No. 22-7466

In the Supreme Court of the United States

RICHARD EUGENE GLOSSIP,
PETITIONER,

v.

STATE OF OKLAHOMA,
RESPONDENT.

ON A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR KENNETH T. CUCCINELLI, II,
FORMER ATTORNEY GENERAL
OF THE COMMONWEALTH OF VIRGINIA,
AS AMICUS CURIAE SUPPORTING PETITIONER

EMMET T. FLOOD
Counsel of Record
JAMES N. SASSO
DANTE K. CHAMBERS II*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
eflood@wc.com

*Practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Other Authorities—continued:

In the Supreme Court of the United States

No. 22-7466

RICHARD EUGENE GLOSSIP,
PETITIONER,

v.

STATE OF OKLAHOMA,
RESPONDENT.

ON A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

INTEREST OF *AMICUS CURIAE*[*]

Ken Cuccinelli served as the 46th Attorney General of Virginia from 2010 to 2014 after representing Virginia's 37th district in the Commonwealth's Senate from 2002 until 2010. Since then, Mr. Cuccinelli has remained active in public service, serving as a senior official in both the United States Citizenship and Immigration Services and the Department of Homeland Security during the Administration of President Donald Trump.

[*] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or his counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

As Attorney General, Mr. Cuccinelli's office routinely reviewed convictions to ensure that defendants were not wrongfully convicted—with a special emphasis on capital convictions. As part of those reviews, his office often examined whether state prosecutors had complied with their constitutional and ethical obligations to disclose exculpatory evidence to defendants and correct any witness testimony known to be false. When his office's investigations led him to conclude that prosecutorial error had materially affected guilty verdicts or convictions in the Commonwealth of Virginia, Mr. Cuccinelli fulfilled his office's duty to pursue justice by confessing error in multiple cases. Mr. Cuccinelli maintains an interest in the integrity and fairness of criminal trials and the criminal justice system in general and in ensuring that courts afford proper respect to state attorney general confessions of error.

SUMMARY OF ARGUMENT

Petitioner Richard Glossip was convicted of capital murder in 2004. Nearly two decades later, the State of Oklahoma provided his counsel with never-before-disclosed material evidencing clear violations of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Brady v. Maryland*, 373 U.S. 83 (1963). When Petitioner sought post-conviction relief in the Oklahoma courts, the Attorney General of Oklahoma took the "remarkable" step of confessing error, *Buck v. Davis*, 580 U.S. 100, 125 (2017), and sought to have the conviction overturned and the case set for retrial. The Oklahoma Criminal Court of Appeals ("OCCA") nevertheless denied Petitioner relief.

Petitioner's conviction should be reversed. The OCCA erred when determining that (1) the State did not violate *Brady*; (2) the withheld evidence did not prove that a *Napue* error had occurred; and (3) the Oklahoma Attorney

General's confession of error deserved no weight.

These mistakes were egregious. Because they occurred in a capital case, the consequences, unless this Court reverses, will be most dire. The OCCA's facile dismissal of the Oklahoma Attorney General's confession could force the State to execute Petitioner Richard Eugene Glossip notwithstanding the State's admission that his constitutional rights were violated. The injustice of such a result is impossible to overstate.

ARGUMENT

I. The OCCA Erred by Weighing the Newly Disclosed Evidence and the Sole Percipient Witness's Corrected Trial Testimony for Itself Instead of Assessing Whether a Reasonable Jury Could Have Used the Belated Disclosures To Discredit Sneed's Actual Testimony.

Glossip's *Brady* and *Napue* claims allege that the State committed serious prosecutorial misconduct by failing to disclose material evidence affecting the credibility of its key trial witness, Justin Sneed, and failing to correct the known false testimony Sneed offered to the jury. *See* Pet.App.78a, 82a-83a, 95a-96a. More than mere ethical failures, the prosecutorial missteps underlying Glossip's *Brady* and *Napue* claims independently establish a reasonable probability that his trial jury might not have convicted him—or at a minimum might not have sentenced him to death—had those missteps never occurred. The State has flatly conceded that it "failed to disclose . . . material evidence" indicating that Sneed had been prescribed lithium by a licensed psychiatrist to treat a serious *diagnosed* psychiatric condition—and that its prosecutors "also failed to correct" Sneed's false trial testimony despite knowing it to be false, resulting in the jury hearing Sneed falsely testify without challenge: (1) that he'd "never seen" a psychiatrist, and (2) that he was prescribed

lithium *by accident* after he'd requested Sudafed to treat symptoms of a head cold. Br. of Resp't in Supp. Pet. for Writ of Cert. at 3-4.

Despite the State's concessions, the OCCA rejected Glossip's claims on the ground that the State's misconduct did not violate Glossip's due-process rights under *Brady* or *Napue*. *See* Pet.App.14a-17a. The OCCA concluded that the State's failure to disclose one of its prosecutor's handwritten pretrial interview notes indicating that Sneed informed prosecutors both of his lithium prescription *and* the identity of the only doctor who could have ordered that prescription created no issue under *Brady* and its progeny because Glossip's counsel "knew or should have known about Sneed's mental health issues" at trial. Pet.App.16a. And the OCCA rejected Glossip's related (but distinct) *Napue* claim on the ground that Sneed's *concededly false* testimony "was not clearly false" because "Sneed was more than likely in denial of his mental health disorders." Pet.App.17a.

