No. 22-7466

In the Supreme Court of the United States

RICHARD EUGENE GLOSSIP,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF OKLAHOMA STATE LEGISLATORS REP. KEVIN MCDUGLE, REP. J.J. HUMPHREY, SEN. DAVID BULLARD, SEN. BLAKE STEPHENS, AND FORMER REP. GARY MIZE AS AMICI CURIAE IN SUPPORT OF REVERSING THE JUDGMENT BELOW

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INTEREST OF AMICI CURIAE[1]

Amici are current or former members of the State of Oklahoma Legislature who formed an Ad Hoc Legislative Committee ("Ad Hoc Committee") to investigate the case of petitioner Richard E. Glossip. Kevin McDugle (R-Broken Arrow) is a member of the Oklahoma House of Representatives who represents Oklahoma's 12th District; J.J. Humphrey (R-Lane) is a member of the Oklahoma House of Representatives who represents Oklahoma's 19th District; David Bullard (R-Durant) is a member of the Oklahoma Senate who represents Oklahoma's 6th District; Blake "Cowboy" Stephens (R-Tahlequah) is a member of the Oklahoma Senate who represents the 3rd District; and Gary Mize (R-Guthrie) is a former member of the Oklahoma House of Representatives who represented Oklahoma's 31st District.

As supporters of the death penalty, amici strongly believe that, in certain cases, "the only justice is a death sentence."[2] But they also believe that a death sentence should be carried out only subject to the strict constitutional and other legal protections that apply to all criminal defendants, especially those

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief

[2] *E.g.,* Kevin McDugle, *Rep. Kevin McDugle: 'I believe Richard Glossip is innocent. This is why,'* The Oklahoman (June 26, 2022), https://www.oklahoman.com/story/opinion/2022/06/26/guest-column-glossip-case-oklahoma-get-wrong/7646656001/.

against whom the State seeks to impose the most severe and final punishment—death.

In February 2022, after amici's constituents raised concerns about Glossip's case, amici formed an Ad Hoc Committee and initiated an independent investigation into Glossip's conviction and death sentence. That investigation revealed—in a final report and several supplemental reports—numerous serious issues that call into question that conviction and death sentence. In light of those issues, which were largely corroborated by a second independent investigation, the Oklahoma Attorney General took the extraordinary step of confessing error in Glossip's case and now joins Glossip in seeking vacatur of Glossip's conviction and death sentence.

Amici believe that, under these circumstances, executing Glossip based on the existing record would be a grave injustice. Not only could it unjustly take a life, but doing so would do inestimable harm to the criminal justice system in Oklahoma and beyond. Given the oaths they took to uphold the Oklahoma Constitution, their responsibility to ensure Oklahoma citizens are afforded due process of law, and their efforts to independently investigate Glossip's conviction and death sentence, amici have a strong interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Absent this Court's intervention, the State of Oklahoma will execute Richard E. Glossip—even though two independent investigations commissioned by death penalty supporters have uncovered grave problems with Glossip's conviction and death sentence, and even though Oklahoma's chief law

enforcement officer has confessed error and now joins Glossip in seeking vacatur of his death sentence. Executing Glossip under those circumstances would be a gross departure from fundamental constitutional protections and cast a shadow over the imposition of the death penalty more generally. Amici's sympathies go out to the murder victim and his family members, who have long suffered and are entitled to closure and justice. But taking another person's life as a result of an unfair trial serves no one's interests. This Court should intervene to ensure that the constitutional and other violations that have been uncovered are cured before any death sentence could possibly be carried out in this case.

Because of the incomparable severity of taking someone's life, implementing the death penalty in a manner consistent with the Due Process Clause of the Fourteenth Amendment demands vigilant adherence to strict procedural protections. Among other things, due process guarantees the "right to a fair trial," *Cone v. Bell*, 556 U.S. 449, 451 (2009). That guarantee imposes on States numerous duties with respect to criminal discovery, including those recognized in the seminal cases of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Those duties assume heightened significance in death penalty cases, where the State seeks to impose the gravest sentence of all. Moreover, the public's confidence in a death penalty system depends on the fair and transparent imposition of criminal justice, no matter the nature of the crime. When a State blatantly ignores those essential guardrails, courts must stand in the breach to ensure adherence to constitutional guarantees and to restore the public's confidence in the justice system.

