22-7466 (Capital Case)

In the Supreme Court of the United States

RICHARD EUGENE GOSSIP,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

On Petition for Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

BRIEF FOR RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether due process of law allows a capital conviction to stand where a thorough and independent review of previously unavailable information compels the State's chief law enforcement officer to confess error and conclude that a capital conviction was secured through potentially outcome-determinative prosecutorial misconduct.

PARTIES TO THE PROCEEDING

Petitioner is Richard Eugene Glossip, an individual. Respondent is the State of Oklahoma.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The State of Oklahoma, acting through its chief law enforcement officer, recently made the difficult decision to confess error and support vacating the conviction of petitioner Richard Eugene Glossip. While the State previously opposed relief for Glossip, it has concluded, based on careful review of new information that recently came to light relating to prosecutorial misconduct at Glossip's trial and cumulative error, that Glossip's conviction and capital sentence cannot stand. Regrettably, the Oklahoma Court of Criminal Appeals refused to accept the State's confession of error, instead reaching the extraordinary conclusion that Glossip's execution must go forward notwithstanding the State's determination that his conviction is unsustainable.

That decision cannot be the final word in this case. While confessions of error of course do not "relieve this Court of the performance of the judicial function[,]" *Sibron v. New York*, 392 U.S. 40, 58 (1968) (citation omitted), the deference due a confession of error is at its zenith when it comes from a State's chief law enforcement officer and relates to prosecutorial misconduct that violated due process and affected the outcome in a capital case. After all, the injustice of allowing a capital sentence to be carried out where the conviction was occasioned by the government's own admitted failings would be nigh unfathomable. In all events, and deference aside, the OCCA's decision is premised on mistakes of law that cannot be reconciled with this Court's precedents and mistakes of fact that cannot be reconciled with the record. The State

therefore acquiesces in certiorari in No. 22-7466 and supports vacating Glossip's capital conviction, either through summary reversal or granting, vacating, and remanding with instructions to set a new trial, so that justice can be done in this case.

STATEMENT OF THE CASE

The petition in this case involves a conceded due process violation under *Napue v. People of State of Illinois*, 360 U.S. 264 (1959), relating to the most critical basis to impeach the most critical witness against the defendant in a capital case—indeed, the sole inculpatory witness. The petition also involves the OCCA's extraordinary refusal to accept a confession of error by the chief law enforcement officer of the State relating to prosecutorial misconduct in a capital case.

On January 7, 1997, Justin Sneed murdered Barry Van Treese, the owner of an Oklahoma City Best Budget Inn, in one of the motel's guest rooms. After his arrest, and in exchange for avoiding a death sentence, Sneed implicated Glossip, the motel's manager, claiming that Glossip had paid him to carry out the murder. "[E]xcept for the testimony of Justin Sneed[,]" the OCCA previously observed that Glossip could not have been charged with murder. App.249a. In fact, Glossip was only formally charged with murder after he was implicated by Sneed; before that, the State only charged him as an accessory after-the-fact, see Amended Information, Case No. CF97-244, Jan. 23, 1997.

Glossip's conviction and sentence thus hinged almost entirely on Sneed's credibility. Indeed, Sneed was the only witness to offer direct evidence of Glossip's

alleged role in the murder. App.187a. Yet the State recently learned that the prosecution not only failed to disclose to the defense material evidence relating to Sneed's credibility, but also failed to correct testimony by Sneed it knew to be false.

In light of these and other concerns relating to the sustainability of Glossip's capital conviction,[1] on January 26, 2023, the Oklahoma Attorney General retained an independent counsel, former district attorney and Republican legislator Rex Duncan, to review the State's prosecution, conviction, sentencing, and post-conviction appeals related to Glossip. The Independent Counsel spent approximately 600 hours poring through the record. After that thorough review, he issued his report to the Attorney General on April 3, 2023. App.48a-66a.

In his report, which makes clear that the State "did not influence" his investigation, App.48a, the Independent Counsel advised as follows:

> In my view, the State must vacate Glossip's conviction due to its decades-long failure to disclose what I believe is *Brady* material, correct what I believe was false trial testimony of its star witness, and what I believe was a violation of the Court ordered Rule of Sequestration of witnesses (The Rule). In my view, this case is also permeated by failures to secure, safeguard and maintain evidence in a capital murder case . . . .
>
> Trying any case a third time is unfortunate and rare, but I believe it is appropriate in this case.

