ORIGINAL

103074321 9

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case Nos. PCD-2015-820
	)	D-2005-310
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 28 2015
MICHAEL S. RICHIE
CLERK

ORDER DENYING APPELLANT'S OBJECTION TO THE RESCHEDULING OF THE EXECUTION DATE

Richard Eugene Glossip is incarcerated at the Oklahoma State Penitentiary pursuant to a conviction and sentence of death for the crime of first degree murder in Oklahoma County District Court case number CF-1997-244. *See Glossip v. State*, 2007 OK CR 12, 157 P.3d 143. The execution of Glossip was rescheduled for September 30, 2015, by previous order, due to his last minute filings, and in order for this Court to give fair consideration to the materials included with his subsequent application for post-conviction relief.

Glossip objects to the resetting of the execution date because, he argues, that the time constraints of 22 O.S.2011, § 1001.1, prevent rescheduling an execution for less than thirty (30) days after the dissolution of the stay. This Court issued Glossip a temporary stay and dissolved the stay in the same order by resetting the execution date. Nothing in the statute prohibits this Court from rescheduling the execution date at any time it deems necessary and prudent.

Glossip's motion, therefore, is denied.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 28th **day of** September, **2015.**

Clancy Smith DISSENT - WRITING ATTACHED
CLANCY SMITH, Presiding Judge

Gary L. Lumpkin Special Concur
GARY L. LUMPKIN, Vice Presiding Judge

Arlene Johnson Dissent writing attached.
ARLENE JOHNSON, Judge

Robert B. Lewis
DAVID B. LEWIS, Judge

Robert L. Hudson Concur in Result
ROBERT L. HUDSON, Judge

ATTEST:
Michael S. Richie
Clerk

SMITH, PRESIDING JUDGE, DISSENTING:

I dissent to this Order. Glossip's current execution date cannot stand. Oklahoma law requires this Court to set an execution date after a stay of execution is dissolved or vacated. 22 O.S.2011, § 1001.1. Under these circumstances, where a previous date certain had been set and stayed, the statute clearly mandates that this Court *shall* set a new execution date thirty days after the stay is vacated or dissolved. 22 O.S.2011, § 1001.1(E), (F). This Court is required by law to set Glossip's execution date a minimum of thirty days after the current stay is dissolved or vacated.

LUMPKIN, VICE PRESIDING JUDGE: SPECIALLY CONCURRING

I agree that Petitioner's objection to the scheduled execution date should be denied but write further to explain why this Court's order rescheduling the execution was not in violation of Oklahoma law.

Section 1089(D)(3), of Title 22 O.S. 2011, authorizes this Court to enter "any orders necessary to facilitate post-conviction review." In the present case, this Court determined that it was necessary to reschedule the execution to facilitate review of Petitioner's successive application for post-conviction relief.

In addition, an examination of the plain language of 22 O.S.2011, § 1001.1, reveals that the Legislature intended the statute to act analogous to the "Forgotten Man" Act codified at 57 O.S.Sup.2013, § 332.7. *State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955 (holding plain language of statute is to be construed to ascertain and give effect to the intention of the Legislature as expressed in the statute). Section 1001.1 does not prohibit this Court from setting an execution date earlier than thirty (30) days following a stay but, instead, causes an execution date to be "set by operation of Law" if this Court fails to act so that no inmate on death row is forgotten.

JOHNSON, JUDGE, DISSENTING:

Glossip asks this Court to rescind the portion of its Emergency Stay of Execution resetting his execution date to September 30, 2015. *See Order Granting Emergency Request for a Stay of Execution and Resetting Execution Date,* Case No. PCD-2015-820 (unpublished)(Sept. 16, 2015). The emergency stay was entered for the Court "to give fair consideration to the materials" included in Glossip's successive application for post-conviction relief. The majority's justification for denying Glossip's motion is flawed. Glossip's materials convince me that he is entitled to an evidentiary hearing to investigate his claim of actual innocence. I would reset Glossip's execution date 60 days from now and order the completion of the evidentiary hearing within 30 days. I dissent.

