal Ethics: A Sino-American Comparison,” Second International Symposium on Sino-American Law, Oklahoma City University School of Law, Oklahoma City, Oklahoma (May 2, 2013).

Presentation, “Historical Review and Analysis of Legal Ethics Instruction at American Law Schools,” Faculty Workshop, China University of Political Science and Law, Beijing, China, (March 18, 2013.)

Presentation, “Five Styles of Teaching Legal Ethics,” Conference on Chinese Legal Ethics: Answer the Call for Reform, China University of Political Science and Law, Beijing, China, (March 17, 2013) (with Judith McMorrow).

Presentation, “The Limits of the Law Schools’ Ability to Inculcate Adherence to Principles of Legal Ethics on the Part of their Graduates,” Conference on Chinese Legal Ethics: Answer the Call for Reform, China University of Political Science and Law, Beijing, China, (March 16, 2013.)

Presentation, “The American Criminal Justice System: The Roles of Prosecutors, Defense Lawyers and Judges in Preventing and Remediating Wrongful Convictions,” Renmin University School of Law, Beijing, China, (March 15, 2013.)

Presentation, The Oklahoma Innocence Project at Oklahoma City University School of Law,” Temple B’Nai Israel, Oklahoma City, Oklahoma (January 13, 2013) (with Tiffany Murphy).

Panelist, “Symposium on International Legal Services Talents Training, Beijing Normal University School of Law, Zhuhai Campus, Zhuhai, Guangdong Province, China, (December 26, 2012.)

Presentation, “The Role of Federal Courts in Interpreting, Applying, and Explaining the Constitution of the United States,” Beijing Normal University, Zhuhai Campus, Zhuhai, Guangdong Province, China, (December 25, 2012.)

Presentations: “The Role and Regulation of Lawyers in the United States,”

- Southwest University of Political Science and Law School of Law, Chongqing, China (December 24, 2012).
- Southwest University for Nationalities, Chengdu, Sichuan Province, China (December 21, 2012.)

- Hunan University School of Law, Changsha, Hunan Province, China (December 18, 2012).
- Zhongnan University of Economics and Law School of Criminal Justice, Wuhan, Hubei Province, China (December 17, 2012).
- Tianjin Bar Association, Tianjin, China (December 14, 2012).
- Civil Aviation University of China School of Law, Tianjin, China (December 13, 2012).
- Nankai University School of Law, Tianjin, China (December 12, 2012).

Program organizer and moderator: “The Difficulty of Recognizing Our Own Biases,” Judicial Retreat, United States District Court, Western District of Oklahoma, Roman Nose State Park, Watonga, Oklahoma (November 26, 2012).

Presentation: “Appealing to Our Better Selves: Legal Ethics for Appellate Lawyers,” Oklahoma Bar Association Section of Appellate Advocacy, Oklahoma City, Oklahoma (November 7, 2012).

Presentation: “The Oklahoma Innocence Project,” University of Central Oklahoma Department of Criminal Justice, Victimology Course, Edmond, Oklahoma (November 7, 2012).

Presentation: “The Oklahoma Innocence Project, Oklahoma City Christian Legal Society, Oklahoma City, Oklahoma (October 26, 2012).

Presentation and materials: “Saving a Corporate Client from Itself: Knowing When to Climb the Ladder and Blow the Whistle,” American Bar Association Section of Energy, Environment, and Resources Fall Meeting, Austin, Texas (October 12, 2012) (organizer, moderator, and panelist).

Presentation: “‘I Solemnly Pledge to *Disobey* the Rules of Professional Conduct?’ The Role of the Attorney’s Oath in Professional Regulation,” International Legal Ethics Conference V, Banff, Alberta, Canada (July 13, 2012).

Presentation: “The Oklahoma Innocence Project,” Kay County Bar Association, Ponca City, Oklahoma (April 19, 2012).

Presentation: “The Oklahoma Innocence Project,” Oklahoma County Bar Association Auxiliary, Oklahoma City, Oklahoma (April 12, 2012).

Presentation: “The Oklahoma Innocence Project,” Twentieth Century Club of Oklahoma City, Oklahoma City, Oklahoma (with Tiffany Murphy) (April 5, 2012).

Presentation: “Constitutional Adjudication in the United States: Which Courts? What Standards? What Effects?” Beijing Normal University, Zhuhai Campus, Zhuhai, Guangdong Province, China (March 19, 2012)

Presentation: “The American Jury System: Why Do We Have It? How Does It Work? What is the Role of the Judge?” Beijing Normal University, Zhuhai Campus, Zhuhai, Guangdong Province, China (March 21, 2012).

Presentations: “The Role and Regulation of Lawyers in the United States,”

- Nankai University School of Law, Tianjin, China (December 12, 2011).

- Beijing Normal University, Zhuhai Campus, Zhuhai, Guangdong Province, China (December 9, 2011).
- Zhongnan University, Wuhan, Hubei Province, China (December 7, 2011).
- Hunan University School of Law, Changsha, China (December 5, 2011).

Presentation: “Trends in Legal Education in the United States,” Beijing Normal University, Zhuhai Campus, Zhuhai, Guangdong Province, China (December 11, 2011).

Presentation: “The Oklahoma Innocence Project,” Innocence Project of Ireland, Griffith University School of Law, Dublin, Ireland (October 13, 2011).

Presentation: “The Oklahoma Innocence Project at Oklahoma City University School of Law,” Rotary Club of Paul’s Valley, Paul’s Valley, Oklahoma (September 30, 2011).

Presentation: “The Oklahoma Innocence Project at Oklahoma City University School of Law,” Downtown Rotary Club, Oklahoma City, Oklahoma, (September 20, 2011).

Presentation: “The Roles of Defense Counsel, Prosecutor, and Judge in an American Criminal Trial,” National Judges College, Beijing, China (July 1, 2011).

Presentation: “Examining the Responsibility of Prosecutors to Rectify Wrongful Convictions in the American Adversarial System of Criminal Justice,” International Conference on Sino-American Comparative Law, Nankai University, Tianjin, China (June 27, 2011).

Presentation: “The Oklahoma Innocence Clinic at Oklahoma City University School of Law,” Charter 35 Club, Oklahoma City, Oklahoma (June 17, 2011).

Presentation: “OCU Law’s Role in Addressing Wrongful Convictions in Oklahoma,” Downtown Kiwanis Club, Oklahoma City, Oklahoma (April 4, 2011).

Presentation: “Addressing Wrongful Convictions in Oklahoma: The Oklahoma Innocence Clinic at OCU LAW and the Oklahoma Justice Commission,” Oklahoma Judicial Conference, Tulsa, Oklahoma (November 17, 2010).

Presentation: “Legal Ethics Problems for Water Law Practitioners,” Oklahoma Governor’s Water Conference, Tulsa, Oklahoma (October 27, 2010).

Presentation: “OCU LAW Programs in China and for Chinese Lawyers and Students in Oklahoma City,” U.S.-Asia Law Center, New York University, New York City, New York (October 14, 2010).

Presentation: “Wrongful Convictions and the Role of Law School Innocence Clinics,” Symposium on Criminal Justice, Oklahoma Senate, Oklahoma City, Oklahoma (December 17, 2009).

TV segment for *The Verdict*: “The Innocence Project at Oklahoma City University School of Law,” Cox Cable Channel 7 (Oklahoma City, Oklahoma), November 24, November 25, and December 13-16, 2009, in Oklahoma City, Oklahoma, <http://www.vimeo.com/8560707>.

Presentations: “The Role and Regulation of Lawyers in the United States,”

- Nankai University School of Law, Tianjin, China (December 10, 2009).
- Tianjin University of Finance and Economics School of Law, Tianjin, China (December 9, 2009).
- Chongqing University School of Law, Chongqing, China (December 8, 2009).
- Southwest University of Political Science and Law, Chongqing, China (December 7, 2009).
- Zhongnan University, Wuhan, Hubei Province, China (December 4, 2009).
- China University of Political Science and Law, Beijing, China (December 2, 2009).

Presentation: “The Changing Role of Graduate Programs for Foreign Lawyers,” Association of American Law Schools 2009 Annual Meeting, San Diego, California (January 8, 2009).