App.62a. The report concluded: "A release of all Sneed's records would have made a monumental difference" to the cross-examination and possibly the outcome of the trial. App.65a.

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[1] The many errors in this case include, among other thing s, a violation of the rule of sequestration and the destruction of various pieces of evidence. App. 124a, 153a.

Although the State did not agree with all findings and conclusions made by the Independent Counsel, it did—and still does—agree that the prosecution's failure to correct material false testimony of the central witness at Glossip's trial compels vacatur of Glossip's capital conviction. Specifically, recently released records that were not disclosed to the defense until January of this year—after the Independent Counsel began his review—indicate that a psychiatrist treated Sneed, the State's indispensable witness, for a serious psychiatric condition—yet the prosecution permitted Sneed to effectively hide both his psychiatric condition and the reason he was prescribed lithium through materially false testimony to the jury. *See* App.266a-267a (Sneed testifying on direct examination that he had "never seen no psychiatrist" and that he was prescribed Lithium, mistakenly, "because [he] had a cold").[2]

As a result, on April 6, 2023, the State filed a Response to Glossip's fourth Successive Application for Post-Conviction Relief with the OCCA, confessing error and supporting Glossip's request for post-conviction relief. App.148a-155a. In addition to confessing error relating to the *Napue* violation, the State confessed to cumulative error in response to multiple issues raised in Glossip's Post-Conviction Relief Application that, when taken together with the incorrect testimony of the State's key witness, the State believes establishes that Glossip's trial was unfair and unreliable. App.150a. Consequently, the State asserted in its Response to the OCCA that it could no longer advocate that the result of the trial would have been the same but for these errors. App.152a.

[2] The State previously opposed discovery of any of Sneed's medical records. App.495a.

Despite that confession of error, the OCCA denied Glossip's application for post-conviction relief in an opinion entered on April 20, 2023. App.1a-26a. The OCCA began by briefly suggesting that Glossip's claims were time-barred, App.11a, 16a-17a, but it quickly proceeded to the merits, concluding that the State's admission of a *Napue* violation was "not based in law or fact." App.15a. In the OCCA's telling, Sneed's testimony "was not clearly false[,]" based on the puzzling theory that "Sneed was more than likely in denial of his mental health disorders . . . ." App.17a. The OCCA went on to raise the speculative theory (for which it cited no support) that perhaps "[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." App.16a-17a. And it concluded—again without record support—that the new "evidence [was] not material under the law" because (the OCCA said) evidence about Sneed's mental health and lack of credibility would not have changed the jury's verdict. App.17a. *But see Napue*, 360 U.S. at 269 ("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."); *cf. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("the prosecution . . . must be assigned the consequent responsibility to gauge the likely net effect of all [defendant-favorable] evidence").

In the wake of the OCCA's decision, Glossip indicated his intent to file a petition for certiorari and sought a stay of execution. The State acquiesced in the stay application and signaled that it would not oppose the petition for certiorari seeking

review of the OCCA's decision here (while reaffirming its opposition to Glossip's still pending petition in No. 22-6500). On May 5, this Court granted the stay of execution pending the resolution of the petitions in this case and in No. 22-6500, without noted dissent, and Glossip filed a timely petition for certiorari seeking review and reversal of the OCCA's refusal to accept the State's confession of error.

ARGUMENT

The OCCA's decision cannot be reconciled with this Court's precedents, the record in this case, or bedrock principles. The State is thus compelled to acquiesce in Glossip's petition for certiorari arising out of that decision and waive any procedural objections it could assert, given the OCCA's refusal both to give full and fair consideration to the *Napue* violation and to accept the State's considered judgment that Glossip's capital conviction can no longer be sustained.

I. The State Agrees That Glossip Is Entitled To Relief From This Court.

A. The OCCA's Refusal to Accept the State's Confession of a Serious *Napue* Violation Is Untenable and Demands Correction.