I am authorized to state that Judge Smith joins this dissent.

HUDSON, JUDGE: CONCUR IN RESULT

I agree the Petitioner's objection to the scheduled execution date should be denied. However, my rationale differs from the reasoning utilized in the Court's order.

Glossip's Successive Application for Post-Conviction Review was filed at the last minute on September 15, 2015, pursuant to 22 O.S.2011, § 1089. The Court issued its order the next day staying the execution and resetting Glossip's execution for September 30, 2015. In my view, the Court's action was made, *inter alia*, pursuant to 22 O.S.2011, § 1089(D)(3) which provides:

> Subject to the specific limitations of this section, the Court of Criminal Appeals may issue any orders as to discovery or *any other orders necessary to facilitate post-conviction review.*

(emphasis added).

The stay was a necessary vehicle to accomplish the Court's primary objective, specifically, gaining sufficient time in which to "give fair consideration to the materials included with [Glossip's] subsequent application for post-conviction relief." Title 22 O.S.2011, §§ 1001.1 and 1089(D)(3) must be read in tandem. The Court's September 16th stay was a limited or definite stay which was entered pursuant to § 1089(D)(3). This is different from the type of stay contemplated by 22 O.S.2011, § 1001.1, i.e. an indefinite stay. The Court's actions were based on the unique and rare circumstances presented in this matter, namely, facilitating the Court's ability to review Glossip's last minute and voluminous successive post-conviction application. Title 22 O.S.2011, § 1001.1(C) was not the basis of the Court's September 16th

order as is evidenced by lack the Court's lack of reference to this section. Accordingly, I agree the Petitioner's objection to the scheduled execution on September 30th should be denied.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. PCD-2015-820
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF, MOTION FOR EVIDENTIARY HEARING, MOTION FOR DISCOVERY AND EMERGENCY REQUEST FOR A STAY OF EXECUTION

LEWIS, JUDGE:

Appellant, Richard Eugene Glossip, was convicted of First Degree (malice) Murder in violation of 21 O.S.Supp.1996, § 701.7(A), in Oklahoma County District Court Case No. CF-97-244, after a jury trial occurring in May and June 2004, before the Honorable Twyla Mason Gray, District Judge. The jury found the existence of one aggravating circumstance: that Glossip committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration and set punishment at death.[1] Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

This Court affirmed Glossip's murder conviction and sentence of death in *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143. Glossip, thereafter, filed an

[1] The jury did not find the existence of the second alleged aggravating circumstance: the existence of the probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

initial application for post-conviction relief, which was denied in an unpublished opinion. *Glossip v. State*, Oklahoma Court of Criminal Appeals Case No. PCD-2004-978 (Dec. 6, 2007). Glossip filed a successive application for post-conviction relief, a motion for evidentiary hearing, a motion for discovery, and an emergency request for stay of execution within twenty-four hours of his scheduled execution.[2]

The State filed a response to Glossip's application and related motions on September 16, 2015. This Court, out of an abundance of caution, and so that this Court could give fair consideration to his pleadings, ordered that Glossip's execution be stayed for two weeks and rescheduled his execution for September 30, 2015. Glossip has since filed a supplement to his post-conviction application, a motion to substitute an exhibit, and a notice of intent to file a reply and ongoing investigation.[3]

The Post-Conviction Procedure Act governs post-conviction proceedings in this State. 22 O.S.2011, §1080, *et seq.* It provides,

> 8. . . . if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent . . . application unless:
>
> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this

[2] Filed September 15, 2015, after the Governor of the State of Oklahoma had denied Glossip's request for a sixty (60) day stay of execution per her authority under § 10 Art. VI, of the Oklahoma Constitution.