In this case, two independent investigations commissioned by Republican supporters of the death penalty concluded that this case has gone terribly awry. The first investigation—commissioned by amici—concluded that "no reasonable jury hearing the complete record would have convicted Richard Glossip of first degree murder." First Suppl. Report 1 (Aug. 9, 2022).[3] On account of long withheld evidence, the second investigation—commissioned by Oklahoma Attorney General Gentner Drummond—reached largely the same conclusion. And in light of the serious concerns raised by both investigations, Attorney General Drummond ultimately took the extraordinary step of confessing error and seeking vacatur of Glossip's death sentence.

The independent investigations revealed instances of grave prosecutorial misconduct, including the destruction of key evidence before Glossip's second trial and improper coaching of the prosecution's key witness, Justin Sneed, on whose testimony the prosecution's entire case against Glossip hinged. The investigations also uncovered clear constitutional violations—the suppression of key impeachment evidence, in violation of *Brady v. Maryland*, and a failure to correct false, material evidence, in violation of *Napue v. Illinois*.

Specifically, the investigations revealed that the State failed to disclose Sneed's desire to recant his

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[3] Reed Smith's final report and five supplemental reports (collectively, "the Report") are available at Reed Smith LLP, *Glossip investigation releases new findings from evidence withheld by the State for 25 years* (Mar. 27, 2023), https://www.reedsmith.com/en/news/2023/03/reed-smith-glossip-investigation-releases-new-findings-evidence-withheld.

testimony and seek a better plea deal. The prosecutor also suppressed evidence that Sneed had been prescribed, and had begun taking, lithium for previously untreated bipolar disorder. The prosecutor compounded that error by failing to correct Sneed's false testimony that he had never seen a psychiatrist. Had the prosecution not suppressed that information and not failed to correct Sneed's false testimony, the defense would have been able to use the fact of Sneed's untreated bipolar disorder, coupled with his intense drug use, to impeach Sneed's credibility, memory, and truthfulness, and to offer a plausible alternative to the prosecution's murder-for-hire theory of the case. This evidence would have been crucial for the defense given that the State's case against Glossip turned on Sneed's testimony that Glossip hired him to kill Barry Van Treese.

The proper remedy for these blatant due process violations is a new trial. *Kyles v. Whitley*, 514 U.S. 419, 421-22 (1995); *Napue*, 360 U.S. at 272. Imposition of the death penalty in the face of these constitutional violations—and over the State's confession of error—not only would be unthinkable, but would cast serious doubt on the legitimacy of the system that led to the imposition of that punishment.

ARGUMENT

I. IMPLEMENTATION OF THE DEATH PENALTY DEMANDS STRICT ADHERENCE TO PROCEDURAL PROTECTIONS

Consistent with the incomparable severity of taking someone's life, imposition of the death penalty has always demanded the most stringent procedural protections. Under the Due Process Clause of the Fourteenth Amendment, a State undoubtedly *may*

"deprive" heinous criminals "of life"—but only with "due process of the law." One of the central features of due process is the "right to a fair trial." *Cone v. Bell*, 556 U.S. 449, 451 (2009). This right "imposes on States" responsible for prosecuting accused criminals "certain duties consistent with [States'] sovereign obligation to ensure 'that "justice shall be done"' in all criminal prosecutions." *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 111 (1976)). That obligation is of the utmost importance in capital cases.

Among a State's duties in safeguarding the right to a fair trial are several involving criminal discovery. Under a long line of cases culminating with *Napue v. Illinois*, a State has the duty to ensure that a conviction not be "obtained through use of false evidence." 360 U.S. 264, 269 (1959) (citing cases). That duty is not exhausted by refraining from "soliciting false evidence"; it also demands the affirmative correction of false evidence "when it appears." *Id.* And under *Brady v. Maryland*, "the suppression by the prosecution of evidence favorable to an accused" is a violation of due process "where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). Far from being a "game" of hide and seek, criminal discovery "is integral to the quest for truth and the fair adjudication of guilt or innocence." *Taylor v. Illinois*, 484 U.S. 400, 419 (1988) (Brennan, J., dissenting).

