No. 22-6500
(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

PETITIONER'S REPLY BRIEF IN SUPPORT OF CERTIORARI

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

In this capital case with an execution date looming,[1] the State has rested almost entirely on procedural defenses, defenses which it expressly waived before the Oklahoma Court of Criminal Appeals (OCCA) and by the terms of the OCCA's decision do not apply to one of the claims before this Court. Thus, this Reply primarily will focus on those defenses and why they do not preclude this Court's review. However, that emphasis should not obscure the stakes: the execution of an innocent person.

Justin Sneed provided the only evidence implicating Mr. Glossip in the murder of Barry Van Treese. Sneed only implicated Mr. Glossip after the State's investigators had named Mr. Glossip six times, saying that Mr. Glossip was "putting it on [Sneed] the worst," and after suggesting his cooperation would result in leniency.

It was, in the view of at least one federal judge, a close case at trial. And a recent independent report on behalf of a large group of mostly Republican, death-penalty-supporting Oklahoma legislators concluded that Mr. Glossip's trial and conviction are unreliable.

But there's more. The State failed to disclose powerful impeachment evidence of Sneed—both that Sneed was coached to contradict his prior statement on a key

[1] Today, the Oklahoma Court of Criminal Appeals rescheduled Mr. Glossip's execution for May 18, 2023.

point and that Sneed desired to recant. In a brief filed today, a host of current and former prosecutors have come to Mr. Glossip's defense, denouncing the State's conduct in this case, declaring no confidence in the outcome, and calling for this Court's intervention. Counsel also understands another brief in support of certiorari will be filed on behalf of Oklahoma lawmakers.

Mr. Glossip is innocent of Barry Van Treese's murder. The State cheated to obtain his conviction. And yet Mr. Glossip faces imminent execution.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO *BRADY V. MARYLAND*

Evidence that the prosecution coaches a witness to perjure himself is exculpatory evidence which must be disclosed to the defense at trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). So too is a witness's desire to recant. *Id.* Respondent does not dispute these points.

Indeed, the State does not defend at all the OCCA's merits treatment of Mr. Glossip's claim that Sneed was coached by the prosecution to perjure himself. Br. in Op. 19 (noting, but not defending, the OCCA's "alternative merits analysis"). Nor could the State credibly do so. The OCCA failed to find materiality because Sneed was so lacking in credibility. App. 17a (rejecting the merits because Sneed "could not have been impeached further"). But that holding turns materiality on its head, making relief the hardest to obtain when the prosecution's case is weakest. Pet. 36–37. The OCCA's analysis is flagrantly wrong, and the State does not defend it.

On Sneed's desire to recant, the State, like the OCCA, willfully obscures the difference between "reluctance to testify" and "recant." The distinction is not semantic. A witness's reluctance could be based on all manner of considerations—from not wanting to be in the public spotlight to hoping for more consideration from the State in exchange for testimony. To "recant" specifically means "to withdraw or repudiate (a statement or belief) formally and publicly" and "to make an open confession of error." Merriam Webster 1038 (11th ed. 2005); *see also* The Oxford Modern English Dictionary 843 (2d ed. 1996) (defining recant as to "withdraw or announce (a former statement or belief) as erroneous or heretical" and to "disavow a former opinion"). In another context, the OCCA demonstrated that it understood recant consistent with its common meaning. *See Primeauz v. State*, 88 P.3d 893, 904 (Okla. Crim. App. 2004).

But here, when the OCCA addressed the merits of this issue, it reduced Sneed's desire to entirely repudiate his previous sworn testimony providing the only link between Mr. Glossip and the murder as a mere reluctance to testify. App. at 10a–11a. As the State and the court below note, trial counsel for Mr. Glossip were well aware that Sneed was reluctant. But the State did not disclose Sneed's desire to *recant*, a point the State does not dispute. This Court should reject the State's efforts to construe this entirely distinct desire to recant as just more "reluctance."

The State suggests that Mr. Glossip's Petition raises a dispute over the resolution of the facts. Br. in Opp. 16 n.8. At the OCCA, Mr. Glossip did request an

evidentiary hearing in hopes of resolving any questions about the meaning of Sneed's expressed desire to recant. The evidence he could have offered was strong. The evidence before the OCCA was that Sneed wrote, prior to his testimony, the following:

> Curious if your [sic] still thinking about coming here to try to visit me before his trial. 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.

