No. 22-7466
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

BRIEF OF NORA FREEMAN ENGSTROM, BRUCE A. GREEN, PETER A. JOY, W. BRADLEY WENDEL, RONALD F. WRIGHT, AND ELLEN C. YAROSHEFSKY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are six legal scholars whose scholarship, teaching, and professional service focus on legal ethics and professional responsibility, including the professional norms governing the work of trial lawyers in general and of criminal prosecutors in particular. Collectively, *amici* have authored well-respected and widely cited scholarship on legal ethics. In particular, *amici* have written and/or lectured on the subject of prosecutors' professional duties. They are uniquely well-suited to consider prosecutors' professional conduct and how prosecutors should be regulated to promote their compliance with professional obligations.

Amici respectfully submit this brief to address why it is important for this Court to reaffirm prosecutors' constitutional obligation to correct their witnesses' false testimony.

Amici's names and professional affiliations are set forth in the Appendix. *Amici* submit this brief in their individual capacities.

SUMMARY OF ARGUMENT

This death penalty case raises a vital question regarding a prosecutor's constitutional obligation to correct the false testimony of a key witness for the State. The decision of the Oklahoma Court of Criminal Ap-

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amici* provided timely notice of intent to file an *amicus curiae* brief to the parties' counsel of record.

peals ("OCCA")—holding that due process was not offended by the prosecution's failure to correct its key witness's false testimony on direct examination—creates uncertainty about the extent of prosecutors' responsibility in such circumstances. If left uncorrected, the OCCA decision will not only erode prosecutorial obligations, but also exacerbate confusion percolating in the lower courts about the scope of this Court's holding in *Napue v. Illinois*, 360 U.S. 264 (1959), that the Constitution requires prosecutors to rectify their witnesses' false testimony.

The OCCA rejected Richard Eugene Glossip's due process claim notwithstanding the state Attorney General's confession of error. To reach that result, the state court assumed that the prosecution's remedial obligation is limited in several respects, and is not implicated when the witness's false testimony may not be deliberate; when the falsehood may not be outcome-determinative; or when the defense might have asked follow-up questions to expose the falsity of the witness's testimony. The state court's decision was wrong. The exceptions to a prosecutor's duty of candor created by the OCCA are inconsistent with the truth-seeking function of the trial process and with the constitutional due process principles described in *Napue*.

The decision below countenances a constitutional violation that draws into question the integrity of the verdict in this case. Further, it misdirects prosecutors about their responsibilities under the Constitution and the rules of professional conduct that derive from it, to the detriment of fair and reliable verdicts in fu-

ture cases. This Court should grant certiorari and reverse the state court's decision to make it clear that the integrity and fairness of criminal proceedings unequivocally require prosecutors to rectify false testimony that is relevant to any issue the jury will decide.

FACTUAL AND PROCEDURAL BACKGROUND

The facts regarding the prosecution's failure here to correct false testimony are straightforward.

The prosecution's key witness, Justin Sneed, murdered the owner of the motel where he worked. To avoid a death sentence, Sneed agreed to testify that Glossip, the motel's manager, hired him to commit the murder. The State's case hinged on the credibility of Sneed's story. 2004 Trial Vol. 15, 73:8–10, 98:2–42, 154:11–155:7, 156:7–8, 157:21–2573:8–10, 98:2–4. At Glossip's trial in 2004, Sneed was the only witness to offer direct evidence of Glossip's alleged role in the murder. The State argued that Sneed had no reason other than Glossip's influence to commit the murder. *Id.* at 68:3–5. The sole death-penalty aggravator in this case was murder for remuneration. The sole evidence for this consisted of Sneed's testimony in the guilt phase. To this day, Glossip asserts his innocence.

At the trial, the State elicited testimony on direct examination from Sneed about whether he was medicated in jail after his arrest. Sneed testified: "When I was arrested I asked for some Sudafed because I had a cold, but then shortly after that somehow they ended up giving me Lithium for some reason, I don't know why. I never seen no psychiatrist or anything." Pet. App. 267a.