[3] Glossip's motion to substitute attachment F with a notarized affidavit is granted.

section, because the legal basis for the claim was unavailable, or

b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

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

22 O.S.2011, § 1089(D)(8). "No subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2015). In order to overcome procedural bars, Glossip argues, citing *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11, that this Court has the power to grant relief any time an error "has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

After reviewing Glossip's "successive application" and related motions, we find that the law favors the legal principle of finality of judgment. *Sporn v. State*, 2006 OK CR 30, ¶ 6, 139 P.3d 953, 954, *Malicoat v. State*, 2006 OK CR 26, ¶ 3, 137 P.3d 1234, 1235, *Massaro v. United States*, 538 U.S. 500, 504,

123 S.Ct. 1690, 1693, 155 L.Ed.2d 714 (2003). Moreover, Glossip has not shown that failure of this Court to review his claims would create a miscarriage of justice. The claims do not fall within the guidelines of the post-conviction procedure act allowing this Court to consider the merits or grant relief.

In this subsequent application for post-conviction relief Glossip raises several propositions which have an overarching claim of ineffective assistance of counsel relating to the actions of trial counsel, direct appeal counsel, and previous post-conviction counsel. In his initial claim he argues that it would violate the Eighth and Fourteenth Amendments to the United States Constitution to continue with the execution of sentence based solely on the testimony of codefendant Justin Sneed, especially based on new evidence he now claims casts more doubt on Sneed's credibility. In proposition two, his overarching ineffective assistance of counsel claim, he argues counsel's omissions to discover this evidence violated the provisions of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

This claim is similar to direct appeal issues. On direct appeal, Glossip argued that the evidence was insufficient to convict him because Sneed's testimony was not corroborated or believable. His new evidence includes expert opinion which claims that the police interrogated Sneed in such a way as that would produce false and unreliable information. Glossip presents affidavits which claim that Sneed has since bragged about setting Glossip up and affidavits which allege that Sneed was addicted to methamphetamine at

the time of the crime and he was not dependent on Glossip, as he was portrayed during the trial.

First, this Court must determine whether the evidence is "newly discovered" and whether the facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have . . . rendered the penalty of death." *See* 22 O.S.2011, § 1089(D)(8).

Glossip's "new" evidence merely expands on theories raised on direct appeal and in the original application for post-conviction relief. This evidence merely builds upon evidence previously presented to this Court. Furthermore, because similar issues were raised under ineffective assistance of counsel claim in the original application and on direct appeal, Glossip's claim of ineffective assistance of counsel presented in this application is barred. *See* 22 O.S.2011, § 1089.

Ineffective assistance of counsel claims were included on direct appeal and in his initial post-conviction application. On direct appeal, Glossip argued, in proposition five, that trial counsel was ineffective for failing to adequately impeach Sneed and Detective Bemo with the use of the police interrogation tape. Glossip also claimed that counsel was ineffective for failing to object to evidence that Sneed was a follower and to evidence eliciting sympathy for Sneed. Likewise, in his initial application for post-conviction relief, Glossip claimed counsel was ineffective for failing to fully investigate Justin Sneed and

discover evidence which would rebut the State's theory that Sneed was subservient to Glossip.

His claim that codefendant Sneed's testimony was insufficient has also been previously raised. On direct appeal this Court found that Sneed's testimony was sufficiently corroborated for a conviction. Even with this "new" evidence, presented in his successive application, Sneed's testimony is still corroborated. None of the trial witnesses have recanted their testimony, and Glossip has presented no credible evidence that the witnesses gave falsified testimony at trial. The thorough discussion of the facts and our conclusion that those facts were sufficient in our 2007 *Glossip v. State* Opinion has not been refuted with credible documentation. Glossip's conviction is not based solely on the testimony of a codefendant and the execution of the sentence will not violate the Eighth Amendment to the United States Constitution. We fail to find that Glossip has suffered or will suffer a miscarriage of justice based on these claims, thus we decline to exercise our inherent power to grant relief when other avenues are barred or waived.