In so deciding, the OCCA failed to assess Glossip's new evidence using the objective materiality standard that this Court has developed under *Brady*, *Napue*, and their progeny for determining whether undisclosed evidence kept from a jury—or false testimony provided to it—undermines confidence in a verdict of guilt. Instead, it weighed new evidence for itself to make exactly the kind of quasi-factual credibility determination that this Court rejected in *Smith v. Cain*, 565 U.S. 73 (2012).

A. Despite His Trial Testimony to the Contrary, Sneed Privately Informed State Prosecutors of His Lithium Treatment and Identified the *Only* Psychiatrist Who Could Have Prescribed That Treatment Shortly Before Glossip's Second Capital Trial.

After his first conviction was vacated on legal grounds,

the State of Oklahoma retried Glossip for first-degree murder and obtained a capital conviction in 2004. The state concedes Sneed was its "sole inculpatory witness." Br. of Resp't in Supp. Pet. for Writ of Cert. at 2; *see also* Pet.App.150a. Almost two decades of post-conviction litigation later—in January 2023—the Oklahoma Attorney General disclosed a box of previously withheld evidence containing, *inter alia*, handwritten interview notes created by one of the assistant district attorneys involved in prosecuting Glossip (the "Smothermon Notes"). *See* Pet.App.58a. Those notes indicated for the first time that, during an interview with the prosecution on the eve of Glossip's second trial, Sneed disclosed that he had been prescribed lithium and provided the name of a specific physician—"Dr. Trumpet"—in connection with that medical disclosure. Pet.App.58a.

Based on a thorough internal review of Glossip's conviction that involved combing through "146,000 pages related to the case," Pet.App.48a-49a, the Oklahoma Attorney General concluded that it was "reasonable" to infer that the Smotherman Notes' handwritten reference to "Dr. Trumpet" was a misspelled reference to Dr. Lawrence *Trombka*—the *only* licensed psychiatrist providing "psychiatric and mental health services" to inmates housed in the Oklahoma County Jail when Sneed was housed there following his 1997 arrest for the same murder for which a jury convicted Glossip, Pet.App.103a. Not long after the Sneed interview at which Smothermon took the previously undisclosed notes, the prosecution allowed Sneed to falsely testify to the jury that ultimately convicted Glossip (and found a single aggravating circumstance warranting his sentence of death) as follows:

> Q: After you were arrested, were you placed on any type of prescription medication?
>
> A: When I was arrested I asked for some Sudafed *because I had a cold*, but then shortly after that somehow they ended up giving me *Lithium* for some reason, I don't know why. *I never seen no psychiatrist or anything.*
>
> Q: So you don't know why they gave you that?
>
> A: No.

Pet.App.267a (emphases added).

Oklahoma's Attorney General, Gentner Drummond, forthrightly and courageously admitted that Glossip deserved a new trial because (among other errors infecting Glossip's prosecution with constitutional error) the undisclosed evidence was material and because Glossip could have impeached Sneed after his false testimony. *See* Pet.App.150a. Ordinarily a state's chief legal officer both confessing legal error *and* concluding that its errors materially impacted the reliability of a capital-murder trial would shake a court's confidence in a conviction and encourage the court to vacate the conviction and order a retrial. Here, the OCCA flatly dismissed the Oklahoma AG's concession as "not based in law or fact." Pet.App.15a. Worse still, the court proceeded to take the jury's task upon itself under the guise of explaining why a *reasonable* jury would have discounted the undisclosed evidence and Sneed's corrected testimony. *See* Pet.App.16a-17a.

B. The Belatedly Disclosed Evidence Violated *Brady* and also Independently Established That the State of Oklahoma Violated *Napue* by Knowingly Allowing Sneed to Falsely Testify to the Jury Without Offering a Factual Correction.

This Court's test for whether withheld favorable evidence or uncorrected false testimony is sufficiently material to warrant vacating a criminal defendant's conviction is well-settled.

A state violates a criminal defendant's due-process rights when it conducts a criminal trial while "withhold[ing] evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75 (2012) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Independently—but relatedly—a state also violates those same rights when it allows material "false evidence . . . to go uncorrected when it appears" in a criminal trial, even when that evidence is introduced through no fault of the State. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This Court has explained that, under both *Brady* and *Napue*, "[e]vidence qualifies as material when there is '*any reasonable likelihood*' it could have 'affected the judgment of the jury.'" *Wearry v. Cain*, 577 U.S 385, 392 (2016) (per curiam) (emphasis added) (quoting *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (citation omitted)).

A new trial is warranted when the evidence withheld from a criminal defendant at trial or the false testimony that went uncorrected by the prosecution, if corrected and viewed in light of the record as a whole, "creates a reasonable doubt that did not otherwise exist" in the defendant's original trial. *United States v. Agurs*, 427 U.S. 97, 112 (1976). This record-sensitive inquiry means that, for verdicts that are "already of questionable validity, additional

evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 113. Even on the questionable assumption that the withheld evidence is only of "minor importance," this qualifies as just such a case.

1. Brady *Violation*

The *Brady* violation in this case resembles the violation addressed in this Court's decision in *Smith v. Cain*, which overturned a conviction because investigation notes prepared by a state detective had not been disclosed. 565 U.S. at 75-76. Such notes are "plainly material" when that new evidence "directly contradict[s]" the trial testimony of a witness whose "testimony was the *only* evidence linking [the defendant] to the crime." *Id.* at 76 (emphasis in original).