That testimony was false, as the prosecution—but not the defense—was aware. The prosecution had interviewed Sneed on October 22, 2003, and memorialized what Sneed told them in handwritten notes. These notes, stored in "Box 8" of the District Attorney's case file, included the phrases: "lithium?", "Dr. Trumpet?" (referring to Oklahoma County Jail Psychiatrist, Dr. Lawrence "Larry" Trombka), "tooth pulled?", and "the nurse's cart record discrepancies v. Mr. Sneed's jail permanent record." Pet. App. 101a, 110a, 269a. An Oklahoma County Sheriff's medical information sheet from 1998 only made public in 2023 confirms that Sneed was diagnosed by a state psychiatrist as having a bipolar disorder for which he was prescribed lithium.

Neither Sneed's bipolar disorder diagnosis nor his treatment was disclosed to the defense pre-trial, during trial, or during the appeals. In fact, the evidence in Box 8 was not released to Glossip's attorneys until January 27, 2023, nearly two decades after the interview.

When Sneed was examined by the prosecution at trial, defense counsel did not have the opportunity to correct his false testimony about his bipolar disorder diagnosis or treatment because that information, known only to the prosecution, was improperly withheld from the defense. The jury was thus left with the false impression that Sneed was placed on lithium as a mistake and that he had no mental health issues that could have contributed to the murder or affected his testimony or his recollection of events. The jury was misled about why Sneed was administered lithium and kept in the dark about his lie on the stand.

The truth would have undermined Sneed's credibility as a witness and supported an alternative theory of the case, *viz.*, that Sneed committed the murder because he was experiencing bipolar disorder symptoms exacerbated by methamphetamine use. 2004 Trial Tr. Vol. 15, 151:8–24.

Two independent investigations subsequently conducted at the request of members of the state legislature and Attorney General Drummond recently determined that the prosecution had *knowingly* withheld the relevant information memorialized in the 2003 interview of Sneed. And the investigations determined that that information, if disclosed, would have undermined the prosecution's theory that Glossip commissioned the murder.

In 2023, shortly after learning that the prosecutors had (1) knowingly withheld this impeachment material and (2) let Sneed's false testimony go uncorrected, Glossip sought a new trial based on these deficiencies and other errors, including the improper suppression of evidence of Sneed's psychiatric treatment in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

In its response to Glossip's petition, the State confessed error regarding the prosecution's knowing failure to correct its key witness's false testimony, relying principally on this Court's decision in *Napue*, which overturned a conviction where the prosecution failed to correct its witness's false statement about receiving no consideration for testifying. The State also cited cumulative errors in the prosecution of Glossip (many of which also related to Sneed's credibility and impeachment evidence). Pet. App. 153a. One such error

was the prosecutor's violation of the rule of sequestration by supplying other witnesses' testimony to Sneed the day before he took the witness stand and reversed his prior account of the murder. *Id.* 124a. Another was the pre-trial destruction of evidence, including the motel's financial records, which were relevant to the State's theory that embezzlement motivated Glossip to commission the manager's murder. *Id.* 153a.

Based on the State's own independent investigation and the Attorney General's thorough review of the complete record, the state Attorney General asked for a new trial, acknowledging that the prosecution's constitutional violations and Sneed's material misstatements were reasonably likely to have led to the jury's guilty verdict.[2] But the OCCA rejected the State's confession of error. Despite suggesting that Glossip's claims were time-barred, Pet. App. 11a, 16a–17a (¶¶ 17, 26–27), the OCCA proceeded to the merits and offered that the State's admission of error was "not based in law or fact." *Id.* 15a (¶ 25). To reach its remarkable conclusion that there was no *Napue* violation by the prosecutor, the OCCA speculated, without record support, that "[i]t is likely [defense] counsel did not want to inquire about Sneed's mental health due to the danger of showing that he was mentally vulnerable to Glossip's manipulation and control." *Id.* 16a–17a (¶¶ 27–28). The OCCA concluded that Sneed's testimony "was not clearly false," again

[2] The Attorney General's confession of error on behalf of the State was consistent with this Court's observation in *Young v. United States*, 315 U.S. 257, 258 (1942): "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent."

speculating with no record support that "Sneed was more than likely in denial of his mental health disorders." *Id.* 17a (¶ 28).

