No. 22-7466

IN THE

Supreme Court of the United States

RICHARD EUGENE GLOSSIP,

Petitioner,

v.

OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED*

1. a. Whether, as the State concedes, the State's suppression of a witness's admission that he was under the care of a psychiatrist and failure to correct that witness's false testimony about his treatment and diagnosis violate the due process of law. *See Brady* v. *Maryland*, 373 U.S. 83 (1963); *Napue* v. *Illinois*, 360 U.S. 264 (1959).

b. Whether the entirety of suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims. *See Kyles* v. *Whitley*, 514 U.S. 419 (1995).

2. Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

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* While the State's confession of error confirms Glossip's entitlement to relief on the below-stated questions, Glossip no longer presses a standalone claim under *Escobar* v. *Texas*, 143 S. Ct. 557 (2023) (mem.); Pet. i.

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BRIEF FOR PETITIONER

INTRODUCTION

In January 1997, Justin Sneed murdered Barry Van Treese. Nobody has ever disputed that Sneed, not petitioner Richard Glossip, was the killer. But after being coached throughout his interrogation, Sneed agreed with detectives that Glossip planned the crime. Sneed pleaded guilty and agreed to testify against Glossip to avoid capital punishment. His testimony is the only direct evidence implicating Glossip in the murder. As the State concedes, "Sneed was the State's indispensable witness," and "Glossip's fate turned on Sneed's credibility, which hung by a thread." State Br. Supp. Cert. 18.

In January 2023—nearly 20 years after Glossip's conviction—the State disclosed files showing that prosecutors knew, yet failed to disclose, that Sneed was seen

after his arrest by a psychiatrist who prescribed him lithium. As it turned out, Sneed—a known methamphetamine addict—also suffered from untreated bipolar disorder. That combination of conditions would have cast doubt on Sneed's perception and memory of the murder and supported the alternative theory that Sneed committed the murder impulsively without Glossip's involvement. But the State failed to disclose that information to the defense. What is more, the State allowed Sneed to testify falsely at Glossip's trial that he had never seen a psychiatrist. The newly disclosed evidence confirms that the State knew Sneed's testimony was false and did nothing to correct it.

The new evidence of Sneed's psychiatric treatment and the State's knowledge of it establishes that Glossip's conviction was obtained in violation of *Napue* v. *Illinois*, 360 U.S. 264 (1959), and *Brady* v. *Maryland*, 373 U.S. 83 (1963). Those violations alone undermine confidence in the verdict. Their materiality is heightened by the "net effect[s]" of other exculpatory evidence that was similarly disclosed for the first time in August 2022 and January 2023. *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). That evidence includes notes showing that the lead prosecutor coordinated with Sneed's attorney to alter Sneed's testimony to better align with forensic evidence and then lied to the trial court to avoid a mistrial by denying any advance knowledge that Sneed would change his story. It also includes suppressed evidence supporting an innocent explanation for the cash Glossip was carrying at the time of his arrest, which the State relied on to support its murder-for-remuneration theory.

Even before these violations came to light, concerns about the integrity of Glossip's conviction had mounted to the point that an independent investigation commissioned by Oklahoma legislators concluded the conviction

should be set aside. A second independent investigation commissioned by the Attorney General reached the same conclusion. Each investigation found that Glossip's prosecution had been riddled with misconduct, errors, and omissions from the start—from a deficient police investigation to the destruction of critical physical evidence to the suppression of substantial exculpatory evidence.

Oklahoma's Attorney General now agrees in the face of Sneed's false testimony and other errors that Glossip's conviction must be overturned. Remarkably, despite that concession, the Oklahoma Court of Criminal Appeals ("OCCA") refused to vacate Glossip's conviction and death sentence, ruling that the prosecutorial misconduct in this case neither "rise[s] to the level of a *Brady* violation" nor "create[s] a *Napue* error." JA989-992.

The prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). It is therefore "as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* Prosecutors may "strike hard blows," but they are "not at liberty to strike foul ones." *Id.*

The prosecution of Richard Glossip was rife with foul blows. A conviction obtained by such misconduct cannot stand. The OCCA erred in concluding otherwise, and Glossip is entitled to a new trial.

OPINION BELOW

The OCCA's decision denying Glossip's application for post-conviction relief is reported at 529 P.3d 218. JA980.

JURISDICTION

The OCCA entered judgment on April 20, 2023. Glossip timely filed a petition for a writ of certiorari on May 4, 2023. This Court has jurisdiction under 28 U.S.C. §1257(a); *see infra* Part III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, §1, provides:

> No state shall … deprive any person of life, liberty, or property, without due process of law ….

Oklahoma's Post-Conviction Procedure Act, Okla. Stat. tit. 22, §1089(D)(8)(b), provides in relevant part:

> [I]f a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on … a subsequent application, unless:
>
> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
>
> (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the

applicant guilty of the underlying offense or would have rendered the penalty of death.

STATEMENT

A. Glossip's Prosecutions

In the early morning of January 7, 1997, methamphetamine addict Justin Sneed murdered Barry Van Treese with a baseball bat at the Best Budget Inn in Oklahoma City, a motel Van Treese owned where Sneed and Glossip worked. JA982-983. Sneed eluded police for a week. JA498. Glossip spoke to police voluntarily on the day of the murder and again after he was detained the next day, admitting that he took actions after Van Treese was killed that helped Sneed after the fact. JA22. But Glossip consistently denied knowing Sneed planned to kill Van Treese or that he in any way encouraged Sneed to do so. *Id.*

Sneed was later arrested and interrogated. Despite Glossip's denials, detectives immediately steered him toward Glossip. Ignoring Sneed's initial attempts to cast blame elsewhere, the detectives brought up Glossip's name six times within the first 20 minutes of the interrogation. JA648-656. They told Sneed that Glossip was blaming him but suggested repeatedly that in fact it was Glossip who had planned the crime. JA654-660. Eventually, Sneed admitted to killing Van Treese and agreed that Glossip had directed him to do so. JA660. Sneed pleaded guilty to first-degree murder and agreed to testify against Glossip in exchange for the State declining to pursue the death penalty. JA982.

Glossip was first tried for capital murder in 1998. The State contended Glossip directed Sneed to kill Van Treese because Glossip feared Van Treese was about to fire him. Sneed was the State's "star witness," and his

testimony was the only direct evidence connecting Glossip to the murder. JA23-30. As the OCCA later explained, "[n]o forensic evidence linked [Glossip] to murder," and the evidence supporting Sneed's testimony was "extremely weak." JA23. Glossip was nonetheless convicted and sentenced to death. JA20-21.

The OCCA reversed. JA22. The court found that Glossip had received constitutionally ineffective assistance of counsel in numerous respects. JA26-32. Chief among them was counsel's failure to impeach Sneed or the lead detective with the videotape of Sneed's interrogation—a "glaring deficiency" given the many "obviously material" inconsistencies in Sneed's account. JA27-28.

Glossip was retried in 2004. This time, the State emphasized a murder-for-remuneration theory, contending Glossip directed Sneed to murder Van Treese so they could rob him and split the proceeds. JA495-497. Sneed's testimony was again the only direct evidence linking Glossip to the murder. *See* Order 1, *Glossip* v. *Sirmons*, No. 5:08-cv-00326-HE (W.D. Okla., Sept. 29, 2010), ECF No. 66. To establish murder-for remuneration—the only charged death-penalty aggravator—the prosecution presented evidence that Glossip was carrying $1,757 when he was arrested, which the State claimed was stolen from Van Treese. JA291, 493. Glossip was convicted and sentenced to death. JA493.

From the start, Glossip's conviction was infected by misconduct and error. Police conducted only a cursory investigation—failing, for example, to search Sneed's room at the motel or to question most of the motel guests and releasing critical evidence just days after the murder. Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip: *Final Report* 39, 85-86, 105

(June 7, 2022) ("Reed Smith First Report").[1] Between trials, the State destroyed critical evidence, including financial records that could have refuted the murder-for-renumeration theory. *Id.* at 44-48, 58.

Based on these and other errors and omissions—and Glossip's steadfast assertions of innocence—concerns about the integrity of Glossip's conviction grew. In June 2021, an ad hoc committee of the Oklahoma legislature engaged Reed Smith LLP to investigate the reliability of Glossip's conviction. Reed Smith First Report 2. In June 2022, Reed Smith issued a 259-page report finding "grave doubt as to the integrity of Glossip's murder conviction and death sentence." *Id.* at 6. Among other bases, Reed Smith's determination rested on the State's "deliberate" destruction of "key physical evidence" before Glossip's second trial; detectives' "[i]ntentional contamination" of Sneed's interrogation, which the jury never saw; the "deficient and curtailed police investigation"; and the discovery of new evidence that "directly undermine[d] the State's theory of the case." *Id.* at 7-11.

