No. 22-_____
(CAPITAL CASE)

IN THE

Supreme Court of the United States

RICHARD EUGENE GLOSSIP, PETITIONER,

v.

STATE OF OKLAHOMA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

AMY P. KNIGHT
Counsel of Record
KNIGHT LAW FIRM, PC
3849 E. Broadway Blvd., #288
Tucson, AZ 85716
(520) 878-8849
amy@amyknightlaw.com

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. Box 4544
New York, NY 10163

JOHN R. MILLS
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612

DONALD R. KNIGHT
7852 S. Elati St., Suite 205
Littleton, CO 80120

WARREN GOTCHER
GOTCHER & BEAVER
323 E. Carl Albert Ave.
McAlester, OK 74501

Counsel for Richard Eugene Glossip

CAPITAL CASE
QUESTIONS PRESENTED

Petitioner, Richard Glossip, faces execution on February 16, 2023 for a conviction premised on the State's theory that he hired Justin Sneed, who is the undisputed actual killer, to kill the owner of a motel where Mr. Glossip was the manager. Sneed's testimony was the only evidence of any agreement, and his testimony, for which he received assurance he would not face a death sentence, was critical to this case where, as one federal judge put it, "the evidence of guilt was not overwhelming."

At Mr. Glossip's first trial, his attorney failed to undertake even rudimentary efforts in his defense, resulting in a full reversal. Chief among the failings was a failure to impeach Sneed with evidence he had been coached to implicate Glossip, whom the interviewing detective brought up six times before Sneed implicated him in the murder.

At retrial, Mr. Sneed was impeached to some extent about having been led to identify Mr. Glossip and about inconsistencies in his account of the murder.

Recently, in post-conviction proceedings, Mr. Glossip learned that prior to the retrial, Sneed had expressed his desire to "recant" and that immediately prior to meeting with Sneed during the second trial, the prosecutor wrote in a memo that the "biggest problem" with the case would be if Sneed repeated his initial statement to police and that she needed to "get to him" before he testified.

This petition presents the following questions:

1. Whether a court may require a defendant to demonstrate by clear and convincing evidence that no reasonable fact finder would have returned a guilty verdict to obtain relief for a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

2. Whether suppressed impeachment evidence of the State's key witness is *per se* non-material under *Brady v. Maryland* because that witness's credibility had been otherwise impeached at trial.

PARTIES TO THE PROCEEDING

The petitioner is Richard Eugene Glossip.

The respondent is the State of Oklahoma.

STATEMENT OF RELATED PROCEEDINGS

State v. Richard Eugene Glossip, No. CF-97-244, Oklahoma County District Court for the State of Oklahoma. Judgment entered July 31, 1998.

Glossip v. State, No. D-1998-948, 29 P.3d 597 (Okla. Crim. App. 2001). Judgment entered July 17, 2001.

State v. Richard Eugene Glossip, No. CF-97-244, Oklahoma County District Court for the State of Oklahoma. Judgment entered on August 27, 2004.

Glossip v. State, No. D-2005-310, 157 P.3d 143 (Okla. Crim. App. 2007). Judgment entered April 13, 2007.

Glossip v. Oklahoma, No. 07-7449, 552 U.S. 1167 (Jan. 22, 2008) (mem.).

Glossip v. State, No. PCD-2004-978, Oklahoma Court of Criminal Appeals. Judgement entered December 6, 2007.

Glossip v. Trammell, No. 08-CV-00326-HE, Western District of Oklahoma. Judgment entered September 28, 2010.

Glossip v. Trammell, No. 10-624, 530 Fed. App'x 708 (10th Cir. 2013). Judgment entered July 25, 2013.

Glossip v. Trammell, No. 13-8943, 572 U.S. 1104 (May 6, 2014) (mem.)

Glossip v. State, No. PCD-2015-820, Oklahoma Court of Criminal Appeals. Judgment entered September 28, 2015.

Glossip v. Oklahoma, No. 15-6340, 576 U.S. 1094 (Sept. 30, 2015) (mem.).

Glossip v. State, No. PCD-2022-589, Oklahoma Court of Criminal Appeals. Judgment entered November 10, 2022.

Glossip v. State, No. PCD-2022-819, Oklahoma Court of Criminal Appeals. Judgment entered November 17, 2022.[1]

[1] There are additional cases arising from Mr. Glossip's death sentence, including from this Court. *See, e.g.*, *Glossip v. Gross*, 576 U.S. 863 (2015). However, those matters concern the manner in which the State of Oklahoma intends to carry out that sentence, not the conviction and sentences themselves. *See Nance v. Ward*, 142 S. Ct. 2214, 2223 (2022) (holding 42 U.S.C. § 1983 is appropriate for challenging method of execution as opposed to validity of a sentence).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Eugene Glossip respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

INTRODUCTION

The Oklahoma Court of Criminal Appeals (OCCA) has placed an innocent life in peril, refusing to hold the State to account for suppressing exculpatory evidence that would have gutted the prosecution's "murder-for-hire" theory that Justin Sneed's brutal murder of Barry Van Treese was at the behest of Richard Glossip. An independent investigation undertaken by international law firm Reed Smith, LLP at the request of an ad hoc group of Oklahoma legislators, has revealed myriad problems with Mr. Glossip's case. That investigation, consuming thousands of attorney hours, led Reed Smith to conclude that the evidence at Mr. Glossip's trial "cannot be relied on to support a murder-for-hire conviction."

In response to the investigation and recent disclosures from the State,[2] the OCCA adjudicated two applications for post-conviction relief. Presented with the opportunity to hold the State to account for suppressing exculpatory evidence, the OCCA instead imposed upon defendants an impossibly high standard for proving prejudice from State misconduct. Their standard—"clear and convincing evidence" that "no reasonable fact finder would have found [the defendant] guilty of the

[2] The District Attorney's Office steadfastly refused to provide Mr. Glossip any access to its files. Some access was afforded only when the Oklahoma Attorney General's Office took custody of the files.

underlying offense"—flatly contradicts *Brady v. Maryland*, 373 U.S. 83 (1963). App. 16a (quoting Okla. Stat. tit. 22, § 1089(D)(8)(b)(2)).

The OCCA further abdicated its responsibility to hold the State to account, illogically holding that in close cases, relief is usually unavailable. That is, it held that because the testimony of the most important prosecution witness had been impeached at trial, "further" impeachment could not undermine confidence in the outcome. App. 17a. But where the evidence is already remarkably weak on a key point, further weakening it must result in reversal, not inevitable affirmance. For these reasons, and those that follow, this Court should grant review and reverse.

OPINIONS BELOW

The November 17, 2022 opinion of the Oklahoma Court of Criminal Appeals is unpublished. App. 1a–20a.

JURISDICTION

The Oklahoma Court of Criminal Appeals entered judgment on November 10, 2022. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Unites States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

The Oklahoma Post-Conviction Procedure Act is set forth in the Appendix. App. 22a; Okla. Stat. tit. 22, § 1089(D)(8).