Presentation: “Carnegie’s Missing Step: Prescribing Lawyer Retraining, International Legal Ethics Conference III, Gold Coast, Australia (July 15, 2008).

Presentation: “An Overview of the Revisions to the Oklahoma Rules of Professional Conduct,” Mineral Lawyers Society of Oklahoma City, Petroleum Club, Oklahoma City, Oklahoma (December 13, 2007).

Presentation: “Update on New Ethics Rules,” Oklahoma Bar Association, Oklahoma City, Oklahoma (October 23, 2007).

Moderator, Panel on Trademark Issues, Global Fusion Oklahoma, Centennial Business Conference and International Festival, Oklahoma City, Oklahoma (October 9, 2007).

Presentation: “A First Look at the Revised Oklahoma Rules of Professional Conduct,” Oklahoma Association of Municipal Attorneys 2007 Fall Conference, Tulsa, Oklahoma (September 13, 2007).

Moderator: “Candidates Forum,” co-sponsored by Mayflower Congregational Church and Temple B’nai Israel, Oklahoma City, Oklahoma (October 24, 2006).

Moderator: “Open World Program – Rule of Law,” Federal Bar Association Colloquium with Russian Judges, Oklahoma City, Oklahoma (September 19, 2006).

Presentation: “A Summary of Proposed Revisions to the Oklahoma Rules of Professional Conduct Now Under Review by the Oklahoma Bar Association Board of Governors,” Annual Ethics Lecture, Oklahoma County Bar Association, Oklahoma City, Oklahoma (December 6, 2005).

Moderator: “Should the Death Penalty Be Abolished? – The Debate,” Federal Bar Association, Oklahoma City Chapter, Oklahoma City, Oklahoma (November 17, 2005).

Presentation: “What Lawyers Need to Know About Proposed Changes to the Model Code of Judicial Conduct,” Annual Ethics Lecture, Oklahoma County Bar Association, Oklahoma City, Oklahoma (December 21, 2004).

Presentation: “Law, Lawyers, and Legal Education,” 2004 Law Day combined meeting of Rotary Club of Downtown Oklahoma City, Lions Club of Oklahoma City Downtown, and Kiwanis Club of Oklahoma City, Oklahoma City, Oklahoma (April 27, 2004).

Presentation: “What’s Up with IOLTA?” Annual Ethics Lecture, Oklahoma County Bar Association, Oklahoma City, Oklahoma (December 16, 2003).

Presentation: “Legal Ethics and Government Attorneys,” 23<sup>rd</sup> Annual National Conference of Regulatory Attorneys, Oklahoma City, Oklahoma (June 11, 2003).

Presentation: “Oklahoma City University School of Law: History, Status, Economic Impact,” Fortune Club, Oklahoma City, Oklahoma (June 3, 2003).

Presentation: “Current and Proposed Law School Accreditation Standards and Their Impact on the Cost and Accessibility of Legal Education and Entry into the Legal Profession,” Holloway Inn of Court, Oklahoma City, Oklahoma (March 12, 2003).

Presentation: “The SEC’s Proposed Standards of Professional Conduct for Attorneys,” 2002 Commercial Law Update, Oklahoma City, Oklahoma (December 13, 2002).

Presentation: “Lawyers and Corporate Disclosure: The Rules are Changing,” Annual Ethics Lecture, Oklahoma County Bar Association, Oklahoma City, Oklahoma (December 10, 2002).

Presentation: “Future Direction for the Law School: The New Strategic Plan,” Oklahoma Bar Association Annual Meeting, Tulsa, Oklahoma (November 21, 2002).

Moderator: Panel on “Ethics and Collegiality: Where Are We and How Is It Affecting the Practice of Law?” Tenth Circuit Judicial Conference, Santa Fe, New Mexico (June 28, 2002).

Presentation: “Ethical Issues in Proving Damages,” Oklahoma Bar Association and the Oklahoma Trial Lawyers Association, Tulsa, Oklahoma (May 10, 2002) and Oklahoma City, Oklahoma (May 17, 2002).

Presentation: “Ethics 2000 – Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees and Rule 1.13: Organization as Client,” Oklahoma Corporation Commission General Counsel Luncheon, Oklahoma City, Oklahoma (May 2, 2002).

Panelist: “Ethics 2000 and Multijurisdictional Practice,” Council Oak Chapter, American Inns of Court, Tulsa, Oklahoma (April 10, 2002).

Paper presented: “Considering Changes to the Rules of Professional Conduct: Why? When?” Annual Ethics Lecture, Oklahoma County Bar Association, Oklahoma City, Oklahoma (December 11, 2001).

Panelist: “Update on Multijurisdictional Practice,” Plenary Session, Oklahoma Bar Association Annual Meeting, Tulsa, Oklahoma (November 15, 2001).

Presentation: “Perspectives on Proposals to Change the Model Rules of Professional Conduct,” William J. Holloway, Jr. American Inn of Court, Oklahoma City, Oklahoma (September 19, 2001).

Panelist: “Administrative Synergies: Admissions, Placement & Financial Aid – Advancing the Mission,” ABA Section of Legal Education & Admissions to the Bar Program, “A Development Odyssey,” Jackson Hole, Wyoming (June 1, 2001).

Panelist: “Making Diversity Count in Oklahoma’s Legal Profession,” Oklahoma City University, Oklahoma City, Oklahoma (May 15, 2001).

Panelist: “Legal Ethics for Prosecutors,” Ruth Bader Ginsburg American Inn of Court, Oklahoma City, Oklahoma (March 28, 2001).

Paper presented: “Future Directions in Legal Ethics,” Phi Delta Phi Ethics Lecture, Oklahoma City University (March 27, 2001).

Panelist: “Legal Education and Access to Justice,” AALS Equal Justice Colloquium, Austin, Texas (February 23, 2001).

Contributing panelist: “Of Stethoscopes and Scales: Modern Intersections of Law and Medicine,” Renaissance Oklahoma, Shangri-La Resort, Oklahoma (January 1, 2001).

Contributing panelist: “Of Virtues and Wisdom: The Relationship of Politics and Religion; Law and Morals,” Renaissance Oklahoma, Shangri-La Resort, Oklahoma (December 31, 2000).

Paper presented: “Regulating Attorneys’ Litigation Conduct – A Cautionary Note,” Oklahoma Bar Association, Advanced Litigation Seminar, Tulsa, Oklahoma (December 15, 2000) and Oklahoma City, Oklahoma (December 21, 2000).

Paper presented: “Recent Efforts to Foster Professionalism in Litigation,” Oklahoma Bar Association, 2<sup>nd</sup> John Shipp Memorial Symposium, Oklahoma City, Oklahoma (December 14, 2000).

Paper presented: “Recent Developments in the Regulation of Lawyers’ Litigation Conduct,” Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 5, 2000).

Panelist, Diversity Forum, Annual Meeting, Oklahoma Bar Association, Oklahoma City, Oklahoma (November 16, 2000).

Presentation: “The Contributions of Law Schools to Community Development,” Economic Affairs Breakfast Club of Oklahoma City, Oklahoma (September 21, 2000).

Paper presented: “Judicial Elections: What Can Lawyers Say? What Can Judges Say? What Should the Bar Say?” Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 14, 1999).

Panelist: “Avoiding Conflicts of Interest When Representing Organizations,” Holloway Inn of Court, Oklahoma City, Oklahoma (November 17, 1999).

Panelist: Roundtable on Judicial Selection, Annual Meeting, Oklahoma Bar Association, Oklahoma City, Oklahoma (November 11, 1999).

Moderator: Panel at American Judicature Society Conference on Trust and Confidence in the Justice System, Tulsa, Oklahoma (October 30, 1999).



Paper presented: “Celebrating the Future of Legal Education,” Installation Address, Oklahoma City University School of Law (March 25, 1999).

Paper presented: “Lessons in Legal Ethics from the Clinton Investigation,” Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 15, 1998).

Panelist: “Legal Ethics in the Clinton Investigation,” Oklahoma City University School of Law, Oklahoma City, Oklahoma (November 10, 1998).