Additionally, the OCCA suggested that the defense had a responsibility to uncover the State's failure to correct Sneed's false testimony, observing: "[defense] counsel did not inquire further [into Sneed's denial of having been seen by a psychiatrist]." *Id.* 16a–17a (¶¶ 27–28). The report cited by the court disclosed neither that Sneed had been seen by a psychiatrist nor that he had been diagnosed with bipolar disorder. *Id.*

Finally, the OCCA concluded that the "evidence [was] not material under the law" because evidence of Sneed's mental health treatment probably "would not have" changed the jury's verdict. *Id.* 17a (¶ 28). This conjecture, made without an evidentiary hearing or factual support in the current record, gave no weight to the Attorney General's contrary conclusion that evidence of Sneed's mental illness would have both made it more likely than not that he committed the murder on his own, not for hire, and provided an alternative theory to the State's case as well as undermined his credibility as a witness.[3] Further, the OCCA did not consider whether, if the prosecution had made the requisite disclosure, the jury could have been influenced by the fact that Sneed was caught lying about his mental health treatment. The OCCA

[3] The Tenth Circuit has held that mental health evidence that goes to a witness's credibility and memory recall of events is exculpatory and impeachment material. *See Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013).

did not consider that the prosecution allowed an unsupported and false narrative to be created at trial when the truth would have directly impugned the veracity of the State's key witness and the State's "but for Richard Glossip" theory of the case. In minimizing the significance of Sneed's falsehood, the state court assessed this evidence in isolation rather than together with other withheld evidence that it had previously found to be immaterial.

ARGUMENT

I. PROSECUTORS HAVE AN UNQUALIFIED CONSTITUTIONAL DUTY TO CORRECT FALSE TESTIMONY THAT IS RELEVANT

Due process forbids the state to contrive a conviction through the presentation of false testimony. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (due process, "in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions," and precludes "depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured"). The violation is not excused simply because the prosecutor did not deliberately elicit the false testimony. In *Napue*, the Court recognized that constitutional error occurs "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

The Court's determination in *Napue* that the prosecution must correct its witnesses' false testimony

was unqualified. Prosecutors must correct their witnesses' false testimony regardless of its subject—whether it bears directly on the defendant's guilt or innocence, or relates only to the witness's credibility—if it is "in any way relevant":

> It *is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt*. A lie is a lie, no matter what its subject, and, *if it is in any way relevant to the case*, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Id. at 269–70 (emphases added and quotation omitted). As the Court explained, misleading the jury about a witness's credibility violates due process even if credibility may seem to have only marginal importance:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Id. at 269.

Napue requires a new trial so long as the false testimony *could* have affected the jury's judgment. *Id.* at 271. That standard of review traces its roots to

Mooney, as the Court explained in *United States v. Agurs*, 427 U.S. 97 (1976):

> [T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could have affected* the judgment of the jury. . . . [T]he Court has applied a strict standard of materiality [in a line of prior cases], not just because [those cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.

Agurs, 427 U.S. at 103–04 (emphasis added). *Napue* violations are thus not further reviewed for harmless error: the finding of constitutional error already entails consideration of the materiality of the false testimony. *See United States v. Bagley*, 473 U.S. 667, 679–80 (1985) ("Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.").[4] And this Court is not

[4] *See also Kyles v. Whitley*, 514 U.S. 419, 435 (1995) ("[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' necessarily

bound by the state court's determination in assessing the significance of the constitutional violation, but rather must review the record independently. *Napue*, 360 U.S. at 271–72; *see also Bagley*, 473 U.S. at 680.

II. EROSION OF *NAPUE* OBLIGATIONS WOULD UNDERMINE THE LEGAL PROFESSION'S ETHICAL RULES

The obligation to correct false testimony that is imposed on prosecutors as a matter of constitutional law has also been imposed on *all* lawyers as a matter of professional ethics. For Oklahoma trial lawyers, the Oklahoma Rules of Professional Conduct as they existed in 2004 obligated lawyers to promptly inform the tribunal when they learned that a person other than their client has offered false evidence.[5] Rule 3.3(a)(3) of the Oklahoma Rules of Professional Conduct, as amended in 2008, states:

> A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.[6]

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entails the conclusion that the [violation] must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" (citations omitted)).