STATEMENT

Mr. Glossip filed his Application with the OCCA just weeks after the State granted years-denied access to some of its files, which revealed suppression of material exculpatory evidence, and after independent investigators gained access to additional key materials. The suppressed information eviscerates the reliability of the most important witness, Justin Sneed, without whose testimony the trial judge concluded Mr. Glossip could not have even been charged with the murder. Newly discovered documents reveal that between Mr. Glossip's initial trial and retrial, Sneed expressed a desire to "recant" unless he could extract further consideration from the State for his cooperation. The new disclosures also confirm Sneed had expressed a desire to recant to both his attorney and his daughter.

The files also contained a memo revealing that, shortly before calling Sneed as a witness, the prosecutor met with him to discuss the "big[] problem" with her case: Sneed's original statement to police, as confirmed in his testimony at the first trial, contradicted the medical examiner's testimony in Mr. Glossip's second trial. Neither Sneed's desire to "recant" nor the memo were disclosed until very recently.

A. Charges and Negotiation

Before dawn on January 7, 1997, nineteen-year-old methamphetamine addict Justin Sneed murdered motel owner Barry Van Treese in Room 102 at his Best Budget Inn property in Oklahoma City by repeatedly bludgeoning him on the head with a baseball bat, then stealing thousands of dollars in cash from his car. App. 284a–87a. These facts have never been disputed. The police investigation obtained a statement from a guest in the room next to 102 that he had heard a woman's voice amid sounds of the assault. App. 103a–05a.

When they arrested Sneed a week later, detectives told him they knew he had killed Van Treese, he had not acted alone and should not take all the blame, they could help him, and they had already arrested the motel's manager, Richard Glossip, who was blaming Sneed for the murder. In their interview, the detectives invoked Mr. Glossip's name six times before Sneed said anything about the crime. Only then did the detectives asks Sneed what happened, and Sneed predictably inculpated Glossip, claiming Glossip induced him to rob (but not kill) Van Treese. App. 25–50a. Later in the interview, he changed his story, claiming Mr. Glossip asked him to kill Van Treese "so he could run the motel without him being boss." App. 70a. The detectives told Sneed his crime carried the death penalty, and the State charged him with first-degree murder. App. 96a; App. 320a.

At that time, the State had already charged Mr. Glossip as an accessory after the fact based on his actions during the day of January 7 prior to the discovery of

Van Treese's body, reflecting the belief that he had helped to cover up the murder. Several days after Sneed's arrest, the State withdrew the accessory charge and added Mr. Glossip as Sneed's co-defendant, seeking death against both men.

The State initially offered to drop its pursuit of a death sentence against Mr. Glossip in exchange for a guilty plea and his testimony against Sneed. He declined, insisting on his innocence and a trial. App. 144a. The next week, prosecutor Fern Smith told the trial court Sneed would plead guilty and testify against Mr. Glossip in exchange for the state dropping death. App. 321a. In fact, no agreement had been reached, with Sneed continuing to refuse any plea without parole eligibility for several months after Smith's misrepresentation to the court. App. 146a.

During the period, Sneed discussed his case with co-inmates in the Oklahoma County jail. He told Roger Ramsey he was "mad at Richard [Glossip] so he was blaming him." App. 152a. Ramsey understood from Sneed that Sneed and an accomplice, possibly a woman, "wanted to ambush and rob [Van Treese], that the robbery went bad, and then that Sneed killed him." App. 153a. Sneed asked Terry Cooper to lie and tell police he had heard Sneed and Glossip discussing a plan to murder Van Treese. App. 155a–56a. He told Paul Melton "that he and his girlfriend planned a robbery that got very messy and ended with him killing the victim," never mentioning Mr. Glossip. App. 160a.

Sneed ultimately reached a deal with the State on May 26, 1998. He would plead guilty and testify against Mr. Glossip, and the State would not seek death against him. App. 169a–70a. Mr. Glossip's trial was set to start one week later.

B. Trial and Conviction

The State's case against Mr. Glossip hinged on the bargained-for testimony of Sneed, who testified that Glossip offered him money to kill Van Treese, and the State portrayed Sneed as helpless, easily manipulated, and thus vulnerable to exploitation by Glossip. App. 283–84a, 293a. The judge presiding over Mr. Glossip's retrial would later observe that Mr. Glossip could not have even been charged with murder without Sneed's testimony. App. 342a. On June 10, 1998, Mr. Glossip was convicted and sentenced to death. App. 376–78a.

C. Appeal

In April of 2000, Mr. Glossip filed his direct appeal. The central, and ultimately successful, claim was that his trial attorney failed to provide even a minimal defense. The failures included failing to impeach Sneed's testimony with readily available evidence, among it the video of the police interrogation where detectives lead Sneed to implicate Mr. Glossip. App. 323a–24a. The appeal also alleged that Fern Smith committed misconduct by presenting Sneed's false testimony and jury misconduct. App. 322a–24a. The OCCA remanded the case for a hearing on these issues. App. 325a–26a.

After an evidentiary hearing, the trial court entered findings that Mr. Glossip had received ineffective assistance of counsel and that the prosecutor had not knowingly misled the jury. App. 329a–51a. The OCCA unanimously held that Mr. Glossip had received ineffective assistance of counsel, noting counsel should have sought a lesser-included-offense instruction on accessory after the fact and used the video of Sneed's interrogation to impeach him.[3] App. 352a–55a.

With the appeal pending, separate counsel began preparing for post-conviction proceedings.[4] After an initial visit with Sneed, she believed he regretted his testimony and would provide testimony exonerating Mr. Glossip. Before she could visit again, Sneed's attorney, Gina Walker, instructed her not to further contact Sneed because if he cooperated with the defense, "the District Attorney's Office would rip up the deal, and Sneed would face the death penalty." App. 173a.

D. Post-Reversal

While Mr. Glossip's retrial was pending, Sneed expressed general reluctance to continue as a witness. In October, 2002, he told Walker he hadn't "been enthused at all, since day one of Richard getting his case overturned of doing the same thing. . . . My opinion is they cannot make me do the same thing." App. 175a. He also told Mr. Glossip's lawyer he "did not want to testify." App. 309a.

---

[3] It declined to reach a challenge to the sufficiency of the evidence, despite the relevance of that determination for double jeopardy purposes.

[4] No Application was ever filed because the appeal was successful.

Meanwhile, Mr. Glossip's counsel sought discovery of all statements, written and oral, made by Sneed. App. 356a–57a. The State averred it had disclosed all such statements. App. 304a. Mr. Glossip's counsel clarified that the request extended to any communications since the remand. App. 304a–05a. Without inquiring further, the trial court said, "the State's absolutely going to comply with the law and I have every confidence about that." App. 305a.

At the same hearing, the court addressed a motion to preclude Sneed's testimony, based on the fact that Sneed clearly would not testify consistently with his taped police interview, as the prosecution claimed, and while the prosecution may not have known that at his first trial, they certainly did now. App. 358–61a. The trial court brushed aside those concerns. App. 311a. Defense counsel, concerned that Sneed simply did not want to be transported and testify as a State's witness at all (content aside), asked the State to confirm Sneed would indeed testify, and Prosecutor Smith responded, "to the best of my knowledge, Justin Sneed will be on the witness stand to testify." App. 306a. In response to a defense request for clarification about any concerns Smith had about Sneed, she offered that any communications with Sneed would be through his lawyer, Gina Walker, and she had no such communications. App. 310a. Smith then told the court she had writted Sneed from the state prison to the county jail and that he would arrive the next week, and she would "talk with Ms. Walker and ask her to let us know what his feelings are at that time." App. 311a. In fact, Sneed had already arrived at the jail

the day before the hearing, where he remained for two more weeks. App. 363a. The State presented no further information about Sneed's status and at no point disclosed information indicating that Sneed wanted to "recant" his accusations against Mr. Glossip.

