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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Richard E. Glossip comes to this Court asking it to recognize, just as Oklahoma's duly elected chief law enforcement officer has determined, that he did not receive a fair trial. Yet Oklahoma teeters on the precipice of executing an innocent man, one whose case has many of the hallmarks of a wrongful conviction, I.P. Br. 14, because its high court has shirked its duty to ensure the review it purports to offer for federal claims is fair, available, and accurate. As the Attorney General put it: "the record (complete with the new evidence that the jury did not hear nor consider in rendering its verdict and death sentence) does not support that he is guilty of first degree murder beyond a reasonable doubt." Reply App. 2a. That new evidence includes long-suppressed information demonstrating the prosecution's seminal witness offered uncontestably false testimony on a material matter.

In denying relief, the Oklahoma Court of Criminal Appeals (OCCA) refused to engage with the Attorney General's concession, instead insisting Mr. Glossip would somehow have been able to raise claims at trial and on appeal based on information he only received almost 20 years after his conviction and sentence, and making mincemeat of longstanding federal precedent. This Court should grant review and condemn the OCCA's efforts in the clearest possible terms.

ARGUMENT

I. THE DECISION BELOW CONTRADICTS FEDERAL LAW

A. The OCCA Erred

The parties agree that "many errors" in this case compel reversal. Resp. 3 n.1. Chief among them is the long-suppressed evidence that the State knowingly presented false testimony from the killer, Justin Sneed, that he was not under a psychiatrist's care for a serious mental disorder but was mistakenly prescribed lithium for a cold. Resp. 4 (citing *Napue v. Illinois*, 360 U.S. 264 (1959), noting additional confession to "cumulative error in response to multiple issues" that "establish[] Glossip's trial was unfair and unreliable."). The lengths to which the prosecution went to hide their lead witness's psychiatric issues and their facilitation of his false testimony underscores the "monumental difference" its disclosure "would have made to the cross-examination and possibly the outcome of the trial." Resp. 3.

The parties' agreement to certiorari and reversal on this error is the only reasonable response to this situation for at least two reasons. First, the stakes, and corresponding need for reliability, could not be greater. Mr. Glossip faces execution for a crime he did not commit based on testimony his prosecutors knew to be false. And the State faces the unthinkable task of executing a person whom its chief law enforcement officer has concluded was wrongfully convicted because of the State's

own misconduct. The agreement reflects the State's willingness to face up to the profound problems with Mr. Glossip's capital conviction.[1]

Second, on the merits, the case is not even close. Reversal on this chief error alone is required if there is "any reasonable likelihood" that the false testimony "*could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added); *see Napue*, 360 U.S. at 272. The D.C. Circuit considers a *Napue* error a "veritable hair trigger for setting aside the conviction." Ethics Br. 17 (quoting *United States v. Butler*, 955 F.3d 1052, 1058 (D.C. Cir. 2020)). And the situation here is the "near-twin" of a case in which the Tenth Circuit overturned—under the more demanding requirements of federal habeas corpus review—a similar erroneous decision of the same state high court, Resp. 15–16, holding it had unreasonably applied the materiality standard to a central witness's undisclosed mental health records. *See Browning v. Trammel*, 717 F.3d 1092, 1106 (10th Cir. 2013). To reach the contrary result (both in *Browning* and here), the OCCA contradicted its own longstanding precedent. *See Hall v. State*, 650 P.2d 893, 898–99 (Okla. Crim. App. 1982) (finding *Napue* error when the State

[1] Counsel for *amici* accuse the Attorney General of being a "comrade-in-arms" with Mr. Glossip, perhaps implying an anti-death-penalty agenda. D.A. Br. 13. But this Attorney General is no squish. Beyond continuing to defend death sentences in the courts, he has personally appeared and opposed clemency in at least one capital case and personally attended the only execution undertaken during his tenure. *See* Oklahoma Attorney General, *Drummond Comments on Clemency Denial for Jemaine Cannon* (June 7, 2023); Andrea Eger, *Scott Eizember Executed for 2003 Murders of Elderly Couple in Creek County*, TULSA WORLD (Jan. 12, 2023).

failed to correct defense witness's prejudicially false testimony). The prior OCCA authority and the *Browning* decision correctly applying *Napue*—both in capital cases—doubtlessly informs the Attorney General's decision here to admit the error.