[5] Oklahoma Rule of Professional Conduct 3.3(a)(4)(B) (adopted in 1988).

[6] Importantly, the reference to "material evidence" in this rule is not meant to incorporate the concept of materiality in the

Other states have similar or identical rules derived from Rule 3.3(a)(2) of the ABA Model Rules of Professional Conduct.[7]

While all lawyers must adhere faithfully to this unequivocal obligation as an ethical no less than constitutional matter, prosecutors have heightened duties. A prosecutor "has the responsibility of a minister of justice" which "carries with it specific obligations to see that the defendant is accorded procedural justice." Oklahoma Rule of Professional Conduct 3.8, Cmt. [1]; *see also Cone v. Bell*, 556 U.S. 449, 469 (2009) ("Although the State is obliged to 'prosecute with earnestness and vigor,' it 'is as much [its] duty to refrain from

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Brady line of cases, which hold that a conviction will not be reversed unless exculpatory or impeachment evidence withheld by the prosecution would *likely* have affected the trial's outcome. In contrast to *Brady* contexts, the term here is meant to exclude only trivial falsehoods. It has the same meaning in this model professional conduct rule as in others. For example, ABA Model Rule of Professional Conduct 3.3(a)(1) requires a lawyer to "correct a false statement of material fact or law previously made to the tribunal by the lawyer," and Model Rule 4.1(a) forbids a lawyer from "mak[ing] a false statement of material fact or law to a third person."

[7] The ABA adopted its current version of Model Rule 3.3(a)(2) in 2002. The ABA's prior version of this rule, adopted in 1983 and in Oklahoma in 1988, provided: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." The ABA's earlier professional code, the Model Code of Professional Responsibility, which had also been adopted in Oklahoma in 1969, had an equivalent provision, Disciplinary Rule 7-102(B)(2), which provided: "A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." *Napue* pre-dated both of these.

improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)); ABA Criminal Justice Standards for the Prosecution Function, Standards 3-1.4(a) (4th ed. 2017) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations."). Prosecutors' obligations include, at the very least, the longstanding and unqualified constitutional obligation not to allow false testimony to "go uncorrected when it appears." *Napue*, 360 U.S. at 269; *see also* Prosecution Function, *supra*, Standard 3-6.6(c) ("During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps. If the witness is still on the stand, the prosecutor should attempt to correct the error through further examination. If the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy.").

In determining the scope of both prosecutors' and defense lawyers' obligations under constitutional provisions, this Court and lower courts often find guidance in professional norms.[8] But the American Bar

[8] *See, e.g.*, *Nix v. Whiteside*, 475 U.S. 157, 166–71 (1986) (referring to "accepted norms of professional conduct" establishing the "special duty of an attorney to prevent and disclose frauds upon the court"); *United States v. Young*, 470 U.S. 1, 7–9 (1985) (referring to ABA professional conduct codes and Criminal Jus-

Association ("ABA") and state courts, in adopting and interpreting professional conduct rules, are also influenced by this Court's constitutional decisions.[9] For example, while some States' professional conduct rules require prosecutors to disclose information "that tends to negate the guilt of the accused" regardless of whether the evidence is "material,"[10] other state supreme courts have incorporated a materiality requirement into their version of the professional conduct rule so that it coincides with prosecutors' due process obligation under *Brady* and its progeny.[11] Because

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tice Standards in determining prosecutor made improper arguments); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like, . . . are guides to determining what is reasonable, but they are only guides."); *see generally* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (Winter 2009) (discussing the relevance of the ABA Criminal Justice Standards).

[9] For example, the ABA amended its Prosecution Function Standards to accord with this Court's decision in *Jones v. Barnes*, 463 U.S. 745 (1983), which held that, in a criminal case, an appellate lawyer was not obligated to make every nonfrivolous argument that the client requested. Likewise, the ABA amended its Model Rules of Professional Conduct to accord with this Court's decision in *Nix*.