As with Glossip's conviction, in *Smith* the conviction for five first-degree murders turned on the jury's assessment of a single witness's credibility. The key witness Larry Boatner testified that he "had been face to face with Smith during the initial moments of the robbery." *Id.* at 74. Again, as with Glossip, "[n]o other witnesses and no physical evidence" presented at the trial "implicated Smith in the crime" and Smith's convictions on the five murders rose or fell based on whether the jury credited Boatner's testimony. *Id.*

In post-conviction efforts, the State of Louisiana eventually admitted (as Oklahoma did here) that it violated *Brady* because evidence discovered by Smith contained conflicting statements by the key witness Boatner. *See id.* at 75. Smith "obtained [previously withheld] files from the police investigation" of his case that included notes written by the State's "lead investigator" indicating that Boatner provided at least two statements "that conflict[ed]

with his testimony identifying Smith as a perpetrator" of the murders. *Id.* at 74-75. Specifically, the investigation notes purported to memorialize Boatner indicating on the night of the crime that he "could not supply a description of the perpetrators other [than] they were black males." *Id.* at 75. He then similarly claimed five days later, according to the notes, that "he 'could not ID anyone because he couldn't see faces'"—and that he "'would not know them if he saw them.'" *Id.* On top of those memorialized statements, the State's lead investigator also noted in an undisclosed typed report days after the crime that Boatner "'could not identify any of the perpetrators of the murder.'" *Id.* Even more to the point, just as the State of Oklahoma has done in this case, the State in *Smith* conceded that the previously undisclosed investigation notes reflecting Boatner's conflicting statements was in fact favorable evidence withheld from the defense at trial. *See id.*

Oklahoma's prosecutors withheld information about their key witness, Sneed. That evidence, had it been disclosed, would have created a reasonable probability that the result would have been different. That possibility undermines confidence in the outcome of Glossip's trial. Recall that Sneed was the "sole inculpatory witness" in Glossip's capital trial and that the interview notes turned over by the Attorney General showed that Sneed was "on [l]ithium" after having a session with Dr. Lawrence Trombka, a psychiatrist who provided services to inmates at the time. Pet.App.101a.

2. Napue *Violation*

The State's 19-years-belated disclosure of new evidence also revealed a violation of *Napue*. The Smothermon Notes created before Glossip's second trial make clear that the State was aware *during* that trial that

Sneed's testimony regarding his prior psychiatric care and lithium treatment was false, but failed to correct it. *See* Pet.App.101a. As its sole inculpatory witness, the State's capital case against Glossip relied on "[t]he jury's estimate of the truthfulness and reliability" of his testimony—and this Court has made clear that a State's "knowing[] use" of false testimony "to obtain a tainted conviction" violates the "concept of ordered liberty" protected by the Fourteenth Amendment's Due Process Clause. *Napue*, 360 U.S. at 269.

There can be little question that, had the State corrected Sneed's false testimony at trial, that occurrence would have fundamentally altered the jury's evaluation of Sneed's "truthfulness and reliability" as a witness. *Id.* As already noted, the Smothermon Notes "directly contradict," *Smith*, 565 U.S. at 76, Sneed's false testimony that he had "never seen no psychiatrist or anything" and that he was given lithium "for some reason" in response to his request for Sudafed "because [he] had a cold," Pet.App.267a. In like manner, a jury would have been made aware of precisely the same "direct[] contradict[ions]" had the prosecution offered the jury factual corrections following that same false testimony and cured the *Napue* error Glossip raised in his petition. *Smith*, 565 U.S. at 76. Moreover, in the sworn affidavit Glossip secured less than 50 days after the State's disclosure of evidence underlying his *Brady* claim, Dr. Trombka declared that lithium "*would . . . not be prescribed for a cold or confused by medical health professionals with Sudafed*"; "[r]ather it is a psychotropic drug used for mental health disorders." Pet.App.104a (emphasis added).

Whether viewed through *Brady* (focusing on the value of Glossip's new exculpatory evidence) or *Napue* (focusing

on the value of Sneed's known false testimony being corrected before the jury), the new evidence disclosed by the State provides a new rationale and independent basis for concluding that Sneed's testimony involved a factual misrepresentation regarding his own mental health. A jury aware of the Smothermon Notes, or of Dr. Trombka's contradicting statements, *or* of the complete, corrected record (had the State actually made the correction) could reasonably have declined to credit Sneed's testimony solely on that basis. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (explaining "the general principle of evidence law that [a] factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'" (citations omitted)).