In January 2023, the Oklahoma Attorney General commissioned his own independent investigation, led by former District Attorney Rex Duncan. That investigation found that "Glossip was deprived of a fair trial"; that the "cumulative effect of errors, omissions, lost evidence, and possible misconduct cannot be underestimated"; and that "a new trial is necessary to restore integrity to the process." Duncan, *Independent Counsel Report in the* Matter of Richard Eugene Glossip,

[1] Reed Smith's reports are available at https://tinyurl.com/3kapbx6v.

Oklahoma County Case CF-1997-244, at 3-4, 19 (Apr. 3, 2023).[2]

B. Disclosure Of Exculpatory Evidence

The petition now before this Court raises errors under *Napue* and *Brady* that came to light when the State, facing mounting pressure, finally disclosed critical exculpatory evidence it had suppressed for nearly 20 years. In August 2022, the State disclosed seven boxes of documents from the prosecutor's files, withholding materials it deemed "work product" in an eighth box. The seven boxes contained exculpatory evidence the defense had never seen despite repeated requests. *See, e.g.*, JA40-41, 783. In January 2023, the State disclosed the contents of "Box 8," which likewise contained exculpatory evidence.

As relevant to the questions presented, the newly disclosed material included three categories of evidence. First, notes taken by lead prosecutor Connie Pope Smothermon (disclosed in Box 8) showed that Sneed told her before Glossip's second trial that he had been treated by a psychiatrist after his arrest who prescribed him lithium. That contradicted Sneed's testimony—which Smothermon failed to correct—denying he had ever received psychiatric treatment. Second, evidence from both sets of boxes revealed that Smothermon coordinated with Sneed's attorney, violating the rule of sequestration, to get Sneed to change his testimony to avoid conflicts with the medical examiner's testimony, aiming to fix what Smothermon deemed the State's

[2] https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/glossip_report_4.3.2023_redacted.pdf.

"biggest problem" at trial.[3] When Sneed then changed his testimony, Smothermon falsely denied any advance knowledge of it to avoid a mistrial. Third, while the State claimed at trial that the cash Glossip was carrying when he was arrested had been stolen from Van Treese, Box 8 contained evidence suggesting that a witness had told the State that a large portion of the money came from Glossip's sale of various possessions.

1. Sneed's psychiatric treatment

During Glossip's retrial, Smothermon asked Sneed whether he had been prescribed any medication. In response, 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.

JA312-313. Smothermon then asked, "So you don't know why they gave you that?" Sneed confirmed, "No," and Smothermon moved on. JA313. Box 8 contained evidence showing this testimony was false and Smothermon knew it.

Specifically, Box 8 included notes Smothermon took during an interview with Sneed before the retrial. JA927, 929. The notes reflect that, during that interview, Sneed told Smothermon he had been "on lithium" and under the care of a "Dr. Trumpet." JA927, 929. As Glossip's counsel easily confirmed after reviewing the

[3] Oklahoma's sequestration rule, Okla. Stat. tit. 12, §2615, requires courts to prevent witnesses from altering their testimony based on that of other witnesses. *Bosse* v. *State*, 400 P.3d 834, 853 (Okla. Crim. App. 2017). Glossip invoked the rule at the start of trial. JA45.

notes, "Dr. Trumpet" meant Dr. Lawrence Trombka, the psychiatrist at the Oklahoma County Jail in 1997-1998, where Sneed was held after the murder. After reviewing Sneed's medical records, Dr. Trombka attested that he "was the only medical health professional" at the jail who would have prescribed Sneed lithium. JA931, Supp. JA 1003.

Years earlier, Glossip had requested access to Sneed's medical records, but the State opposed, and the OCCA denied his request. JA621-622, 632. And although records from Sneed's competency proceedings indicated that he had taken lithium, those records did not report that Sneed had been treated for any psychiatric condition (because Sneed denied it at his competency examination). JA700. The disclosure of Box 8 in January 2023 was thus the first time the defense learned of Sneed's treatment by a psychiatrist. Further investigation, enabled by the new disclosures, revealed that Sneed had been diagnosed with bipolar disorder before the 1998 trial. JA933, 975, Supp. JA 1005; Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip, *Fifth Supplemental Report* 8 (Mar. 27, 2023) ("Reed Smith 5th Supp.").

Smothermon's notes showed that Sneed lied when he testified that he had never seen a psychiatrist and received lithium for a cold and that Smothermon knew his testimony was false but allowed his lies to stand uncorrected.

Doing so avoided damaging Sneed's credibility in two ways. First, Sneed's treatment with lithium by a psychiatrist showed that he suffered from a serious mental-health disorder, later revealed to be bipolar disorder. There is no evidence Sneed had ever received treatment for that disorder before his arrest. JA312-313. His

untreated bipolar disorder, both alone and in combination with his habitual methamphetamine use, Reed Smith First Report 217-220, rendered his perception and memory of the crime unreliable and supported the theory that Sneed murdered Van Treese on impulse. As Dr. Trombka explained in his affidavit, bipolar disorder symptoms "can be exacerbated by illicit drug use, such as methamphetamine," which could make a user "potentially violent" and "affect an individual's perception of reality" and "memory recall." JA932, Supp. JA 1004.

Scientific literature on bipolar disorder and methamphetamine use supports Dr. Trombka's observations. Untreated bipolar disorder and methamphetamine use both can cause defects in key areas of cognition, including attention and memory. Quevedo et al., *Neurobiology of Bipolar Disorder: Road to Novel Therapeutics* 85 (2020); Healy, *Methamphetamine Use and Addiction* 16, 18 (2016). During psychostimulant-induced psychosis, methamphetamine users "are unable to distinguish what is real—they lose contact with reality." Healy, *supra*, at 17. And both untreated bipolar disorder and methamphetamine use can cause deficient impulse control. American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 132, 136 (5th ed. 2013); Moallem et al., *The relationship between impulsivity and methamphetamine use severity in a community sample* 187 (2018). Sneed's methamphetamine use and untreated bipolar disorder thus had mutually reinforcing, deleterious effects on his impulse control at the time of the crime and, later, his reliability as a witness. In short, the revelations that Sneed, a known methamphetamine addict, had been prescribed lithium shortly after the murder by a psychiatrist for previously untreated bipolar disorder called into question Sneed's whole account.

Second, Smothermon's note showed that Sneed lied when he testified he had never seen a psychiatrist. And Sneed had told that lie before. During Sneed's post-arrest competency examination, although his lithium prescription had been disclosed, Sneed "denied any psychiatric treatment in his history," claiming instead he took the lithium "after his tooth was pulled." JA700. And at his competency hearing before Glossip's first trial, Sneed claimed the competency examination was the "only time [he had] ever been examined by anybody concerning [his] mental health." JA14. Had the State disclosed the "Dr. Trumpet" note and corrected Sneed's false testimony, the defense could have impeached Sneed with these repeated lies—including his lie to the jury on the stand—casting serious doubt on his credibility.

2. The knife

The seven boxes released in August 2022 also contained a memorandum Smothermon sent to Sneed's attorney, Gina Walker, during Glossip's retrial. JA953, 955-957. In the memo, Smothermon detailed "a few items that ha[d] been testified to" that she "needed to discuss with Justin." JA955. One item related to a broken-tipped knife found under Van Treese's body.

Sneed always maintained that he had bludgeoned Van Treese with a baseball bat. JA8-9, 663-664, 685-686. But a broken-tipped knife was also found under Van Treese's body, and small wounds were observed on his chest, back, and buttocks. JA235-240. At Glossip's retrial, one day before Sneed was scheduled to testify, medical examiner Dr. Chai Choi testified on cross-examination that these small wounds were consistent with the broken-tipped knife—a knife Dr. Choi had never seen or

even been informed about until the defense presented it as a possible source of Van Treese's injuries. JA239-241.

The inconsistency between Dr. Choi's testimony and Sneed's account of the murder posed a serious problem for the State. Sneed always denied that he had stabbed Van Treese or that any other assailant was present who could have stabbed him. JA8-9, 663-664, 685-686. In the newly disclosed memo, Smothermon wrote to Walker after Dr. Choi's testimony that the State's "biggest problem is still the knife," and that "we"—*i.e.*, Smothermon and Walker—"should get to [Sneed] th[at] afternoon." JA953, 955-957. In handwritten notes in the margins of Smothermon's typed memo, Walker recorded Sneed's responses, including the statements that Sneed "brought knife down one time" and "in chest w/ knife." JA953, 956.[4]

The next day, for the first time in the seven years since the murder, Sneed testified that he had attempted to stab Van Treese in the chest with the knife. JA319. The defense moved for a mistrial, arguing that the State had violated its discovery obligations by failing to provide notice that Sneed was going to change his testimony. JA321-323. Smothermon responded by falsely denying any advance knowledge of Sneed's about-face. Smothermon told the court that, after hearing Dr. Choi's testimony, she called Walker, who reported back after talking to Sneed that he continued to deny having stabbed Van Treese. JA324. Smothermon unequivocally denied knowing anything about Sneed's shifting

[4] In the petition for certiorari in No. 22-6500, Glossip stated that the handwritten notes "appear to have been made by" Smothermon. 6500 Pet.18. This was an error. A former investigator with Walker's office identified the handwriting as Walker's. JA958-959.

account: "The chest thing we're all hearing at the same time." *Id.* Upon Smothermon's assurance, the court denied the mistrial. JA325.