While crucial in all criminal prosecutions, these discovery duties assume heightened significance when a State seeks to use its immense power to impose a sentence of death—"the gravest sentence our society may impose." *Hall v. Florida*, 572 U.S. 701, 724 (2014). As this Court has stressed, the "qualitative difference" between death and all other

punishments, including life imprisonment, imposes "a corresponding difference in the need for reliability" in death sentences. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). And "the severity of the sentence [likewise] mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

The public's trust in the justice system depends on the State conforming its conduct to constitutional requirements and fundamental notions of justice. This Court has emphasized this exact point with respect to criminal discovery, noting that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974). When agents of the State "abuse the immense power they hold" by securing convictions through suppression of evidence or failure to correct false evidence, "the fairness of our entire system of justice is called into doubt and public confidence in it is undermined." *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005). And when "such transgressions are . . . forgiven by the courts, [they] endorse and invite their repetition," further eroding the public's confidence. *United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, J., dissenting from the denial of rehearing en banc). The threat to the public's confidence is especially great if errors are committed when the State seeks to impose the death sentence.

The integrity of the criminal justice system depends on prosecutors and other agents of the State acting in accordance with then-Attorney General Robert H. Jackson's observation that real victory for the State in any given case does not depend on whether "the government technically loses its case,"

but on whether "justice has been done."[4] When the State loses sight of this objective, the prosecutor can be transformed from "one of the most beneficent forces in our society" into "one of the worst."[5] This case underscores the stakes when prosecutors violate constitutional requirements in pursuit of a conviction.

The administration of the death penalty requires States to operate faithfully within procedural guardrails, and courts must stand ready to enforce those guardrails to protect against the unconstitutional imposition of any death sentence.

II. TWO INDEPENDENT INVESTIGATIONS HAVE REVEALED GRAVE PROBLEMS WITH GLOSSIP'S DEATH SENTENCE THAT CAST DOUBT ON ITS LEGITIMACY

Two thorough and independent investigations, both commissioned by elected Oklahoman officials—amici and the attorney general—who support the death penalty when administered properly, revealed grave problems with Glossip's conviction and death sentence. Many of those problems implicate serious prosecutorial misconduct with severe constitutional implications, including blatant violations of *Brady* and *Napue*.

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[4] Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18, 18 (June 1940), https://www.roberthjackson.org/wp-content/uploads/2015/01/The_Federal_Prosecutor.pdf (address by Attorney General Robert H. Jackson delivered at Second Annual Conference of U.S. Attorneys).

[5] Jackson, *supra*, at 19.

A. Investigations Commissioned By Amici And Oklahoma's Attorney General Uncovered Grave Problems With Glossip's Conviction And Death Sentence

1. Rep. Kevin McDugle has been a member of the Oklahoma House of Representatives since 2016. He is a "strong believer and supporter of the death penalty" and believes that in certain cases, "the only justice is a death sentence."[6] Around five years ago, Rep. McDugle began inquiring into the case of Richard Glossip after learning of potential concerns with his conviction and death sentence.

Rep. McDugle approached his inquiry with considerable skepticism, but as he dug deeper into the case, he became concerned about the integrity of Glossip's conviction and death sentence, and the broader implications for Oklahoma's criminal justice system. Rep. McDugle shared his concerns with fellow lawmakers, and in May 2021, 34 Oklahoma legislators—including 28 Republicans—sent a letter to Governor Kevin Stitt and the Pardon and Parole Board requesting "an independent investigation" into the Glossip case.[7] The letter noted that "the prosecution's case that put Mr. Glossip on death row has been called into serious question . . . that can only

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[6] Kevin McDugle, *Rep. Kevin McDugle: 'I believe Richard Glossip is innocent. This is why*,' The Oklahoman (June 26, 2022), https://www.oklahoman.com/story/opinion/2022/06/26/guest-column-glossip-case-oklahoma-get-wrong/7646656001/.