In his third proposition, Glossip claims that the evidence was insufficient to convict him in the first trial because no rational trier of fact could find that Glossip aided and abetted Sneed, thus the second trial was prohibited by double jeopardy. Glossip cites no authority for the proposition that a second

trial after an initial conviction is reversed on legal grounds is subject to double jeopardy if the State presented insufficient evidence in the first trial.[4]

Glossip had opportunity to raise this issue on direct appeal after his first trial. His claim, therefore, is waived under the post-conviction procedure act. We further fail to find that Glossip has suffered or will suffer a miscarriage of justice based on this claim. *See Cannon v. State*, 1995 OK CR 45, ¶ 16, 904 P.2d 89, 98 (holding that double jeopardy bars retrial only when a conviction is reversed based on insufficient evidence).

In his final proposition, Glossip claims that counsel was ineffective for failing to adequately investigate and prepare for the testimony of the medical examiner, which he now claims was false, or at least misleading. He presents affidavits to rebut the medical examiner's conclusions. Glossip has never raised claims attacking the credibility of the medical examiner's testimony with this Court. This is a claim that could have been raised much earlier on direct appeal or in a timely original application through the exercise of reasonable diligence. Furthermore, we find that the facts underlying this claim are not sufficient when viewed in light of the evidence as a whole to show that no reasonable fact finder would have found Glossip guilty or would have rendered the penalty of death. Moreover, Glossip has not suffered a miscarriage of justice based on this claim.

---

[4] Glossip did raise a similar issue in a motion for rehearing after this Court decided his first appeal and reversed on legal grounds, but this Court did not rule on the merits. *See Glossip v. State*, 2001 OK CR 21, ¶ 8, 29 P.3d 597, 599 ("we need not reach Appellant's claim going to the sufficiency of the evidence, because trial counsel's conduct was so ineffective that we have no confidence that a reliable adversarial proceeding took place.") See order denying petition for rehearing dated Aug. 20, 2001, *Glossip v. State*, Court of Criminal Appeals case number D-1996-948.

Glossip seeks a stay of execution, a motion for discovery, and application for an evidentiary hearing. Glossip merely wants more time so he can develop evidence similar to the evidence presented in his subsequent application for post-conviction relief. We find, therefore, an evidentiary hearing, discovery, or further stay of execution is not warranted in this case.

CONCLUSION

After carefully reviewing Glossip's subsequent application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Glossip's subsequent application for post-conviction relief is **DENIED**. Further, Glossip's motion for an evidentiary hearing and motion for discovery is **DENIED**. Any further request for a stay of execution is also **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS FOR PETITIONER:

MARK HENRICKSEN
HENRICKSEN & HENRICKSEN
LAWYERS, INC.
600 NORTH WALKER AVE.
SUITE 201
OKLAHOMA CITY, OK 73102

KATHLEEN LORD
LORD LAW FIRM
1544 RACE STREET
DENVER, CO 80206

DONALD KNIGHT
DONALD R. KNIGHT
LAW FIRM
7852 S. ELATI ST.
SUITE 201
LITTLETON, CO 80120

MARK OLIVE
OFFICE OF MARK E. OLIVE, P.A.
320 W. JEFFERSON ST.
TALLAHASSEE, FL 32301

ATTORNEYS FOR RESPONDENT:

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. MILLER
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105

OPINION BY: LEWIS, J.

SMITH, P.J.: DISSENTS
LUMPKIN, V.P.J.: SPECIALLY CONCURS
JOHNSON, J.: DISSENTS
HUDSON, J.: SPECIALLY CONCURS

SMITH, PRESIDING JUDGE, DISSENTING:

I dissent. Glossip claims to have newly discovered evidence that Sneed recanted his story of Glossip's involvement, and shared this with other inmates and his daughter. The tenuous evidence in this case is questionable at best if Sneed has, in fact, recanted. Previous attorneys, exercising due diligence, may not have been able to discover this new evidence. I would grant a stay of 60 days and remand the case to the District Court of Oklahoma County for an evidentiary hearing. Because Glossip's execution is imminent, he will suffer irreparable harm without a stay. *White v. Florida*, 458 U.S. 1301, 1302, 103 S.Ct. 1, 1, 73 L.Ed.2d 1385 (1982). On the other hand, the State's interests will not be harmed by this delay. *California v. Brown*, 475 U.S 1301, 1305-6, 106 S.Ct. 1367, 1369-70, 89 L.Ed.2d 702 (1986). While finality of judgment is important, the State has no interest in executing an actually innocent man. An evidentiary hearing will give Glossip the chance to prove his allegations that Sneed has recanted, or demonstrate to the Court that he cannot provide evidence that would exonerate him.

I further dissent to any preemptive denial of relief.

I am authorized to state that Judge Johnson joins in this dissent.

LUMPKIN, VICE PRESIDING JUDGE: SPECIALLY CONCURRING

I specially concur in the opinion of Judge Lewis and join with Judge Hudson in further defining and summarizing our decision today.

JOHNSON, JUDGE, DISSENTING:

A bare majority of this Court affirmed this case on direct appeal. I dissented because Glossip's trial was deeply flawed. *Glossip v. State,* 2007 OK CR 12, ¶¶ 1-4, 157 P.3d 143, 175 (Johnson, J. dissenting). Because I believe Glossip did not receive a fair trial, I cannot join in the denial of this successive post-conviction application that further calls into doubt the fairness of the proceeding and the reliability of the result. "The death penalty is the gravest sentence our society may impose." *Hall v. Florida,* 572 U.S. ——, ——, 134 S.Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014). I would grant Glossip's request for evidentiary hearing to investigate his claim of actual innocence because those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.*

Furthermore, the majority's denial of any further requests for a stay of execution appears to be an attempt to preempt the filing of any additional last minute claims regardless of merit. I believe such a ruling to be in conflict with this Court's authority and purpose.

HUDSON, JUDGE: SPECIALLY CONCUR

I agree Glossip's successive application for post-conviction relief should be denied. It should be noted upfront that codefendant Sneed has not recanted his testimony. Had he done so, this would be an entirely different result. Glossip's claims for relief must be evaluated in light of the previous 11 years of proceedings since his second trial. *See Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 855, 122 L. Ed. 2d 203 (1993). Glossip has been afforded a fair trial and convicted of the offense for which he was charged; thus, his constitutional presumption of innocence no longer exists. *Id.* Glossip's alleged newly discovered evidence is hearsay—at best it may be used as impeachment evidence. 12 O.S.2011, § 2613. Glossip's proffered evidence is as dubious as that of a jailhouse informant. *See Dodd v. State*, 2000 OK CR 2, ¶ 22, 993 P.2d 778, 783 ("Courts should be exceedingly leery of jailhouse informants."). Moreover, the eleventh-hour nature of this evidence is suspect. Remand for an evidentiary hearing at this point would be superfluous. Under the total circumstances of this case, this evidence is insufficient to establish that no reasonable fact finder would have found Glossip guilty of the first degree murder of Barry Van Treese or would not have imposed the death penalty. 22 O.S.2011, § 1089(D)(8)(b)(2). *See Glossip v. State*, 2007 OK CR 12, ¶¶ 43-53, 157 P.3d 143, 152 – 153 (discussion of evidence corroborating Sneed's testimony); *Id.*, 2007 OK CR 12, ¶ 33, 157 P.3d at 175 (Chapel, J., dissenting) ("I agree with the majority that the State presented a strong circumstantial case against Glossip, which when combined with the testimony of Sneed

directly implicating Glossip, was more than adequate to sustain his conviction for the first-degree murder of Barry Van Treese.").