1. For nearly a century, "this Court [has] counselled prosecutors 'to refrain from improper methods calculated to produce a wrongful conviction.'" *United States v. Young*, 470 U.S. 1, 7 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Prosecutors have embraced and internalized that obligation to the point where the entrance to the office of the United States Attorney General is adorned with the reminder that the government "wins its point whenever justice is done its citizens in

the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (citation omitted). After careful consideration—including a thorough review by an independent counsel—the State came to the conclusion that because of mistakes made by prosecutors before and during Glossip's trial, ensuring that justice is done in this case requires a retrial. The State therefore acted consistent with "[t]he public trust reposed in the law enforcement officers of the Government" and "confess[ed] error" in light of the State's reasoned judgment that "a miscarriage of justice" of the highest order "may result from [its] remaining silent." *Young v. United States*, 315 U.S. 257, 258 (1942).[3]

The OCCA's decision to waive away the State's confession of not just any error, but of prosecutorial misconduct skewing the testimony of the single-most critical witness against the defendant in a capital case, is untenable. While a confession of error obviously does not deprive this Court of its proper role even when the stakes are highest, the "considered judgment" of the chief law enforcement officer of the sState "that reversible error has been committed is entitled to great weight . . . ." *Young*, 315 U.S. at 258-59. And the weight to which such a confession is entitled is

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[3] *See also, e.g.*, AM. BAR ASS'N, *Criminal Justice Standards for the Prosecution Function* 3-8.1 (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ ("The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred."); NAT'L DIST. ATT'YS ASS'N, *National Prosecution Standards* § 6-1.3 (3d ed. 2009), https:// ndaa.org/wp content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf ("If a prosecutor learns that material evidence previously presented by the prosecutor is false, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence.").

greater when the reversible error concerns prosecutorial misconduct relating to the State's star witness, and greater still when that unconstitutional misconduct contributes to a capital conviction.

Whatever the proper course may be when the government confesses error on a pure question of law, as in *Young*, it is difficult to imagine a valid basis for second guessing a state's highest law enforcement officer when he has lost confidence *in a capital conviction* that the state has concluded was procured based on a *Napue* violation. The "severity" of a capital conviction itself "mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). The prospect of executing an individual based on a conviction that the State's chief law enforcement officer believes, after careful scrutiny, was secured by prosecutorial misconduct in violation of due process, is all but unthinkable.

The OCCA nonetheless denied Glossip a new trial and refused to accept the State's confession of error. That remarkable decision is wrong on the facts and wrong on the law. It cries out for correction.

2. Starting with the facts, the State's confession of error was informed by a thorough, independent investigation and is amply supported by the record. The conviction in this case was obtained through false testimony that the prosecution elicited but failed to correct from the most indispensable witness at Glossip's second trial—indeed, from the person who actually delivered the fatal blows to the victim and agreed to cooperate with prosecutors to avoid facing the death penalty himself. Evidence that was previously withheld by the State and was made available to the

defense only this year reveals that Sneed appears to have been evaluated by a county jail psychiatrist, and diagnosed with bipolar affective disorder in 1997, shortly after the murder and while in the custody of the Oklahoma County Jail. Resp.App.33a-38a. Sneed was prescribed lithium by a psychiatrist, not furnished it by a clumsy dispensary. Based on newly released interview notes from 2003 that were previously withheld by the State, the prosecutor was aware that Sneed had been treated by a "Dr. Trumpet." Resp.App.34a. Glossip pointed out to the OCCA that "Dr. Trumpet" surely referred to Dr. Lawrence Trombka. Resp.App.15a. The State agrees, especially given that it is the State's understanding that Dr. Trombka was generally known to be the sole psychiatrist treating patients at the Oklahoma County Jail in 1997. App.103a; Resp.App.37a.

Despite this reality, prosecutors allowed Sneed to effectively hide his serious psychiatric condition and the reason for his prior use of lithium through false testimony to the jury. At the second trial in 2004, Sneed testified as follows on direct examination:

> Q. After you were arrested, were you placed on any type of prescription medication?
>
> A. 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.**
>
> Q. So you don't know why they gave you that?
>
> A. No.