The trial was then delayed after the defense realized certain physical evidence had not been tested. During the delay, Sneed expressed ambivalence not simply about testifying, but about his role in the case against Mr. Glossip.[5] In January, he wrote to Walker, "I still question on what I should do, on when the time comes." App. 183a. A few days later he wrote about "ever haunting court issues," and "what happens depends on what I'll do." App. 188a. The next month, he wrote, "As of now do not expect to [sic] much." App. 190a.

His substantive concerns escalating, on May 15, 2003, he wrote:

> Curious if your [sic] still thinking about coming here to try to visit me before his trial [currently scheduled for August 25]. And parts of me are curious if I chose to do this again, *do I have the choice of re-canting [sic]* my testimony at any time during my life, or anything like that. For now I guess that's pretty much it. If there is anything you know, on his court date and about *re-canting [sic]*. The most thing I just hate the waiting game, and not seeing what is going to come next.

[5] The OCCA's opinion repeatedly conflated these two issues and ignored affidavits from trial counsel stating that while they knew of a general reluctance, they were unaware of the recantation issue. App. 273a; 276a.

App. 192a (emphasis added). Walker responded on May 21 that she would write to let him know when she would visit after her trial ended and that they would discuss "[t]he remainder of the things you mention in your letter . . . in person." App. 194a.

E. Retrial

During the summer of 2003, Smith left the case.[6] On June 12, 2003, the court and counsel agreed to postpone the trial from August 23 to November 3, 2003 to allow the State's new counsel to re-evaluate the case. App. 365a. On August 15, 2003, the new prosecutor, Connie Pope,[7] and an investigator met with Mr. Glossip's counsel, who asked her to take a fresh look at the case. Pope agreed.

On September 13, in a letter to Walker, Sneed indicated she had recently visited him and he remained "not sure on what even to do." App. 196a. A second letter indicates there was communication between Sneed, Walker, and the prosecution on September 23: "I've learned, as you & the DA's said on the 23rd there's a lot in words & details that can tell people a lot." App. 199a. No record of such a meeting has ever been provided to Mr. Glossip. *See* App. 125a. Whether in person or by phone, there was plainly *some* communication including a discussion of

---

[6] Although Smith indicated an intention to retire, she continued to appear in Oklahoma County capital cases long after leaving the Glossip case.

[7] Pope married during the proceedings and was then known as Connie Smothermon. For simplicity, this pleading refers to her Pope throughout, although in some transcripts and correspondence, she appears with her married name.

re-negotiating Sneed's deal, as on September 25—two days later—Pope met with the Van Treese family, prompting an email from the decedent's brother expressing concern that "Sneed may attempt to renegotiate the terms of his plea agreement in exchange for testifying to the same facts he provided in the first trial." App. 125a–26a. Pope reassured him "there will be no modification to the agreement." App. 126a. The existence of this discussion proves the State had some information about Sneed's intentions. The day after this meeting, the State served Sneed's attorney with a subpoena to testify at the scheduled November 3 trial, again reflecting concern about Sneed's testimony. App. 364a.

On October 10, Pope called one of Mr. Glossip's attorneys about "offers;" their subsequent correspondence confirms the prosecution was seeking to settle the case. App. 204a. The following week, Walker requested two visits with Sneed: one on October 20, for which she requested video equipment, and one on October 22, at which she would be accompanied by prosecutors Pope and Gary Ackley. App. 126a.

On October 20, two weeks prior to the scheduled trial, Pope filed several documents. One formally added Gina Walker to her witness list. App. 367a. A concurrent summary of witness testimony stated Walker "Will testify to gaining information that Mr. Sneed was visited by the defendant's attorneys in an attempt to prevent him from testifying." App. 368a. That testimony would be wholly irrelevant if Sneed, in fact, was going to testify as he had at the first the first trial,

notwithstanding any visits from defense counsel. Rather, such testimony would only be needed if Sneed might refuse to testify as he had previously.

Pope also filed an Amended Bill of Particulars, adding a previously unalleged aggravating factor: murder for remuneration. App. 368a. Pope provided a more definite statement specifying the planned evidence for the new aggravator:

> Justin Sneed will testify that the defendant came to this motel room in the early morning hours of January 7, 1997 and offered Mr. Sneed $7,000.000 to kill the victim. Mr. Sneed killed the victim at the defendant's instructions. The defendant instructed Mr. Sneed to wait until the evening of January 7th to move the body. The defendant had offered to pay Mr. Sneed on numerous occasions to kill the victim. The defendant had offered to pay Mr. Sneed that if the victim was not killed that Mr. Sneed and the defendant would get kicked out of the motel. The defendant told Mr. Sneed that the defendant might be able to con the victim's wife into letting the defendant run two motels after the murder.

App. 366a. All of this was in Sneed's prior statements and testimony.

Two days later, Pope made her first documented visit to Sneed, accompanied by both Walker and Ackley. App. 126a. That same day, she filed a document adding to both the more definite statement and the summary of testimony, containing additional testimony of only one witness, Sneed:

> [T]estimony 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.
>
> Further, Mr. Sneed will testify that starting approximately two months prior to the murder, the defendant began talking about killing the victim. The defendant offered Mr. Sneed money in increasing increments to kill the victim. On one occasion, the defendant, Mr. Sneed and the victim were working on a television feed line. The defendant was putting a lot of pressure on Mr. Sneed to get something and hit the victim over the head with it. The defendant was wearing gloves and cautioned Mr. Sneed to get a pair of gloves for himself. After the defendant offered to pay Mr. Sneed to kill the victim on more than one occasion, Mr. Sneed realized the defendant was serious in his request. Mr. Sneed will testify that the defendant told him he could talk the victim's wife into letting him manage both motels after the victim was dead.

App. 369a–70a. Much of this information was new; it was not in Sneed's police interview or testimony, nor in any prior summary filed by the State.

The parties continued to discuss possible plea resolution, but could not reach an agreement, and at a hearing held the next Monday, October 27, Pope did not raise any concerns about the need for testimony from Walker and/or Mr. Glossip's counsel about his visit to Sneed the year before.

Sneed was brought to the Oklahoma County Jail that Thursday. App. 374a. Although the writ the State had obtained for Sneed (App. 372a) said the transport was for the November 3 trial, the prison's file contains a memo noting Sneed would be picked up and would be "out overnite [sic]," and the Sheriff's return indicates he was indeed transported back to the prison the next day, October 31. App. 206a. The

jail's paperwork reflects that upon arrival, Sneed was placed in protective custody at the prosecutor's request, explaining he was a "key witness in a murder trial." App. 208a. When Sneed was sent back to prison the next day, Pope sought a writ to have him brought back again on November 10. App. 371a. While there is no record of what occurred during this overnight visit, it was coordinated by the District Attorney's Office, and it is clear that although the transport was purportedly for trial testimony, that was not the plan, as the prison was aware in advance that Sneed was to be gone only overnight, and would be back at the prison before the trial started.