[7] Letter from Rep. McDugle to Governor Kevin Stitt and Pardon and Parole Board at 1 (May 17, 2021), https://dpic-cdn.org/production/documents/Glossip-Oklahoma-Legislative-Letter-to-Gov-Stitt-2021-05-17.pdf.

be resolved by additional investigation and testing."[8] The letter also encouraged releasing to an independent investigator "all information held by the District Attorney's office, or any police or law enforcement agency that investigated [the] case."[9] Such transparency, the letter explained, would be "the only way" to lift "the cloud of doubt surrounding [the] case" and inspire "confiden[ce] that justice is done—one way or the other."[10]

To the dismay of Rep. McDugle and his colleagues, no official investigation ensued. So, led by Rep. McDugle, amici formed an Ad Hoc Legislative Committee to address the concerns surrounding the Glossip case. In February 2022, the Committee sought the assistance of an independent third party to investigate the Glossip case and to prepare a report detailing the investigation's findings.[11] The Committee ultimately retained the law firm Reed Smith LLP to perform those duties, while stressing that the investigation had to be independent and that it had "not indicated to [Reed Smith] in any way how [it] should conduct [its] work or what conclusions [it] should reach."[12]

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8 *Id.* at 2.

9 *Id.*

10 *Id.*

11 Reed Smith LLP, *Oklahoma legislators request Reed Smith independently examine Richard Glossip case* (Feb. 22, 2022), https://www.reedsmith.com/en/news/2022/02/ok-leg-request-reed-smith-independently-examine-richard-glossip-case.

12 Letter from Rep. Kevin McDugle to Reed Smith regarding Independent Investigation regarding *State v. Glossip* (Feb. 2022), https://www.jw.com/wp-content/uploads/2024/04/Feb-2022-OK-Legislators-Ad-Hoc-Committee-Request-Glossip.pdf.

The scope of Reed Smith's independent investigation was massive. Just the initial stage of the investigation took over four months—and involved over 30 attorneys who spent over 3,000 pro bono hours reviewing close to 150,000 pages of documents and conducting dozens of interviews, many with people who had never been interviewed regarding the case. Reed Smith LLP, *Independent Investigation of* State v. Richard E. Glossip*: Final Report* 2-3 (June 7, 2022) (Final Report). In conducting its investigation, Reed Smith worked with Oklahoma law firm Crowe & Dunlevy and Texas-based law firm Jackson Walker LLP.

Reed Smith released its initial report in June 2022, and, as it discovered more evidence, it released five supplemental reports in the period between August 2022 and March 2023. One of the primary reasons for the piecemeal release was the State's repeated refusal to grant Reed Smith access to the District Attorney's case file. Third Suppl. Report 1 & n.4 (Sept. 20, 2022). In late August/September 2022, Reed Smith finally gained access to seven boxes from the District Attorney's case file (Boxes 1-7), but was still denied access to an eighth box (Box 8), which "contained documents removed from boxes 1-7" over which then-Attorney General John O'Connor asserted privilege. Fifth Suppl. Report 1 (Mar. 27, 2023). Reed Smith finally gained access to Box 8 only after Attorney General Gentner Drummond took office in January 2023 and adopted a more transparent approach than his predecessors. *Id.* As discussed below, contrary to the State's assertions of privilege, Box 8 contained "significant discoverable information," Letter from Independent Counsel at 1, *In re Glossip*, No. CF-1997-244 (Okla. Cnty. Apr. 3,

2023) (Independent Counsel Report),[13] that in many instances could not even "arguably be considered work product or otherwise privileged." Fifth Suppl. Report 2.

2.a. Reed Smith's independent investigation revealed numerous grave problems with Glossip's conviction and death sentence. Those problems compelled the law firm's bottom-line conclusion that "no reasonable jury hearing the complete record would have convicted Richard Glossip of first-degree murder." First Suppl. Report 1. Rep. McDugle was "sickened that something like this could happen in the State of Oklahoma."[14] Rep. Humphrey likewise described being "shocked," "appalled," and "sickened" by the findings of the investigation.[15] The investigation's findings ultimately spurred 61 Oklahoma legislators (including 45 Republicans) to write a letter to then-Attorney General John O'Connor asking him "to join in Mr. Glossip's request asking the Oklahoma Court of Criminal Appeals to order an evidentiary hearing."[16]

The Report poked gaping holes in the prosecution's evidence, including its motive evidence and its theory

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

[14] Video Recording at 1:43:43-48, Clemency Hearing of Richard E. Glossip held April 26, 2023 (statement of Rep. Kevin McDugle) (Clemency Hearing).