Smothermon's mid-trial memo and Walker's response showed that Smothermon knew Sneed was going to change his story, contrary to her explicit denial. JA324. And it suggested that she had coordinated with Walker specifically to bring about that result. Sneed later told Reed Smith that he recalled "sitting with the District Attorney's Office and Gina Walker in a conference room," apparently to discuss Dr. Choi's testimony. Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip: *Third Supplemental Report* 19 & n.97 (Sept. 18, 2022). But whether or not Smothermon or others met with Sneed in person to coach his testimony, Smothermon went to great lengths to influence Sneed's account, with no disclosure to the defense. Those attempts succeeded. Sneed changed his story to better match Dr. Choi's testimony that Van Treese had likely been stabbed with the broken knife. JA239-241.

Box 8, released in January 2023, contained further evidence of the prosecution's concern that, absent a change in Sneed's account, Dr. Choi's testimony would undermine Sneed's already-tenuous credibility. Box 8 contained notes passed during Dr. Choi's cross-examination between Smothermon and her co-counsel, Gary Ackley, who examined Dr. Choi. JA945, 947. When Dr. Choi testified that Van Treese had multiple wounds that could have been caused by the knife, Smothermon wrote notes to Ackley suggesting that he ask whether the cuts could "be made by sharp furniture" or if they were "splits in skin from impact" and asking him to clarify with Dr. Choi that the "cuts ≠ knife cuts." JA945, 947.

In a later affidavit, Ackley explained that the notes documented the prosecution's "concern" about Dr. Choi's testimony. JA940-941. Ackley recalled that Smothermon's suggestions were an attempt to "help [him] out of the quagmire" caused by Dr. Choi's testimony that the victim may have been stabbed, a version of events that contradicted Sneed's account. JA941. These notes shed further light on Smothermon's intentions in sending her mid-trial memo to Walker: Smothermon sought to help Ackley out of the "quagmire" by violating the rule of sequestration, coordinating with Sneed and Walker, and securing an explanation for the knife wounds through Sneed's changed story.

3. Glossip's cash

Also in Box 8 were notes Smothermon took during a pretrial interview with motel security guard Clifford Everhart, whose testimony supported the prosecution's murder-for-remuneration theory.

Glossip had $1,757 in cash with him when he was arrested while leaving the office of a criminal defense attorney (whom he had not retained). JA291-292; *see also* Reed Smith 5th Supp. 19. The State claimed the cash must have come from the robbery and murder of Van Treese. JA448-449. As the OCCA recognized on direct appeal, "the discovery of money in Glossip's possession" was "[t]he most compelling corroborative evidence." JA505. To support that theory, the State had to exclude other explanations for the cash. Everhart testified that, on the day after the murder, Glossip had sold him and others some personal possessions, including a couch, big-screen TV, vending machines, and an aquarium. JA284-285. Consistent with the State's theory, Everhart testified that he could only recall Glossip making $250-300 for

the vending machines and aquarium—leaving the majority of Glossip's cash unaccounted for. JA285-286.

Smothermon's notes of her pretrial interview of Everhart included the notations "liquidated," "big screen," "900," and "couch." JA949, 951-52. This note suggested that when Everhart told Smothermon before trial what he knew about Glossip's "liquidat[ion]" efforts after the murder, he referred to Glossip obtaining $900. This contradicted Everhart's trial testimony. Everhart testified that Glossip had received $250-300 for selling vending machines and an aquarium (he "really d[idn't] recall" exactly), and when asked how much Glossip had earned for his "couch" and "big screen TV," Everhart responded, "I really don't know." JA286. The State did not challenge that testimony despite the pretrial interview. *Id.*

By withholding Smothermon's notes, the State precluded the defense from impeaching Everhart with his prior inconsistent statements or using his testimony to support an innocent explanation for the cash. And an innocent explanation existed: Glossip's then-girlfriend, D-Anna Wood, later attested that, after Glossip was taken in for questioning, the couple "beg[a]n to sell all of [thei]r furniture, and vending machines in order to pay [for an] attorney." JA706. Disclosure of Everhart's interview statements would have helped support that explanation and undermine the State's theory.[5]

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[5] The State also read to the jury a portion of Glossip's testimony from the first trial in which he listed certain items he had sold and for how much. JA443-444. The State did not read to the jury Glossip's testimony that the two vending machines—which he had emptied of cash before selling—could earn $850-$1,500 per month. JA11-12.

C. Procedural History

Oklahoma law requires a prisoner to file any successive application for post-conviction relief within 60 days after learning the basis for new claims. Okla. R. Crim. App. 9.7(G)(3). Accordingly, because the State withheld Box 8 for more than four months after disclosing Boxes 1-7, Glossip had to split his newly discovered claims into multiple successive applications.

On September 22, 2022, Glossip filed a successive application based on the evidence disclosed in Boxes 1-7 and other evidence Reed Smith had uncovered. JA785. Among other claims, Glossip alleged a *Brady* violation based on the suppression of Smothermon's memo to Walker about the knife. JA842-845. Glossip relatedly argued that Smothermon had prejudiced the defense by violating the rule of sequestration to coordinate with Walker about aligning Sneed's testimony with Dr. Choi's. JA857-860.

On November 17, 2022, the OCCA denied Glossip's application. Although the knife-related matters had not been disclosed until 2022, the court stated that the "fact that the prosecution talked to Sneed or his attorney about other testimony during the trial is not new evidence" and there was "nothing new in this claim that could not have been raised earlier." JA780. Glossip sought this Court's review. That petition (No. 22-6500) remains pending.

On March 27, 2023, after the State released Box 8, Glossip filed another application. JA883. Armed with the additional material, he asserted *Napue* and *Brady* violations based on the "Dr. Trumpet" note revealing Sneed's psychiatric treatment, as well as additional *Brady* claims based on the Ackley-Smothermon trial notes about the knife testimony and Smothermon's notes

from Everhart's interview. JA902-923. Citing *Kyles* v. *Whitley*, 514 U.S. 419, 436 (1995), Glossip argued that the court should consider "the 'net effect' of the entirety of the suppressed evidence." JA900-901. Glossip also raised a claim of factual innocence based on separately discovered evidence indicating that Sneed, likely accompanied by a female accomplice, had killed Van Treese on impulse in a methamphetamine-fueled robbery gone wrong, with no involvement by Glossip. *See* JA911, 963-966.

In response to this last application, the State confessed error. JA973-979. Citing the prosecutor's overriding interest that "'justice shall be done,'" JA973, the State conceded that Glossip's conviction should be set aside under *Napue* and the case remanded for a new trial because Sneed "made material misstatements to the jury regarding his psychiatric treatment and the reason for his lithium prescription." JA974. Although the State had previously opposed relief for Glossip, it explained that it had "changed its position based on a careful review of the new information that ha[d] come to light," which "establish[ed] that Glossip's trial was unfair and unreliable." JA978-979.

D. Decision Below

The OCCA denied Glossip's application. JA980. The court first noted that its review was limited by the Oklahoma Post-Conviction Procedure Act. As relevant, that statute precludes relief on a successive post-conviction application unless (1) the claims could not have been presented previously because the factual basis was unavailable through the exercise of reasonable diligence, and (2) the facts, if proven, would establish by clear and convincing evidence that, but for the alleged error, no reasonable factfinder would have found the applicant

guilty or rendered a penalty of death. Okla. Stat. tit. 22, §1089(D)(8)(b).

Regarding the new evidence of Sneed's psychiatric treatment, the court stated that, "[e]ven if this claim overcomes procedural bar, the facts do not rise to the level of a *Brady* violation." JA989. The court said this issue "could have been presented previously" and that "the facts [we]re not sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found [Glossip] guilty." JA990. This was so, the court asserted, because the prosecution had not hidden exculpatory information. *Id.* Sneed's competency examination had "noted Sneed's lithium prescription" (though not his psychiatric treatment or condition), so defense counsel already "knew or should have known about Sneed's mental health issues." JA991. The court speculated that the defense feared that the evidence might have shown Sneed "was mentally vulnerable to Glossip's manipulation and control." *Id.* And although the State did not disclose the "Dr. Trumpet" notes until 2023—and had successfully opposed a discovery request for Sneed's mental-health records, *supra* pp. 9-10—the court stated that "this issue could have been and should have been raised, with reasonable diligence, much earlier." JA991.