Paper presented: “A Review of Legal Ethics Developments during the Past Year and a Look Ahead,” Boiling Springs Institute, Woodward, Oklahoma (September 15, 1998).

Paper presented: “Ethics in Evidence,” Oklahoma Bar Association Section on Family Law Program on Evidence for the Effective Family Lawyer, Oklahoma City and Tulsa, Oklahoma (May 1998).

Moderator, Panel on Ethical Issues in Family Law Mediation, Community Conference on Family Mediation, Oklahoma Supreme Court, and Oklahoma City University, Oklahoma City, Oklahoma (April 1, 1998).

Paper presented: “Conflict of Laws Meets Legal Ethics,” Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 16, 1997).

Presentation and memo: “An Overview of Proposed Changes in Trial Publicity Rules,” Oklahoma Supreme Court, Oklahoma City, Oklahoma (June 19, 1997).

Problems presented for discussion: “Conflicts of Interest,” American Inns of Court, William J. Holloway Chapter, Oklahoma City, Oklahoma (February 19, 1997).

Presentation: “Legal Ethics, Ethics, and Morals,” Adult Sunday School Class, Chapel Hill United Methodist Church, Oklahoma City, Oklahoma (December 15, 1996).

Paper presented: “Regulating Attorneys’ Trial Publicity,” Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 11, 1996).

Paper presented: “A Proposed Agenda for the Legal Ethics Committee of the Oklahoma Bar Association,” Oklahoma Bar Association Legal Ethics Committee, Oklahoma City, Oklahoma (November 14, 1996).

Paper presented: “A Report on the Professional Responsibility Curriculum at OCU,” Oklahoma Bar Association Legal Ethics Committee, Oklahoma City, Oklahoma (November 14, 1996).

Panelist: “Media and the Law,” American Inns of Court, Hudson Hall-Wheaton Chapter, Tulsa, Oklahoma (October 15, 1996).

Paper presented: "Proposed Amendment of Trial Publicity Regulations: Rules 3.6 and 3.8," Oklahoma Bar Association Rules of Professional Conduct Committee, Oklahoma City, Oklahoma (July 1, 1996).

Paper presented: "When 'Ethics' Rules Don't Mean What They Say," Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 7, 1995).

Orientation address: "Professional Responsibility," Oklahoma City University School of Law Oklahoma City, Oklahoma (August 1995).

Paper presented: "A Smorgasbord of Ethics Opinions: Some Easier to Digest than Others," Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 6, 1994).

Paper presented: "Dealing with Client Fraud," Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 2, 1993).

Paper presented: "A Consideration of the Proposed 1993 Amendments to Federal Rule of Civil Procedure 11", Federal Bar Association, Oklahoma City Chapter, Oklahoma City, Oklahoma (November 18, 1993).

Paper presented: "Ethical Considerations in Representing Participants in Shareholder Disputes in Closely held Corporations," Lorman Education Services Program on Shareholder Disputes, Oklahoma City, Oklahoma (October 13, 1993).

Paper presented: "Rule 11 Gets the Ten-Year Itch," Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 1, 1992).

Paper presented: "Ethical Considerations for the Corporate Lawyer: Two Recent Ethics Opinions from the ABA," Third Annual Corporate Law Institute, University of Oklahoma Continuing Legal Education, Norman, Oklahoma (November 13, 1992).

Paper presented: "Is There Room for Legal Ethics in Bankruptcy Analysis?" Oklahoma County Bar Association, Section on Bankruptcy Law, Oklahoma City, Oklahoma (June 17, 1992).

Address: "Viewing Lawyers as Professors of Legal Ethics," Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 3, 1991).

Address: "Teaching Law Students about Legal Ethics: What They Learn Outside the Classroom," Jewish Federation of Greater Oklahoma City, Oklahoma City, Oklahoma (December 2, 1991).

Paper presented: "Recognizing and Analyzing Conflict of Interest Issues in Bankruptcy Practice," Oklahoma County Bar Association, Section on Bankruptcy Law, Oklahoma City, Oklahoma (May 15, 1991).

Paper presented: "Searching for Guidance in Interpreting Federal Rule 11," Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 11, 1990).

Paper presented: "Ethical Considerations in Advising the Corporate Client," Corporate Law Institute, University of Oklahoma Continuing Legal Education, Norman, Oklahoma (December 7, 1990).

Paper presented: "The Supervisory Responsibilities of a Lawyer," Oklahoma County Bar Association, Annual Ethics Lecture, Oklahoma City, Oklahoma (December 7, 1989).

Paper presented: "Major Changes in Oklahoma Rules of Professional Conduct Affecting Corporate Practitioners," Mid-year Meeting, Patent, Trademark and Copyright Section, Oklahoma Bar Association, Shangri-La Resort, Afton, Oklahoma (June 1989).

Presentation of outline and materials: "Legal and Judicial Ethics," Conference on "The Indian Civil Rights Act," Oklahoma City University's Native American Legal Resource Center, Oklahoma City, Oklahoma (January 1989).

Panelist: Program on "The Ethics of Trial Advocacy," Oklahoma Bar Association Department of CLE, Oklahoma City and Tulsa, Oklahoma (December 1988).

Paper presented: "Ethical Considerations in Devising Collection Strategies," Oklahoma City University CLE Program on "Special and Creative Collection Tactics and Strategies," Oklahoma City, Oklahoma (December 1987).

Comments submitted: "Considering the ABA Model Rules of Professional Conduct," Oklahoma Bar Association Committee to Study the ABA Model Rules of Professional Conduct, Oklahoma City, Oklahoma (September 1985).

Paper presented: "Ethical Problems: Lawyers' Duty to Investigate Representations of Syndicate Organizers," Oklahoma City University CLE Program, "Basic Oil and Gas Law," Oklahoma City, Oklahoma (May 1982).

Paper presented: "Analyzing Conglomerate Mergers," Olson Lecture (co-winner of endowed, judged lectureship), Oklahoma City, Oklahoma (October 1981).

Paper presented: "Analyzing Conglomerate Mergers," Illinois Institute for Continuing Education program, "Mergers Under the Federal Antitrust Laws – Practical Considerations and a Retrospective Review," Chicago, Illinois (May 1981).

Prepared remarks: "Lawyer Advertising," Oklahoma Bar Association's Special Committee on Lawyer Advertising, Oklahoma City, Oklahoma (October 1979).

Panelist: "Teaching Professional Responsibility," Centennial Conference of the Wisconsin Lawyer, Lake Geneva, Wisconsin (May 1978).

Organizer and Moderator: "Changing Times for the Legal Profession," Oklahoma City University School of Law (April 1978).

Prepared remarks: Oklahoma Board of Bar Examiners, "Proposed Increased Scrutiny of

Candidates' Moral Character" (February 1978).

Presentation: "Teaching Professional Responsibility," Virginia Humanities Conference, Lexington, Virginia (1975).

Orientation Address: "Professional Responsibility," Washington & Lee University School of Law (September 1974).

**COMMUNITY SERVICE:**

President, Temple B'nai Israel (Oklahoma City), 1993 - 95.

Member, Board of Trustees, Temple B'nai Israel, 1987 - 1997.

Youth Soccer and Baseball Coach, 1988 - 1994.

**UNIVERSITY ACTIVITIES:**

Faculty Senate Executive Committee, 1981 – 1987, 1990 – 1993 (chair, 1986 – 87).