2004 Trial Tr. Vol. 12, 64:3-8 (emphasis added).

That testimony is roughly consistent with what Sneed told a psychologist, Dr. Edith King, Ph.D., during a competency exam in July 1997, where he claimed to be on lithium "after his tooth was pulled" and "denied any psychiatric treatment in his history." State of Oklahoma's Response to Petitioner's Successive Application for Post-Conviction Review (Sept. 16, 2015), Case No. PCD-2015-820, Exhibit B. But it is wholly inconsistent with the fact, known to the prosecution and withheld from the defense, that Sneed *had* been treated by a psychiatrist in 1997—and he was not administered lithium for a cold or a toothache, but to treat a serious psychiatric condition that, combined with his known and extensive illicit drug use, would have had a material impact on the jury's view of his credibility (not to mention his memory recall or potential paranoia).

The OCCA nevertheless concluded that Sneed's testimony was not false on the puzzling theory that Sneed simply may have been in denial. But denial tends to produce falsehoods, not accuracy, and those falsehoods do not become truthful just because the speaker refuses to accept reality. Even if Sneed was sufficiently in the grip of denial to believe his false testimony, that would not excuse the admission of testimony the prosecutors knew to be false (or the withholding of evidence from the defense tending to show it to be false).

3. The OCCA's contrary conclusion not only defies the record, but contradicts settled law. The OCCA's decision to reject the State's confession and find no due process violation was premised on a miserly view of *Napue* that cannot be squared with this Court's precedents or basic principles of due process. This Court has long

held, and repeatedly reaffirmed, that a denial of due process occurs even "when the State, although not soliciting false evidence, allows" "what he knows to be false" "to go uncorrected," regardless of what the witness may have believed. *Napue*, 360 U.S. at 269-70; *see also White v. Ragen*, 324 U.S. 760, 764 (1945); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

And this Court has made clear that the duty of the State to correct the record when the prosecution elicits false testimony is unflagging and unqualified. "[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269. Neither the witness's subjective state of mind nor the prosecutor's reasons for failing to correct a lie makes a difference; all that matters is that the testimony offered against the accused is false.

> [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 (quoting *People v. Savvides*, 136 N.E.2d 853, 854-55 (N.Y. 1956)). Whether Sneed was in denial about his mental health, as the OCCA posited (without citing a shred of evidence), makes no difference to the constitutionally relevant question.

B. The *Napue* Violation Here Cannot be Dismissed as Harmless.

The OCCA further erred in suggesting that any failure to correct the record here was immaterial. The undisclosed evidence here did not relate to some ancillary

witness or tertiary issue. Justin Sneed was *the* indispensable witness for the State. Indeed, without Sneed's testimony, it is difficult to imagine a capital case being brought against Glossip at all; Glossip was only formally charged with capital murder after Sneed implicated him. Sneed's credibility was thus critical to the verdict, especially given his obvious incentives to inculpate Glossip to avoid the death penalty for himself.

An amicus brief filed on behalf of the family of the victim argues that there was "overwhelming evidence of guilt" and that "Glossip is clearly guilty of aggravated murder." Victims' Br. at 9, 11. While the State understands the victim's family's desire to see this saga brought to an end, that description of the record is simply not accurate. "Unlike many cases in which the death penalty has been imposed, the evidence of petitioner's guilt was not overwhelming." Order at 1-2, *Glossip v. State*, No. 5:08-cv-00326 (W.D. Ok. Sept. 29, 2010), ECF No. 66 ("Order"). To the contrary, "the physical evidence basically all goes to Mr. Sneed," as even the prosecution contemporaneously recognized. May 29, 1998 Pre-Trial Hearing Transcript at 27:21-25 (ADA Fern Smith); *see also* Public statement of Former ADA Gary Ackley, June 2016 Interview, Radical Media Transcript at p. 33 (All of "the specifics about the murder plot came from Mr. Sneed."). Simply put, what the district court reviewing Glossip's federal petition found is correct: "The State's case against petitioner hinged on the testimony of one witness, Justin Sneed." Order at 1. His credibility was absolutely essential to Glossip's conviction and death penalty aggravator (murder for

remuneration), especially given the unique pressures that the death penalty creates for someone in Sneed's position to cooperate and inculpate Glossip to save himself.[4]

Perhaps for that reason, the OCCA suggested that the defense somehow should have known the facts about Sneed's bipolar disorder and treatment by a psychiatrist. But while the centrality of Sneed's testimony would have certainly justified considerable defense efforts to impeach him, it makes the State's regrettable failure to turn over the relevant notes and records until earlier this year all the more prejudicial. App.64a, 101a, 105a.