The court next stated that the new evidence "moreover[] does not create a *Napue* error" because "[d]efense counsel was aware or should have been aware that Sneed was taking lithium at the time of trial." JA991. "This fact," accordingly, "was not knowingly concealed by the prosecution." *Id.* The court further concluded that because "Sneed was more than likely in denial of his mental health disorders," his trial testimony was "not clearly false." *Id.*

The court finally stated that the mental-health evidence "is not material under the law" because it "does not create a reasonable probability that the result of the proceeding would have been different had Sneed's testimony regarding his use of lithium been further developed at trial." JA991-992. In reaching that conclusion, the court focused on the evidence of psychiatric treatment in isolation without considering the entirety of the suppressed evidence. *Id.*

The court rebuffed the State's confession of error, stating that it "c[ould] not overcome the limits on successive post-conviction review" and was "not based in law or fact." JA990.

The court separately considered and rejected Glossip's *Brady* claim based on Smothermon's notes from her interview with Everhart. *Supra* pp. 15-16. The court concluded that the notes did not "clearly have an amount of money," so there was "no factual basis" for Glossip's claim. JA993. Moreover, the court stated, Glossip "ha[d] not shown that this information is material." *Id.*

Finally, as to the additional evidence from Box 8 about the knife testimony, the court concluded that the claim was "substantially the same" as that presented after the disclosure of Boxes 1-7 and thus could not be considered despite the new information. JA994.

Glossip applied to this Court for a stay of execution and filed a petition for a writ of certiorari seeking review of his *Napue* and *Brady* claims based on Sneed's psychiatric treatment. Pet. i, 7-8, 15-18. The petition additionally argued that those claims should be evaluated in light of the entirety of the suppressed evidence, Pet. i, 18-19, including the evidence relating to the knife, Pet. 7, 10, 18-19, and Smothermon's notes from the Everhart interview, Pet. 11. This Court entered a stay of execution and

granted review. In addition to the questions presented, the Court directed the parties to address whether the OCCA's judgment rested on an adequate and independent state-law ground.

SUMMARY OF ARGUMENT

Evidence disclosed in Box 8 revealed for the first time that prosecutors knew their star witness—the undisputed murderer—had received psychiatric treatment and testified falsely when he denied it. Prosecutors failed to disclose this exculpatory information before trial, in conceded violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and failed to correct Sneed's false testimony, in conceded violation of *Napue* v. *Illinois*, 360 U.S. 264 (1959). Glossip is therefore entitled to a new trial.

I. In *Napue*, this Court held that the State "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." 360 U.S. at 269. Under the Due Process Clause, a prosecutor has "the responsibility and duty to correct what he knows to be false." *Id.* at 269-270. A conviction obtained through the knowing use of false testimony must be set aside if there is "any reasonable likelihood" that the false testimony "could have affected the judgment of the jury." *Id.* at 271.

At Glossip's trial, Sneed lied about his history of psychiatric treatment. When Smothermon asked whether he had been "placed on any type of prescription medication" 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." JA312.

Smothermon knew Sneed's testimony was false. She knew Sneed had been prescribed lithium by Dr. Trombka, a psychiatrist. Her failure to correct Sneed's testimony left the jury with the impression that Sneed had told the truth—that he had never received psychiatric care and that the lithium had been prescribed by mistake or for some reason unrelated to a psychiatric condition. This was no harmless error. The State's entire case hinged on Sneed's credibility. Any evidence bearing on that credibility was crucial.

In rejecting Glossip's *Napue* claim, the OCCA committed three legal errors. First, the court injected a requirement that the witness intended to lie. But *Napue* requires prosecutors to correct objectively false statements, *see* 360 U.S. at 369, not just statements the witness subjectively intends to be false. Second, the court reasoned that the defense could have cross-examined Sneed. That was baseless. The suppression of the "Dr. Trumpet" note precluded the defense from impeaching Sneed's denial of psychiatric treatment. It was also irrelevant. *Napue* focuses on the prosecutor's obligations, not defense counsel's: Due process requires that a conviction be set aside whenever "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* Third, the OCCA failed to recognize that false testimony can be material when it undercuts the credibility of a key witness. Had it been corrected, the false testimony here would have destroyed Sneed's paper-thin credibility and, with it, the State's case.

II. The State's suppression of the evidence of Sneed's psychiatric treatment also violated *Brady*. Because "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of

evidence," *United States* v. *Nixon*, 418 U.S. 683, 709 (1974), due process requires that prosecutors disclose all evidence that is "favorable to an accused" and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87.

Here, the State withheld evidence revealing that Sneed had been treated by a psychiatrist who prescribed him lithium for a serious psychiatric condition. The suppression of that evidence was highly prejudicial. Had the State disclosed the evidence, the defense could have impeached Sneed by calling out his repeated lies on the subject and by demonstrating to the jury that Sneed's untreated bipolar disorder, in combination with his methamphetamine use, rendered his perception and memory of the crime highly unreliable and his commission of violence a likely product of extreme impulsivity. The OCCA completely disregarded the weight of that impeachment evidence.

Moreover, the net effect of all the suppressed evidence, considered collectively, makes clear that had the State fulfilled its *Brady* obligations, Glossip's trial likely would have come out differently. *See Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995). The prosecution repeatedly suppressed evidence that would have enabled the defense to impeach Sneed more effectively or undercut the State's theory of the case. That included evidence suggesting that Sneed had changed his testimony about the knife at the prosecution's behest and that the prosecutor had lied about it to avoid a mistrial. It also included evidence supporting an innocent explanation for the cash in Glossip's possession at the time of his arrest. The OCCA ignored that record in evaluating the materiality of the suppressed evidence of Sneed's psychiatric treatment, contrary to *Kyles*.

III. There is no jurisdictional barrier to review. This Court will not address a federal question "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." *Lee* v. *Kemna*, 534 U.S. 362, 375 (2002). Although the OCCA at times recited the limitations of the Oklahoma Post-Conviction Procedure Act, its application of that Act derived directly from its misunderstanding and misapplication of *Napue* and *Brady* and therefore is not an independent state-law ground. And to the extent the OCCA rested on the Act—even despite the State's affirmative waiver and the suppression of the relevant evidence—that conclusion was a novel, unforeseeable, and factually baseless application of state law and therefore is not an adequate state-law ground. This Court has jurisdiction and should hold that Glossip is entitled to a new trial.

ARGUMENT

I. THE STATE'S KNOWING PRESENTATION OF FALSE TESTIMONY VIOLATED *NAPUE*

A. This Case Presents A Straightforward *Napue* Violation

In *Napue* v. *Illinois*, 360 U.S. 264 (1959), this Court recognized as "implicit in any concept of ordered liberty" that the State "may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." *Id.* at 269. Under the Due Process Clause, a prosecutor has "the responsibility and duty to correct what he knows to be false," and a denial of due process occurs when the State allows false testimony to "go uncorrected." *Id.* at 269-270 (citation omitted). A conviction obtained through the knowing use of false testimony "must be set aside if there is any reasonable likelihood

that the false testimony could have affected the jury's verdict." *United States* v. *Bagley*, 473 U.S. 667, 679 n.9 (1985) (citing *Napue*, 360 U.S. at 271); *see also Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

As the State agrees, this case presents a straightforward *Napue* violation. The relevant facts are undisputed. At Glossip's trial, prosecutor Smothermon asked Sneed whether he was "placed on any type of prescription medication" after his arrest. JA312. Sneed answered: "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." *Id.* Smothermon then asked, "[s]o you don't know why they gave you that?" Sneed confirmed, "No." JA313. Then Smothermon moved on. *Id.*

Smothermon's decision to let Sneed's false testimony go uncorrected violated *Napue*. To prevail under *Napue*, a defendant must show: (1) falsity of the witness's testimony; (2) the prosecutor's knowledge that the testimony was false; (3) the prosecutor's failure to correct that testimony; and (4) materiality. 360 U.S. at 269-270. All these elements are met here.

First, Sneed's statements were clearly false. *Supra* pp. 9-10. Contrary to his testimony, Sneed had been prescribed lithium after his arrest by the psychiatrist at the Oklahoma County Jail, Dr. Trombka. Sneed needed lithium for his previously untreated bipolar disorder, *see* JA930-933, Supp. JA 1002-1005—not, as Sneed testified, to treat a cold.

Second, prosecutors knew that Sneed's testimony was false. *Supra* pp. 9-12. As reflected in her notes, Smothermon knew before the second trial that Sneed had been treated by a psychiatrist, Dr. Trombka, who

had prescribed the lithium. She thus knew that Sneed's denial of prior psychiatric treatment—and his explanation for the lithium prescription—were false. *See* JA927, 929. Smothermon, but not the defense, also had access to Sneed's medical records, including records documenting his bipolar diagnosis. *Supra* p. 10; JA621-622, 632, 930-933, Supp. JA 1002-1005.