**PERSONAL:**

Born: 1944

Married: 1972, Gay Linn Silver

Children: Eli, b. 1978; Max, b. 1983

## List of Materials Reviewed

02/21/1997	Letter from Van Treese family
05/01/1997	Letter from Governor Keating to Bob Macy
1/21/1997	DA Case File Folder and note from Ken Van Treese
7/31-1997 - 9/12/1997	F. Smith Notes
1/23/1998	Tim Wilson telephone message re Sneed's trial date
6/25/2002 - 8/20/2002	F. Smith Notes
1/6/2003 – 1/13/2003	F. Smith Notes
1/14/2003 - 1/23/2003	F. Smith Notes
1/20/1997	Fax from Ken Van Treese
1/10/1997	ATT records (from Ken Van Treese)
3/10/1997	Ken Van Treese memo re motel status
0/00/0000	Ken Van Treese Correspondence to Fern Smith
	Email from Ken Van Treese to Connie Pope re retrial
9/28/2003	Ken Van Treese email to Connie Smothermon
	Various Smothermon-Ken Van Treese emails
	Letters to DA
2/10/1997	McLaughlin to Bob Macy
2/13/1997	Van Handel to Bob Macy
2/26/1997	Norman to Bob Macy
7/23/2001	Mileto to Wes Lane
7/23/2001	Mileto-Johnson to Wes Lane
7/26/2001	Brown to Wes Lane
	ND Drouillard to Macy
	ND VT father to Wes Lane
2/10/1997	Phone message from Vivian Van Treese
4/28/1997	Roche to Macy
7/24/2001	White to Lane
7/26/2001	Wilson to Lane
7/15/2020	ABA Rule Judge Disqualification
	Connie Smothermon OU Bio
	OCCA Judge Robert L. Hudson Bio
6/14/1996	Article regarding Connie Pope Joins Staff of Logan County DA
7/23/2022	Defense Request for Judge Rowland Recusal
8/4/2022	Judge Rowland Recusal Order
8/22/2022	Defense Request for Recusal of Judge Hudson's Law Clerk Seth Branham
9/1/2022	Order by Judge Hudson

6/5/1996	First Assistant Richard Smothermon
12/6/2007	OCCA Opinion Denying Post-Conviction Brief
9/29/2015	OCCA Order Denying Glossip's Petition for Rehearing
4/13/2007	Glossip v. State of Oklahoma, 157 P3d 143, OCCA Denial
9/23/2015	Opinion Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing, Motion for Discovery and Emergency Request for a Stay of Execution
9/15/2015	Successive Application for Post-Conviction Review

Excerpt from Defendant's Motion for Sanctions for Violations of the Court's Gag Order and To Disqualify the Oklahoma County District Attorney's Office, *State v. Nichols*, Oklahoma County District Court, Case No. CF-99-1845 (April 25, 2000) at 3-7

Mr. Macy's and his subordinates' unethical conduct is well known to the federal and state appellate courts. Indeed, the Oklahoma Court of Criminal Appeals as well as the United States Court of Appeals for the Tenth Circuit have on numerous occasions found that Mr. Macy or his assistants had engaged in improper or unethical behavior. As in the case of this gag order, Mr. Macy has repeatedly demonstrated a total disregard of the Rules of Professional Conduct and the specific directives of the courts. See, for example, the following opinions:

a. *McCarty v. State*, 1988 OK CR 271,765 P.2d 1215, 1221 (Ct. Crim. App. 1988) (The court reversed the defendant's conviction for first degree murder and death sentence in part because "Mr. Macy improperly expressed his personal opinion as to the death penalty by stating, 'this defendant deserves it . . . This is a proper case for the death penalty., and justice demands it.' Such argument was not based on evidence supporting any alleged aggravating circumstance, but was simply a statement of Mr. Macy's personal opinion as to the appropriateness of the death penalty and, as such, was clearly improper.").

b. *Howell v. State*, 1994 OK CR 62, 882 P.2d 1086, 1094 (Ct. Crim. App. 1994) ("Such conduct in the first stage of trial involved a 'physical pushing' of the defense attorney by the District Attorney, who subsequently called the jury's attention to it by saying the matter would be and should be dealt with later. Second, the District Attorney asserted to the jury during closing argument that Appellant had laughed throughout the proceedings. It is highly improper for a prosecutor to comment on facts not in evidence. *McCarty v. State*, 765 P.2d 1215, 1220 (Okla. Cr. 1988). Third, the District Attorney characterized the defendants as 'a pair of losers' and Appellant as an 'ex-convict.' Additionally, he expressed his personal opinion of the guilt of the accused. While, we find these remarks improper, we do not find that they were so atrocious as to amount to fundamental or plain error." However, the cumulative effect of these errors combined with the prosecutorial comments during the second stage of the trial and improprieties between a juror and two deputy sheriffs constituted reversible error so as to require vacating the death sentence.).

c. *Hooker v. State*, 1994 OK CR 75,887 P.2d 1351, 1367 (Ct. Crim. App. 1994) ("First, the prosecutor argued to the jury 'do justice in this case. Do justice. And you do that only by bringing back two verdicts of death in this case.' While [the defendant] did not lodge a contemporaneous objection to this comment, the prosecutor's comments come perilously close to argument which was condemned by this Court in *McCarty v. State*. Second, the prosecutor responded to defense counsel's pleas of mercy by telling the jury he was sorry about the 'guilt trip laid on [the jury] by [the defendant's] counsel. Defense counsel objected, the objection was sustained and the jury was admonished to

disregard the statement. Nonetheless, the prosecutor tried to continue this line of argument until the trial court halted further attempts to do so and admonished the jury to disregard the prosecutor's comments. Finally, the prosecutor argued 'I ask you not to kill their client. You can't. All you can do is bring in a verdict of death...' (T.V. at 196). Defense counsel objected to the comment and the trial court sustained the objection. Such comments push the boundaries of permissible argument and we do not condone the prosecutor's disregard of the law and the trial court's warnings.").

d. *Hawkins v. State*, 1994 OK CR 83, 891 P.2d 586, 598 (Ct. Crim. App. 1995) (Mr. Macy argued, "... There have been too many tears in this courtroom. Too many tears by too many people. It's time for those tears to stop and the only way those tears are going to stop are when those two reach death row. Only then would it stop and as much as I hate putting the burden on you, only you cant (sic) stop it .... We're asking a lot but it's got to stop. It's got to stop here. It's got to stop now." The court noted, "There is no doubt the prosecutor improperly attempted to evoke sympathy and societal alarm by these remarks.").

e. *Robinson v. State*, 1995 OK CR 25,900 P.2d 389, 398 (Ct. Crim. App. 1995) ("This Court does not condone prosecutor's comments encouraging the jurors to allow improper sympathy, sentiment or prejudice to influence their decisions... Likewise, it is improper for a prosecutor to express his personal opinion of the guilt of the accused... However, while the prosecutor's comments are not to be condoned, we do not believe that they were so grossly improper as to require reversal or modification.").

f. *Duckett v. State*, 1995 OK CR 61,919 P.2d 7, 19 (Ct. Crim. App. 1995) (During his final closing argument Mr. Macy argued, in part, "Ladies and gentlemen, is he a threat to society? Don't you bet your lives on it." He later argued, "Ladies and Gentlemen, is it justice to send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while [the victim] lies cold in his grave'? Is that justice? Is that your concept of justice?" The court stated, "These kinds of comments cannot be condoned. There is no reason for them and counsel knows better and does not need to go so far in the future.").

g. *Lev. State*, 1997 OK CR 55,947 P.2d 535, 555 (Ct. Crim. App. 1997) ("[T]he prosecutor told they jury they could only do justice by finding [the defendant] guilty and bringing in a verdict of death. This Court has warned the prosecutor against this argument before, and we repeat that warning here.").

h. *Ochoa v. State*, 1998 OK CR 41,963 P.2d 583,601 (Ct. Crim. App. 1998) ("Here, although the prosecutor did not used the phrase 'cloak of innocence,' his rhetorical question that he would not prosecute an innocent man impermissibly treaded on [the defendant's] presumption of innocence. Such argument cannot be condoned .... In the second stage closing argument, the prosecutor argued that if the jury sentenced the defendants to a term of imprisonment the defendants would have food and shelter while the victims' lie cold in their graves.' This Court has condemned similar arguments by the same prosecutor, and we continue to



do so here .... In addition, the prosecutor improperly pleaded with the jury to do justice 'and the only way you can do that is bring back a sentence of death.' He also told the jury 'If this isn't a death penalty case, what is?' It is error for a prosecutor to refer to facts not in evidence and it is error for the prosecutor to state his personal opinion as to the appropriateness of the death penalty." (footnotes omitted)).

i. *Torres v. State*, 1998 OK CR 40, 962 P.2d 3 (Ct. Crim. App. 1998) (co-defendant of Ochoa; similar findings by the court).