On the first day scheduled for trial, November 3, 2003, rather than beginning with jury selection, there were continued plea negotiations. The court noted on the record that the State had offered Mr. Glossip an agreed sentence of life *with* the possibility of parole if he would plead guilty, thus averting the trial that would otherwise begin.[8] App. 210a. The State had never before agreed to an offer that would allow for parole. The Court gave Mr. Glossip until the next morning to consider the offer, but he refused it. App. 315a.

Before proceeding with the trial, the Court stated the need to resolve, at *Pope's* request, "a potential problem in regard to hearsay." App. 315a. Pope did not indicate why she did not raise the issue previously—for instance, at the motions

[8] The State served subpoenas for the new May 2004 trial date on D-Anna Wood and William Bender (both out-of-state witnesses) *in person* on November 4, 2003.

hearing held the week before. The Court then inquired about Mr. Glossip's attorney's October 23, 2002 (i.e., over a year prior) visit to Sneed, confirming his lawyer had visited Sneed without Walker and Sneed's lawyers had taken exception. The Court asked Pope how that meant Walker might be a witness. She responded:

> [W]e would not anticipate that she would be called as a case in chief witness in order to substantively prove the guilt of Richard Glossip. However, Justin Sneed is going to be called as a witness. Depending on how the cross-examination goes and/or the tenure [sic] and the questions that are asked or the impressions that are left, there may need to be some rehabilitation of some issues. I believe that's how Ms. Walker would come to be a witness. I believe that there will be, could potentially be, again, I don't know how cross-examination is going to go, but I think there potentially could be an express or implied claim of fabrication, recent fabrication. I believe that she could be called under the law in order to rebut that.

App. 317a. In other words, Pope was concerned Sneed was going to say something different on the stand that would require "rehabilitation" or invite a claim of "recent fabrication"—presumably of some testimony that did not accomplish what Pope needed for a conviction.

Pope went on to say she thought Walker could be a witness to the original agreement to testify truthfully (although how that could become necessary when they had the agreement itself and anything underlying it would be privilege, is unclear) or to the fact that her office told Mr. Glossip's attorney to leave Sneed alone after his visit, App. 317a–18a (Walker obviously could not be a witness about the visit itself because she was not there and anything Sneed had told her about it

would be privileged). Apparently, Pope was still concerned Sneed was not going to give the testimony she needed, and she would thus need to bring up with Sneed the fact that Mr. Glossip's attorney had made a visit at which he allegedly tried to persuade Sneed not to testify. App 318a. How Walker's office's subsequent instruction to Mr. Glossip's attorney would be relevant, Pope did not say, but this conversation led the court to ask him if he might now be a witness—to rebut any claim by Sneed that Mr. Glossip's attorney had pressured him—and Mr. Glossip's attorney agreed and promptly moved to withdraw. This caused the trial to be postponed six months, to May 11, 2004, and left Mr. Glossip in the hands of two lawyers who had only six months to prepare. The same day, Ackley recalled the writ his office had obtained to bring Sneed to testify on November 9. App. 375a.

Oddly, the next day, Kenneth Van Treese (the decedent's brother) emailed Pope a "memo for record" detailing his version of the events of the previous two days, prefaced by "PLEASE CHECK FOR ACCURACY. YOUR MOMMA SHOULD BE PROUD!" App. 212a. Although Van Treese does not say why he was so pleased with Pope when the long-awaited trial for his brother's murder had just been cancelled, in context, it appears the State did not want to proceed with the trial at that time (first the sweetened offer and agreement to postpone trial by a day to try to negotiate it, then raising at the last minute the issue requiring disqualification that could have been addressed the week before, or at any time in the preceding year). That would certainly be in the State's favor if Sneed were not at that point

willing to testify; once the trial began and jeopardy attached, they would be unable to stop it, whether they had their star witness on board or not.

When the May trial date grew near, Walker arranged a visit with Sneed on May 5, for two hours by herself and then joined by Pope and Ackley[9], with video equipment requested. App. 215a. Testimony in the second trial began on Friday, May 14, 2004, with the testimony of the widow, Donna Van Treese. Pope elicited from Donna something she had never previously said: that she recognized the knife found under Barry's body as a pocketknife he owned and would carry. App. 288a. Thus, it appeared Pope was concerned about the presence of the knife in the room. Testimony continued the following week and into the next week when John Fiely, who initially processed the crime scene, testified on cross that in fact, two still-folded pocketknives were found in Barry's pants pockets, App. 289–90a, making it unlikely that the open knife found with the body was a knife he had been carrying with him. After all, Donna Van Treese did not testify he was known to carry three knives at a time. That same day, Justin Sneed was brought back to the Oklahoma County jail in anticipation of his testimony.

The following day, the medical examiner, Dr. Chai Choi, took the stand. Ackley took her through the wounds she had observed during the autopsy, establishing that the fatal wounds on Van Treese's head were made by a blunt object such as a baseball bat. There were also several smaller wounds on his chest

[9] It appears Ackley did not actually attend.

and one on his buttocks, in addition to two cuts (one on a finger and one on an elbow) made by something sharp, but she was not asked about the source of these wounds. On cross, the defense showed her the knife that had been found under Van Treese's body—she had not previously been aware a knife was found—and asked if the smaller wounds on the chest and buttocks could have been made by that knife. The knife was distinctive because its tip was broken off, meaning it still had sharp edges but did not have a point, but rather a blunt, dull edge. Dr. Choi thought it was a good match for the wounds, that it seemed someone had been trying to stab Van Treese in the heart, but the object used was dull, resulting in patterned marks that did not piece the skin. App. 291–92a. She testified the knife could also have made the two cuts on Van Treese's elbow and finger. App. 292a. This testimony was especially significant to the defense because Sneed had told police the knife was his, but *he did not stab Van Treese*. App. 219a. Evidence that someone had attempted to stab Van Treese was thus inconsistent with the State's case; it meant that either Sneed was lying about his own actions, or there was a second assailant in the room.

In an undated memo that appears to have been written that day, after Choi's testimony but before Sneed would testify the following day,[10] Pope wrote to Walker: "Here are a few items that have been testified to that I needed to discuss with

[10] The timing of this memo is further confirmed by the fact that it discusses the testimony of Kayla Pursley, who did not testify in the first trial. Reed Smith details at length the support it found for the conclusion that this memo was written during the second trial. App. 131a–34a.

Justin." App. 222a. She then lists six areas, drawn from witness testimony that had occurred so far in the trial, and concluded with "Thanks – we should get to him this afternoon. Gina wasn't here on Monday so Justin may not get to the old jail until noon." App. 222a. These areas of testimony were thus being presented to Walker—herself on the witness list and under subpoena—for the purpose of discussion with Sneed, the star witness, prior to his taking the stand.