Third, Smothermon allowed the false testimony to stand, doing nothing to correct or clarify it. *Supra* pp. 9-12. To the contrary, she confirmed that Sneed did not know "why they gave" him lithium, JA313, leaving the jury with the misimpression that the lithium prescription was a mistake or mere happenstance.

Finally, Smothermon's failure to correct Sneed's false testimony was material. A *Napue* violation requires reversal when there is "any reasonable likelihood" that the false testimony "could have affected" the verdict. *Bagley*, 473 U.S. at 679 n.9; *see Napue*, 360 U.S. at 271. That standard is easily satisfied here. Had Smothermon corrected Sneed's testimony, the correction would have fatally undermined his credibility in two ways.

First, disclosing the truth—that Sneed's lithium had been prescribed by a psychiatrist to treat a serious mental-health disorder—reasonably could have led the jury to question Sneed's cognition and memory recall at the time of the murder and at his initial interrogation, which formed the basis of his testimony. *See* JA931-932, Supp. JA 1003-1004; Quevedo, *Neurobiology of Bipolar Disorder*, at 85 (recognizing that bipolar disorder can cause defects in attention and memory). The jury might also have considered whether Sneed's methamphetamine use exacerbated those effects. *See supra* pp. 10-11 (describing effects of methamphetamine on impulsivity and

impairments in attention and memory). Had Smothermon corrected Sneed's testimony, it is reasonably likely the jury would have doubted his reliability as a witness. It would also have lent weight to the alternative theory that Sneed's actions resulted from extreme impulsivity, not from any plan with Glossip. Instead, Sneed's false testimony gave the jury the misimpression that Sneed had no mental-health conditions that might have compromised his perception or memory or cast doubt on his account of the crime. And it neutralized the evidence of his lithium prescription so that the defense could not use it to suggest otherwise.

Second, correcting Sneed's false testimony would have fed the jury's skepticism of Sneed by revealing that Sneed had lied about his psychiatric condition on the stand—and that he had repeatedly lied during the investigation and prior competency proceedings. False testimony may be material under *Napue* when it bears on a key witness's credibility no less than when it bears on the defendant's guilt. In *Napue* itself, the witness falsely denied having received any consideration for his testimony. 360 U.S. at 267. This Court found that testimony material because "[t]he 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.

The same is true here. Sneed's word was the only direct evidence linking Glossip to the murder. JA23. Correcting Sneed's false testimony would have given the jury greater reason to question Sneed's truthfulness. That is precisely the kind of impeachment information that "may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. As this Court

recognized in *Giglio*, when "the Government's case depend[s] almost entirely on" the testimony of a key witness, issues regarding that witness's credibility are especially significant. 405 U.S. at 154. At a minimum, "[e]ven if the jury—armed with all of this new evidence—*could* have voted to convict" Glossip, this Court cannot have "'confidence that it *would* have done so.'" *Wearry* v. *Cain*, 577 U.S. 385, 394 (2016).

B. The OCCA Erred In Rejecting Glossip's *Napue* Claim

The OCCA's conclusion that there was no *Napue* violation hinged on three legal errors.

First, in concluding that Sneed's testimony was not "clearly false," the court gave dispositive weight to its own speculation that Sneed might simply have been "in denial" of his mental-health condition and psychiatric treatment. JA991. That reasoning read into *Napue* a requirement that the witness must have intended to lie, ignoring that *Napue* is concerned not with subjective motivations, but with objective falsity.

Contrary to the OCCA's reasoning, *Napue* requires prosecutors to correct all false statements, not just false statements by a witness who intended to lie. *See* 360 U.S. at 369 (describing the violation as letting "false evidence" go uncorrected). This Court has long distinguished between falsity and intent to lie. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 & n.30 (1984) (recognizing the "significant difference between proof of actual malice and mere proof of falsity"); *accord Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988) (in defamation cases, requiring that public-figure plaintiffs "prove *both* that the statement was false and that the statement was made with the requisite level of culpability"). The OCCA cited no support for its

conclusion that a prosecutor is absolved of any *Napue* obligation if a witness has an innocuous explanation for attesting to something the prosecutor knows to be false. For good reason, this Court has never carved out such an exception. *Napue*'s concern is with the "corruption of the truth-seeking function of the trial process," not with the moral shortcomings of any given witness. *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). The *Napue* obligation would be hollow if it were triggered only when a prosecutor knew that a witness subjectively intended to lie.

Second, the OCCA erred by scrutinizing the conduct of defense counsel, when *Napue* instead focuses on the conduct of the prosecutor. The OCCA rejected Glossip's *Napue* claim because "[d]efense counsel was aware or should have been aware that Sneed was taking lithium at the time of trial" and ostensibly could have corrected Sneed's testimony themselves. JA991. But in *Napue*, this Court stated the rule without equivocation: A conviction cannot stand under the Fourteenth Amendment "when *the State*, although not soliciting false evidence, *allows it* to go uncorrected when it appears." *Napue*, 360 U.S. at 269 (emphasis added); *see also Bagley*, 473 U.S. at 680 n.8 (*Napue* violation lies in the prosecution's "knowing use of false testimony to obtain a conviction"). This obligation—part of a prosecutor's overarching duty "to refrain from improper methods calculated to produce a wrongful conviction"—"plainly rest[s] upon the prosecuting attorney." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

Moreover, the OCCA was simply wrong to assert that defense counsel could have corrected Sneed's false testimony after the State failed to do so. Although the defense knew or should have known "that Sneed was taking lithium," JA991, the State had suppressed the

evidence showing that the lithium had been prescribed by a psychiatrist for a serious mental-health disorder, *supra* pp. 9-10. The defense thus had no factual basis to correct Sneed's false testimony denying psychiatric treatment or his false assurances that the lithium had been prescribed for a cold or by mistake. Given the State's conceded failure to disclose this information, the OCCA's ruling imposes the very kind of "prosecutor may hide, defendant must seek" rule that this Court has soundly rejected. *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004).

Third, the OCCA summarily concluded that Sneed's false testimony was not material because "[t]his known mental health treatment evidence does not create a reasonable probability that the result of the proceeding would have been different" had Sneed's "use of lithium been further developed at trial." JA991-992. That analysis is obviously wrong: Far from being "known," the relevant evidence had been suppressed for nearly 20 years, *see supra* pp. 9-10. And it asks the wrong question: Under *Napue*, the constitutional harm is not just that the defense is impeded from "further develop[ing]" a line of inquiry, JA992, but that the prosecution obtained a conviction by letting the jury be misled by false testimony. In any event, the OCCA's reasoning is inconsistent with this Court's precedents on the importance of effective impeachment—even when (unlike here) other direct inculpatory evidence is left untouched by the impeachment. *See Kyles* v. *Whitley*, 514 U.S. 419, 445 (1995) ("[T]he effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others[.]"). Here, as in *Napue*, "[t]he jury's estimate of the truthfulness and reliability of a given witness" was likely "determinative of guilt or innocence." 360 U.S. at 269.

Had the prosecution corrected Sneed's false testimony, the jury would have learned of the serious mental-health issues affecting Sneed at the time of the murder and his interrogation, which would reasonably have led the jury to doubt the accuracy and truthfulness of his inculpatory testimony. Just as importantly, the jury would have learned of Sneed's untrustworthiness on the stand, which reasonably would—and certainly "could," *Napue*, 360 U.S. at 271—have led them to doubt the entirety of his testimony. Because the State could not have convicted Glossip without Sneed's testimony, that is more than enough to "undermine confidence" in Glossip's conviction and warrant a new trial. *Smith* v. *Cain*, 565 U.S. 73, 76 (2012); *see also Banks*, 540 U.S. at 698-699; *Kyles*, 514 U.S. at 434-435.

II. THE STATE'S SUPPRESSION OF EXCULPATORY EVIDENCE VIOLATED *BRADY*

Suppressing the evidence of Sneed's psychiatric treatment also violated *Brady*. To protect "[t]he very integrity of the judicial system and public confidence in the system," *Nixon*, 418 U.S. at 709, due process requires that prosecutors disclose all evidence that is "favorable to an accused" and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. The State flouted this foundational duty.

A. Suppression Of Evidence Concerning Sneed's Psychiatric Treatment Violated *Brady*

As revealed in the 2023 disclosure of Box 8, Sneed told Smothermon before Glossip's second trial that he was "on lithium" under the care of a "Dr. Trumpet." JA927, 929; *supra* pp. 9-10. There is no dispute that "Dr. Trumpet" meant Dr. Trombka—at the time the only psychiatrist treating patients at the Oklahoma County Jail.