Indeed, that failure to disclose makes clear that the prosecutor's failure to correct Sneed's testimony would be reversible error in every court save the OCCA.[5] In most courts, what the defendant's counsel knew or should have known is irrelevant, as the *Napue* obligation is directed *to the prosecutor*. The majority rule is that "the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). Defense counsel's

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[4] Sneed indeed testified that he knew he would not receive the death penalty if he agreed to testify against Glossip. 2004 Trial Tr. Vol. 12, 57:25-58:4.

[5] Notably, the position the OCCA took in this case is not even in line with its own prior case law. For example, in *Hall v. State*, the OCCA reversed a capital conviction where "the prosecutor chose to sit idly by" as a witness testified "false[ly]," even though the prosecutor was aware that reality was "totally to the contrary." 650 P.2d 893, 901 (Okla. Crim. App. 1982) (Brett, J., concurring). In that case, the misconduct was arguably less egregious than it was here, as State in *Hall* did not itself put on the perjuring witness; that witness testified "during the defendant's case." *Hall*, 650 P.2d at 899.

failure "to correct the prosecutor's misrepresentation . . . d[oes] not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions." *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988). "The fact that defense counsel was also aware of [evidence revealing the falsity of testimony elicited by the State] is of no consequence," *id.*, because the prosecution's "obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution," *People v. Smith*, 870 N.W.2d 299, 306 n.7 (Mich. 2015). *Accord, e.g.*, *United States v. Cargill*, 17 F. App'x 214, 226 (4th Cir. 2001).

The OCCA appears to have tried to align itself with the minority view, under which *Napue* challenges to the deliberate use of false evidence fail where the defense "had reason to know of the falsity of the subject testimony," but "faile[d] to raise it at trial." *DeVoss v. State*, 648 N.W.2d 56, 63-64 (Iowa 2002); *accord, e.g.*, *Ross v. Heyne*, 638 F.2d 979, 986 (7th Cir. 1980). That view is inconsistent with *Napue* and its progeny, which make clear that "the knowing use of perjured testimony involves . . . a corruption of the truth-seeking function of the trial process," regardless of what the defense may or may not know. *United States v. Bagley*, 473 U.S. 667, 680 (1985); *see also Kyles*, 514 U.S. at 435 ("[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review."); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) ("The prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge."). But it is also beside the point here. The minority rule is that a prima facie *Napue* violation may be forgiven if the prosecution has fulfilled all of its *Brady*

obligations. *See, e.g.*, *United States v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017). But here (the State has confessed that) a *Brady* violation did indeed occur; as noted, the State failed to disclose the relevant information relating to Sneed's bipolar disorder and treatment by a psychiatrist until *earlier this year*. App.64a, 101a, 105a. In that context, no case of which the State is aware supports forgiving the prosecution's failure to comply with its *Napue* obligations, regardless of what the defense knew or should have known.

The OCCA's error is all the more troubling, and in need of correction, because it appears to be a recurring one at that court. This case is a near-twin of *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013), except it is even more in need of correction. There as here, "the most important witness at trial" for the State "had been diagnosed with a severe mental disorder," but "the defense attorneys . . . did not know" that fact at the time, because the State failed to disclose it. *Id.* at 1094. There as here, the mental health information impacting the witness's reliability and credibility did not come to light until post-conviction review. *Id.* And there as here, the OCCA unreasonably "determin[ed] that" information relating to the mental condition of the most critical witness against the accused "contained nothing favorable to [the defense]" and thus that there was "no reasonable probability that, had this evidence been disclosed, the result of the trial would have been different." *Id.* at 1100 (quoting *Browning v. State*, 134 P.3d 816, 837 (Okla. Crim. App. 2006)).

In rejecting that miserly view of what process is due a criminal defendant, the Tenth Circuit did not mince words. The court of appeals found it "beyond question"

not only that information about the mental health of "the prosecution's indispensable witness" constituted "both exculpatory and impeaching evidence" that needed to be disclosed to the defense, *but also* that "the Oklahoma courts' conclusion" that the "mental health records—had they been available for use at trial—could not have put the trial in a 'different light' and 'undermine[d] confidence in the verdict'" was so "unreasonable" to justify habeas relief even "apply[ing] the deference prescribed in § 2254(d)." *Id.* at 1103, 1105-06 (quoting *Kyles*, 514 U.S. at 435).