The most crucial item was #3 on the list:

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

App. 222a. In noting the problem was "still" the knife, Pope conveyed that they had previously discussed the knife being a "problem" for the State. It is unclear why the prosecutor and the lawyer for a witness who has always denied using a knife would have had such a conversation, but it does establish that Pope and Walker had already discussed perceived problems with Sneed's testimony. In addition, the paragraph clearly reflects content from Dr. Choi's testimony, specifically about the lacerations and the possibility of falling on furniture, which was not in the testimony from the first trial. It also conveys Pope's concern that Sneed's version of

events "doesn't make much sense." In other words, Pope recognized that Sneed's statement to police about the knife was inconsistent with the evidence, but that the State's theory of the case depended on Sneed's matching that record. This document was discovered by Mr. Glossip's present counsel in the September 1, 2022 inspection of the District Attorney's file. The handwritten notes, which reflect answers to the questions, appear to have been made by Pope, in talking either directly with Sneed or with Walker, who had taken those questions to Sneed on Pope's behalf. Thus, it seems that after the memo was written, she did indeed "get to" Sneed.

The following morning, Sneed took the stand. As detailed below, Sneed has also described speaking with Pope and Walker in a conference room at the courthouse immediately prior to his testimony. App. 128a. He then testified he and Pope had met only twice, once with Ackley and once without, and that he had never spoken to anyone else from the District Attorney's Office. App. 294a. He described the October and April visits Pope made to the prison, but said nothing about communications on September 23, nor his overnight trip to Oklahoma City on October 30. When asked by Pope to describe his actions inside Room 102 of the motel, he said:

> I grabbed the baseball bat and my keys and walked over to room 102 and entered the room. And then when I opened the door, Mr. Van Treese got up out of the bed he was sleeping in and came around towards me. At that point I took one swing with the baseball bat. He pushed me back into a chair and when I tripped and fell in the chair the end of the baseball bat hit the window shattering the outside window, and he tried to make it to

> the door and I got up out of the chair and grabbed him by the back of his shirt, because I think he was sleeping in a nightshirt and pulled him sideways so he tripped over my feet and his own feet and put him on the ground.
>
> **And then at one point -- at that point I tried to – I took my knife out of my pocket and tried to force it through his chest but it didn't go,** and then that caused him to roll over onto his stomach to where his back was facing the ceiling and then I hit him quite a few more times with the baseball bat.

App. 281–82a (emphasis added).[11]

The defense moved for a mistrial, explaining they had "never received information concerning Mr. Sneed testifying that he either forced or tried to force the knife into Mr. Van Treese's chest, ever, at any point." App. 299a. Pope avowed:

> I asked Mr. Sneed about this knife one time and that was last year. **He told me that he had the knife open during the attack, that he did not stab Mr. Van Treese with it.** I knew all the wounds to be blunt force trauma and so I didn't pursue it any further.
>
> Yesterday after I heard the ME's questions, I called Ms. Walker. She had a conversation with Mr. Sneed and

[11] In his testimony at the first trial, Sneed described his actions this way:

> I went in with my baseball bat, and basically when I opened the door, Mr. Van Treese woke up, and then I just hit him with the bat. And then he pushed me and I fell back into the chair, and that's how the window ended up getting broke because the bat hit the window. And then I just – Mr. Van Treese was trying to get out of the room, and I just grabbed the back of his shirt and slung him in the floor and then hit him a couple more times.

Tr. 6/8/98 at 92. There was no discussion of the knife, but it was largely the deficient cross-examination of Sneed in this trial that led the OCCA to overturn Mr. Glossip's conviction.

> 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. . . . In fact, I had given these pictures to Gina. She, I think showed the pictures to me . . . Because the pictures seemed to indicate that it happened more than once and **I thought that he had told me last year that he has just, you know, tried once to attack him with it.** That's what he told Ms. Walker.

App. 301a–02a. Despite the internal inconsistencies in these statements—did Sneed tell Pope the year before that he did not stab Van Treese, or that he had *tried* once? — and the obvious conflict between Sneed's statement to police and his testimony (what Ackley later called a "night-and-day" difference, App. 134a), the Court ruled there had been no discovery violation and denied the motion for mistrial. App. 303a. Never having seen Pope's memo, they were unable to point out that she had in fact written, prior to Sneed's testimony, that Sneed said he had tried to stab Van Treese, and thus while the court and defense were "hearing it for the first time" on the stand, she was not; that was a lie.

Mr. Glossip was convicted on June 1 and sentenced to death on June 3.

F. Sneed's Attorney's Connections with the Prosecutor

While there is documentation of meetings where Sneed and Pope spoke directly, it is also apparent from the record that Walker passed information between Sneed and the prosecutors. It began with Pope's predecessor, Smith, who explained at the hearing that occurred shortly after the defense had discovered untested evidence that she "talked with Ms. Walker this morning concerning this case and

gave her some police reports and things and she has informed me that Mr. Burch has been to the penitentiary and her words were 'pressured Mr. Sneed' concerning his testimony in this, not once but several times." App. 312a. In other words, Smith and Walker were discussing the facts of the case (hence the police reports), and Walker was giving Smith information from Sneed.

Pope then explained during Sneed's testimony that after Dr. Choi testified in the second trial, she, too, had "called Ms. Walker. She had a conversation with Mr. Sneed and conveyed to me that—the same thing that I knew, that he had the knife open during the attack but that he did not stab him with it." App. 302a. She went on to say she "had given these pictures to Gina. She, I think showed the pictures to me. . . [b]ecause the pictures seemed to indicate that it happened more than once." App. 302a. In other words, Pope was getting information from Sneed even when not meeting with him in person. Pope's note to Walker that the knife was "still" their biggest problem also suggests prior conversation about this.

Kenneth Van Treese's communications with Pope also show she was receiving information about Sneed's intentions, as in the September 28, 2003 email (prior to any disclosed meeting between Pope and Sneed), he reported having discussed with her a concern "that Sneed may attempt to renegotiate the terms of his plea agreement." App. 202a. Given Sneed's later reference to Walker "and the DAs" saying something to him on September 23, App. 199a, Walker, if not Sneed himself, had obviously told her about his plans.

It is also apparent from the record that Walker worked hard to get Sneed to agree to the State's terms. The post-conviction lawyer appointed after the first trial recalled Sneed telling her his "attorneys were pushing real hard for him to take the offered deal," and he ultimately gave in. App. 172a. After Mr. Glossip's conviction was reversed, when Sneed wrote to Walker in 2003 to ask about recanting, she wrote she would talk to him about that in person (App. 194a, which, according to Sneed, she did, telling him, "you have to testify or they will kill you." App. 228a. Walker also assisted Sneed in preparing his testimony, showing him the video of his police interview, presumably to help ensure he testified consistently. App. 215a; App. 233a. Sneed has never reported receiving advice or information from his attorneys about his options; only insistence that he testify against Glossip and accept life without parole. In short, communication between Sneed and Pope was not always direct; sometimes it went through Walker.

G. Post-Conviction Proceedings

Available materials regarding Sneed then skip until shortly after Mr. Glossip's direct appeal from the second trial was denied on April 13, 2007. A few months after the denial, Sneed wrote to Walker (July 30, 2007), stating:

> There are a lot of things right now that are eating at me. Something **I need to clean up**. If I can't get in contact with you or anyone who gets your mail, I'm going to try to contact the indigent defense over his case or the D.A.s. I think you know were [sic] I'm going **it was a mistake reliving this**.