j. *Washington v. State*, 1999 OK CR 22, 989 P.2d 960, 979 (Ct. Crim. App. 1999) (Mr. Macy argued in final closing remarks, "So what is the proper punishment in this case? Mrs. Smith said it would be easy to vote life imprisonment without parole or you can sit around in prison and go three miles (sic) a day and have visits from his friends. Meanwhile [the victim] lies cold in the ground. And her daddy lies out there mourning the loss of his baby. Folks, life, life without parole doesn't even come close to being justice in this case. He brutally tortured and murdered this young lady and he took away everything he had to give. For that he needs to go to death row. He needs to have justice." The court stated, "the final closing argument contains remarks strikingly similar to those condemned in *McCarty*. As in *McCarty*, the argument in this case was not based on evidence supporting any alleged aggravating circumstance, but was simply a statement of the prosecutor's personal opinion as to the appropriateness of the death penalty .... Such argument is clearly improper.").

k. *Paxton v. Ward*, 199 F.3d 1197, 1213-18 (10th Cir. 1999) ( During closing

arguments, "Macy clearly and deliberately made two critical misrepresentations..." The court described Macy's closing by stating "... in view of the prosecutor's mendacious closing arguments..." "[T]he state successfully prevented Mr. Paxton from telling the jury that the former district attorney had dismissed the case upon concluding that Mr. Paxton had been cleared by polygraph results. In closing argument, Mr. Macy took advantage of Mr. Paxton's inability to present the reason for the dismissal, deceitfully telling the jury that Mr. Paxton had failed to avail himself of the opportunity to counter the state's case and inviting the jury to draw an adverse inference from that failure. 'I'll tell you what, ladies and gentlemen, he had the same opportunity to put evidence on that witness stand about that killing that we did .. [I]f the defense had any evidence to show that that crime didn't happen exactly the way that our witnesses told you it did he could have put a witness on the witness stand. You didn't hear from anybody.'... Mr. Macy then invited the jury to speculate on the reasons for the dismissal, implying that it was somehow improper or that it was because Pamela was afraid or reluctant to testify against her father: 'Andy Coats [the former district attorney] didn't dismiss that case. The Assistant District Attorney did named Robert Mildfelt dismissed it. We have no... way of knowing whether Mr. Coats even knew about it or not. And there could be a lot of reasons as to why it wasn't - one of them may have been the fact that Pam Paxton wouldn't talk about it and she was the only eyewitness that witnessed

it and who knows. We don't know why it as dismissed.'... We begin by rejecting summarily the state's invitation to parse the prosecutor's argument word by word in a vacuum and justify it on the ground that there was in fact no evidence in the record as to why the charge had been dismissed. The argument was clearly meant to be understood as inviting the jury to infer that Mr. Paxton had no evidence to rebut the state's assertion that he killed his wife and to speculate at Mr. Paxton's expense on the reasons for dismissal. While it may be true that Mr. Macy could not have commented on facts not in the record, rather than saying nothing he chose to misrepresent the reason for the absence of those facts.... We further conclude that Mr. Macy's comments had a substantial prejudicial effect on [the defendant's constitutional] fights by implying to the jury that Mr. Paxton had no evidence in mitigation, that the reason for the dismissal of the charges was suspect, and that his daughter was afraid to testify against him. These remarks cannot be characterized as an invited response, nor did the defense have any means for effectively rebutting them .... We thus have no doubt that Mr. Macy's conduct crossed the line between a hard blow and a foul one, consequently giving rise to a valid constitutional claim.").

See also *Bowen v. Maynard*, 799 F.2d 593,604 (10th Cir. 1986) (reversing defendant's convictions and three death sentences because Mr. Macy and his assistants assigned to tile case failed to disclose the names of "all other suspects" as requested by the defense;

when the evidence in the state's possession made a stronger case against a man other than the defendant in this case); *Cantrell v. State*, 1985 OK CR 35,697 P.2d 968 (Ct. Crim. App. 1985) (in dissent, Presiding Judge Parks noted, "The Oklahoma County District Attorney Robert H. Macy, repeatedly breached the boundaries of the issues in this case, as shown in the appendix. The prosecutor called attention to the defense counsel's body english and demeanor in the courtroom and inferred it was evidence of the appellant's guilt .... He erroneously stated appellant had plead guilty to the charge .... The prosecutor's remarks about politicians and lawyers were a prohibitory injection of his personal views of the ethics and credibility of the members of both groups.").

Lawrence K. Hellman  
11312 Willow Grove Road  
Oklahoma City, OK 73120-5317  
March 21, 2023

David E. Weiss,  
Attorney at Law  
ReedSmith LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94117

Re: Independent Investigation of State v. Richard E. Glossip

Dear Mr. Weiss:

This is in response to your request for my professional opinion regarding the failure of Patricia High to recuse herself from participation in the Oklahoma Pardon and Parole Board's consideration of Richard Glossip's Petition for Clemency filed on October 10, 2014. A public hearing on Mr. Glossip's petition was held on October 24, 2014.

**Questions Presented and Conclusions**

1. Did Patricia High have a conflict of interest that required her to disqualify herself from participating in Glossip's 2014 clemency application?

Conclusion:

It is my professional opinion that a reasonable person with knowledge of all of the facts would question High's impartiality with respect to Glossip's 2014 clemency petition. This being the case, pursuant to 57 O. S. Ann. Sec. 332.15 C and OPPB Policy 123, High had a conflict of interest that required disclosure and her recusal from the 2014 proceeding.

2. If so, what is the legal effect of her failure to recuse?

Conclusion:

It is my professional opinion that Patricia High's participation in Glossip's 2014 clemency hearing resulted in proceeding in which neither Glossip nor the public could have been assured that no member of the decision-making body was predisposed to vote against him.

## Factual Background

In 1998, Richard Glossip was convicted in Oklahoma County District Court of Murder I and sentenced to death. Oklahoma County Assistant District Attorney Fern Smith was the lead prosecutor. On direct appeal, that conviction was reversed by the Oklahoma Court of Criminal Appeals (“OCCA”) in 2001. The Oklahoma County District Attorney’s Office retried Glossip in 2004. This time the prosecution was led by ADA Connie Pope Smothermon. ADA Gary Ackley assisted. Glossip was once again convicted and sentenced to death. In 2007, the OCCA affirmed this conviction and death sentence. Glossip’s attempts at post-conviction or habeas relief were unsuccessful. His 2014 petition for clemency ensued.

Patricia High was one of the five members of the Oklahoma Pardon and Parole Board (“OPPB”) who considered Glossip’s Petition. High had been appointed to the OPPB by Governor Mary Fallin just two and a half months before the OPPB’s hearing on Glossip’s petition.<sup>1</sup> At the time of her appointment, High was a lawyer engaged in a civil legal practice in Oklahoma City. For most of her career, however, she had been a prosecutor. From 1989 to 2007, she was a senior criminal felony prosecutor in the Oklahoma County District Attorney’s Office. Her work there included serving as “special prosecutor” in death penalty cases.<sup>2</sup> Although there is no record of her involvement in that office’s prosecutions of Glossip in 1998 or 2004, she was a senior prosecuting attorney there during both trials. She prosecuted cases alongside Connie Pope.<sup>3</sup>

## Legal Background

**In general.** There is no federal constitutional right for persons sentenced to death to petition for clemency.<sup>4</sup> However, the Oklahoma Constitution *does* establish such a right and authorizes the Governor to grant such petitions, but only if approval is first recommended by the OPPB.<sup>5</sup> The Oklahoma Constitution also establishes the OPPB and directs it to consider (among other matters) clemency petitions and then recommend to the Governor that they be either

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<sup>1</sup> High’s appointment was effective July 28, 2014. *Gov. Fallin names Patricia High, city attorney, to Pardon and Parole Board*, CapitolBeatOK (July 25, 2014).

<sup>2</sup> *Id.* Media announcements of her appointment mentioned that High had also served for a time as an ADA in the District Attorney’s Office for Lincoln and Pottawatomie Counties. *Id.*

<sup>3</sup> See *Harris v. State*, 2004 OK CR 1; see also May 2022 Reed Smith interview of Connie Pope Smothermon.

<sup>4</sup> See generally *Williams v. Pennsylvania*, 579 U.S. 1 (2016); *Connecticut Board of Pardons et al. v. Dumschat*, 452 U.S. 458 (1997).