But the *Napue* error does not stand alone. The State also concedes its prosecutors suppressed the evidence of Sneed's psychiatric condition (the subject of his false testimony), establishing a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Resp. 15. It further concedes the Oklahoma City Police Department intentionally destroyed 10 items of potentially exculpatory evidence, including physical evidence from the crime scene and records crucial to testing the State's theory of motive, apparently at the direction of the District Attorney's Office, during the appeal of Mr. Glossip's ultimately-overturned first conviction, prior to his second trial. Police similarly either destroyed or lost a surveillance video from the gas station adjacent to the motel that almost certainly showed Sneed and any companion during the timeframe of the murder. App. 86a.

On top of that, the State admits it violated the rule against sequestration during the trial, after the medical examiner had given testimony that contradicted Sneed's prior accounts of how the murder had occurred. During an illicit meeting before Sneed took the stand, the prosecutor coached him to lie to conform his testimony to the medical examiner's testimony that a knife and baseball bat had both been used, when Sneed had previously stated he used only a bat. The

prosecution also failed until September 2022 to disclose a memo documenting that coaching, suppressing that evidence for more than 18 years after the trial.[2]

But even that was not all. The State also suppressed information that Sneed expressed a wish to recant his implication of Mr. Glossip, Pet. i, *Glossip v. Oklahoma*, No. 22-6500 (U.S.). And it placed posterboards detailing prior witnesses' testimony around the courtroom in full view of all subsequent witnesses and the jury. *See Glossip v. Trammell*, 530 Fed. App'x 708, 718 (10th Cir. 2013).

Each of these instances is relevant, not only as context for the State's ethical duty to redress its prior misconduct, but because the OCCA, in assessing the conceded *Brady* and *Napue* errors, was required to consider the cumulative effect of *all* the misconduct. *See Kyles v. Whitley*, 514 U.S. 419, 421–22 (1995). The OCCA refused, holding it would only consider the errors claimed in a single petition, dismissing as irrelevant any errors raised previously. App. 21a. There is a good reason the Due Process Clause does not permit this; it would allow a state to get away with dribbling out over time individual bits of suppressed exculpatory evidence that would have required a new trial if disclosed all at once, requiring each to be litigated as soon as it was discovered, and limit *Brady/Napue* relief to those lucky defendants who happen to discover all the misdeeds at the same time. The OCCA's decision flatly violates *Kyles*.

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[2] While the State continues to oppose certiorari on procedural grounds in the other case pending before the Court, which involves this issue, it now admits the sequestration violation was error. Resp. 3.

As the State's Brief explains, the OCCA's opinion also contradicts *Napue*. *Napue* does not, as the OCCA erroneously held, require that a witness perjure himself by telling an intentional lie. All *Napue* requires is proof that a witness presented material evidence the State knew or had reason to know was false. *See Napue*, 360 U.S. at 269; *Giglio v. United States*, 405 U.S. 150, 154 (1972). It is the State's failure to correct *false* testimony, regardless of the witness's beliefs or intentions regarding that testimony, that violates due process of law. *See White v. Ragen*, 324 U.S. 760, 764 (1945); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

The District Attorneys Association's Brief ("D.A. Brief"), like the OCCA, fails to reckon with the plain falsehood at issue and makes serious legal and factual errors. At no point does the brief argue that Sneed's testimony was not, in fact, false or that the State did not know it was false. That should end the matter.

In addition to this glaring omission, the D.A. Brief makes at least two important legal errors. First, it suggests that to prevail, Mr. Glossip must demonstrate "the prosecutor's knowing concealment of information from the defense." D.A. Br. 12. Neither *Brady* nor *Napue* requires such a showing. *Brady* requires only a showing that materially exculpatory evidence was suppressed. *See Brady*, 373 U.S. at 87–88. Whether a particular prosecutor specifically knew the evidence was suppressed is irrelevant.[3] *See Gigilio*, 405 U.S. at 154. Under *Napue*,

[3] Although Mr. Glossip need not prove it to prevail on this claim, it appears the prosecution's suppression of the evidence *was* knowing. On the very same day that the prosecution interviewed Sneed and learned he was under the care of a

the information need not even be concealed. *See Napue*, 360 U.S. at 269 (explaining State's failure to correct false evidence violates due process, "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.").