C. Usurping the Role of the Jury

Though *Napue* and *Brady* claims both require reviewing courts to examine trial records to determine whether undisclosed evidence or uncorrected false testimony was material in a *constitutional* sense, that threshold materiality assessment only requires judges to assess the role that omitted evidence had on the *range of reasonable possibilities* that were presented to the jury. *Cf. Agurs*, 427 U.S. at 112 ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."); *see also Giglio*, 405 U.S. at 154. After all, within the range of reasonable possibilities supported by facts introduced into evidence, the jury is best-positioned to decide which reasonable inferences should be drawn in light of factors that fail to appear in a cold appellate record—such as witness demeanor while testifying on particular points or under cross-examination. *See, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (explaining that the "beyond a reasonable doubt" standard courts use to review whether "*any* rational trier of fact

could have found the essential elements of the crime" is a "familiar" one that "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts").[1]

Again, *Smith* is instructive. In concluding that the previously undisclosed investigation notes were "plainly material" under *Brady*, this Court took note of the fact that "[t]he State . . . advance[d] various [credibility maintaining] reasons why the jury *might* have discounted Boatner's undisclosed statements"—including (1) that "Boatner made other remarks on the night of the murder indicating that he could identify" one perpetrator but not the others and (2) that his contradictory statements five days after the crime could "be explained by fear of retaliation." *Smith*, 565 U.S. at 76 (emphasis added). Even so, this Court held that, in light of the fact that Boatner's undisclosed statements contradicted his trial testimony, the State's proffered explanations were insufficient to support Smith's conviction because, although they "offer[ed]

[1] Not only are criminal juries best positioned to determine all the facts necessary to return a guilty verdict as a practical matter, there is also already an easily administrable legal presumption in place that protects those jury verdicts from disturbance on appeal. As this Court explained over five decades ago in *Jackson*: "[o]nce a defendant has been found guilty," the jury's "role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." 443 U.S. at 319 (emphasis in original). Because the *Jackson* "legal conclusion" treats all evidentiary conflicts in the trial record as though the jury had affirmatively resolved those conflicts in the prosecution's favor, this Court stressed that judicial review of a guilty verdict to ensure the verdict was reached upon a constitutional minimum of relevant evidence should "impinge[] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.*

a reason that the jury *could* have disbelieved Boatner's undisclosed statements," that gave this Court "no confidence that it *would* have done so." *Id.* (emphasis in original).

The OCCA failed to follow this Court's careful guidance in *Smith*, as it singled out its own preferred explanations of how a jury *might* have responded had it been presented with the belatedly disclosed evidence showing that Sneed had provided false testimony. Given the centrality of Sneed's testimony, a court could only uphold Glossip's capital conviction in light of the State's admitted *Brady* and *Napue* misconduct by "speculat[ing] about which of [Sneed's] contradictory declarations the jury would have believed" had the *Brady* and *Napue* misconduct never occurred. *Id.* The OCCA undertook a quasi-factfinding mission when it engaged in precisely that kind of speculation *en route* to concluding that Sneed's (now concededly) false testimony at Glossip's capital murder trial regarding his lithium prescription and previous psychiatric care at the Oklahoma County Jail "was not clearly false" because "Sneed was *more than likely* in denial of his mental health disorders" at the time he testified. Pet.App.17a (emphasis added). *Smith* counsels that, when credibility is outcome-determinative—as it is here—that type of guesswork lies beyond the province of a reviewing court.

The OCCA should not have substituted its own amateur diagnosis—that Sneed was "in denial of his mental health"—for a jury's determination of facts *and* credibility.

II. Admissions of Prosecutorial Misconduct by Attorneys General in Capital Cases Deserve Maximum Deference.

Courts have long attributed "great weight" to prosecutorial confessions of error, while reserving a role for the judiciary to independently examine the record. *Young v.*

United States, 315 U.S. 257, 258 (1942). Confessions of error that call for vacating capital convictions are "extraordinary," "remarkable," and "to [a State's] credit." *Buck v. Davis*, 580 U.S. 100, 124-25 (2017) (citation omitted). Yet the OCCA summarily dismissed Attorney General Drummond's exhaustively investigated—and, indeed, substantively accurate—confession of *Brady*, *Napue*, and other constitutional errors as "not based in law or fact." Pet.App.15a.

The OCCA's failure to give Oklahoma's top law-enforcement officer any weight—let alone "great weight"—is all the more troubling given the circumstances of the confession. That deference should have been "at its zenith," Br. of Resp't Supp. Pet. for Writ of Cert., at 1, because the state's chief law enforcement officer confessed *Brady*, *Napue*, and other constitutional errors in a capital case after a thorough investigation. By according that confession no respect, the OCCA threatens to force the State to execute an individual whose conviction was infected by admitted constitutional violations. In so doing, the OCCA flouted the foundational, justice-seeking purpose articulated in *Young*. 315 U.S. at 258-59.

A. A Court's Giving Great Deference to an Attorney General's Confession of Error Tends Strongly To Promote the Obligation of Both Branches To Secure Justice.

Though brief, there is much packed into *Young*'s articulation of why prosecutorial confessions of error hold significant heft. After a jury convicted Doctor Peter Young of violating Section 6 of the Harrison Anti-Narcotic Act for distributing certain narcotics without keeping records, the government confessed that the recordation requirement did not apply. *Young*, 315 U.S. at 257-58. The Court gave "great weight" to that "considered judgment [by] the law enforcement officers that reversible error ha[d] been

committed," yet undisputedly reserved a role for courts "to examine independently the errors confessed." *Id.* at 258-59 (citing *Parlton v. United States*, 75 F.2d 772 (D.C. Cir. 1935)).

That division of power builds from the premise that "[t]he public trust" requires attorneys general and other prosecutors to "be quick to confess error when … a miscarriage of justice may result from their remaining silent." *Id.* at 258. This Court first reversed for confessed error in 1891, congratulating the "representatives of the government" for "frankly conced[ing]" constitutional errors in a capital conviction as "was their duty." *Cook v. United States*, 138 U.S. 157, 185 (1891); *see also* Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 Fordham L. Rev. 3027, 3030 (2013).