[15] Clemency Hearing at 1:51:15-23 (statement of Rep. J.J. Humphrey).

[16] Letter from 61 Oklahoma Legislators to Attorney General regarding The pending execution of Richard Glossip (Aug. 4, 2022), https://www.jw.com/wp-content/uploads/2024/04/586077939-Legislators-letter-to-AG-John-O-Connor-on-Glossip-case.pdf.

that Justin Sneed was Glossip's puppet, "incapable of significant independent action." Final Report 212-13. It also revealed instances of troubling misconduct by the State that severely tainted the fairness of Glossip's trial. For example, the Report detailed the State's inexplicable destruction of a box of evidence before Glossip's second trial. That box contained, among other things, "critical financial books and records needed to disprove" the State's theory that Glossip wanted Barry Van Treese dead because Glossip embezzled thousands of dollars from Van Treese's hotel. *Id.* at 44-58. Former Assistant District Attorney Gary Ackley, one of the two prosecutors who represented the State in Glossip's retrial, admitted being "horrifie[d]" upon learning about the destruction of such evidence and had "no idea how something like this could happen." *Id.* at 7 (citation omitted); *see* JA935. What is more, the Report uncovered evidence that the destruction of this evidence was *not* an accident. Final Report 45-47. Either way, the destruction of potentially critical evidence in a capital case is inexcusable.

But perhaps the most grave revelations of prosecutorial misconduct involved the State's conduct with respect to the crucial testimony of Sneed—the actual killer—who, in exchange for being spared the death penalty, agreed to testify that Glossip hired him to commit the murder. Because no physical evidence linked Glossip to the murder and "no person, other than Sneed, testified that Glossip had anything to do with Van Treese's murder," the case against Glossip hinged on Sneed's testimony. *Id.* at 5; *see* Order 1, *Glossip v. State*, No. 08-cv-00326 (W.D. Okla. Sept. 29, 2010), ECF No. 66 (State's case against Glossip "hinged on the testimony of one witness, Justin

Sneed"). Former Assistant District Attorney Gary Ackley candidly admitted that "if the jury didn't believe that testimony that came direct to their ears from Justin Sneed, there's no way they would have convicted Richard Glossip." Fifth Suppl. Report 11 (emphasis and citation omitted).

b. The State's misconduct with respect to Sneed's critical testimony was threefold.

First, the Report discovered evidence withheld by the State until of the summer of 2022 that strongly suggested that the State fed Sneed information relating to the testimony of other witnesses and coached Sneed to alter his testimony accordingly—which Sneed did. Third Suppl. Report 14-21; *see* JA953. The Independent Counsel Report (at 8-9), discussed below, "found no other explanation" for this evidence other than improper coaching.

Second, the Report uncovered "deeply troubling" correspondence between Sneed and his attorney in which he discussed recanting his previous testimony before the second trial. Second Suppl. Report 1-2 (Aug. 20, 2022); *see* Third Suppl. Report 2-5. Even more troubling, evidence showed that the State was aware that Sneed wanted to break his plea deal by recanting his testimony in hopes of negotiating a better deal, but nevertheless failed to disclose any of this to the defense. Second Suppl. Report 5-10, 14; Third Suppl. Report 9-14; Fifth Suppl. Report 22.

Third, and especially damning, are the revelations from Box 8. Box 8 included the prosecutor's notes from pre-trial interviews of Sneed, which indicate that Sneed was taking lithium and had seen a "Dr. Trumpet." JA927; Fifth Suppl. Report 6. In less than a day, the parties were able to identify "Dr. Trumpet"

as Dr. Trombka, who "was generally known by lawyers and investigators" as the treating "psychiatrist at the Oklahoma County Jail during the late 1990s." Reply.App.37a. Dr. Trombka was the *sole* Oklahoma County jail psychiatrist at the time of Sneed's arrest in 1997. Fifth Suppl. Report 8.