Second, the D.A. Brief erroneously claims neither party has "made any attempt to marshal the evidence . . . [to] call Sneed's testimony into question," implying any error would be harmless. D.A. Br. 13. Its authors either did not notice or ignored the fact that Mr. Glossip clearly argued, both before the OCCA and in the pending petition, that the jury learning about the "dangerous interplay of bipolar disorder with methamphetamine" would have made a monumental difference in the jury's assessment of the credibility of the prosecution's indispensable witness.[4] Pet. 8; *see also* Pet. 13. Sneed was *the* "key witness" for the prosecution and the uncorrected falsehood, together with the undisclosed mental health information, was information vital to the jury's credibility assessment. Resp. 4.

The D.A. Brief's myriad additional factual errors further demonstrate a troubling lack of familiarity with the case. Although ultimately irrelevant to the merits of the *Napue* claim, the fact of Sneed's treatment and diagnosis was *not*

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psychiatrist, the state disclosed the aspects of Sneed's statement that supported its theory of the case and omitted Sneed's psychiatric issues. Reply App. 32a–33a.

[4] The D.A. Brief also erroneously claims *Browning v. Trammell*, the Tenth Circuit case the parties agree is a "near-twin" to Mr. Glossip's situation, was never cited below. D.A. Br. 12 n.4. But the briefing at the OCCA did, in fact, cite *Browning*, as reflected in the Appendix to the petition for certiorari. App. 83a ("Given Sneed's centrality to the State's case, this impeachment evidence was material." (Citing *Browning*, 717 F.3d at 1107)).

available to Mr. Glossip "a quarter of a century earlier." D.A. Br. 11. As the State explains, Dr. Edith King's competency report, on which the D.A. Brief relies for this point, simply memorializes the same falsehoods Sneed told the jury: he denied to Dr. King being under psychiatric treatment and linked his lithium prescription to a wholly non-psychiatric issue, which is what she reported.[5] Resp. 10; App. 441a.

Defense counsels' affidavits eliminate any doubt about what they knew and whether they would have used Sneed's condition and treatment to impeach him: they didn't know and, if the information had been disclosed, they would have used it to impeach Sneed. Reply App. 35a–45a. Their unequivocal interest in impeaching Sneed with the hidden evidence (which rebuts the OCCA's baseless speculation that the evidence would have gone unused) makes perfect sense. Contrary to the D.A. Brief's unsupported suggestion, bipolar disorder, particularly when combined with methamphetamine use, renders a person more emotionally dysregulated and volatile—not more vulnerable to manipulation. App. 104a. Sneed's volatility would thus support Mr. Glossip's theory that Sneed committed the murder in the course of a robbery, making the information especially useful to the defense. App. 79a.

No one has ever testified that Mr. Glossip "feared he would be fired due to discrepancies in the motel's finances." D.A. Assoc. Br. 10. Donna Van Treese's testimony that there were discrepancies could not be tested because the State

[5] Dr. King's report was part of the record before the OCCA and this Court. Counsel for the D.A. Association's choice to re-append it to their brief as though it was new information further demonstrates unfamiliarity with the record.

destroyed the motel's records prior to the second trial. And only a single witness testified that the victim was angry at Mr. Glossip, but he referenced anger only on the night of the murder, saying nothing about any existing fear of termination that could have led to the long-running murder plot Sneed invented. Reply App. 47a–49a.

The D.A. Brief also claims Sneed "has never come forward stating he wishes to recant." D.A. Br. 11. As detailed in Mr. Glossip's other petition before this Court, when Sneed asked his lawyer whether he would "have the choice of re-canting [his] testimony at anytime during [his] life," she told him doing so would result in his being placed on death row. Pet. 25, *Glossip v. Oklahoma*, No. 22-6500 (U.S.). These myriad factual errors call the brief's reliability into question. At bottom, nothing in the D.A. Brief rebuts the conclusion that the OCCA erred.

B. Certiorari Is Warranted

In light of the Attorney General's extraordinary exercise of his duty to confess error, the agreement of the parties on this petition's worthiness reflects the OCCA's extreme dysfunction in Mr. Glossip's case. The OCCA's analysis of the *Napue* error hinged on speculation—fabricated by the court without record citation—on an irrelevant point: that Sneed was in denial about his psychiatric treatment. App. 17a. The state court then procedurally defaulted Mr. Glossip's claim for a purported lack of diligence despite the incontrovertible fact that the claim arises from a document the Office of the Attorney General had disclosed only

sixty days prior, after decades of dogged State suppression. The OCCA's *Brady* analysis is contrary to *Kyles*. Its decision in this capital case blinks factual and legal realities before it.