<sup>5</sup> “The Governor shall have the power to grant, after conviction *and after favorable recommendation by a majority vote of the said Board*, commutations, pardons and paroles . . . upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law.” Oklahoma Constitution, Art. VI, Sec. 10 (emphasis added). The “Board” referred to in this provision is the Oklahoma Pardon and Parole Board, which was also created by this same section of the Oklahoma Constitution. See n. 6 and accompanying text, *infra*. The commutation of a death sentence to life with or without the possibility of parole is the result when a clemency petition is granted. Oklahoma Constitution, Art. VI, Sec. 10.

approved or rejected.<sup>6</sup> Although the Oklahoma Constitution places the OPPB in the executive branch of Oklahoma government, when it makes a recommendation on a clemency petition it exercises a quasi-judicial function.<sup>7</sup>

The Oklahoma Legislature has enacted statutes implementing this constitutional system.<sup>8</sup> Among these statutes are provisions defining the powers and responsibilities of the OPPB and establishing rules and procedures for its operation.<sup>9</sup> The OPPB has supplemented this statutory law with administrative rules, policies, and procedures.<sup>10</sup>

**Emphasis on impartiality.** In creating the OPPB and empowering it to act on petitions for clemency, both the Oklahoma Constitution and Oklahoma statutes demand that board members maintain impartiality when making these quasi-judicial decisions.

It shall be the duty of the Board to make an *impartial* investigation and study of applicants for commutations . . . , and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency. Oklahoma Constitution, Art. VI, Sec. 10 (emphasis added).

Applications for commutation shall be given *impartial* review as required in Section 10 of Article VI of the Oklahoma Constitution. 57 Okl. St. Ann. § 332.2. H (emphasis added).

**Defining impartiality.** Most people have a general understanding of what it means to be impartial. In law, however, there is actually a definition of the term – at least when it comes to thinking about judicial and quasi-judicial decision-making. That definition comes directly from the Oklahoma Supreme Court, promulgator of the Oklahoma Code of Judicial Conduct (“OCJC”).

"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.<sup>11</sup>

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<sup>6</sup> “There is hereby created a Pardon and Parole Board to be composed of five members . . . . It shall be the duty of the Board to make an impartial investigation and study of applicants for commutations . . . and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency.” *Id.*

<sup>7</sup> The Merriam-Webster Dictionary defines quasi-judicial as “having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims . . . .” <https://www.merriam-webster.com/dictionary/quasi-judicial> (last visited March 19, 2023). The OPPB exercises quasi-judicial authority when it makes recommendations to the governor regarding clemency petitions or other applications, such as for parole reprieve, pardon, or other act of clemency. Many administrative agencies within the executive branch exercise similar quasi-judicial functions.

<sup>8</sup> 57 O. S. Ann. Sec. 332 *et seq.*

<sup>9</sup> 57 O. S. Ann. Sec. 332.1 *et seq.*

<sup>10</sup> OAC, Title 515, Ch. 10, Sub.ch. 1 *et seq.*, available at [www.sos.ok.gov](http://www.sos.ok.gov). (last visited on March 17, 2023).

<sup>11</sup> Oklahoma Code of Judicial Conduct, 5 O.S. Ch. 1, App. 4, Sec. Terminology.

While the OCJC was not promulgated for the purpose of regulating OPPB members (or members of other administrative agencies),<sup>12</sup> in the absence of a competing definition in the Oklahoma Constitution or Oklahoma statutes, it is appropriate to look to this definition to give meaning to the concept of impartiality as it applies to OPPB members when engaged in quasi-judicial functions. There is no reason why the terms “impartial,” “impartiality,” and “impartially” should mean one thing when used in the OCJC and something different when used in the Oklahoma Constitution or an Oklahoma statute.

This definition treats bias and prejudice as opposites of impartiality. The duty to be impartial thus becomes the duty *not* to be biased or prejudiced – either *for or against* a particular party or group. It is the duty to have an open mind about a decision under consideration.

To comply with the mandate to exercise its authority impartially, the OPPB has promulgated rules, policies, and procedures designed to ensure board members will, in fact, remain impartial when exercising their quasi-judicial responsibilities. One such policy, Number 123, addresses conflicts of interest, viewing such conflicts as posing a risk that the conflicted individual will be biased and unable (or unwilling) to be impartial.

Any Board member who is aware of a conflict of interest shall recuse himself or herself from a matter pending before the Board if it would impact the member’s *impartiality*. Conflict of interests include, *but are not limited to*, the following:

...

6. The Board member is biased, prejudiced, has had a previous personal involvement in a case, has a personal interest in the case or its outcome, or [is] biased or is prejudiced toward or against the offender or the offender's attorney to the extent that the Board member would be unable to fairly and impartially participate in the hearing.<sup>13</sup>

Thus, it is deemed necessary for OPPB members to avoid conflicts of interest in order for them to act *impartiality*.

**Defining appearance of impropriety.** In addition to demanding OPPB members to be impartial, the Oklahoma statute that governs all OPPB activities directs board members to avoid conducting themselves in a manner that creates an “appearance of impropriety.”

If any Pardon and Parole Board member determines circumstances [that] would cause a reasonable person with knowledge of all the relevant facts to question his

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<sup>12</sup> *Id.*, Sec. Application.

<sup>13</sup> Pardon and Parole Board Policy 123, available at <https://www.ok.gov/ppb/documents/Policy%20123%20-%20Ethics%20Policy.pdf> (last visited March 17, 2023) (emphasis added); In every clemency proceeding, there are two parties: the offender and the State. On its face, Policy 123 seeks only to avoid bias or prejudice toward or against offenders and their attorneys. However, a board member may be biased or prejudiced against or in favor of the State or an attorney representing the State. A bias or prejudice against or in favor of either party manifests itself as a bias or prejudice in favor of or against the other party. A person who has a bias in favor of the State inevitably will be biased against the offender, and vice versa. Thus, Policy 123 requires disclosure and recusal of any OPPB board member who is biased or prejudiced against or in favor of either party or either party’s attorney.

or her impartiality in a specific matter, or creates the *appearance of impropriety*, the Pardon and Parole Board member shall disclose any *potential* conflict of interest and shall withdraw from participation in the matter.<sup>14</sup>

The OCJC also employs this term and requires judges to avoid “the appearance of impropriety.”<sup>15</sup>

While some may view the term “appearance of impropriety” as so vague that it is virtually meaningless and prone to be misused or exaggerated, both the Oklahoma Legislature and the Oklahoma Supreme Court have defined it in a way that makes it useful and manageable. Each definition is based on an objective test to be used in identifying a legally cognizable “appearance of impropriety.”

For OPPB members, the statutory test is whether “circumstances [exist that] would cause *a reasonable person with knowledge of all the relevant facts* to question his or her *impartiality* in a specific matter.”<sup>16</sup>

For judges, “[t]he test for appearance of impropriety is whether the conduct [in question] would create in *reasonable minds* a perception that the judge . . . engaged in . . . conduct that reflects adversely on the judge's honesty, *impartiality*, temperament, or fitness to serve as a judge.”<sup>17</sup>

Thus, here, too, the focus is on impartiality. That is, for OPPB purposes, rather than implying a judgment about a Board member’s morality, an appearance of impropriety arises from conduct that, viewed objectively, gives reason to doubt the member’s impartiality.

**Defining conflicts of interest.** An Oklahoma statute requires OPPB members to recuse from proceedings in which they have “a *potential* conflict of interest,”<sup>18</sup> while OPPB Policy 123 requires Board members to recuse from participating in any proceeding in which they are “aware” that they have a conflict of interest “if it would impact the member’s impartiality.” The language of Policy 123 suggests Board members should use a subjective test for determining whether they are required to recuse, since it only applies to conflicts of which the Board member is aware. Even then, this policy’s wording appears to recognize the possibility that conflicts of interest may exist that would not necessarily impact the member’s impartiality. This wording unfortunately (and apparently unintentionally) muddies the waters surrounding OPPB members’ evaluation of conflicts of interest.

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<sup>14</sup> 57 O. S. Ann. Sec. 332.15 C.