This prosecutorial duty follows directly from the fundamental principle that the government pursues justice, not convictions. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney['s] … interest… in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *see also* ABA, *Criminal Justice Standards for the Prosecution Function* 3-1.2(a)-(b) (Am. Bar. Ass'n 4th ed. 2017); *Peninger v. Oklahoma*, 811 P.2d 609, 614 (Okla. Crim. App. 1991) (Parks, J., concurring) (Prosecutors' "primary duty is not to convict, but to see that justice is done").[2] Confessions of error are thus part

[2] According to Rafael Alberto Madan, *The Sign and Seal of Justice*, 7 Ave Maria L. Rev. 123, 192-96 (2008), the Department of Justice's motto—"The United States wins its point whenever justice is done its citizens in the courts"—also (perhaps apocryphally) came about after a confession of error. As lore has it, Solicitor General Frederick Lehman responded to a judge's question about the government's confession of error with that storied phrase. *See id.* & n.197 (collecting references to Lehman as the quotation's source yet finding no proof he uttered or crafted the statement despite an exhaustive review of cases

of an attorney general's responsibility to investigate and remedy unjust convictions. NDAA, National Prosecution Standards, §§ 9-1.3, 9-1.8, 9.1 commentary (Nat'l Dist. Att'y's Ass'n 4th ed. 2023); ABA, *Criminal Justice Standards for the Prosecution Function* 3-8.3 (citing ABA Rules of Pro. Conduct R. 3.8(g)-(h)); Okla. Rules Pro. Conduct R. 3.8 (Okla. Bar. Ass'n (2017) (same). The obligation to do justice is particularly acute when an attorney general determines that prosecutors have failed to live up to these ideals. *Cf. Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986) (explaining that attorneys have a "special duty … to prevent and disclose frauds upon the court.").

Further, confessions of error ought to be exceptionally persuasive because attorneys general are typically states' chief legal officers. *See e.g.*, Okla. Stat. Ann. tit. 74, § 18 ("The Attorney General shall be the chief law officer of the state."). Like federal officials, state attorneys general are oath-bound to faithfully execute the law. *See* U.S. Const. art. VI, cl. 3; Okla. Const. art. XV, § 1. They control prosecutorial decisions, at least at the appellate level, in most states. *See United States v. Armstrong*, 517 U.S. 456, 464, 467 (1996) (repeating settled law that the Executive Branch's core power is the "power to prosecute" or to decide not to prosecute). Unlike local prosecutors, attorneys general also speak on behalf of the entire citizenry regarding how and when to pursue, secure, and defend convictions. *See Sibron v. New York*, 392 U.S. 40, 58 (1968) (elevating the word of statewide executive officers over local prosecutor); *Korematsu v. United States*, 584 F. Supp. 1406, 1413 (N.D. Cal. 1984) ("A confession of er-

---

on which Lehman worked as Solicitor General between 1910 and 1912).

ror is generally given great deference. Where that confession of error is made by the official having full authority for prosecution on behalf of the government it is entitled to even greater deference."); *Oklahoma ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 816 (Okla. 1973) (explaining common law powers of attorney general "to dismiss, abandon, discontinue, or compromise suits … and to make any disposition of such suits as he deems best for the interest of the state"). Even where prosecutors have caused the errors requiring the confession, such as with *Brady* or *Napue*, courts presume state officials concede such mistakes in "good faith." *United States v. Welborn*, 849 F.2d 980, 983 (5th Cir. 1988) (per curiam) (articulating the presumption in the context of prosecutors' motion to dismiss indictment).

To that end, attorneys general can use confessions of error to check overzealous district prosecutors pursuing capital convictions in an atmosphere of local political pressure. *Cf.* Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L.J. 1442, 1471 (1969) ("By acting as a watchdog," through confessions of error, "the Solicitor General may have restrained perhaps over-zealous FBI agents in their surveillance."). Crimes that result in capital convictions have the potential to infect prosecutorial decisions with "emotion." *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983) (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)). Confessions of error can be a tool wielded to mitigate problems inherent in an unwieldly criminal justice system. *See Dretke v. Haley*, 541 U.S. 386, 399-400 (2004) (Kennedy, J., dissenting). The confessions can help the chief legal officer exercise control while also helping the judiciary identify and remedy errors more efficiently.

Because courts can expect attorneys general to confess in the name of pursuing justice, it is unsurprising that courts have rarely upheld convictions when prosecutors concede such errors.[3] *See* Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 Fla. St. U. L. Rev. 291, 312 (2014) ("on exceedingly rare occasions, the Court will reject a concession from the Solicitor General and adopt the opposite view"); Charles L. Maak, The Confession of Error, 1968 Utah L. Rev. 286, 291-92 & n.45 (1968) (suggesting that the small number of affirmances "on the merits" when attorneys general confessed errors means those "concessions have some effect"); *see also* Recent Cases, *Effect of Attorney-General's Confession of Error in A Criminal Appeal*, 49 Harv. L. Rev. 645 (1936) (noting that, before *Young*, courts rarely reversed and rarely actually examined the record in the face of confessions of error). Often this Court has reversed "in light of the confession of error." *Escobar v. Texas*, 143 S. Ct. 557, 557 (2023) (mem.) (vacating judgment and remanding capital conviction after confession of *Napue* error); *Chappell v. United States*, 494 U.S. 1075, 1075 (1990); *Biddle v. United States*, 484 U.S. 1054, 1054 (1988); *Malone v. United States*, 484 U.S. 919, 919 (1987); *Mariscal v. United States*, 449 U.S. 405, 405 (1981) (per curiam); *Marino v. Ragen*, 332 U.S. 561, 562, 562 (1947) (per curiam); *Weare v. United States*, 276 U.S. 599, 599 (1928) (per curiam) (similar); *see also Alvarado v. United States*, 497 U.S. 543, 544 (1990) (per curiam) ("When the Government has suggested that an error has been made by the court