As learned amici and the Attorney General set forth, the decision, on its face, also implicates splits of authority on the relevance of defense counsel's notice of a witness's falsehood and on the showing required before remediating the due process harm of a *Napue* claim. Ethics Br. 17; Resp. 14–15. If any doubt remained about whether certiorari is warranted, counsel for the D.A. Association volunteering to argue the case suggests a consensus on the matter.[6] D.A. Br. 23 n.8.

In keeping with his historical duty, the Attorney General has assented to certiorari and summary reversal in pursuit of "simply justice . . . [without] any pride of professional success." *Hurd v. People*, 25 Mich. 405, 416 (1872). This Court has granted similar requests, including by Oklahoma. *See Escobar v. Texas*, 143 S. Ct. 557 (2023); *Moore v. Texas*, 139 S. Ct. 666, 670 (2019) (summary reversal granted where prosecutor agreed defendant was intellectually disabled and therefore ineligible for death penalty); *see also Calcutt v. FDIC*, 143 S. Ct. 1317, 1321 (2023) (summarily reversing Sixth Circuit's decision in response to Solicitor General's confession of error); *Smith v. Oklahoma*, 464 U.S. 924 (1983) (granting certiorari, vacating judgment, and remanding for consideration in light of the Attorney

[6] As for whether the Court should appoint amici's counsel, Mr. Glossip notes that he is already counsel for amici, who have a particular set of interests in the outcome, presenting a potential conflict.

General's confession of error).[7] The OCCA's upholding of Mr. Glossip's conviction and death sentence despite the Attorney General's confession of error is a due process violation demanding this Court's intervention.

II. THE OCCA'S RESULT-DRIVEN PROCEDURAL DEFAULT DEMANDS REVIEW

A. The OCCA Decision Rests On Neither Any Independent Nor Adequate State Law Ground

The State correctly recognizes that there is no jurisdictional impediment to this Court's reviewing the OCCA's ruling that Mr. Glossip's *Napue* claim, premised upon evidence suppressed in violation of *Brady*, was procedurally defaulted. ("Proposition One," App. 13a, ¶ 24). Resp. at 19 *et seq*. The OCCA disposed of the claim by concluding Mr. Glossip "cannot overcome the limitations on successive post-conviction review" under Okla. Stat. tit. 22, § 1089(D)(8), premised entirely on its faulty application of *Brady* and *Napue*. App. 14a, ¶ 25. As the State underscores, the decision is thus founded upon neither independent (because it depends on a federal issue) nor adequate (because it is unforeseeable and factually incorrect) state grounds. Resp. at 20. The OCCA's decision expressly derives from *Brady* and

[7] Further, for Mr. Glossip, executive clemency is not available. *Cf. Grzegorczyk v. United States*, 142 S. Ct. 2580, 2581 (2022) (statement of Kavanaugh, J., respecting denial of certiorari). After a 2-2 tie at the Oklahoma Pardon and Parole Board (with one member recused), the Board determined it was foreclosed from recommending clemency to the Oklahoma Governor. *See* Liliana Segura & Jordan Smith, *Shocking Vote by Oklahoma Parole Board Clears the Way for Richard Glossip's Execution*, THE INTERCEPT (Apr. 27, 2023).

Napue—and those federal authorities only. App. 13a–14a (discussing *Brady*, as applied in *Wright v. State*, 30 P.3d 1148, 1152 (Okla. Crim. App. 2001), and *Brown v. State*, 422 P.3d 155, 175 (Okla. Crim. App. 2018)); App. 16a, ¶ 28 (discussing *Napue*).

This Court has long recognized its jurisdiction to "review[] the federal question on which the state-law determination appears to have been premised." *Three Affiliated Tribes of Fort Berthold Reservations v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984) (collecting cases) (cited in *Foster v. Chatman*, 578 U.S. 488, 497–98 (2016) (reversing Georgia Supreme Court post-conviction denial of *Batson* claim after deeming state procedural bar not independent of the merits)). Further, the OCCA's decision relied on an "incorrect perception of federal law," which plainly renders it *dependent* upon federal law and necessitates vacatur and remand. *Id.*

The State also correctly points to *Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)), in explaining that the OCCA's application of Okla. Stat. tit. 22, § 1089(D)(8) was "unforeseeable and unsupported" and, as such, is "not an adequate ground to preclude this Court's review of a federal question." Resp. at 22.