App. 235a (emphasis added). Walker quickly wrote back, but rather than reassure Sneed that he had done the right thing in telling the truth, she advised him:

> I know it was very hard for you to testify at the second trial. I also know that OIDS lawyers tried to talk you out of it—acting totally against your best interests to the benefit of their client. Had you refused, you would most likely be on death row right now. Mr. Glossip has had two opportunities to save himself and has declined to do so both times. I hope he has not or his lawyers have not tried to make you feel responsible for the outcome of his case and his decisions.

App. 238a. Asked recently about this, Sneed had no explanation. App. 117a.

Two men incarcerated with Sneed during this period remember him. Michael Scott heard Sneed laughing "about setting Richard Glossip up for a crime Richard didn't do. It was almost like Justin was bragging about what he had done to this other guy—to Richard Glossip. Justin was happy and proud of himself for selling Richard Glossip out." App. 240a. According to Scott, "Justin made stuff up to try to save his own life, and to get a better deal," and he "heard Justin talking about the deal he made, and what he did to Richard." App. 240a. Frederick Gray, who worked in the library at in the prison, recalled that in 2008 or 2009, "Sneed was seeking to have his sentence commuted," and said since Glossip "wouldn't help me in my need," i.e., covering up the crime, "I'll see if I can get some revenge and I testified for the state for a L-WOP . . . against him; he got death." App. 246a–47a.

In 2015, a letter purportedly written by Sneed's daughter surfaced, reporting that Sneed had told her he was considering recanting his testimony. App. 111a

[Attachment 1] The authenticity of that letter could never be established, and Sneed denied saying any such thing to his daughter, as recently as July 2022. App. 118a.

H. The Reed Smith Investigation and Accessing the State's Files

In 2022, a Republican-led group of Oklahoma legislators commissioned an independent report on Mr. Glossip's case from global law firm Reed Smith, which conducted an exhaustive investigation *pro bono*. Reed Smith was able to gain access to myriad materials that had never been available to Mr. Glossip's defense team. The firm issued an initial report in June of 2022, concluding that Mr. Glossip's conviction and sentence were unreliable and identifying major problems in the case.[12] Shortly thereafter, Mr. Glossip filed a successive application for post-conviction relief, alleging actual innocence, among other claims. Reed Smith, however, continued to investigate, and has since issued four supplements to their initial report, on August 9, August 20, September 18, and October 16, 2022, addressing information that emerged after the issuance of their primary report.

Among the materials addressed in the supplements was the correspondence between Sneed and his attorney. Mr. Glossip's team had sought that material years ago, but was told all files on Sneed's case had been destroyed. App. 250a. Reed Smith ultimately obtained these materials directly from the office that had

[12] The complete report was attached to Mr. Glossip's July 1, 2022 application. It is available online, along with all four supplements, https://www.reedsmith.com/en/news/2022/10/reed-smiths-glossip-investigation-supplemented-ethics-prof-responsibilities (last visited Dec. 27, 2022).

represented Sneed, the Oklahoma County Public Defender. While the materials were generally protected by the attorney-client privilege and not subject to disclosure, the Public Defender determined, after extensive conversation with Reed Smith and in reliance on Reed Smith's original report and findings, that certain items from the file satisfied the crime-fraud exception to the attorney-client privilege. App. 124a. A number of Sneed's letters were thus released for the first time in Reed Smith's two supplemental reports in August 2022.

After the August 9 supplement, Reed Smith was able to interview Justin Sneed in person, which they did three times: August 15, August 26, and September 7, 2022. Sneed told these investigators crucial things he had never admitted before, in large part because they were able to confront him with the letters they had obtained from the Public Defender after the release of their original report. He confirmed he had told his mother and daughter in 2015 that he was considering recanting his testimony. App. 117a–20a. He explained he felt immense pressure to testify, having been led to believe that "if I didn't do that they were going to kill me." App. 228a. He also discussed wanting to undo his plea deal in a meeting with Pope and his view that Pope knew he did not want to testify. App. 229a. He recalls telling Pope and Walker that counsel for Mr. Glossip had given him the case *State v. Dyer,* which "infuriated" them. App. 229a.

Sneed also said that at the second trial, he met with Walker and Pope in a conference room off the courtroom where he told them he did not want to testify,

and "it was to the point of breaking me and me saying ok. Maybe in the reality of life I could have kept waiting more time but it seemed like we were not leaving the scene until I agreed to do it." App. 229a. He was "told really you're out of time and your plea agreement is right here," and was "marched out to the stand." App. 229a. In other words, he was refusing to testify up until the time he took the stand.

Having collected this new information and reviewed it in the context of the entire existing record, Reed Smith concluded Sneed had discussed his desire to take back his testimony and/or seek to get a better deal with Pope prior to the second trial, and based on Sneed's correspondence and Pope's subsequent actions, including seeking to ensure the availability of Walker's testimony, that conversation left Pope concerned that Sneed would not testify against Glossip as he previously had. App. 124a–29a. Sneed's correspondence, both before and after this meeting, strongly corroborates the conclusion that he was threatening to recant.

Prosecutor Ackley confirmed to Reed Smith that "if somebody told me Sneed told me he is thinking about recanting, of course, that's clearly Brady material." App. 128a. Yet the prosecution to this day has not disclosed to Mr. Glossip Sneed's statements to them about his unwillingness to testify as he had in the first trial.

Since 2015, Mr. Glossip's team has repeatedly requested materials from the District Attorney's Office, without response, continuing well into 2021. An October of 2020 letter, for instance, noting it followed prior requests for access, specifically sought "access to the notes taken by prosecutors and any investigators or staff

members working with them during interviews with witnesses in preparation for Mr. Glossip's 1998 and 2004 trials," citing *Brady* and *Giglio* obligations. App. 252a. On January 8, 2021, Mr. Glossip's counsel wrote again, requesting documentation of specific interviews, including those of "Justin Sneed, both prior to the first trial in 1998, and by ADAs Gary Ackley and Connie Pope [] on October 21, 2003 and in April, 2003, including a 'list' [Pope] referred to in her questioning of Mr. Sneed at trial." App. 257a–71a. The State never responded.[13]

After Reed Smith released its initial report and Mr. Glossip filed his July 1 application, the Attorney General's Office took possession of seven boxes from the District Attorney, and on August 26, 2022, the Attorney General's Office informed Mr. Glossip's counsel they had decided to allow an on-site review of those materials, excluding anything the office considered to be attorney work product. Attorneys for Mr. Glossip completed that review on September 1. They were provided access to seven boxes from which any materials regarding interviews with witnesses after the initial police reports had been removed.[14] The boxes did, however, contain several items that had never been provided to the defense, including correspondence between Kenneth Van Treese and Pope, several motel financial documents that had never been disclosed, materials indicating the District Attorney's Office had

[13] The District Attorney also refused to provide access to the file to legislators seeking to investigate the case and to Reed Smith. *See* Reed Smith Report at 4.
[14] The Attorney General refused to provide any log or accounting of what was removed.

investigated several witnesses who came forward in support of Mr. Glossip in 2015, typed notes reflecting a conversation with witness Cliff Everhart, only a portion of which were disclosed to the defense before trial, and the above-discussed mid-trial memorandum from Pope to Walker concerning Sneed's testimony.