[3] Amicus has no reason to doubt Respondent Oklahoma's legal research, which found no instance where "[t]his Court has … countenanced a death sentence issued over a State's confession of error." Br. of Resp't Supp. Pet'r, at 37. Indeed, Amicus's own research turned up no such instance.

below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court."). Even when this Court does not reverse summarily, it generally concurs with the confession. *See, e.g.*, *Casey v. United States*, 343 U.S. 808, 808 (1952) (per curiam) (reversing for new trial in line with confession of error because doing so would not create or affect precedent); *Rose v. United States*, 629 A.2d 526, 533 n.17 (D.C. 1993) ("the Supreme Court itself—both before and after *Young*—has reversed criminal convictions merely on a confession of error without evidencing any opinion about the merits").

B. The Circumstances of Attorney General Drummond's Confession Underscore the Need for Maximum Deference.

There are concrete reasons that the Oklahoma Court of Criminal Appeals' summary dismissal of the confession of error was especially problematic. Attorney General Drummond (i) had commissioned a thorough investigation, (ii) which uncovered constitutional errors due to prosecutorial misconduct (iii) in a capital case. In these circumstances, the OCCA's deference to the confession of error should have been at its zenith.

1. Attorneys general can make especially strong confessions of error that demand greater respect from courts when they back them up with thorough investigations.

Executive officials can investigate certain errors, such as *Brady* and *Napue*, more completely than courts, which cannot independently fact-find outside of the record. *See United States v. Pryce*, 938 F.2d 1343, 1352-53 (D.C. Cir. 1991) (Silberman, J., dissenting). Attorneys general can (and have a responsibility to) investigate and act upon credible allegations that unjust convictions have occurred.

See Parlton, 75 F.2d at 773 (explaining that "it was manifestly [the attorney general's] duty to confess error" after his "independent investigation … satisfie[d] him the defendants [were] innocent of the crime of which they were convicted"); *see also* ABA, *Criminal Justice Standards for the Prosecution Function* R. 3-8.3 (citing Am. Bar Ass'n Model Rules of Pro. Conduct R. 3.8(g)-(h)); NDAA, National Prosecution Standards, §§ 9-1.7; 9-1.8; Okla. Stat. Ann. tit. 74, § 18f ("Attorney General shall have authority to conduct investigations").

What these investigations "may disclose" is "an important factor" when courts "study[] the record" and decide whether to side with the party confessing error. *Casey,* 343 U.S. at 811-12 (Douglas, J., dissenting). Evidence that the attorney general "consider[ed]" and investigated "a wide range of information" can tip a court to defer to the confession of error. *United States v. Weber*, 721 F.2d 266, 268 (9th Cir. 1983) (per curiam); *cf. United States v. Cowan*, 524 F.2d 504, 513-14 (5th Cir. 1975) (reversing district court's denial of Rule 48 motion because attorney general provided "specificity of evidentiary proof" without "conclusory" "representations"). Providing a reasoned explanation for a confession of error "where the facts and law so require" is part of an attorney general's duty of candor, which engenders public and judicial confidence that the sought reversal can withstand scrutiny. Br. for Pa. Off. Att'y Gen. Amicus Curiae Supporting Court-Appointed Counsel, *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140 (3d Cir. 2024) (No. 22-2839) (hereinafter "Br. of Pa. Att'y Gen.").

Attorney General Drummond did not come lightly to his determination that error had occurred. He "reached this conclusion about Glossip's conviction through extensive diligence" after "retain[ing] an independent counsel

… to review" Glossip's conviction. Resp. to Unopposed Appl. for Stay of Execution, *Glossip v. Oklahoma*, 2023 WL 3203157, at *3 (May 1, 2023) (No. 22A941). The independent counsel reviewed the entire trial and post-conviction record of about 146,000 pages over 600 hours, and then Attorney General Drummond conducted his own review of the findings. *See* Pet.App.149a-154a. Serious investigations by attorneys general, like Drummond's, strengthen the case for deferring to the confession of error. *See Haynesworth v. Virginia*, 717 S.E.2d 817, 827-28 (Va. Ct. App. 2011) (en banc) (Humphreys, J., dissenting) (disagreeing with majority's summary issuance of writ of actual innocence because writ would not have issued absent confession of error by Attorney General Cuccinelli following his office's thorough investigation of the record). This Court too has recently (and summarily) vacated and remanded a conviction in which Texas "comprehensive[ly] reexamin[ed] … the forensic evidence and claims" before confessing error. Br. of Resp't State of Tex. Supp. Pet'r at 2, 12-16, 27-30, *Escobar v. Texas*, 2022 WL 4781414 (Sept. 28, 2022) (No. 21-1601). Attorney General Drummond's investigation deserves no less consideration.