I write separately to focus on the real issues presented in this matter and clarify the Court's ruling by providing a succinct summary. "As we have repeatedly stated in our opinions, Oklahoma's Post-Conviction Procedure Act is not designed or intended to provide applicants repeated appeals of issues that have previously been raised on appeal or could have been raised but were not." *Slaughter v. State,* 2005 OK CR 6, ¶ 4, 108 P.3d 1052, 1054. The Court's review of subsequent post-conviction applications is limited to outcome-determinative errors and claims of factual innocence. *Id.* Moreover, "this Court's rules and cases do not impede the raising of factual innocence claims *at any stage* of an appeal." *Id.,* 2005 OK CR 6, ¶ 6, 108 P.3d at 1054.

To be clear, Glossip raised the following issues in his application, which have been thoroughly reviewed and vetted by this Court:

I. It would violate the Eighth Amendment for the state to execute Mr. Glossip on the word of Justin Sneed;

II. Counsel were ineffective in violation of the Sixth Amendment;

III. The evidence presented at trial was insufficient to support the murder conviction because no rational trier of fact could have found beyond a reasonable doubt that Mr. Glossip aided and abetted Sneed; and

IV. Counsels' performance violated Mr. Glossip's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the medical examiner testified in a way that misled the jury and undermines the reliability of the verdict and death sentence.

Glossip's allegations of error do not meet the requirements for filing a successive application as set forth in 22 O.S.2011, § 1089(D)(8). Glossip's claims are waived as they either were or could have been previously presented. *See Patton v. State*, 1999 OK CR 25, ¶ 2, 989 P.2d 983, 985. Moreover, with regard to Glossip's proffered "newly discovered evidence", Glossip has failed to show this evidence is sufficient to establish by clear and convincing evidence that—with this information—no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death. 22 O.S.2011, § 1089(D)(8)(b)(2). Glossip is therefore not entitled to post-conviction relief.

Glossip's first proposition of error is twofold: (1) his execution would violate the Eighth Amendment because there was insufficient evidence of his guilt; and (2) a death sentence cannot be predicated solely on the testimony of a murderer whose stories changed. As to his first contention, the assertion is barred as the claim of insufficient evidence was raised and rejected in Glossip's second direct appeal. To the extent that Glossip is suggesting a new slant on his original evidentiary sufficiency claim, such claim is waived. As to his second contention, this claim also could have been raised and is thus barred. With regard to the proffered "new evidence" cited in support of this contention, Glossip fails to explain why this information could not have been developed with due diligence earlier. Moreover, pursuant to § 1089(D)(8)(b)(2), Glossip has failed to show by clear and convincing evidence that with this information

no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

In his second proposition of error, Glossip argues that trial counsel was ineffective for failing to attack Sneed's credibility. This claim was raised in Glossip's second direct appeal, and thus, it is parsed and *res judicata*. *Bryan v. State*, 1997 OK CR 69, ¶ 4, 948 P.2d 1230, 1235 (Lumpkin, J., concurring in results) (finding that the Court should not address on the merits the petitioner's single proposition of error parsed into sub-parts, part to be alleged on direct appeal and part on post-conviction because the issue is barred by *res judicata*).

In his third proposition of error, Glossip essentially asserts that the evidence at his first trial was insufficient to show he aided and abetted Sneed. Based upon this assertion, Glossip urges this Court to review the issue now and find that double jeopardy prohibited his second trial. This issue clearly could have been raised in Glossip's second direct appeal and is thus waived.

Finally, as to his fourth proposition of error, Glossip contends counsel were ineffective for failing to deal with aspects of the Medical Examiner's testimony. This claim could have been raised earlier and is waived. With regard to the proffered "new evidence", Glossip has failed to demonstrate that this information could not have been discovered earlier with due diligence. Additionally, this information does not demonstrate—by clear and convincing evidence—"that, but for the alleged error, no reasonable factfinder would have

found ... [Glossip] guilty or would have rendered the death penalty." 22 O.S.2011, § 1089(D)(8)(b)(2).

For the above reasons, I concur in the Opinion denying Glossip's subsequent application for post-conviction relief along with the denial of all other accompanying motions and supplements.

I am authorized to state that Judge Gary L. Lumpkin joins in this special concurrence.