I. The Decision of the OCCA

Mr. Glossip presented the newly obtained information in another application to the OCCA. That application raised claims that the State suppressed material exculpatory evidence that Sneed sought to recant (as opposed to merely expressing reluctance to testify) and of the memo recounting the need to "get to" Sneed to address the "big problem" in the case—the medical examiner's testimony not aligning with Sneed's account. App. 222a. The State waived any reliance on procedural bars, expressing concern that absent a clear ruling on the merits, the Oklahoma legislature might "eliminate the death penalty." App. 392a.

The OCCA rejected both claims. For the recantation, it held the "information was not material." App. 12a. It characterized the claim as being about whether Sneed "want[ed] to testify," rather than about his recantation. App. 13a. As such, it rejected the claim both on the merits and because his prior counsel were aware of Sneed's reluctance, rendering the claim waived. App. 10a ("this issue is one which could have been raised during the second trial, because his attorneys knew or should have known that Sneed was reluctant to testify."). In addressing the merits, the OCCA applied a statutory standard: whether the suppressed evidence "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." App. 4a, 16a. The OCCA did not discuss whether knowing Sneed wanted to "recant" might have been material.

For the memo, the OCCA rejected the claim only on the merits. App. 17a. It explained Sneed had "admitted that he was testifying to save himself from the death penalty" and "had not told anyone about using the knife until he testified" at the second trial and had, in fact, told the police "he did not use the knife." App. 17a. Because these lines of impeachment had already damaged Sneed's credibility, the OCCA explained, he "could not have been impeached further." App. 17a. The OCCA denied these, and the other claims raised in his application. This petition follows.

REASONS FOR GRANTING THE PETITION

I. *BRADY V. MARYLAND* REQUIRES ONLY PROOF OF SUPPRESSION AND MATERIALITY

A statement that the State's most important witness desired to "recant" is exculpatory impeachment evidence that the State is required to disclose. Likewise, a memo recounting the prosecution's efforts to ensure its witness would change his prior account to comport with other trial testimony—which he then did— should have been disclosed. The decision below turned on the merits of these claims. In rejecting them, the OCCA dramatically undermined the Constitution's Due Process Clause protections and extended its own holdings that are sure to undermine the reliability of convictions more broadly in Oklahoma criminal cases.

A. The State Suppressed Exculpatory Evidence

In addressing the *Brady* claims on the merits, the OCCA did not find evidence was not suppressed or was not exculpatory; rather, it ruled only that regarding the recantation, "the information was not material," App. 12a, and the memo would not have changed the verdict. App. 18a. It is undisputed that the State suppressed this information that Mr. Sneed sought to "recant" and the prosecutor's memo betraying her revision of his future testimony. Thus, its decision on both items turned on materiality.

B. A Standard of Clear and Convincing Evidence Foreclosing a Guilty Verdict Plainly Does Not Govern *Brady* Materiality

To prevail, Oklahoma required Mr. Glossip to demonstrate "by clear and convincing evidence that" but for the suppression of evidence, "no reasonable fact finder would have found [him] guilty." Okla. Stat. tit. 22, § 1089(D)(8)(b)(2). That standard applies in Oklahoma regardless of whether the defendant has been diligent and regardless of the bad faith of the State. *Id.; see also Bosse v. State*, 499 P.3d 771, 775 (Okla. Crim. App. 2021) (explaining clear and convincing standard applies even if the factual or legal basis of a claim was previously unavailable).

But the Constitution demands far less. Relief is required where suppressed evidence is merely exculpatory and material. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the

proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469–70 (2009) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "A 'reasonable probability' of a different result" is one where the suppressed evidence "'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (*Strickland* prejudice standard is "rooted" in the *Brady* materiality doctrine). This standard is qualitatively lesser than "more likely than not" or "preponderance of the evidence." *Kyles*, 514 U.S. at 434 (collecting cases); *see also Chinn v. Shoop*, 143 S. Ct. 28, 28 (2022) (Jackson, J., dissenting) (emphasizing the "relatively low burden that is the 'materiality' for purposes of *Brady* and *Strickland*.")

Oklahoma's prejudice standard far exceeds even this already too-high burden by requiring not only "clear and convincing evidence" of a different outcome, but also that "no reasonable fact finder" would find the defendant guilty, had the State produced what the Constitution requires it to disclose. Okla. Stat. tit. 22, § 1089(D)(8)(b)(2). The clear and convincing standard on its own violates *Brady*'s requirement of relief any time there is a reasonable probability of a result favorable to the defendant; the Supreme Court of Oklahoma leaves no doubt about the incompatibility of *Brady* with the Oklahoma's "clear and convincing evidence"

standard, which it has explained entails the measure of proof "which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *In re C.D.P.F.*, 243 P.3d 21, 23 (Okla. 2010). Plainly, adding the requirement to show "no reasonable fact finder" would have convicted the defendant unconstitutionally raises the bar to obtaining relief under *Brady*. The OCCA's requirement improperly mirrors the Anti-Terrorism and Effective Death Penalty Act's standards, which require demonstrating "an error" so grave as to be "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Although the precise contours of Oklahoma's standard have not been extensively elaborated, no published decision of the OCCA has found a petitioner to have met them. And that standard far exceeds the bounds due process requires. *See Kyles*, 514 U.S. at 434.

Brady enunciates a federal constitutional claim. Having agreed to hear constitutional claims for relief, Oklahoma must apply controlling federal law in upholding its "duty to grant the relief that federal law requires." *Yates v. Aiken*, 484 U.S. 211, 218 (1988). "Under the Supremacy Clause of the Constitution, state collateral courts have no greater power than federal courts to mandate that a prisoner continue to suffer punishment barred by the Constitution." *Montgomery v. Louisiana*, 577 U.S. 190, 204 (2016). This is particularly true for application of "*an old rule*, settled at the time of [the defendant's] trial," such as *Brady*. *Id.* at 219 (Scalia, J., dissenting). As Justice Scalia put it, "when state courts provide a forum

for postconviction relief, they need to play by the 'old rules' announced *before* the date on which a defendant's conviction and sentence became final." *Id.*

As members of this Court recently observed in another context, a scheme such as Oklahoma's "rewards prosecutors who successfully conceal their *Brady* and *Napue* violations until after an inmate has sought relief from his conviction on other grounds." *Storey v. Lumpkin*, 142 S. Ct. 2576, 2578 (June 30, 2022) (Sotomayor, J., dissenting) (quoting *Bernard v. United States*, 141 S. Ct. 504, 506 (2020) (dissenting opinion)). Under Oklahoma's rule, "prosecutors can run out the clock and escape any responsibility for all but the most extreme violations." *Id.*

This is precisely what occurred here. The State continued to withhold Sneed's statement about recantation during the initial post-conviction proceedings when the state courts would have applied *Brady*'s standard. Instead, it waited until the eve of Mr. Glossip's execution to turn over its file, material Mr. Glossip had requested during trial, and repeatedly over the years during post-conviction and post-post-conviction proceedings. The State thus gamed its way into a very deferential review of its misconduct, a standard this Court should strike down as wholly inconsistent with the rule of law because "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *See In re Winship*, 397 U.S. 358, 364 (1970).