2. The OCCA should also have given greater respect to Attorney General Drummond's confession of error because it directly addressed material withheld by the prosecution that is not immediately available to courts.

Courts generally defer to prosecution-side confessions in part because, as a general matter, executive branch tools equip those officials with insider information about the strengths and weaknesses of a case that courts cannot see. *See United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016). Based on that control, attorneys general can more readily identify unconstitutionally withheld

favorable evidence (*Brady* errors) or false testimony (*Napue* errors) than courts because they possess that information by definition. *See Agurs*, 427 U.S. 97 at 103 (applying *Brady* for information "which had been known to the prosecution but unknown to the defense."); Leslie Kuhn Thayer, *The Exclusive Control Requirement: Striking Another Blow to the Brady Doctrine*, 2011 Wis. L. Rev. 1027, 1040-41 (2011) (arguing that under Supreme Court precedent, "where the State *does* have exclusive control of the withheld evidence, its suppression results in an especially egregious error." (emphasis added) (interpreting *Giles v. Maryland*, 386 U.S. 66, 100 (1967) (Fortas, J., concurring) (plurality op.))). Attorneys general can thus access evidence about possible prosecutorial or trial errors that do not make it into the judicial record (absent post-conviction discovery). *See Parlton*, 75 F.2d at 775 (noting how the attorney general's confession of error examined "facts outside the record").

Confessions of error, of course, are not evidence. But that is precisely why they are powerful. *Cf. Weber*, 721 F.2d at 268 (deferring to attorney general's "access to and … consideration [of] a wide range of information that may not be competent evidence at trial" when deciding upon Rule 48 motion to dismiss).

3. The rarity of confessions of error in capital cases and the deadly consequences of ignoring those admissions provide further reason for courts to give those concessions great respect. This Court has called such moments when an attorney general "seeks to vacate the sentences of … defendants found guilty of capital murder" after conducting its own investigation "remarkable." *Buck*, 580 U.S. at 125.

The nature of the death penalty explains why courts should give confessions of error in capital cases more deference than in other criminal appeals. Capital convictions are the most severe penalty the state can impose, "qualitative[ly] differe[nt]" from "any other permissible form of punishment." *Zant*, 462 U.S. at 884-85. Before putting a person to death, executives and the courts should be certain that the jury convicted the defendant on "reliab[le]" evidence instead of after a trial infected by "caprice or emotion" or some other error. *Id.* (citation omitted); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality op) ("this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). Ensuring that the capital penalty stands on that type of solid evidence and legal justification supersedes other concerns, including important concerns such as finality. *See Shinn v. Ramirez*, 596 U.S. 366, 379 (2022); Br. of Pa. Att'y Gen. at 1-2. In fact, where there are confessions of constitutional error in how the state secured its capital conviction, "the State's interest in finality deserves little weight." *Buck*, 580 U.S. at 126.

Attorney General Drummond's reasoned confession that the State had subjected Glossip to an unconstitutional trial therefore "effectively acknowledge[d] that the people of [Oklahoma] lack an interest in enforcing a capital sentence obtained on so flawed a basis." *Buck*, 580 U.S. at 125-26. "Especially in light of the capital nature of this case and the express recognition by [the Oklahoma] attorney general" that *Brady* and *Napue* errors had occurred, the OCCA should have listened when Attorney General Drummond followed his ethical and legal duty as the state's chief legal officer to scrutinize a capital conviction before speaking up about an unconstitutionally convicted person facing death. *Buck v. Thaler*, 132 S. Ct. 32,

38 (2011) (mem.) (Sotomayor, J., dissenting). The surprisingly dismissive language used by the OCCA in its treatment of Attorney General Drummond's confession of error shows that those confessions were not given the consideration due under this Court's jurisprudence

C. Maximum Deference to an Attorney General's Confession of Error Does Not Mean Relinquishment of the Judicial Role.

None of this is to say that this Court and others have or should "respond in Pavlovian fashion to confessions of error" by state legal officials. *DeMarco v. United States*, 415 U.S. 449, 450 (1974) (per curiam) (Rehnquist, J., dissenting). And contrary to the members of the Van Treese family's contention, these arguments do not promote "rework[ing] Oklahoma's separation of powers" by "transfer[ring] the last word from five judges … to a single, politically elected official." Br. of Amicus Curiae Victim Family Members in Opp. of Writ of Cert. at 17. Pointing out that Attorney General Drummond's confession of error deserved maximum deference instead demonstrates that (i) the OCCA misapplied its judicial authority and (ii) none of the reasons for a court to second guess a confession were present.