Armed with this information about Dr. Trombka, the defense would have easily learned that Sneed suffered from previously untreated bipolar disorder. It could have then used the information about Sneed's bipolar disorder—and testimony from Dr. Trombka—to counter the State's argument that the only plausible explanation for Sneed committing the murder was Glossip's control of Sneed.

The defense could have also used this information to impeach Sneed by casting doubt on his ability to recall events. As Dr. Trombka explained in a recent affidavit, a "manic episode could . . . affect an individual's perception of reality as well as their memory recall," and those symptoms "can be exacerbated" by the use of methamphetamine—the precise drug Sneed was known to have abused at the time of the murder. JA932. In addition, a manic episode brought about by bipolar disorder combined with methamphetamine use could "cause an individual to be more paranoid or potentially violent." *Id.* That information could have been used by Glossip's lawyers to cast further doubt on Sneed's critical testimony at trial and to buttress an alternative version of events exculpating Glossip.

3.a. A second investigation, commissioned by Oklahoma's Attorney General, largely corroborated the findings of the first investigation.

On January 9, 2023, Gentner Drummond was sworn in as Oklahoma's Attorney General. Drummond, a Republican, previously served as Assistant District Attorney for Pawnee and Osage Counties. During Drummond's fifteen months as Attorney General, Oklahoma has executed several convicted murderers, and in each instance, Drummond publicly noted his approval of the execution and his belief that justice had been served.[17] Outside of Glossip's case, Attorney General Drummond has never requested clemency from the Oklahoma Pardon and Parole Board for a death row inmate. To the contrary, he has implored the Pardon and Parole Board to *deny* such clemency.[18]

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[17] *See* Oklahoma Attorney General, *Attorney General Drummond Statement on execution of Michael Dewayne Smith* (Apr. 4, 2024), https://www.oag.ok.gov/articles/attorney-general-drummond-statement-execution-michael-dewayne-smith; Oklahoma Attorney General, *Attorney General Drummond Comments on Hancock execution* (Nov. 30, 2023), https://www.oag.ok.gov/articles/attorney-general-drummond-comments-hancock-execution; Oklahoma Attorney General, *Attorney General Drummond comments on Sanchez execution* (Sept. 21, 2023), https://www.oag.ok.gov/articles/attorney-general-drummond-comments-sanchez-execution; Oklahoma Attorney General, *Drummond issues statement on Jemaine Cannon execution* (July 20, 2023), https://www.oag.ok.gov/articles/drummond-issues-statement-jemaine-cannon-execution; Oklahoma Attorney General, *Attorney General statement on Eizember execution* (Jan. 12, 2023), https://www.oag.ok.gov/articles/attorney-general-drummond-statement-eizember-execution.

[18] Oklahoma Attorney General, *Drummond requests Pardon and Parole Board reject clemency for Michael Dewayne Smith* (Feb. 23, 2024), https://www.oag.ok.gov/articles/drummond-requests-pardon-and-parole-board-reject-clemency-michael-dewayne-smith.

In keeping with his campaign commitment to increased transparency and compelled by a "sense of justice," Attorney General Drummond reversed the decision of his predecessor and granted access to the previously withheld materials in Box 8.[19] And just a few weeks after being sworn in, Drummond announced that he had "directed an independent counsel to conduct a comprehensive review of Richard Glossip's murder conviction and death sentence."[20] The Attorney General explained that "[c]ircumstances surrounding the case"—no doubt a reference to the revelations from the Reed Smith report—"necessitate a thorough review."[21]

Attorney General Drummond appointed Rex Duncan as Independent Counsel. Duncan, also a Republican, previously served as District Attorney of Osage and Pawnee Counties and as a representative in the Oklahoma House of Representatives. While serving as Chairman of the Oklahoma House of Representatives Judiciary Committee, Duncan "supported pro-death penalty legislation" and "guided" such legislation "through committee." Independent Counsel Report 18-19. Duncan spent approximately 600 hours reviewing the case materials with fresh eyes.[22] Attorney General

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[19] Clemency Hearing at 2:08:09-16.