<sup>15</sup> OCJC, Rule 1.2.

<sup>16</sup> 57 O. S. Ann. Sec. 332.15 C (emphasis added).

<sup>17</sup> OCJC, Rule 1.2, Comment [5] (emphasis added).

<sup>18</sup> 57 O. S. Ann. Sec. 332.15 C.

The best interpretation of Policy 123 is to read it in conjunction with the Legislature's mandate regarding conflicts of interest at the OPPB. The Legislature enacted an objective test for assessing whether there is a disqualifying conflict of interest. It does this by focusing, not on what the Board member knows or believes, but rather on whether "a reasonable person with knowledge of all the relevant facts [would] question [the Board member's] impartiality regarding a specific matter. An OPPB member who fails to recuse based on reliance of the subjective test suggested by Policy 123 risks violating the objective conflict of interest test that the Legislature enacted to address OPPB conflicts of interest. When all is said and done, legislation trumps conflicting regulations. Thus, OPPB members and those who evaluate their conduct can avoid this quagmire by reading Policy 123 in a way that is consistent with what the Legislature has enacted.

Reconciling Policy 123 with the controlling legislation is not difficult. Policy 123 lists five (5) specific circumstances that *conclusively* constitute conflicts of interest.<sup>19</sup> For example, if a Board member acted as an attorney (for or against the offender) in a matter involving the offender, that Board member has an disqualifying conflict of interest.<sup>20</sup> Period. It does not matter if the Board member subjectively believes he or she can still be impartial regarding this offender. Objectively, the risk that he or she will not be impartial makes this a disqualifying conflict of interest.

The sixth illustrative circumstance where Policy 123 presumes a conflict of interest exists is when:

6. the Board member is biased, prejudiced, has had a previous personal involvement in a case, has a personal *interest* in the case or its outcome, or biased or is prejudiced toward or against the offender or the offender's attorney to the extent that Board member would be unable to fairly and impartially participate in the hearing."<sup>21</sup>

This is a more generalized, objective test that only makes sense if it is read to mean the same thing as the test enacted by the Legislature: a disqualifying conflict of interest presumptively exists if

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<sup>19</sup> The examples are, when:

1. the Board member was a witness in a relevant court case;
  2. the Board member has acted as an attorney in a matter involving the offender;
  3. the Board member was directly involved in the arrest or prosecution proceeding in which the offender was a party;
  4. the Board member, the spouse of the Board member, or a relative of the Board member is the attorney for the offender;
  5. the Board member is a relative of the offender.
- ...

OPPB Policy 123.

<sup>20</sup> OPPB Policy 123, conflict of interest example number 2.

<sup>21</sup> OPPB Policy 123, conflict of interest example number 6.



there are any circumstances that “would cause reasonable person with knowledge of all the relevant facts to question [a Board member’s] impartiality.”<sup>22</sup>

Policy 123’s open-ended sixth illustration of a disqualifying conflict of interest emphasizes that illustrations one through five are just that – illustrations: This is made clear by Policy 123’s introduction of the list of presumptively disqualifying conflicts: “Conflicts of interest include but are not limited to the following [circumstances].”<sup>23</sup> Some examples of common situations that can and do arise in clemency proceedings that, although not included in Policy 123’s list of illustrations, would constitute a disqualifying conflict of interest are when:

- a Board member, the spouse of the Board member, or a relative of the Board member is the attorney for the State in a clemency proceeding;
- a Board member’s spouse or a relative of the Board member was a member of the prosecution team that secured the offender’s conviction and death sentence;<sup>24</sup>
- a Board member was professionally associated (e.g., in the same law office) with a prosecutor or defense attorney who participated substantially as a lawyer in the criminal proceeding that resulted in the death sentence under review in a clemency proceeding.

These are three circumstances where the OCJC would require a judge to recuse from a matter brought before him or her.<sup>25</sup> The OCJC defines each as a circumstance in which a judge’s impartiality might reasonably (i.e., objectively, presumptively) be questioned. Because OPPB members perform a quasi-judicial function when considering clemency petitions, it follows that, in addition to the circumstances listed in OPPB Policy 123, an OPPB member should be recused from participating in clemency proceedings involving these and other additional circumstances.

Further justifying the application of an objective test for identifying disqualifying conflicts of interest is the recognition of the operation of various types of cognitive bias in human behavior. When considering the application of any conflict-of-interest rule, the risk of unconscious bias must be accounted for. For example, the United States Supreme Court has recognized that it is only human for a person to harbor “an improper, if inadvertent, motive to validate and preserve” a result to which they have reason to be attached.<sup>26</sup> For this and similar reasons, OPPB Policy 123 should be applied objectively.

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<sup>22</sup> 57 O. S. Ann. Sec. 332.15 C.

<sup>23</sup> OPPB Policy 123.

<sup>24</sup> I note that OPPB member Richard Smothermon has recused himself from Glossip’s clemency proceedings apparently because his wife, Connie Pope Smothermon, was the lead prosecutor in the 2004 re-trial that resulted in Glossip’s death sentence. It is my professional opinion that Mr. Smothermon’s recusal is required by illustration six (6) in Policy 123, even though none of the more specific illustrations in the policy applies to his situation.

<sup>25</sup> OCJC, Rule 2.11(A)(2)(b), 2.11(A)(6)(a).

<sup>26</sup> *Williams v. Pennsylvania*, 579 U.S. 1, 11 (2016).

**The requirements of due process in clemency proceedings.** No convicted person has a “right” or “a legitimate claim of entitlement” to clemency. A grant of clemency resulting in a commutation of a death sentence to a less severe punishment is an act of mercy. A legion of cases dealing with analogous Oklahoma prisoner claims of a right to parole, or at least a right to be *considered* for parole, so holds. Nevertheless, a divided United States Supreme Court has held that, *if* a state creates a process for a person who has been sentenced to death to petition for clemency, *minimal* due process requirements attach to the procedure.<sup>27</sup> But “minimal” means “minimal.” To fail a due process test, a state’s procedure must be arbitrary, as if it were to be determined by a coin flip. I am unaware of any state’s clemency procedure having been found to fail the minimal due process test. For example, courts have rejected claims that the state agency or governor involved must articulate reasons for a denial. Courts have also rejected claims when a state clemency agency has not strictly followed its own procedures or those called for by state statute. Compared with many states’ clemency processes, Oklahoma’s is fairly robust in terms of procedural safeguards.

Still, core principles on which our legal system is premised would seem to suggest that a *material* departure from specifically required procedures should have some consequences. Nevertheless, without further research and analysis, I am not prepared to state an opinion on the legal consequences of even a material departure from prescribed clemency procedures.

## Analysis

### **Did Patricia High have a conflict of interest that required her to disqualify herself from participating in Glossip’s 2014 clemency application?**

Imagine for a moment that the OCCA granted Glossip’s hypothetical 2012 motion for post-conviction relief, setting aside his 2004 conviction, and ordering a new trial. Suppose he was retried in 2013 and again convicted and sentenced to death and this led to his direct appeal to the OCCA in 2014. Finally, assume that by this time, after having ended her 18-year career as a senior prosecutor in the Oklahoma County District Attorney’s Office, Patricia High had been appointed to a seat on the OCCA. Even though she had not been involved in either the 1998 or the 2004 prosecution of Glossip, “Judge” High would have been required to disclose that she had a conflict of interest concerning Glossip’s appeal and recuse. This would follow from OCJC Rule 2.11(A)(6)(A):

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

...

(6) The judge: (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association.<sup>28</sup>

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<sup>27</sup> *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

<sup>28</sup> OCJC, Rule 2.11(A)(6)(a).