[10] *See* ABA Model Rule of Professional Conduct 3.8(d), and state rules derived from it; *see also* ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 09-455 (2009).

[11] Oklahoma is one such State. *State ex rel. Okla. Bar Ass'n v. Ward*, 353 P.3d 509 (Okla. 2015) (holding that a prosecutor's professional duty to disclose exculpatory or mitigating evidence or information is co-extensive with *Brady*); *see also, e.g.*, *Matter of Kutzrock*, 192 A.D.3d 197, 209–10 (N.Y. App. Div. 2020) (reviewing conflicting views of whether state rules derived from

these ethical obligations are moored to constitutional anchors, an erosion of the constitutional standard of candor risks impairing the ethical one.

Moreover, prosecutors sometimes assume that their ethical obligations are no more demanding than their constitutional obligations. Based on the OCCA's decision, they may wrongly assume that they may decline to correct false testimony if, in their judgment, the witness may not have intended to lie, the truthful testimony would not necessarily result in an acquittal, or the defense will have an opportunity to attempt to rectify the false testimony through cross-examination. Clarifying prosecutors' constitutional obligations will help ensure prosecutors satisfy their ethical ones in criminal proceedings across the country.

III. THE OCCA DECISION IS AT ODDS WITH *NAPUE* AND WIDENS CONFUSION IN THE LOWER COURTS

The OCCA's decision is wrong and out of step with the majority of courts that properly follow *Napue*'s unqualified directive. Constitutional due process does not hinge on the motivations of the lying witness, the importance of the witness's testimony, or defense counsel's ability to assert the perjury to the jury. *See, e.g.*, *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988) ("The fact that defense counsel . . . failed to correct the prosecutor's misrepresentation is of no consequence. This did not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions."); *Gomez v. Comm'r of*

ABA Model Rule 3.8(d) are coextensive with or codify *Brady*, or whether the rules impose distinct obligations on prosecutors).

Correction, 243 A.3d 1163, 1168, 1174–76 (Conn. 2020) (applying *Napue* "[r]egardless of the lack of intent to lie on the part of the witness" and even when defense counsel has notice of the truth (quotations omitted)); *Birano v. State*, 426 P.3d 387, 413–14 (Haw. 2018) (noting that "a prosecutor's constitutional duty to correct testimony is triggered even when a witness's testimony is 'at best misleading'" on an issue related to witness's credibility (quotations omitted)); *People v. Wiese*, 389 N.W.2d 866, 869 (Mich. 1986) ("It is inconsistent with due process when the prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears, even when the false testimony goes only to the credibility of the witness.").

And as courts have equally recognized, when the prosecution knowingly elicits relevant false testimony, the conviction should be reversed so long as the prosecution's misconduct *could have affected* the jury's verdict. *See, e.g.*, *Kyles*, 514 U.S. at 435; *Bagley*, 473 U.S. at 679–80. Most lower federal courts apply this standard. The Ninth Circuit has held, for example, that a conviction must be overturned if "'there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.'" *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013) (quoting *Agurs*, 427 U.S. at 103); *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) ("When the Supreme Court has declared a materiality standard, as it has for this type of constitutional error, there is no need to conduct a separate harmless error analysis."). The D.C. Circuit has described the standard as "quite easily satisfied" and a "veritable hair trigger for setting

aside the conviction." *United States v. Butler*, 955 F.3d 1052, 1058 (D.C. Cir. 2020) (quotations omitted).

Some lower court decisions have questioned whether *Napue* establishes an unqualified obligation to take remedial measures when, as here, the prosecution knows its witness's relevant testimony is false. For example, the Seventh Circuit has held that prosecutors do not necessarily have a constitutional duty to correct their witnesses' false testimony when it is elicited by defense counsel on cross-examination or when defense counsel already knows the truth, and that prosecutors' constitutional duty to correct false testimony may be excused when the prosecutor does not rely on the false testimony or when defense counsel presents contrary evidence. *Long v. Pfister*, 874 F.3d 544, 548–49 (7th Cir. 2017) (holding these applications had not been clearly established by the Court for purposes of collateral review). The Second Circuit has suggested that a *Napue* violation may be excused if the defense counsel had notice of the false testimony but did not correct it due to "strategic or tactical omissions." *Jenkins v. Artuz*, 294 F.3d 284, 295 (2d Cir. 2002). And some courts have (improperly) overlaid a harmlessness analysis on their constitutional review. *See, e.g.*, *Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995) (applying a two-step analysis, the second step of which asked "whether the perjured testimony in fact had a substantial and injurious influence on the jury's verdict"); *Carter v. Mitchell*, 443 F.3d 517, 537 (6th Cir. 2006) (noting that, even if there had been a *Napue* violation, "any constitutional error would have been harmless").