App. 192a. At the OCCA, Mr. Glossip did ask for factfinding about this statement, and any necessary factfinding could be done on remand. But at this Court, it is Respondent that raises factual questions about the meaning of "recant," pointing to its own evidence on the matter, while omitting discussion of Mr. Glossip's evidence, including Sneed's statement. Br. in Opp. 16–17.

However, the dispute before the Court is not a factual one. It is the denial Mr. Glossip's *Brady* claim, which the OCCA deemed meritless because trial counsel knew of Sneed's reluctance to testify.[2] Failing to acknowledge the impeachment

[2] Respondent suggests that this claim is premised only on a letter from Sneed's files. As the Petition makes clear, it is the State's knowledge of the contents of that letter, as borne out by its behavior leading up to Sneed's trial, that forms the basis of the claim, as painstakingly recounted in the Petition. Pet. at 3–31. The State has not denied having knowledge of this information and does not dispute that Sneed's desire to *recant* was not disclosed before trial.

value of a witness's desire to recant separate and apart from being reluctant is contrary to *Brady*, and this Court should grant review and reverse.

II. NO ADEQUATE OR INDEPENDENT GROUND APPLIES

As the State concedes, it expressly waived any reliance on procedural bars before the OCCA. Br. in Opp. 13 n.5. This Court should hold it to its waiver here and address the merits of Mr. Glossip's claims. *See Buck v. Davis*, 580 U.S. 100, 126 (2017). Moreover, the OCCA did not rely on any procedural bar for the claim that the memo itself was *Brady*. App. 17a–18a (discussing "Proposition Four," the memo claim). Regardless, the procedural bars alleged are both intertwined with federal law and inadequate to bar review. Pet. 37–40.

A. The OCCA Applied No Procedural Bar to "Proposition Four"

The OCCA applied no procedural bar to Proposition Four, the *Brady* claim associated with the State's failure to disclose a memo evidencing its efforts to coach Sneed in his testimony to account for the medical testimony the State had just offered and contrary to his prior statements. With the other claims (denominated "propositions" consistent with Oklahoma practice), the OCCA identified and applied a procedural bar. But with Proposition Four, the OCCA applied no such bar.

After discussion of Proposition One, before addressing the four remaining claims, the OCCA references how it would rule "were [it] to address" them. App. 15a. The State suggests this means the OCCA found each of those claims was procedurally barred. Br. in Opp. 13 n.6. But the OCCA does not say that and for

Proposition Four, only addresses the merits. That stands in contrast to each of the other propositions, where the OCCA plainly did apply a procedural bar. Because there is no "plain statement" in which the OCCA relied on a procedural bar, this Court can directly address the merits of it. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (1986). Regardless, as discussed below, any bar on reviewing Proposition Four is not an independent and adequate state ground.

B. Whether the Basis for a *Brady* Claim Had Been Disclosed Is Intertwined with the Merits of that Claim

The OCCA's application of the procedural bar in question turns entirely on whether the State had suppressed the bases for the *Brady* claims before this Court. If the State had suppressed that evidence, then the claims could not have been raised earlier, and they would not be barred. If the State had not suppressed the evidence, they would be barred—but would also inherently fail on the merits because suppression is a necessary element of a *Brady* claim.

As the OCCA put it, Mr. Glossip's attorneys at trial "knew or should have known Sneed was reluctant to testify," rendering the claim about Sneed's recantation procedurally barred. App. 10a. As it relates to the memo providing evidence that the State suborned perjury, the OCCA merely stated it too was barred because that information was available at trial. App. Thus, suppression of the evidence is the key question. That question is not just interwoven with federal law, but an *element* of a *Brady* claim.

The Court has time and again invoked its jurisdiction to address the merits of federal claims in similar circumstances. It has recognized that when "the state-law prong of the court's holding is not independent of federal law," its "jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *see also Three Affiliated Tribes of Fort Berthold reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984). And it has not permitted states to insulate the adjudication of federal claims from review by labeling a merits determination as a procedural bar. *See, e.g.*, *Foster v. Chatman*, 578 U.S. 488, 498–99 (2016).

For Sneed's recantation, the OCCA clearly relied upon its view that the information was available to trial counsel. Whether the information was available or not is an element of Mr. Glossip's *Brady* claim, rendering it interwoven with federal law.

For the concededly suppressed memo containing evidence of the State's inducement of Sneed to perjure himself, it is not "clear from the face of the opinion" that the OCCA relied on a procedural bar or how the related claim could have been raised prior to the State's disclosure of the memo. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). But assuming such a bar applies, the OCCA's application of that bar is interwoven with federal law for the same reason the recantation claim is: it hinges on whether the evidence was suppressed, an element of a *Brady* claim.