That evidence was favorable to Glossip and should have been disclosed. Prosecutors' *Brady* obligations extend to material impeachment evidence. *See Bagley*, 473 U.S. at 676 ("Impeachment evidence … falls within the *Brady* rule." (citing *Giglio*, 405 U.S. at 154)). Evidence is material for *Brady* purposes when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"—that is, when there is a "reasonable probability of a different result." *Banks*, 540 U.S. at 698-699 (quotation marks omitted). As with exculpatory evidence, the failure to disclose impeachment evidence is material when the "reliability of a given witness may well be determinative of guilt or innocence." *Giglio*, 405 U.S. at 154; *see also Banks*, 540 U.S. at 701; *Kyles*, 514 U.S. at 450-451 (noting "favorable tendency" of impeachment evidence).

That standard is well met here. In *Williams* v. *Taylor*, 529 U.S. 420 (2000), this Court recognized that the suppression of a witness's psychiatric records, if timely pursued, can violate *Brady*. *Id.* at 438. The Court there concluded that the transcript of a star witness's sentencing proceeding, which contained "repeated references to a 'psychiatric' or 'mental health' report," "should have alerted [state habeas] counsel to a possible *Brady* claim" relating to the psychiatric records. *Id.* at 438; *accord Fuentes* v. *T. Griffin*, 829 F.3d 233, 248 (2d Cir. 2016) (discussing *Williams* and finding "no question that the prosecution's failure to disclose the psychiatric report could be a proper basis for a habeas petition under *Brady*"); *Browning* v. *Trammell*, 717 F.3d 1092, 1106 (10th Cir. 2013) (finding it "difficult to see how the Oklahoma courts could reasonably conclude there was

nothing material about a recent diagnosis of a severe mental disorder").[6]

The State's suppression of the psychiatric evidence here was material. As discussed above, disclosure of Sneed's psychiatric treatment would have enabled the defense to investigate Sneed's psychiatric issues and discover both his bipolar diagnosis and his previous lies on the issue. *Supra* pp. 10-12. The defense could also have shown the jury that there were serious reasons to doubt that Sneed accurately perceived or remembered what had happened at the time of the murder and his interrogation. And disclosure would have allowed the defense to retain an expert, or call Dr. Trombka as a witness, to explain the effects that Sneed's untreated bipolar disorder, in combination with his methamphetamine use, may have had on Sneed's impulsivity and recollection of the events surrounding the murder. *Supra* pp. 10-12.

This evidence, in other words, would have given the jury strong reason to doubt Sneed's version of events, most of which was otherwise uncorroborated. That is more than enough to establish *Brady* materiality.

B. The Net Effect Of Suppressed Evidence Confirms That The *Brady* Violation Denied Glossip A Fair Trial

The entirety of suppressed evidence further confirms the reasonable probability that, had the State fulfilled its *Brady* obligations, the result of Glossip's trial would have been different. Under *Kyles*, materiality for *Brady* purposes must be considered "in terms of

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[6] In *Williams*, the Court concluded that the petitioner defaulted his claim because at the time of trial, unlike here, petitioner's counsel had access to evidence detailing the nature of the psychiatric issues but failed to act. 529 U.S. at 424.

suppressed evidence considered collectively, not item by item." 514 U.S. at 436. *Kyles* requires "a 'cumulative evaluation' of the materiality of wrongfully withheld evidence." *Wearry*, 577 U.S. at 394. *Brady* thus assigns to prosecutors "the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Kyles*, 514 U.S. at 437.

The State's suppression of Sneed's psychiatric evidence did not occur in isolation. It was part of an expansive effort unfairly to shore up the testimony of the State's star witness and mask vulnerabilities in the State's theory of the case. When considered "collectively," as *Kyles* requires, the "net effect" of the suppressed evidence confirms that Glossip was denied a fair opportunity to defend himself. *Kyles*, 514 U.S. at 421-422, 436-437.

As an initial matter, under *Kyles*, the Court should consider the relationship between the *Napue* and *Brady* violations. By suppressing information regarding Sneed's psychiatric treatment, the prosecution prevented the defense from impeaching Sneed on that basis or exploring possible defenses regarding Sneed's impulsivity, perception, and memory. Then, when the State failed to correct Sneed's false testimony denying any psychiatric treatment and downplaying the lithium prescription, the defense was unable to respond. Because of the *Brady* violation, the defense had no way of knowing that Sneed was lying and no way to ensure the jury had all information relevant to assessing Sneed's credibility.

More broadly, the net effect of all the wrongfully withheld evidence raises a reasonable probability that compliance with *Brady* would have yielded a different result at trial. As *Kyles* held, "the character of a piece

of evidence as favorable will often turn on the context of the existing or potential evidentiary record." 514 U.S. at 439; *see also Bagley*, 473 U.S. at 683; *Agurs*, 427 U.S. at 112. The full record casts the *Brady* violation in a starker light.

Most notable here is the prosecution's mid-trial intervention to sway Sneed's testimony to avoid conflicting with Dr. Choi's testimony about the knife. *Supra* pp. 12-15. Smothermon's memo to Sneed's attorney, Gina Walker—indicating that the State's "biggest problem [was] still the knife" and that they needed to "get to" Sneed before he testified—was never disclosed to the defense. JA953, 955-957. The Smothermon-Ackley notes disclosed in Box 8 revealed the State's grave concern over the "quagmire" posed by the inconsistencies in Sneed's account, shedding light on Smothermon's intentions in sending the mid-trial memo to Walker. *Supra* pp. 14-15. Also suppressed were Walker's notes informing Smothermon that Sneed would be changing his story. JA953, 955-957. That evidence situates the *Brady* violation here as part of a larger campaign by the prosecution improperly to protect Sneed's fragile credibility by suppressing key impeachment evidence, letting him lie on the stand, and depriving the defense of any opportunity to reveal his weaknesses—even to the point of coordinating with Sneed's counsel to influence his testimony and then falsely denying Smothermon's advance knowledge of Sneed's about-face. *Supra* pp. 13-14.

A collective evaluation of the suppressed evidence must also consider evidence that could have undermined the State's reliance on the $1,757 in cash Glossip was carrying at the time of his arrest. *Supra* pp. 15-16. To persuade the jury that the cash was stolen from Van Treese, the State had to exclude the possibility that Glossip received the money when he emptied his vending

machines and sold them along with his TV, couch, and other belongings to raise money for an attorney. *Supra* p. 15. Clifford Everhart testified that Glossip had earned only $250-300 from selling some of the items, claiming he could not recall what Glossip got for anything else. *Supra* pp. 15-16. Everhart's testimony—and the State's cherry-picked excerpts of Glossip's prior testimony, *see supra* n.5—left the impression that most of Glossip's cash was unaccounted for except as the proceeds of the alleged murder plot. But the suppressed notes from Everhart's pretrial interview suggested that when Everhart told Smothermon what he knew about Glossip's "liquidat[ion]" efforts, he referred to Glossip obtaining $900. JA949, 952. Had the notes been disclosed, the defense could have impeached Everhart with his prior inconsistent statements, undermining the State's theory and supporting the innocent explanation that Glossip acquired the cash by "liquidat[ing]" his personal possessions to retain an attorney. JA949, 952; *see also* JA706; Reed Smith 5th Supp. 19.

Ignoring *Kyles*, the OCCA "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively." *Wearry*, 577 U.S. at 394. The court reasoned that the "mental health treatment evidence" could not by itself "create a reasonable probability that the result of the proceeding would have been different," JA991, without considering how the rest of the suppressed evidence, if "vary[ing] in kind," all "strengthen[ed] the inference" that Sneed's assertion of any link between Glossip and the murder was unreliable at best. *Cone* v. *Bell*, 556 U.S. 449, 470 (2009).

This Court's materiality analysis in *Wearry* illustrates what the OCCA should have done instead. There, this Court concluded that a key witness's "credibility, already impugned by his many inconsistent stories, would

have been further diminished" had the jury learned of additional holes in his testimony and his incentives to "implicate[] Wearry to settle a personal score." 577 U.S. at 393. Recognizing that each instance of suppression cast further doubt on the witness's reliability, the Court confirmed that evaluating the materiality of any single instance of prosecutorial misconduct requires considering the full record. *See id.* at 393-394.

The same is true here. Had the suppressed evidence been disclosed, the defense could have mounted a much more fulsome argument that the jury should discredit Sneed's testimony—because he had lied on the stand and in prior proceedings; because his psychiatric condition made his account unreliable; because he changed his testimony mid-trial at the State's behest; and because the only corroboration of his story was contradicted by Everhart's prior inconsistent statements. True to *Kyles*, the weight of the suppressed evidence would have accumulated, and the *Brady* violations in this case would have been cast in an even more powerful light. A jury that might have forgiven Sneed for being impeached once could easily have concluded that repeated impeachments showed he was unreliable.