But the OCCA's decision blows past those incremental qualifications of *Napue*, definitively truncating prosecutors' obligation to correct false testimony. Under the OCCA's approach, prosecutors need pay little attention to the truth or falsity of their witnesses' testimony. So long as the witness's lie may have been non-deliberate, or might not affect the verdict, or could be unearthed on cross-examination by a defense lawyer willing and able to explore theories with no evidentiary basis, or could conceivably be left uncorrected as a strategic defense decision, then the prosecutor may leave the falsehood undisturbed. Such a qualified obligation to correct false testimony defies *Napue* and is wrong.

The OCCA's approach is also impracticable—a prosecutor may not know, in the heat of a trial, the motivations of the witness, what impact the falsehood will have on the jury, or whether a defense lawyer will expose the falsehood. Prosecutors' ethical and constitutional obligations should not turn on the fortuity of how those facts later develop.

The OCCA was equally incorrect in upholding the conviction because it believed that there was not "a reasonable probability that the result of the proceeding *would* have been different had Sneed's testimony regarding the use of lithium been further developed at trial." Pet. App. 17a (¶ 28) (emphasis added). As explained, *Napue*'s standard of review asks only whether the error *could* have affected the verdict. If so, the conviction is unconstitutionally tainted by the false testimony.

Here, the prosecution's errors constitutionally tainted the conviction because if the prosecution had

corrected Sneed's false testimony, the verdict could have been different. The evidence at issue created doubt about Sneed's credibility and thus the veracity of his testimony, as well as the plausibility of the State's theory of the case: "[w]hat reason above and beyond the reasons of Richard Glossip did Justin Sneed have to kill Barry Van Treese?" 2004 Trial Tr. Vol. 15, 68:3–5, 151:21–22. It provided an alternative explanation for the murder, *viz.*, that Sneed's conduct was caused by his own mental illness, not Glossip. Given the evidence that methamphetamine use can cause manic episodes, paranoia, and even violent behavior in an individaul with bipolar disorder, Pet. App. 104 (¶ 10), the correction of Sneed's lie would have permitted the jury to conclude that Sneed's bipolar disorder and methamphetamine use triggered the attack.[12] Setting aside the likely impact of the OCCA's erroneous decision on future trials, prosecutors, and defendants, review by this Court is warranted in *this* case for *this* capital defendant in order to correct the OCCA's serious error in summarily concluding the jury would have been unmoved by the truth.

CONCLUSION

This Court should grant certiorari in this case to reinforce that prosecutors have an unqualified obliga-

[12] Based on its misunderstanding of the obligation under *Napue*, the Oklahoma Court also erred by concluding that Glossip could have raised this claim earlier. Pet. App. 16a (¶ 26). Until January 27, 2023, Glossip's counsel did not have a basis to assert that the prosecution knowingly failed to correct Sneed's false testimony on direct examination.

tion to correct their witnesses' false testimony. Clarifying prosecutors' obligation is a matter of national importance, given the premium this Court places on the integrity of criminal proceedings, the important role of prosecutors in ensuring fairness in those proceedings, and the influence that this Court's constitutional decisions exert on prosecutors' and courts' understanding of the related professional norms. The constitutional principles embodied in *Napue* are important to ensuring that individuals charged with crimes receive a fair and reliable process for adjudicating guilt or innocence. Reaffirming these principles is imperative not only to prevent erroneous denials of liberty but, as this case reflects, to prevent accused individuals from being unfairly deprived of their lives.

Respectfully submitted,

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APPENDIX A
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