The same is true here—and then some. Here as in *Browning*, the false testimony was from the State's "indispensable witness" and the defendant's "fate turned on [his] credibility." *Id.* at 1106. Indeed, here as there, "the prosecution made it abundantly clear at closing argument" that Sneed's testimony was effectively dispositive of Glossip's guilt or innocence. *Id.*; *see, e.g.*, 2004 Trial Tr. Vol. 15, State's Closing, 73:8–10 ("[I]t's as if Justin Sneed was a Rottweiler puppy, let's say 11 months old, and Richard Glossip was the dog trainer."); 68:3–5 ("What reason above and beyond the reasons of Richard Glossip did Justin Sneed have to kill Barry Van Treese?"); 92:25–93:1 ("It doesn't make sense to put all this on Justin Sneed."); 151:21–22 ("But for Richard Glossip, Justin Sneed would never have killed Barry Van Treese."); 171:18–19 ("And you know that Justin Sneed could not and would not have done this alone."). And here, this Court is not constrained by the same exacting AEDPA standards that the court in *Browning* faced. The decision below constitutes an unreasonable application of federal constitutional law that justifies federal relief.

C. The Decision Below Conflicts with this Court's Decision in *Escobar*.

The OCCA's refusal to accept the State's confession of error here is all the more puzzling and problematic given that this case is on all fours with *Escobar v. Texas*, 143 S.Ct. 557 (2023), a capital case in a similar posture which this Court GVRed earlier this year in light of the State's confession of error. The OCCA blithely dismissed *Escobar* in a footnote, *see* App.15a n.8, but the grounds on which it distinguished that case are both legally irrelevant and factually inaccurate. The OCCA asserted that, in *Escobar*, the State never "confessed error before its own state courts as the Attorney General has done [here]." *Id.* That is not true. The State did, in fact, confess error in its own state courts. *See* Brief of Respondent State of Texas in Support of Petitioner at 29–30, *Escobar v. Texas*, No. 21-1601 (2023), 2022 WL 4781414. Regardless, whatever force the OCCA believed the timing of the confession had for its own purposes, it certainly has no effect on this Court's authority to grant relief in these gravest of circumstances. *Cf. Wearry v. Cain*, 577 U.S. 385 (2016) (summarily reversing, on post-conviction review, of a 14-year-old murder conviction where the prosecution violated *Brady*).

More important, the error confessed in *Escobar* is the same as the one here: The State learned during post-conviction proceedings that the prosecution likely violated its due process obligations pursuant to *Napue* to correct false testimony it elicited that tended to bolster its case and weaken the defense's. There is no reason why this Court should be less likely to grant relief here than it was there. Just the opposite, in fact. Not only did the OCCA "repeat[] the same errors that" the Texas court

committed in *Escobar* and which "this Court previously condemned—if not quite in *haec verba*, certainly in substance," *Moore v. Texas*, 139 S.Ct. 666, 672 (2019) (Roberts, C.J., concurring), but here the errors to which the State has confessed go beyond *Napue*. In addition to that independently-reversal-worthy violation, the State has confessed to violating the rule of sequestration and destroying evidence that bore directly on the State's theory of Sneed's motive to kill, *i.e.*, "but for Richard Glossip, Justin Sneed would have never killed . . . ." 2004 Trial Tr. Vol. 15, State's Closing, 151:21–22; *see also, e.g.*, *id.* at 68:3–5, 73:8–10, 92:24–93:1, 171:18–19. On the heels of *Escobar*, the sum-total of the State's misconduct here confirms the need for this Court's intervention. *See Kyles*, 514 U.S. at 435.