Absent this Court's correction, the OCCA's disregard of *Kyles* also heralds a powerful incentive for prosecutors to trickle exculpatory evidence just slowly enough that a defendant can never present a full-throated *Brady* claim. This case is a perfect example. When the State finally disclosed exculpatory evidence years after Glossip's conviction, it did so in multiple tranches separated by months—far longer than the 60 days Glossip had to file a successive application after learning of new evidence. By doing so, the State ensured that Glossip could not present all the suppressed evidence at once. The OCCA's refusal to consider the

evidence collectively aggravated that problem, giving prosecutors an incentive to slow-roll their constitutional obligations—an outcome that "is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

Because the wrongful withholding of evidence of Sneed's psychiatric treatment—worsened by the net effects of other suppressed evidence—"raises a reasonable probability that its disclosure would have produced a different result," Glossip "is entitled to a new trial." *Kyles*, 514 U.S. at 421-422.

III. No Adequate And Independent State-Law Ground Supports The OCCA's Judgment

This Court will not review federal questions addressed in a state-court decision that "rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Lee* v. *Kemna*, 534 U.S. 362, 375 (2002). That jurisdictional rule poses no barrier to review in this case. While the OCCA recited the limitations of the Oklahoma Post-Conviction Procedure Act, Okla. Stat. tit. 22, §1089(D)(8)(b), any fair reading of the opinion confirms that this state-law ground was neither independent nor adequate. Any ostensible application of §1089(D)(8)(b) followed directly from the OCCA's construction and application of *Napue* and *Brady* and therefore was not an independent state-law ground. And any reliance on the Act's limitations despite the State's affirmative waiver of those limitations, and the impossibility of asserting the *Napue* and *Brady* claims before Box 8 was disclosed, was a novel and unforeseeable application of state law and thus not an adequate state-law ground.

A. The OCCA's Judgment Was Not Independent Of Federal Law

A state-court judgment deciding a federal question is presumptively subject to this Court's review absent a "plain statement" that it "rest[s] on an adequate and independent state ground." *Michigan* v. *Long*, 463 U.S. 1032, 1044 (1983). By design, this is a high hurdle. Given the "important need for uniformity in federal law" and "[r]espect for the independence of state courts," this Court cabins its jurisdictional inquiry to "the four corners of the opinion" of the state court. *Id.* at 1040.

A telltale sign of dependence on federal law is reliance on federal case law in the state court's reasoning. *Long*, 463 U.S. at 1041. A state-court decision that "rel[ies] on federal precedents" is not independent of federal law unless it clearly states that "the federal cases are being used only for the purpose of guidance." *Id.* Thus, even when a state court invokes a state-law procedural bar, the "state-law prong of the court's holding is not independent of federal law" if the court's "resolution of the state procedural law question depends on a federal constitutional ruling." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985). In that event, "the federal-law holding is integral to the state court's disposition of the matter," and this Court's resolution of the federal issue is "in no respect advisory." *Id.*; *see Three Affiliated Tribes of Fort Berthold Rsrv.* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984) (Supreme Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

In *Ake*, for example, an indigent capital defendant argued that the federal constitution entitled him to psychiatric services to aid his defense. 470 U.S. at 70-73. In addition to denying the claim on the merits, the OCCA

held that the defendant had waived his request for a psychiatrist as a matter of state law by failing to reiterate it in his motion for a new trial. *Id.* at 74. In this Court, the State argued that the waiver holding constituted an adequate and independent state-law ground for the judgment. *Id.*

This Court disagreed. Under Oklahoma law, the waiver rule did not apply to fundamental trial errors, including federal constitutional errors. *Ake*, 470 U.S. at 75. Oklahoma had thus "made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Id.* Before ruling on the state-law waiver issue, the state court had to rule "either explicitly or implicitly" on the federal issue. *Id.* Accordingly, the OCCA's waiver decision was not independent of federal law.

Much the same was true in *Foster* v. *Chatman*, 578 U.S. 488 (2016). The post-conviction petitioner there raised a *Batson* claim, but the state habeas court ruled the claim was "not reviewable based on the doctrine of res judicata" under Georgia law. *Id.* at 496. The court then evaluated whether there had been "'any change in the facts sufficient to overcome the res judicata bar.'" *Id.* at 498. After analyzing a newly uncovered prosecution file, the court concluded that the petitioner's renewed *Batson* claim was "'*without merit*'" and therefore could not displace the res judicata bar. *Id.*

As in *Ake*, this Court concluded it had jurisdiction to review the state court's judgment. The Court underscored that, in evaluating changed circumstances, the state court had "engaged in four pages of what it termed a '*Batson* … analysis.'" *Foster*, 578 U.S. at 498. The Court thus found it "apparent that the state habeas

court's application of res judicata to [the petitioner's] *Batson* claim was not independent of the merits of his federal constitutional challenge." *Id.* The state court's *Batson* analysis was sufficient to support this Court's jurisdiction, even though it was fully incorporated into the analysis of res judicata under state law.

These authorities establish this Court's jurisdiction to review the OCCA's judgment here. The OCCA relied directly on *Brady* and *Napue*, JA989-992, and made no "plain statement" that its discussion of those federal precedents served "only for the purpose of guidance," rather than to "compel the result that the court … reached." *Long*, 463 U.S. at 1041. To the contrary, the OCCA's opinion makes clear that its ruling depended entirely on its analysis of Glossip's federal *Napue* and *Brady* claims. Although the court began by stating that the issue of Sneed's psychiatric treatment "could have been presented previously" and that "the facts [we]re not sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found [Glossip] guilty"—reciting the two-part standard under the state post-conviction relief statute, JA990; *see* Okla. Stat. tit. 22, §1089(D)(8)(b)—the only support the court offered for those conclusions was its rejection of Glossip's *Brady* and *Napue* claims on the merits.

The court first explained that "to establish a *Brady* violation, a defendant must show that the prosecution failed to disclose evidence that was favorable to him or exculpatory, and that the evidence was material." JA989-990. But here, the court thought, the prosecution had not hidden exculpatory information because Sneed's competency examination already "noted Sneed's lithium prescription" and thus defense counsel already "knew or should have known about Sneed's mental health issues."

JA991. That was an adjudication of Glossip's *Brady* claim on the merits.

The court then explained that the evidence "does not create a *Napue* error" because "[d]efense counsel was aware or should have been aware that Sneed was taking lithium at the time of trial" and thus "[t]his fact was not knowingly concealed by the prosecution." JA991. The court further concluded that, because "Sneed was more than likely in denial of his mental health disorders," his trial testimony was "not clearly false." *Id.* This was an adjudication of Glossip's *Napue* claim on the merits.

Moreover, the court went on to hold that "this evidence is not material under the law," for purposes of both *Brady* and *Napue*, because Sneed's "known mental health treatment evidence does not create a reasonable probability that the result of the proceeding would have been different had Sneed's testimony regarding his use of lithium been further developed at trial." JA991-992. That is the materiality standard of *Brady* and *Napue*. *See, e.g.*, *Bagley*, 473 U.S. at 682 (under *Brady*, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"); *Giglio*, 405 U.S. at 154 (under *Napue*, evidence is material "if the false testimony could in any reasonable likelihood have affected the judgment of the jury" (quotation marks and alterations omitted)). Oklahoma's post-conviction relief statute has a separate materiality standard, Okla. Stat. tit. 22, §1089(D)(8)(b)(2), but after initially reciting it, the OCCA never analyzed or applied it, JA987-992.

The takeaway is inescapable. The only reason the court gave for finding that the "issue could have been and should have been raised earlier" under state law was that "Sneed's previous evaluation and his trial testimony

revealed that he was under the care of [a] doctor who prescribed lithium"—*i.e.*, the very reason why there purportedly was no misconduct under *Brady* and *Napue*. JA991-992. And the only reason the court gave for finding that "the facts [were] not sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty" under state law was that the "known mental health treatment evidence does not create a reasonable probability that the result of the proceeding would have been different had Sneed's testimony regarding his use of lithium been further developed at trial"—*i.e.*, the very reason why the alleged prosecutorial error was purportedly not material under *Brady* and *Napue*. JA991-992. A state court's application of state law that is "so interwoven with" its federal-law reasoning does not defeat this Court's jurisdiction. *Enterprise Irrigation Dist.* v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

The OCCA's dismissal of the State's confession of error confirms that analysis. In determining that the concession "c[ould] not overcome the limitations on successive post-conviction review" as a matter of state law, the OCCA stated that the concession was "not based in law or fact." JA990. But the only "law or fact" the court proceeded to discuss was its view that Glossip's federal constitutional claims lacked merit under this Court's precedent. *Id.*

The OCCA's opinion is thus no different from the state-court opinions in *Ake* and *Foster*. Because the court's "resolution of the state procedural law question depend[ed] on [its] federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law." *Ake*, 470 U.S. at 75.