Because the OCCA's application of the procedural bar at issue turns on a question of federal law—whether evidence was suppressed—it is interwoven with federal law, and this Court has jurisdiction to review the claims.

C. The Arbitrary Application of the State's Procedural Rule Does Not Bar Review

The State, before this Court, relies on a state procedural rule providing that claims cannot be raised if they could have been brought in an earlier proceeding. Okla. Stat. tit. 22, § 1089(D)(8). The OCCA's application of that rule in this case is arbitrary. As it relates to the recantation, the OCCA was able to apply the procedural bar only by addressing a claim not before the court: that Mr. Glossip should have been able to impeach Sneed about his reluctance. But the claim is not about reluctance, it is about a recantation. Addressing imaginary facts divorced for the record to reach a desired result is the essence of an arbitrary and unpredictable application of a rule. *See Beard v. Kindler*, 558 U.S. 53, 60 (2009) (explaining to be adequate to bar federal review a state rule must be "firmly established and regularly followed" (quotation marks omitted)).

And to the extent the OCCA even applied this bar to the memo-related claim, that application is also arbitrary. The OCCA itself acknowledged that "[t]he impeachment evidence is the memo itself" and does not dispute that the memo was only recently disclosed despite Mr. Glossip's diligence. To the extent the OCCA believes Mr. Glossip should have raised a claim based on that memo previously—

without having previously had the memo—its decision is arbitrary and does not bar merits review.

III. HAVING OPENED ITS DOORS TO CONSIDER *BRADY* CLAIMS, THE STATE COURT MUST GRANT THE RELIEF IT REQUIRES

Respondent has relegated to a footnote its opposition to the argument that having elected to hear *Brady* claims, it must grant relief that those claims demand. Pet. 32–35; Br. in Opp. 9 n.4. The State does not dispute three key points about this argument.

First, it has not disputed that the state-law standard for addressing *Brady* claims that were unavailable at the initial state post-conviction review proceeding—clear and convincing evidence that no reasonable factfinder would have convicted the defendant—is wholly insufficient to provide the relief that *Brady* would otherwise require. Second, the State does not dispute that this standard applies regardless of whether the reason the claim was not previously presented was the State's own conduct. So, according to the State, "prosecutors can run out the clock and escape any responsibility for all but the most extreme violations." *Storey v. Lumpkin*, 142 S. Ct. 2576, 2578 (2022) (Sotomayor, J., dissenting). Third, the State does not dispute that the OCCA has jurisdiction to hear *Brady* claims in cases in the posture in which they were presented below.

Together, these undisputed points are sufficient to reverse. There is no "persistent legal misperception." Br. in Op. 9 n.4. By application of the statutory claim-processing standard, the OCCA will necessarily deny relief where *Brady*

would otherwise require it. That standard applies to addressing the merits of a claim, not the OCCA's jurisdiction. Thus, the OCCA had an obligation to faithfully grant the relief that federal law would require.

That this standard is non-jurisdictional is especially clear in light of the OCCA's court-made exception to that standard. That is, the OCCA has authority to address *Brady* claims where, in its view, failing to do so in light of what it views as "a miscarriage of justice" or a "substantial violation of a constitutional or statutory right." *Valdez v. State*, 46 P.3d 703, 710–11 (Okla. Ct. Crim. App. 2002). This exception to the "clear and convincing" standard is not statutory and demonstrates that the statutory standard is non-jurisdictional.

Where, as here, "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." *Montgomery v. Louisiana*, 577 U.S. 190, 219 (2016) (Scalia, J., dissenting). Put another way, because Oklahoma has agreed to hear constitutional claims for relief, it has a "duty to grant the relief that federal law requires." *Yates v. Aiken*, 484 U.S. 211, 218 (1988). Oklahoma has no federal constitutional obligation to hear post-conviction claims at all. But if it is going to hear such federal constitutional claims in post-conviction proceedings, it must faithfully remedy those violations consistent with federal law. And the OCCA "cannot ignore valid and controlling federal substantive law by resort to principles, supposedly of procedure, that would replace federal law with state law." 16B

Charles Allen Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 4023 (3d ed. Apr. 2022 update).

Mr. Glossip asks this Court to make it clear that when state courts agree to hear federal constitutional claims, they must provide the relief that federal law requires. But more than that, he seeks this Court's intervention to prevent Oklahoma from extinguishing the life of an innocent.

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

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 PETITIONER

January 24, 2023