* * *

In sum, there is no dispute that Sneed was the State's indispensable witness at the second trial and that Glossip's fate turned on Sneed's credibility, which hung by a thread given his own culpability and capital exposure absent his inculpation of Glossip. Sneed personally bludgeoned the victim to death, and his testimony linking Glossip to the murder was central to the prosecution, conviction, and death penalty aggravator (murder for remuneration). If Sneed had accurately disclosed that he had seen a psychiatrist, then the defense would have likely learned of the serious nature of Sneed's psychiatric condition and the true reason for Sneed's lithium prescription. With this information, plus Sneed's history of drug addiction, the State believes that a qualified defense attorney likely could have attacked, *inter alia*, Sneed's ability to properly recall key facts at the second trial and provide a viable alternative theory of

the case that did not involve Glossip. At the very least, there is a reasonable probability that evidence casting doubt on a centerpiece of the State's theory would have been enough to persuade a juror to reject the death penalty.

The State therefore respectfully submits that this Court should either summarily reverse the OCCA's decision or grant the petition, vacate the decision below, and remand with instructions to set a new trial.

II. There Is No Impediment To Granting Relief.

The Van Treese family *amicus* brief argues that the decision below "rests on an independent state ground" and thus that this Court lacks jurisdiction to grant the relief requested. Victims' Br. at 8. That argument is mistaken.

This Court unquestionably has jurisdiction to review the claims asserted in the present petition. To be sure, "[t]his Court will not take up a question of federal law in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Cruz v. Arizona*, 143 S.Ct. 650, 658 (2023) (as in original) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). And that rule holds true "even when the state court also relies on federal law." *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). But a state-law ground must actually be adequate and independent of any federal-law holding to divest this

Court of jurisdiction. And, here, the singular state-law ground on which the decision below rested was neither.[6]

First, "the state court's judgment does not rest on an independent state ground." *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985). This Court has long held that "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 75; *see, e.g.*, *Enter. Irrigation Dist. v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917) ("[W]here the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."). Such is the case here: The OCCA's state-law holding depends on its federal-law ruling, and consequently does not present an *independent* state-law ground.

The OCCA concluded that Glossip's *Napue* claim failed to "overcome the [state-law] limitations on successive post-conviction review" set forth in Oklahoma Statute title 22, § 1089(D)(8), because (the OCCA said) that issue "could have been presented previously," and a "reasonable fact finder" still could "have found the applicant guilty

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[6] In its introduction, the *amicus* brief asserts that the OCCA's decision is supported "by *multiple* independent and adequate state grounds." Victims' Br. at 2 (emphasis added). But, consistent with the OCCA's opinion, the brief goes on to invoke just one: that the OCCA found that the *Napue* claim presented in the petition for certiorari "did not meet the standard of" "Oklahoma's successive petition rule for capital cases." Victims' Br. at 6-8; *see* Okla. Stat. tit. 22, § 1089(D)(8).

of the underlying offense" even if "the alleged error" had been corrected. App.15a-16a. The basic problem with reliance on that conclusion here should be pellucid: It depends on asking the very same materiality question that goes to the heart of the due process issue discussed above. Indeed, the OCCA's basis for concluding that the *Napue* claim was procedurally defaulted was that it failed as a matter of federal law. *See* App.15a-17a. Accordingly, the OCCA's entangled § 1089 ruling is no barrier to this Court's review. *See Foster v. Chatman*, 578 U.S. 488, 497 (2016); *Ake*, 470 U.S. at 74–75.

Another problem with that conclusion is that it rests on an unreasonable, counterfactual assertion that is intertwined with merits of the federal question and, as already explained in the context of addressing that federal question, lacks a basis in the record: Despite the OCCA's *ipse dixit*, the State failed to disclose the relevant information relating to Sneed's bipolar disorder and treatment by a psychiatrist *until earlier this year*. *See supra* pp.3–5. To be sure, the defense previously had reason to know that Sneed had been given lithium. But Sneed provided an innocuous explanation for that phenomenon in testimony the prosecutors themselves elicited and knew to be false. Moreover, the defense had no reason to know—indeed, could not have known, given the State's *Brady* and *Napue* violations—about Sneed's bipolar diagnosis. The defense sought to obtain Sneed's medical records in 2015, but the State opposed and the OCCA denied the defense's motion. App.495a–496a, 164a. The defense therefore had no basis until this January to explore potential avenues of impeachment stemming from that critical revelation about the critical witness against the accused—and, more to the point, it had no reasonable basis for

disbelieving the testimony that the State elicited from Sneed on the subject, and thus no reasonable basis to assert a *Napue* claim.