[20] Oklahoma Attorney General, *Attorney General Drummond orders independent Counsel to review Glossip death penalty case* (Jan. 26, 2023), https://www.oag.ok.gov/articles/attorney-general-drummond-orders-independent-counsel-review-glossip-death-penalty-case.

[21] *Id.*

[22] Clemency Hearing at 2:41:40-42:13 (statement of Independent Counsel Rex Duncan).

Drummond himself devoted "countless hours of [his] time examining the facts in this case."[23]

b. On April 3, 2023, Independent Counsel Duncan submitted the findings of his investigation to Attorney General Drummond. Independent Counsel Report 1. The Attorney General released the Independent Counsel's report three days later. [24]

The Independent Counsel Report noted that "[t]he State's murder case against Glossip was not particularly strong" to begin with and that it "would have been … weaker if full discovery had been provided." Independent Counsel Report 3. In the Independent Counsel's view, "Glossip was deprived of a fair trial," which made it impossible to "have confidence" in both "the process" *and* the "result." *Id.*

The Independent Counsel discovered a litany of "errors, omissions, lost evidence, and possible misconduct," and noted that the "cumulative effect of [such] errors . . . cannot be underestimated." His report listed eleven "[s]pecific concerns," including the ones mentioned above that bear directly on Sneed's credibility—and, thus, the State's case. *Id.* at 6-15.

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[23] *Id.* at 2:08:04-08 (statement of Attorney General Drummond).

[24] Oklahoma Attorney General, *Drummond releases Independent Counsel report, files motion to vacate conviction of death row inmate* (Apr. 6, 2023), https://www.oag.ok.gov/articles/drummond-releases-independent-counsel-report-files-motion-vacate-conviction-death-row.

B. The Findings Of These Investigations Cast Serious Doubt On The Legitimacy Of Glossip's Conviction And Death Sentence

The problems identified by the two independent investigations fundamentally undermine the legitimacy of Glossip's conviction and death sentence.

The investigations revealed multiple *Brady* violations. As the Reed Smith Report explains, the evidence of Sneed's desire to recant his testimony and break his plea deal to get a better one "goes directly to [Sneed's] credibility and reliability as a witness." Second Suppl. Report 13-14. This is critical because, as discussed, Sneed's credibility and reliability was crucial to the State's case against Glossip. The suppression of this evidence was a clear *Brady* violation. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("[N]ondisclosure of evidence affecting credibility falls within [the *Brady* Rule]" if "'reliability of a given witness may well be determinative of guilt or innocence.'" (citation omitted)). The revelations concerning this evidence are the subject of a pending petition for a writ of certiorari (No. 22-6500). But they are also relevant to this case because the materiality of *Brady* violations "turns on the cumulative effect" of all suppressed evidence favorable to the defense. *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *Wearry v. Cain*, 577 U.S. 385, 394 (2016).

The State's suppression of the prosecutor's notes from interviews with Sneed was also an egregious *Brady* violation because it deprived the defense of important information it could easily have used to impeach Sneed's testimony and counter the State's theory of the case. As detailed above, those notes revealed that Sneed saw a psychiatrist who

prescribed lithium to him. "If the defense knew Dr. Lawrence "Larry" Trombka (spelled in Smothermon's notes as Dr. Trumpet) had diagnosed Sneed as [bipolar] and prescribed lithium, Glossip's attorneys could have impeached Sneed's credibility, memory, and truthfulness." Independent Counsel Report 11. Thus, the release of this information "would have made a *monumental* difference in [Sneed's] cross-examination." *Id.* at 18 (emphasis added).

The State also committed a clear *Napue* violation in conjunction with the suppression of the information related to Sneed's bipolar disorder. At trial, Sneed testified that he was given lithium after asking for some Sudafed for a cold, and that he had "never seen no psychiatrist or anything." JA312-13. The prosecutor's interview notes demonstrate, however, that the State knew that this testimony was false. (As discussed, the notes make clear that Sneed *had* been seeing a psychiatrist, Dr. Trombka, who prescribed lithium for Sneed's bipolar disorder.) Yet, the State allowed the testimony "to go uncorrected," in blatant disregard of *Napue*'s directive to correct such testimony. 360 U.S. at 269.