B. The OCCA's Judgment Did Not Rest On An Adequate State-Law Ground

To the extent the OCCA applied §1089(D)(8)(b)'s limitations despite the State's waiver or held that Glossip defaulted his *Napue* and *Brady* claims before he even knew, or reasonably could have known, of the salient facts underlying those claims, the OCCA's judgment also did not rest on an adequate state-law ground. There is simply no support in Oklahoma law for such a novel application of the Oklahoma Post Conviction Procedure Act, and it therefore cannot insulate the judgment from this Court's review.

"The question whether a state procedural ruling is adequate is itself a question of federal law." *Beard* v. *Kindler*, 558 U.S. 53, 60 (2009). A state procedural rule that is "firmly established and regularly followed" generally forecloses review of a federal claim. *Id.* Yet "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958). Thus, "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." *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964); *see also, e.g.*, *Ford* v. *Georgia*, 498 U.S. 411, 425 (1991) (state procedural rule that was not "firmly established at the time [of] question … cannot bar federal judicial review"); *Johnson* v. *Mississippi*, 486 U.S. 578, 588-589 (1988) (state procedure rule that was not "consistently or regularly applied" was not an "adequate and independent state ground").

Last Term, this Court applied this rule to reject as inadequate a state-law procedural ruling in *Cruz* v. *Arizona*, another post-conviction case. 598 U.S. 17 (2023). There, the petitioner sought to vacate his capital sentence under *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), because the jury that sentenced him had not been informed that a life sentence in Arizona would be without parole. *Cruz*, 598 U.S. at 21-22. Although the Arizona Supreme Court had held that "Arizona's sentencing and parole scheme did not trigger application of *Simmons*," this Court disagreed in *Lynch* v. *Arizona*, 578 U.S. 613 (2016), making clear that *Simmons* applies in Arizona. *Cruz*, 598 U.S. at 20.

The petitioner in *Cruz* sought post-conviction relief based on *Lynch*. 598 U.S. at 20. The Arizona Supreme Court rejected his motion under a state procedural rule barring successive motions for post-conviction relief absent a "significant change in the law." *Id.* (citing Ariz. R. Crim. Proc. 32.1(g)). The court determined that *Lynch* was not a significant change in the law because "the law relied upon by the Supreme Court in [*Lynch*]—*Simmons*—was clearly established at the time of Cruz's trial … despite the misapplication of that law by the Arizona courts." *Id.* at 25.

Although the Arizona Supreme Court's decision rested exclusively on a state-law procedural requirement, this Court held that it could exercise jurisdiction over the judgment. *Cruz*, 598 U.S. at 32. The Court concluded that the state court's interpretation and application of the Arizona procedural requirement could not constitute an adequate state-law ground for the judgment because that ruling was "novel and unforeseeable" and "lack[ed] fair or substantial support in prior state law." *Id.*; *see id.* at 27 (state-law ground was "entirely new and in conflict with prior Arizona case law").

The same is true here. As explained above, the OCCA did not rest on any state-law ground independent of its adjudication of the federal claims on their merits. But had it done so, the court's ruling plainly would have been inadequate to deprive this Court of jurisdiction. The OCCA's application of §1089(D)(8)(b) was "novel and unforeseeable" in two ways, each sufficient to render the judgment inadequate.

First, the OCCA's conclusion that §1089(D)(8)(b)'s diligence and materiality limitations could not be waived by the State contravened its own precedent. In responding to Glossip's application, the State waived reliance on the Oklahoma Post-Conviction Procedure Act, instead arguing that its limitations were satisfied. JA976. The OCCA, however, refused to accept this waiver, stating that its review was "limited by the legislatively enacted Post-Conviction Procedure Act" and that the "Attorney General's 'concession'" changed nothing. JA981-982.

This holding—that §1089(D)(8)(b) is effectively a jurisdictional requirement that cannot be waived—violated established state law. Generally, a State is "obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter." *Gray* v. *Netherland*, 518 U.S. 152, 166 (1996). The same is true under Oklahoma law, as shown by the OCCA's own opinion in *McCarty* v. *State*, 114 P.3d 1089 (Okla. Crim. App. 2005).[7]

As in this case, the capital petitioner in *McCarty* filed a successive application for post-conviction relief alleging due-process violations. 114 P.3d at 1090, 1092. Among other things, the petitioner claimed the State

[7] The OCCA is Oklahoma's court of last resort for criminal appeals and thus the authoritative voice on Oklahoma criminal law. Okla. Stat. tit. 20, §40.

had suppressed documents proving the Oklahoma City police chemist had "excluded [the] [p]etitioner as a donor of all crime scene hairs" and that her contrary report and testimony "were false and materially misleading." *Id.* at 1091.

Like here, the OCCA "reiterate[d] the narrow scope of review available under the amended Post-Conviction Procedure Act," citing an earlier version of §1089. *McCarty*, 114 P.3d at 1091. But the State had "expressly waived any procedural bars that may arguably apply" to the claim. *Id.* at 1091 n.7. Unlike in this case, the OCCA accordingly proceeded to adjudicate the claim on the merits, ruling for the petitioner and vacating his death sentence. *Id.* at 1095. It did so even though the defense—indeed, the "entire legal community"—had been "on notice" of problems with the police chemist's report at the time of trial. *Id.* at 1093. But given the State's waiver, the court declined to apply the Oklahoma Post-Conviction Procedure Act's limitations. *Id.* That is precisely how state law should have applied in Glossip's case. Indeed, the OCCA has elsewhere recognized that the Act's limitations are subject to equitable exceptions, confirming that they are not jurisdictional. *See Valdez* v. *State*, 46 P.3d 703, 710-711 (Okla. Crim. App. 2002) (allowing exception to predecessor to §1089(d)(8)(b)(1) "when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right").

Second, the OCCA's analysis of Glossip's diligence, under §1089(d)(8)(b)(1) defied any reasonable application of state law. In finding that Glossip had slept on his rights, the court cited the fact that "Sneed's previous evaluation and his trial testimony revealed" his lithium prescription. JA991. But Glossip's *Napue* and *Brady* claims never rested on the fact that Sneed was taking

lithium. They focused instead on why he was taking lithium—*i.e.*, because he was under the care of a psychiatrist who had prescribed it to treat a serious mental-health disorder. Sneed falsely testified that he had been given lithium for a cold and that he had "never seen no psychiatrist or anything." JA312-313. Smothermon's interview notes confirmed this was false testimony and she knew it. And the State wrongfully withheld those notes until January 2023, in blatant violation of *Brady*. Glossip had previously sought Sneed's medical records, but the State opposed that request and the OCCA denied it. JA621-622, 632.

The upshot is that—to the extent there is any purely state-law rationale for OCCA's diligence holding—it is simply that Glossip should have brought a claim of constitutional error before he knew or could possibly have known the salient facts establishing that error. Needless to say, nothing in Oklahoma law supports such a procedural rule.

In *Davison* v. *State*, 531 P.3d 649 (Okla. Crim. App. 2023), for example—decided just weeks after the OCCA decided this case—the petitioner filed a successive application alleging that his capital post-conviction counsel had been ineffective. *Id.* at 653-654. "In addition to documents previously submitted or plainly available at the time of the initial post-conviction application," the application relied on "recently obtained reports of two forensic psychological evaluations of Petitioner, as well as more recent affidavits from his family members, a legal intern, and two defense investigators." *Id.* Because "the factual particulars of initial post-conviction counsel's presentation of claims became reasonably ascertainable only *after* the filing of the initial post-conviction application," the OCCA held that §1089(D)(8)(b)(1)—the same diligence limitation at issue here—did not preclude

consideration of the claim on the merits. *Id.* That is what a proper application of Oklahoma law would have looked like in Glossip's case.

Indeed, if the Oklahoma Post-Conviction Procedure Act mandated the result reached here, such a baseless and arbitrary rule would itself violate the federal constitution. *See, e.g.*, *Walker* v. *Martin*, 562 U.S. 307, 321 (2011) ("[F]ederal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights."); *Michel* v. *Louisiana*, 350 U.S. 91, 93 (1955) (requiring, as a matter of due process, "a reasonable opportunity to have the issue as to the claimed [federal constitutional] right heard and determined by the State court" (quotation marks omitted)). But the Court need not go so far to decide this case. The far simpler explanation for the judgment below is that the OCCA grievously deviated from what the Act actually requires when it adjudicated Glossip's application for post-conviction relief.

As in *Cruz*, then, the OCCA's procedural ruling was "entirely new and in conflict with prior [Oklahoma] case law," 598 U.S. at 27, resulting in a "novel and unforeseeable state-court procedural decision [that] lack[ed] fair or substantial support in prior state law," *id.* at 32. Even if the OCCA's judgment were independent of its extensive discussion of *Brady* and *Napue*—and it was not—the judgment remains subject to this Court's jurisdiction.

CONCLUSION

The OCCA's judgment should be reversed and a new trial granted.

Respectfully submitted.

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