1. It is not entirely clear that the OCCA always has, as the Van Treese family argues, the "last word" on capital convictions, *id.*, because the executive and judicial branches share responsibility for ensuring that the state does not unconstitutionally exercise its power to execute defendants, *see* Okla. Const. art. VI, § 10 (empowering a Pardon and Parole Board to determine clemency with members appointed by the Governor, the Chief Justice of the Oklahoma Supreme Court, and the Presiding Judge of the Oklahoma Criminal Court of Appeals); Okla. Stat. Ann. tit. 22, § 1004 ("No judge, court or officer, other than

the Governor, can reprieve or suspend the execution of the judgment of death… unless an appeal is taken"); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

In Oklahoma, the judiciary and the executive together check the validity of a capital conviction. First, the OCCA reviews the entire record to ensure the executive branch pursued and prosecuted those cases properly. *See Woodruff v. Oklahoma*, 846 P.2d 1124, 1145 (Okla. Crim. App. 1993). Second, the Pardon and Parole Board (a quasi-executive body), can grant clemency. *See* Okla. Const. art. VI, § 10. Here, however, because this Board deadlocked in a clemency vote three days after the OCCA ruled against Glossip, the OCCA's decision might force executive officials to put him to death. *See* State of Oklahoma Pardon & Parole Bd., *Clemency Hearing Minutes* 1-3 (Apr. 26, 2023), https://tinyurl.com/378wjv77.

Even still, the executive must carry out the legal execution according to procedures formulated by the Department of Corrections. Those procedures prohibit executions unless the "attorney general … and the governor … confirm there is no legal impediment to proceeding with [a] lawful execution." Okla. Dep't of Corr., Policy No. OP-040301: Execution of Inmates Sentenced to Death, at 25 (Feb. 20, 2020), https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-04/op040301.pdf. These procedures are not primarily about "process." They derive from the State's obligation to assure that justice is done, a responsibility shared by the State's executive and

judicial branches to "protect[]" the "public interest" in a just outcome that is "foremost in every criminal proceeding." *Young*, 315 U.S. at 259.

2. For clarity, amicus wishes to make plain one aspect of his position. He does not contend that state attorneys general should be given the last word on capital convictions or that a confession of error "relieve[s] … [c]ourt[s] of the performance of the judicial function." *Young*, 315 U.S. at 258. There remain good reasons why a court should be cautious about confessions of error. But those reasons do not apply here.

For one, Attorney General Drummond did not intend to (or even accidentally) subvert the adversarial process through "private agreement between litigants." *Garcia v. United States*, 469 U.S. 70, 79 (1984). He in no way intended the confession to create or improperly protect precedent. *See Pryce*, 938 F.2d at 1354 (Silberman, J., dissenting) ("If a party could eliminate the Courts' power to act on a case simply by confessing error and thereby allow the appellate precedent … to stand, the party would be able to employ the adversary process illegitimately to insulate favorable precedents from reversal"). *Brady* and *Napue* errors based on the withholding of evidence that a key witness gave false testimony have long required reversal in federal and Oklahoma courts. *See United States v. Bagley*, 473 U.S. 667, 680 n.8 (1985) (summarizing *Napue*, 360 U.S. at 269, as a relative of *Brady* rule for "dealing with convictions based on the prosecution's knowing use of perjured testimony."); *Oklahoma v. Munson*, 886 P.2d 999, 1002-04 (Okla. Crim. App. 1994) ("Given the wealth of exculpatory evidence suppressed by the State, we are left with the inescapable conclusion that Munson was deprived of his right to a fair trial and due process." (citing *Brady*, 373 U.S. at 87)); *Binsz v. Oklahoma*, 675

P.2d 448, 450 (Okla. Crim. App. 1984) (reversing and remanding convictions and sentences after analyzing for *Napue* error). It is hard to see that any damage would have been done to the judiciary's control of "the proper administration of the criminal law" by respecting Attorney General Drummond's reasoned confession. *Casey*, 343 U.S. at 809-10 (Douglas, J., dissenting).

For another, Attorney General Drummond was responding to disclosure of critical *Brady* and *Napue* violations. He was not a rogue "elected legal officer" pursuing a political agenda when "com[ing] late to [an] opinion" unrooted in law or fact that the conviction was untenable. *Sibron*, 392 U.S. at 58-59. His confession of error contrasts sharply with the facts of a recent Third Circuit decision affirming sanctions against the Philadelphia District Attorney's office for misleading the district court and conceding to penalty phase relief in a capital murder, *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 144-45 (3d Cir. 2024), "without a single explanation" for the change of heart, *Wharton v. Vaughn*, 371 F. Supp. 3d 195, 201 (E.D. Pa. 2019). After reviewing Pennsylvania's Attorney General's investigation of those supposed constitutional errors, the district court determined that the only reason for the confession was a "change in administration in the Office." *Id.* at 201-02 (E.D. Pa. 2019); *see also Pennsylvania v. Brown*, 196 A.3d 130, 141-49 (Pa. 2018) ("Elections alone" are not a valid reason for Philadelphia district attorney's office to confess error).

Rare examples like *Wharton* illustrate why confessions of error by law enforcement officials do not demand "rubber stamp[ed]" deference or automatic reversal. *Brown*, 196 A.3d at 143. But when those confessions contain none of the faults described, as with Attorney General

Drummond's, they should be "highly persuasive," especially in a capital case in which the confession is supported by a thorough investigation and that involved flagrant breaches of the sort condemned in *Napue* and *Brady*. *Id.* (quoting Br. of Pa. Att'y Gen., at 3).

CONCLUSION

This capital case involves grave errors of constitutional significance and a "remarkable" confession of error by the Oklahoma Attorney General in a capital case. This Court should reverse and remand with instructions to vacate the conviction and order a new trial.

Respectfully submitted,

EMMET T. FLOOD
Counsel of Record
JAMES N. SASSO
DANTE K. CHAMBERS II*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
eflood@wc.com

Counsel for Amicus Curiae

APRIL 30, 2024

*Practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c).