C. Some Impeachment at Trial Does Not Render All Subsequently Disclosed Impeachment Evidence *Per Se* Immaterial

The OCCA also made mincemeat of *Brady* in its substantive application holding there was no constitutional infirmity with the State's suppression of a mid-trial memo about its meeting with its key witness. App. 17a. The decision turned neither on any provision of state law nor on a claim the memo was not suppressed. Instead, the OCCA held the memo was not "material" because the witness for whom it offered impeachment evidence "could not have been impeached any further [at trial] than he ahead already been impeached." App. 17a. That standard, offered without reference to the factual record, let alone consideration of *any* legal authority, flatly contradicts *Brady*. The memo strikes at the credibility of the only witness to the supposed agreement with Mr. Glossip that he, Sneed, would kill Van Treese for a price. In this murder-for-hire case, as the trial judge observed, Sneed's testimony was the only link exposing Mr. Glossip to a murder charge. App. 342a.

As such, the OCCA's opinion, holding Sneed could not have been further impeached and affirming the conviction, reaches a remarkable outcome. According to the OCCA, Sneed was so badly compromised that no further disclosure—no matter how damning—could have affected the outcome. The OCCA seems to proceed from the premise that the jury *already* disbelieved Sneed, despite repeated recognition that the conviction could not stand without Sneed's testimony. This untenable premise sustains Mr. Glossip's condemnation.

Brady dictates a different standard and different outcome, requiring only a showing that the suppressed evidence undermines confidence in the outcome. *See Bagley*, 473 U.S. at 682. The mere presence of significant questions about whether the suppressed evidence might have affected the outcome requires reversal. *See id*. When the evidence is already weak, further evidence undermining its unreliability demands reversal, not affirmance. Thus, when the State's pivotal witness at trial has already encountered impeachment, the accrual of any further impeachment is especially likely to surpass the materiality standard. The OCCA held the opposite, that because Sneed had been impeached at trial, no further impeachment could create a reasonable probability of a different result. That illogical holding flatly contravenes *Brady* and this Court should grant review and reverse.[15]

II. THE DECISION BELOW SQUARELY IMPLICATES THE QUESTIONS PRESENTED

The court below addressed the merits of these claims and no adequate or independent state ground can bar this Court's review. The resolution of these claims below was on the merits. App. 12a–13a (recantation), 17a–18a (memo).

Below, the State expressly waived reliance on procedural bars. App. 7a. Given the gravity of the claims, it expressed concern that absent a clear ruling on

[15] The OCCA also erred by holding that the memo did not constitute evidence of the prosecution's presentation of false evidence. App. 16a–17a. That erroneous application of *Napue v. Illinois*, 360 U.S. 264 (1959) in this death penalty case is further reason for this Court to grant review and reverse on the questions presented. *See Chinn*, 143 S. Ct. at 28 (noting particular importance of even error correction where a petitioner's "life is on the line").

the merits, the Oklahoma legislature might "eliminate the death penalty." App. 392a. Where a state expressly foregoes reliance on its own procedural bars, the "finality" federal courts normally embrace in avoiding the merits of constitutional questions entirely recedes. *See Buck v. Davis*, 580 U.S. 100, 126 (2017).

Despite the State's waiver, the OCCA noted the claims could have been raised earlier and were, therefore, waived. App. 9a, 16a. But that conclusion is "interwoven" with its view on the merits of the claim and is not independent of federal law. *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *Zacchini v. Scripps-Howard*, 433 U.S. 562, 568 (1977) ("[I]f the state court erred in its understanding of [this Court's] cases," then the Court should "so declare.").

The OCCA held the claim about Sneed's desire to recant "could have been raised during the second trial" in light of Mr. Glossip's trial counsel knowing "Sneed was reluctant to testify." App. 10a. Whether Sneed's desire to "recant" evinced mere reluctance—and not the more consequential desire to no longer (wrongly) implicate Mr. Glossip—is the essence of the claim. The OCCA's willful mischaracterization of it as "reluctance" available to trial counsel adjudged both the materiality of the new disclosure and whether it had been suppressed. Trial counsel was aware Sneed was reluctant as a practical matter, but it is uncontested they did *not* know Sneed had asked, "[D]o I have the choice of re-canting my testimony at any time during my life, or anything like that. . . . If there is anything you know, on this court date and

about re-canting."[16] App. 192a Determining whether Sneed's desire to "recant" was of a piece with his known reluctance is interwoven with the claim's merits, giving this Court jurisdiction to review it. *See Long*, 463 U.S. at 1040.

The OCCA's analysis of the suppressed memo of the prosecutor's meeting with Sneed as it relates to any procedural bar is "not clear from the face of the opinion." *Id.* at 1041; *see New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (1986) (absent a "plain statement" of reliance solely on state law, this Court has jurisdiction). At no point in the OCCA's opinion does it explicitly apply a procedural bar to this claim. Thus, nothing bars this Court's review. *Long*, 463 U.S. at 1041. The denial is entirely premised on the notion that the prosecution's key witness "could not have been impeached any further than he had already been impeached." App. 17a. As discussed *supra*, that is a question wrapped up in federal law and confers jurisdiction on this Court. *Long*, 463 U.S. at 1040.

Even if this Court adopts a broad view of the OCCA's statements on procedural bars, it should conclude the procedural holding is "interwoven" with its

---

[16] The OCCA's refusal to acknowledge prior counsel's unawareness of, and the unavailability of, the recantation also renders arbitrary any reliance on a procedural bar based on an ability to raise the claim previously. That arbitrariness renders the application of any such bar inadequate to bar federal review. *See Beard v. Kindler*, 558 U.S. 53, 64 (2009) (Kennedy, J., concurring) (states must not use "novel procedural requirements" to "evad[e] compliance with a federal standard"); 16B Charles Allen Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Federal Procedure: Jurisdiction* § 4026 (3d ed. Apr. 2022 update) (state courts "should not be allowed to avoid federal claims by deliberately fabricating spurious state grounds for decision").

resolution of the merits of the federal claim and, therefore, is properly before the Court. *Id.* at 1040. Mr. Glossip's counsel's mere knowledge that the prosecution met with its key witness immediately before his retrial testimony is fundamentally different from knowledge that the prosecutor believed she had to "get to" him to cover the "biggest problem" in the case before he testified so he could jettison his prior statement and testimony to comport his account with the medical examiner's testimony the day before. App. at 222a. These claims are part and parcel with the merits and the State's waiver in the OCCA of possible procedural bars displaces any adequate and independent state-law grounds for the OCCA's decision.

Similarly, pending before the Court in *Cruz v. Arizona*, No. 21-846 (U.S.), is the question: "Whether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment." Should the opinion in *Cruz* inform this case, Petitioner requests the Court hold this Petition pending that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AMY P. KNIGHT
Counsel of Record
KNIGHT LAW FIRM, PC
3849 E. Broadway Blvd., #288
Tucson, AZ 85716
(520) 878-8849
amy@amyknightlaw.com

JOHN R. MILLS
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. Box 4544
New York, NY 10163

DONALD R. KNIGHT
7852 S. Elati St., Suite 205
Littleton, CO 80120

WARREN GOTCHER
GOTCHER & BEAVER
323 E. Carl Albert Ave.
McAlester, OK 74501

COUNSEL FOR PETITIONER

January 2023