The egregiousness of the *Brady* and *Napue* violations is compounded by the fact that the State rebuffed Glossip's attempt to obtain Sneed's medical records in connection with Glossip's effort to secure post-conviction relief. Former Attorney General Scott Pruitt opposed Glossip's motion for access to the records, asserting that this request was "nothing more than a fishing expedition." Fifth Suppl. Report 11 (citation omitted). Far from being a "fishing expedition," Sneed's medical records could have made the difference between a guilty and innocent verdict,

given that the State's case indisputably hinged on Sneed's testimony—and credibility.[25]

III. GLOSSIP'S CONVICTION AND DEATH SENTENCE SHOULD BE VACATED AND A NEW TRIAL SHOULD BE ORDERED

The State's appalling misconduct in this case is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The Attorney General is therefore correct: It would be "a grave injustice" to allow the execution of Richard Glossip to proceed, when his trial was plagued by so many errors, including *Brady* and *Napue* violations.[26]

As detailed above, and as Glossip and the State explain in their briefs, the State committed textbook *Brady* and *Napue* violations in its prosecution of Glossip. Pet'r's Br. 24-38; Resp't Oklahoma's Br. 21-31. The only proper remedy for those violations is setting aside Glossip's conviction and ordering a new trial. *Kyles*, 514 U.S. at 421-22; *Giglio*, 405 U.S. at 154; *see United States v. Gale*, 314 F.3d 1, 4 (D.C. Cir. 2003) (describing *Napue* violation as a "veritable hair trigger for setting aside the conviction").[27]

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[25] On top of these violations, the State improperly coached Sneed's testimony during the 2004 trial by providing him with a summary of the testimony of other witnesses after the rule of sequestration had been invoked. JA953; Fourth Suppl. Report 2 (Oct. 16, 2022); *see Geders v. United States*, 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.").

[26] Clemency Hearing at 3:24:28-24:34.

[27] As petitioner and the State of Oklahoma have explained, there is no independent and adequate state ground barring relief. *See* Pet'r's Br. 24-38; Resp't Oklahoma's Br. 49-51.

There are no plausible grounds to question the motives of the Attorney General's rare confession of error or to suspect that it is part of some "broader plan" to bolster a "campaign against the death penalty." Victim Family Members Amicus Br. (Amicus Br.) 9. Attorney General Drummond is a strong supporter of the death penalty, *see supra* at 16. His advocacy on behalf of vacating Glossip's death sentence is thus an outlier, which only serves to highlight the severe—and unique—problems with the death sentence *in this case*. At Glossip's clemency hearing, Attorney General Drummond "acknowledge[d] how unusual it is for the State to support a clemency application of a death row inmate."[28] In fact, it is unprecedented in Oklahoma. The Attorney General is no "comrade-in-arms" with death penalty abolitionists. Amicus Br. 14.

Consistent with the common-sense notion that a State's confession of error is "entitled to . . . great weight," *Sibron v. New York*, 392 U.S. 40, 58 (1968), this Court recently granted a petition for writ of certiorari, vacated the lower court's judgment, and remanded "for further consideration in light of the confession of [*Napue*] error" by the State of Texas in another capital case. *Escobar v. Texas*, 143 S. Ct. 557, 557 (2023). The confession of error here deserves similar treatment to the one in *Escobar*. If anything, this case presents an even more compelling case for vacatur, as the State's unconstitutional conduct here went far beyond the single instance of *Napue* error that prompted the confession of error in *Escobar*. *See supra* at 19-21.

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[28] Clemency Hearing at 2:07:16-20.

Amici acknowledge the heavy costs that can come with revisiting a death sentence after so many years. In particular, amici do not minimize the Van Treese family's tragic loss and its understandable desire for closure and justice. But no one benefits from carrying out a death sentence that was unlawfully imposed. The grave doubts that plague Richard Glossip's conviction and death sentence require this Court's intervention and a new trial. A contrary result would erode the public's confidence in the justice system and cast doubt on the death penalty more generally.

CONCLUSION

The Court should reverse the judgment of the Oklahoma Court of Criminal Appeals and remand with instructions to vacate the judgment of conviction and order a new trial.

Respectfully submitted,

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