In all events, any factual disputes about what the defense knew about Sneed's bipolar disorder and when counsel knew it weigh in favor of, not against, relief. The State is not asking this Court to exonerate Glossip by fiat (or at all). Granting the relief that Glossip himself seeks, and in which the State joins, would not allow him to walk free. It would merely allow the State a chance to try to secure a conviction that comports with due process and the most basic commitments of our law. And if this Court believes that there are genuine disputes about what defense counsel knew and that potential contemporaneous knowledge may defeat a *Napue* claim, then at the very least this Court should grant the petition, vacate the OCCA's decision, and remand for an evidentiary hearing on that question.

Second, even if the OCCA's threshold § 1089 holding were independent of the *Napue* holding, it is not adequate to support the judgment. "The question whether a state procedural ruling is adequate is itself a question of federal law." *Cruz*, 143 S.Ct. at 658 (quoting *Beard v. Kindler*, 558 U.S. 53, 60 (2009)). And "an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). That is precisely what we have here. The OCCA ruled that Glossip's *Napue* claim was procedurally defaulted under § 1089 because he could have brought it earlier. But the idea that a defendant needs

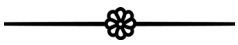
to bring a *Napue* claim *before he actually knows of the basis for the claim* was simply not a foreseeable application of state law.

In fact, such a rule—that a *Napue* violation can be forfeited before a defendant has knowledge of the salient facts because of a *Brady* violation—would itself violate the Fourteenth Amendment. *See Cooper v. Oklahoma*, 517 U.S. 348, 354-62 (1996) (application of a state procedural rule that implicated a federal due process right, but was less protective than the federal rule, violated the Fourteenth Amendment); *cf. Reed v. Goertz*, 143 S.Ct. 955, 972 (2023) (Thomas, J., dissenting) (recognizing that "Congress has provided" for review in this Court of a state court's "application of a rule of decision that itself violates due process"). Simply put, a state court cannot insulate a due process violation from this Court's review by erecting unreasonable preservation requirements without itself violating due process.

Furthermore, the OCCA failed to accord even a modicum of deference to the confession of the State's chief law enforcement officer that a capital conviction was secured by prosecutorial misconduct in violation of due process. The State is unaware of any previous decision of the OCCA to that (unforeseeable) effect. And the only reasons the OCCA provided for its blithe dismissal of the State's confession were unsupportable, as explained above. Indeed, the OCCA distinguished *Escobar* solely on the theory that Texas did not confess error there until its brief before this Court—but that is simply untrue. *See supra* p.18.[7]

[7] That is what distinguishes the present petition from the separate petition in No. 22-6500. There, even Glossip admits that the OCCA refused to consider his claims because they were waived. Here, by

The Oklahoma Attorney General has a critical role in representing the State in legal proceedings and speaks for the State in those proceedings, and the OCCA's denial of that role was an unforeseeable event that renders its state-law holding inadequate under this Court's jurisdictional precedents. That said, the State wishes to be clear about its role here. Neither the Attorney General nor the OCCA has the final word on the Constitution or what it demands in the context of this capital case. The final word belongs to this Court, based on the Constitution, the record, and the representations of the State—all of which confirm that Glossip is entitled to relief in this instance.



CONCLUSION

The State is fully aware of the stakes of this case, for Glossip, the victim's family, and the rule of law. Indeed, the State deeply respects the victim's family's concerns about ensuring justice be done, both here specifically and in capital litigation generally. But justice would not be served by moving forward with a capital sentence that the State can no longer defend because of prosecutorial misconduct and cumulative error. Our Constitution contemplates capital punishment but explicitly demands that it occur only with the due process of law. The notion that a conceded *Napue* violation in a capital case could simply be ignored because the government's

contrast, OCCA's § 1089 holding was neither independent of its mistaken federal-law holding nor adequate to support the judgment within the meaning of this Court's cases.

disclosure and confession of error came too late in the process is fundamentally incompatible with that bedrock guarantee. A state court cannot stand in the way of the known remedy for this type of federal constitutional due process violation. Accordingly, the State agrees with petitioner that the OCCA's decision refusing to remedy a conceded *Napue* violation cannot stand.

For the foregoing reasons, this Court should either summarily reverse the OCCA's decision or GVR with instructions for further proceedings consistent with this Court's precedents and the Constitution.

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