B. The OCCA Gave Mr. Glossip No Reasonable Opportunity For Review Of This Federal Constitutional Violation

In addition to the reasons the State cites to demonstrate the insufficiency of the OCCA's procedural bar, the state court's novel application of Oklahoma's postconviction relief statute also denied Mr. Glossip "a reasonable opportunity" to

obtain state-court review of the underlying *Napue* claim that arose only with the recent disclosure of evidence long suppressed in violation of *Brady*. *Parker v. Illinois*, 333 U.S. 571, 574 (1948) (quoted in *Michel v. Louisiana*, 350 U.S. 91, 93 (1955)). It did so despite state law that allows consideration of the very sorts of claims Mr. Glossip raised. *See Yates v. Aiken*, 484 U.S. 211, 218 (1988) (explaining that where state courts provide a forum for such claims, they have a "duty to grant the relief that federal law requires."). While the State is correct that the OCCA's ostensible default grounds are neither independent nor adequate under state law, the OCCA's decision, in an important sense, gets too much credit. Assessing these grounds on their own terms obscures the decision's gravest flaw: the OCCA's determination that "controlling here, is the fact that this issue could have been and should have been raised, with reasonable diligence, much earlier . . ." App. 16a, ¶ 27; *see* D.A. Br. at 7, 11.

Finding that a lack of diligence precluded merits review was wholly unforeseeable (*supra*) and worse than unreasonable. This emphasis on diligence effectively blamed Mr. Glossip for the decades-long suppression of the document by the offices of the Attorney General of Oklahoma and District Attorney of Oklahoma County. Even if the physical laws of time and space permitted an inference that Mr. Glossip could have discovered this evidence, due process plainly did not place an obligation upon him to do so. In *Banks v. Dretke*, this Court unequivocally declared: "Our decisions lend no support to the notion that defendants must scavenge for

hints of undisclosed *Brady* material. . . . A rule thus declaring 'prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. 668, 695–96 (2005).

Moreover, this evidence was not discoverable by the defense, no matter their effort. There is no dispute that the Office of the Attorney General released the suppressed document only sixty days prior to Mr. Glossip's successive filing in the OCCA. Further, there can be no dispute that Mr. Glossip, through his counsel, sought *Brady* disclosures diligently throughout this case. There is no conception of "reasonable diligence" that excludes Mr. Glossip's conduct in relation to the disclosure on January 27, 2023, of Box 8's contents that ultimately precipitated this matter. And, as the State explains in its brief, "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." Resp. 22–23.

Thus, the OCCA's present application of its post-conviction statute, buttressed with its perfunctory mentions of *Brady* and *Napue*, in no way offers the requisite "reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by the state court." *Michel*, 350 U.S. at 93 (quoting *Parker*, 333 U.S. at 574). It is beyond "unrealistic"—it is impossible—to conclude that Mr. Glossip had an opportunity for review of his federal claim under the OCCA's construal of the statute. *Reece v. Georgia*, 350 U.S. 85, 89–90 (1955) (holding "the right to object to a grand jury presupposes an opportunity to exercise that right"

(citing *Michel*, *supra*; *United States v. Gale*, 109 U.S. 65 (1883)). The OCCA's application of § 1089(D)(8) cannot amount to "the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348–49 (1984) (reversing procedural default based on state law distinction between jury "admonitions" and "instructions" that precluded review of federal right to impartial jury) (citing *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (reversing South Carolina Supreme Court preclusion of federal claim review upon state rule that objections to breach-of-peace convictions were "too general to be considered")). Yet the OCCA's express invocation of § 1089(D)(8) sought to insulate the present issue from meaningful federal review.

The OCCA's cynical interpretation is an "obvious subterfuge," deployed for "evad[ing] consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945); citing *Ward v. Love County*, 253 U.S. 17, 22 (1921) ("[I]f nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."); *Terre Haute & I.R. Co. v. Indian ex rel. Ketcham*, 194 U.S. 579, 589 (1904)). In this matter of Mr. Glossip's life or death, this Court must not countenance such evasion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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