Even though High is not known to have worked on the Glossip prosecution team, she was professionally associated with Fern Smith when she prosecuted Glossip in 1998 and with Connie Pope Smothermon and Gary Ackley when they prosecuted Glossip in 2004.<sup>29</sup> Because of that professional association, the OCJC would conclusively *presume* her impartiality “reasonably might be questioned.” This presumption would be premised on a recognition that the hypothetical circumstances presented “a serious *risk* that [“Judge” High] would be influenced by her “improper, if inadvertent, motive to validate and preserve the result obtained” by her then-colleagues.<sup>30</sup> Focusing on the paramount importance of providing a tribunal that is impartial in fact *and* that appears to be impartial, not only to the petitioners, but also to reasonable observers aware of the relevant facts, High’s recusal would be required regardless of whether she were biased in fact, consciously or unconsciously. Public trust in the impartiality of the judiciary is essential for public confidence in and respect for the rule of law.<sup>31</sup>

But High was not a judge in 2014 and, even though she was involved in a quasi-judicial proceeding, the OCJC did not apply to her. Instead, she was a member of the OPPB and required to comply with the statutes and regulations governing that body. Like the OCJC, the law regulating the OPPB sets requirements that go *beyond* what the Due Process Clause demands.<sup>32</sup>

As discussed above, despite having different origins and using slightly different wording, OPPB law and the OCJC have the same objective: to ensure that petitioners and the public have reason to be confident that decision makers<sup>33</sup> are impartial. There are many reasons why High’s impartiality in the Glossip matter must be doubted:

1. High was a professional colleague of Fern Smith when she prosecuted Glossip in 1998.
2. High was a professional colleague of Connie Pope Smothermon and Gary Ackley when they prosecuted Glossip in 2008.
3. High was a senior prosecutor, with special assignments in death penalty cases, in the same office where Smith, Smothermon and Ackley practiced while they prosecuted the Glossip.

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<sup>29</sup> A different analysis would be required if we changed the hypothetical to have High depart the Oklahoma County DA’s Office before anyone there became involved in the Glossip prosecution.

<sup>30</sup> *Williams v. Pennsylvania*, 579 U.S. 1, 11 (2016). Note that, in *Williams*, although the Supreme Court based its decision on the Due Process Clause rather than the Pennsylvania Code of Judicial Conduct, it acknowledged that the Pennsylvania CJC, like the Codes in many states (including Oklahoma’s), would likewise require recusal on the facts of the case. Also note that the circumstances requiring recusal in *Williams* were slightly different than those postulated in this hypothetical, but OCJC Rule 2.11(A)(6)(a) would lead to the same result in the hypothetical as they did in *Williams*.

<sup>31</sup> OCJC, Preamble, para. 1.

<sup>32</sup> *Cf. Williams*, *supra* n. 30, at 13.

<sup>33</sup> Of course, we must recognize that the ultimate decision maker for clemency petitions is the Governor. However, the Governor can grant clemency *only* if the OPPB first recommends it. Thus, in actuality, OPPB members have two important decisions to make in the clemency process: (1) whether to recommend that the Governor grant clemency, and, if so, (2) whether to recommend to the Governor that the petitioner’s death sentence be commuted to life with the possibility of parole or life without the possibility of parole.

4. During the time period when Smothermon was leading the prosecution of Glossip, High and Smothermon prosecuted at least one different case together.
5. High had a lengthy career in the District Attorney's Office that prosecuted Glossip two times for the same crime.
6. The Oklahoma County DA's Office, where her seventeen-year career led her to the status as a senior prosecutor and a special prosecutor in death penalty cases, had a reputation for taking pride in the number of death penalties it obtained.
7. Sometime after she left the Oklahoma County DA's Office in 2007, High took a position in the smaller, rural Lincoln/Pottawattamie County DA's office, where Connie Pope Smothermon's husband, Richard Smothermon was DA.

It is my professional opinion that a reasonable person with knowledge of all of these facts would question High's impartiality with respect to Glossip's 2014 clemency petition. This being the case, pursuant to 57 O. S. Ann. Sec. 332.15 C and OPPB Policy 123, High had a conflict of interest that required disclosure and her recusal from the 2014 proceeding.

In reaching this conclusion, it is unnecessary to demonstrate that High did in fact have a personal bias in favor of the State, or opposed to Glossip, when she participated in the 2014 clemency hearing. However, upon reading the transcript and watching the video recording of that clemency hearing, it is my opinion that High exhibited a bias against Glossip and a desire to shore up the State's case for opposing clemency. During the final portion of the hearing when Glossip was allowed to address the OPPB, High basically took over the hearing.<sup>34</sup> To my eye and ear, she conducted the equivalent of a cross-examination of Glossip, displaying body language and facial expressions that conveyed an attitude of disbelief and disgust for what Glossip had to say. Although she did not appear to be referring to notes, her questions seemed to have been carefully prepared and designed to reinforce points that counsel for the State, Mr. Branham, had made in his argument to the Board earlier in the hearing.<sup>35</sup>

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<sup>34</sup> Except for two short questions by a male board member and some housekeeping by the chair, High was the only Board member who spoke during this portion of the hearing. In assessing the central role she played in the hearing, it should be remembered that High was a very new member of the OPPB. She conveyed the impression that she was more familiar with the facts and evidence in Glossip's case than the other Board members.

<sup>35</sup> Sticking up for the professional work of one's colleagues is a common human trait. In addition, most of us are influenced by interests and preference of which we are unaware. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58. B.C.L. Rev. 463, 483-484. Recent advances in cognitive science and social science research have increased our understanding of unconscious bias. Recent legal scholarship has reflected on the role of unconscious bias among prosecutors. For example, Bruce Green, a former U.S. Attorney, and a co-author have acknowledged that, inasmuch as they are human, personal interest conflicts are ubiquitous among prosecutors. For example, a prosecutor's self-image, professional reputation, and political popularity are at risk in every decision he or she makes. "[O]n a general level, virtually all prosecutors have a personal interest in appearing successful--to themselves if not to others in their offices and beyond. Every prosecutor wants to appear competent, skilled, and prudent. Some may also have an interest in conveying toughness or strength. Even prosecutors who do not seek professional advancement are jealous of their professional reputation. This broad self-interest can come into play in every criminal case . . ." *Id.* at 480 - 481.

In sum, the facts recounted here demonstrate that the risk that she had an unacceptable bias was so great that she had to recuse. The risk was present whether or not High recognized.<sup>36</sup>

### **What is the legal effect of High's failure to recuse?**

While those sentenced to death in Oklahoma do not have a right to *receive clemency*, they *do* have a state constitutional right to *apply for* clemency. The Oklahoma Legislature and the OPPB have established rules and regulations to govern the clemency application process. However, I am unaware of any statute, regulation, or judicial opinion (state or federal) providing a remedy for the failure of the State to follow the prescribed process.

If it were a judicial proceeding in which a judge failed to recuse when the controlling law plainly required recusal, as it did in this matter, there *would* be a remedy: reversal and remand. The United States Supreme Court has explained why such a remedy is required in judicial proceedings that wrongfully were handled by a court that included a judge who failed to recuse when he or she should have. Responding to the argument that the participation of just one conflicted judge on a multi-judge court should not require reversal and remand.

[I]t does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. . . .

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

...

Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be

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<sup>36</sup> Incidentally, it is possible, if not likely, that High was the only person involved in the 2014 hearing (as counsel, Board member, or Board staff) who was aware of her proximity to the prosecutors whose death verdict she was advocating to preserve.

granted an opportunity to present his claims to a court unburdened by any “possible temptation ... not to hold the balance nice, clear and true between the State and the accused.”

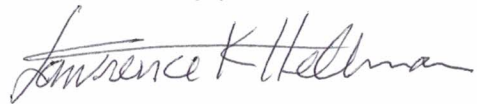
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Due process entitles Terrance Williams to “a proceeding in which he may present his case with assurance” that no member of the court is “predisposed to find against him.”<sup>37</sup>

But the 2014 clemency was not a judicial proceeding. Oklahoma and federal courts have reduced the requirements of the Due Process Clause in clemency proceedings to little more than prohibiting arbitrary decision making. Whether the facts of Glossip’s clouded 2014 clemency hearing, combined with the reasoning of the Supreme Court in *Williams*, will spark reconsideration of the role of due process in clemency proceedings is a question beyond the scope of my expertise.

I would be happy to discuss my report with you or answer any questions.

Sincerely yours,

A handwritten signature in cursive script that reads "Lawrence K. Hellman".

Lawrence K. Hellman

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<sup>37</sup> *Williams*, *supra* n. 30, at 15-17 (citations omitted).